

## *Winter for Purehearts*

By Michael Cavendish\*

### I. INTRODUCTION

The worst judicial opinion ever written issued from Florida on an anonymous day in 1864. The opinion discussed slavery. More accurately, it cherished slavery—lionizing the then extant practice in the way the British sing of the sea. It was a *judicium horribili* not unlike the most famous U.S. legal opinion of the same era, *Dred Scott v. Sandford*.<sup>1</sup> Like *Dred Scott* it was a deeply flawed opinion, yet it was far more compact of prose and rationale. In this way, as a legal precedent, it was a more dangerous opinion than *Dred Scott* because it was presented not as a timid jurist's tortured squirmings through a broken political landscape. It was presented as something basic, something fundamental and inexorable, something not to be questioned. It was dangerously simple when conveyed to accepting minds in the way a cold knife is dangerous in angered hands. The opinion is therefore a vital study for researchers looking for the lines of human fallacy that in the American past have demarcated those regions of thought where the pretense of law dissolves real legal foundational principles like freedom or justice. And yet, somehow, the opinion has not

---

\* *Michael Cavendish is a Florida native and a partner in the Jacksonville, Florida office of Boyd & Jenerette. He received his J.D. and M.A. (Anthropology) from the University of Florida and his bachelor's degree (Anthropology) from Florida State University. He dedicates this article to his father, Dr. Thomas Hamilton Cavendish.*

<sup>1</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 15 L.Ed. 691, 1856 WL 8721

(1856).

## *Winter for Purehearts*

By Michael Cavendish\*

been studied; it is at present nearly forgotten. The opinion is *Miller v. Gaskins*, 11 Fla. 73 (1864). Before discussing the case, I will first sift the literal soil from which it sprang.

### II. THE SHORT SAD STORY OF MIDDLE FLORIDA

Spain conquered the New World, and for more than two centuries after Ponce de Leon, Florida was a possession of Spain.<sup>2</sup> The Spanish territory's first experience of U.S. influence began in 1799 and reached a high point during General Andrew Jackson's 1818 military expedition against the Seminoles and Red Sticks.<sup>3</sup> During the Spanish era, the territory called Florida was a naval waystation; a geographic identity that persisted once it became a U.S. possession.

There was a port and city in the panhandle at Pensacola, a naval depot at Key West, a port and city on the Atlantic at Jacksonville, an administrative settlement just south at St. Augustine, and, excepting groups of Native Americans and a smattering of African Americans branded as runaways,<sup>4</sup> little else in terms of populace within the vast fifty-

---

<sup>2</sup> With the limited exception of brief periods of British rule and French adventurism.

<sup>3</sup> Paul E. Hoffman, *FLORIDA'S FRONTIERS* 274-279 (Indiana Univ. Press 2002); Walter W. Manley II ed., et. al., *THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917* 3 (1997 Univ. Press of Fla.).

<sup>4</sup> The Native American Seminole tribes of northern Florida were never conquered by the Spanish, and during the Spanish Era in Florida, they

## *Winter for Purehearts*

By Michael Cavendish\*

thousand square mile triangle of space between the Atlantic, the Gulf of Mexico, and Georgia.<sup>5</sup> In its interior, this Florida was a frontier, influenced by the temperate climes, the Spanish, the sea, and a pioneering, individualistic 'Cracker' culture subsisting on tiny smallholding farms and cattle pens.<sup>6</sup>

---

were joined in their forests and marshes by groups of African Americans escaping from slavery in Georgia, then known as Maroons. Sean Michael O'Brien, *IN BITTERNESS AND IN TEARS: ANDREW JACKSON'S DESTRUCTION OF THE CREEKS AND SEMINOLES* 32, 188 (The Lyons Press 2003).

<sup>5</sup> Manley, *supra* note 3 at 3-4, 187; Spanish territorial Florida was larger than the present-day U.S. state, stretching so far to the west so as to include the cities of Baton Rouge, Natchez, and Mobile. Michael Gannon, ed., *THE NEW HISTORY OF FLORIDA* 150, 164 (Univ. Press of Fla. 1996); Nicholas De Fer, (Map) *Les costes aux environs de la Riviere de Misisipi* [1705], LEWIS ANSBACHER MAP COLLECTION No. 134, 4<sup>th</sup> Floor, Map Room, Main Branch, Jacksonville Public Library, Jacksonville, Florida (accessed September 7, 2006).

<sup>6</sup> Larry Eugene Rivers, *SLAVERY IN FLORIDA: TERRITORIAL DAYS TO EMANCIPATION* 253 (2000 Univ. Press of Fla.). On territorial Florida's distinctive 'Cracker' culture, *see* note 12, *infra*.

## *Winter for Purehearts*

By Michael Cavendish\*

With the Adams-Onís Treaty of 1819, ratified in 1821, Florida was ceded to the United States.<sup>7</sup> And while U.S. territorial Florida was adjacent to and contiguous with states that we now call ‘the South’ or ‘the Old South,’ Florida at the time of its annexation from Spain was not at all Southern.

This changed once the economic, social, and cultural institution that was plantation agriculture was imported into that swath of inland space known then as ‘Middle Florida,’ the land in today’s northern Florida between the Suwannee and Apalachicola rivers.<sup>8</sup> Cotton was the world’s most important and arbitrated commodity in the early nineteenth century,<sup>9</sup> and Middle Florida ran on it.

---

<sup>7</sup> Michael Gannon, *FLORIDA: A SHORT HISTORY* 27-28 (2003 Univ. Press of Fla.).

<sup>8</sup> Rivers, *supra* note 6 at 47 (showing map); David R. Colburn and Jane L. Landers, eds., *THE AFRICAN AMERICAN HERITAGE OF FLORIDA* 105 (1995 Univ. Press of Fla.).

<sup>9</sup> See Steven Yafa, *BIG COTTON: HOW A HUMBLE FIBER CREATED FORTUNES, WRECKED CIVILIZATIONS, AND PUT AMERICA ON THE MAP* 86-90 (Viking Penguin 2005)(By 1825, the young United States exported 171 million pounds of raw cotton to Great Britain annually; cotton’s nickname in the nineteenth century U.S. South was “white gold”; financing the U.S. cotton production created the London financial giants Barclays and Lloyds).

## *Winter for Purehearts*

By Michael Cavendish\*

The scions and heads of wealthy planting families seated in North Carolina, Virginia, and Tennessee emigrated to Middle Florida in numbers during the 1820s, 30s and 40s—there they chased rich soils and a lack of established land ownership.<sup>10</sup> These ‘legacy planters’ snatched up tracts of land for growing cotton, first through squatting, and later through hard-sought political favors from the territorial government in Tallahassee.<sup>11</sup> These planters were Southern, they were different in means, class and outlook from their smallholding cracker<sup>12</sup> neighbors, and they quickly organized and consolidated control over most of the Florida Territory’s

---

<sup>10</sup> Rivers, *supra* note 6 at 10; Colburn et. al., *supra* note 8 at 129 (noting a contemporaneous newspaper account of the soils in Middle Florida as the finest agricultural district in the United States).

<sup>11</sup> Baptist, *infra* note 14 at 91.

<sup>12</sup> During the territorial period, a Florida Cracker was a (usually white) settler or pioneer who typically subsisted on growing corn in small areas, hunting, fishing, and herding cattle and hogs. Dana St. Claire, CRACKER: THE CRACKER CULTURE IN FLORIDA HISTORY 10 (Museum of Arts and Sciences 1998). Some Crackers eschewed livestock raising and instead subsisted on fishing or shellfish harvesting in Florida’s rivers and beaches. *Id.* at 68. By the time of the Civil War, ‘cracker’ referred generally to any white person living in Florida who was not a slaveowner. *Id.* at 51.

## *Winter for Purehearts*

By Michael Cavendish\*

local and territorial politics.<sup>13</sup> And they grew much wealthier, producing great yields of cotton and setting up their own banks to attract further credit and investment from European commodity speculators.<sup>14</sup> Within a decade, some counties in Middle Florida were among the wealthiest in the entire South.<sup>15</sup> It was a boom economy; it ran on slave labor.

Money and farming techniques were not all the planters brought with them from the Old South. There was a widespread belief among Southern plantation owners and their families that they existed as a kind of American nobility or gentry<sup>16</sup>—as real as the English feudal nobility and gentry that survived into the times when many of the planters and their parents were born.

A planter of Virginian origin might refer to himself as a ‘cavalier,’<sup>17</sup> a direct reference to a knight-type of fighting person serving

---

<sup>13</sup> Rivers, *supra* note 6 at 14; Gannon, *supra* note 7 at 40; Colburn et. al., *supra* note 8 at 130.

<sup>14</sup> Edward E. Baptist, *CREATING AN OLD SOUTH: MIDDLE FLORIDA’S PLANTATION FRONTIER BEFORE THE CIVIL WAR* 111 (Univ. of North Carolina Press 2002); Hoffman, *supra* note 3 at 298-300.

<sup>15</sup> Rivers, *supra* note 6 at 252.

<sup>16</sup> Baptist, *supra* note 14 at 7.

<sup>17</sup> Baptist, *supra* note 14 at 2; Yaffa, *supra* note 9 at 162 (describing the romanticized preferred southern planter identity as being descended from royalist exiles escaping from Cromwell’s England); *see generally*

## *Winter for Purehearts*

By Michael Cavendish\*

the English Crown during the seventeenth-century reign of Charles II. Planters all over the Old South were keen on the medieval-era novels of Sir Walter Scott, e.g., *Ivanhoe*, and imagined themselves as the real successors to Scott's fictional characters.<sup>18</sup> Hyper-romanticism and myth-making<sup>19</sup> were everywhere; wealthy people were styling themselves not just as wealthy but as a real aristocracy.<sup>20</sup> It was a collective exercise in taking on airs, but it had a savage dark side—an ideology of white supremacy.<sup>21</sup>

---

William R. Taylor, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER* (Doubleday New York 1963).

<sup>18</sup> Baptist, *supra* note 14 at 250.

<sup>19</sup> Yaffa describes a set of carefully constructed core values the southern planter imputed to himself, and followed, as a sort of secular religion, as including honor, chivalry, bravery, and the importance of lineage. *See* Yaffa, *supra* note 9 at 159.

<sup>20</sup> Baptist, *supra* note 14 at 261.

<sup>21</sup> *See, e.g.,* Yaffa, *supra* note 9 at 150 (“Southern whites genuinely believed blacks could not fend for themselves [ . . . ]”). But this was an atypically nuanced white supremacy insofar as it existed outside of any real feudal or monarchical political system and was premised upon equal parts racial consciousness and class consciousness. According to historical reviews of generally held social beliefs of the age, the planters also

## *Winter for Purehearts*

By Michael Cavendish\*

The Middle Florida planters transformed much of Florida into a Southern state quickly. By the 1861 outbreak of the Civil War, Florida was home to 61,000 enslaved African Americans.<sup>22</sup> Florida was the third state to secede from the Union.<sup>23</sup> Florida sent eighty percent of its eligible adult men into the Confederacy's army, and shipped tons of assistance to the grey troops in the manner of food and supplies.<sup>24</sup> Florida supplied the Confederacy with three significant generals and a secretary of the navy, and Florida's secession-era Governor, Joseph Milton, committed suicide rather than see the state captured by U.S. forces.<sup>25</sup> The Civil War nearly began at Pensacola's Santa Rosa Island during a standoff between U.S. naval and infantry forces stationed at Fort Pickens and 5,000 massed

---

believed themselves to be superior to their white Cracker neighbors. *See* Baptist, *supra* note 14 at 90, 103; Hoffman, *supra* note 3 at 303.

<sup>22</sup> Manley et. al., *supra* note 3 at 187.

<sup>23</sup> Manley et. al., *supra* note 3 at 189; Gannon, *supra* note 7 at 41.

<sup>24</sup> *Id.* at 193; The army-filling was accomplished in part through a new conscription law, which, it should be said, was resisted by a substantial number of Florida men with pro-U.S. leanings, often at the risk of their lives. *See* Gannon et. al., *supra* note 5 at 234-236.

<sup>25</sup> Gannon, *supra* note 7 at 46.

## *Winter for Purehearts*

By Michael Cavendish\*

confederate troops commanded by General Braxton Bragg.<sup>26</sup> After the Civil War was finished, Florida's Legislature, still controlled by the planters and their allies, passed one of the harshest anti-black codes<sup>27</sup> in the country; banning African Americans from moving into the state, and prescribing punishments like whipping, pillories, and forced labor for new, black-only offenses.<sup>28</sup>

### III. *MILLER V. GASKINS*

The setting for *Miller v. Gaskins* was this same antebellum Middle Florida; specifically, Wakulla County. Wakulla County is that especially picturesque inverted triangle of space lying south from Tallahassee, laying between the St. Marks and Ochlocknee Rivers, terminating in the Gulf of Mexico at places named Shell Point and Alligator Point.

The case tells the story of Thomas G. Gaskins, a planter who died in the summer of 1862.<sup>29</sup> At the time of Thomas' death, a woman named

---

<sup>26</sup> Gannon et al., *supra* note 5 at 233 (noting that the fighting ending the standoff at Pensacola's Fort Pickens finally broke out two days after the famous firing on Fort Sumter, South Carolina).

<sup>27</sup> *Id.* at 48 ("these so called Black Codes represented an attempt by the former slaveholders to reinstitute the slave system in fact if not in law.").

<sup>28</sup> See Donald G. Nieman, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868* 86-98 (1979).

<sup>29</sup> *Miller v. Gaskins*, 11 Fla. 73, 1864 WL 1117 \*1 (Fla. 1864).

## *Winter for Purehearts*

By Michael Cavendish\*

Sarah resided at the Gaskins' household as a slave.<sup>30</sup> Thomas also had a trusted friend at the time of his passing, Charles K. Miller.<sup>31</sup> Out of guilt perhaps, or sympathy, or a form of humanity, Thomas had made out a will before dying "bequeathing" Sarah to the stalwart Charles Miller, but "in trust," so that Sarah would be allowed "to go, if she wishes, to any free [s]tate."<sup>32</sup> Thomas' will went further and authorized an expenditure of up to a hundred dollars from what would become his estate after death to arrange for Sarah's needs and transport.<sup>33</sup>

As to Sarah, the case recites that it was complained of by Thomas' family heirs that Charles Miller largely did his friend's bidding and arranged for her to leave her situation at the Gaskins farm, directing her to go where she would without restraint, without subjecting herself to the authority of Miller or anyone else.<sup>34</sup>

---

<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \* 1-2. Sarah's options for destinations out of Middle Florida might likely have included black and Indian settlements in southern and central Florida, and also the Bahamas, and settlements in Cuba and Mexico, in addition to the free states of in the northern U.S. *See Colburn et. al. supra* note 8 at 120; Gannon et. al., *supra* note 5 at 181.

<sup>33</sup> *Miller*, 11 Fla. 71, 1864 WL 1117 at \* 2.

<sup>34</sup> *Id.*

## *Winter for Purehearts*

By Michael Cavendish\*

The case arose when Thomas' grandchildren, assisted by a guardian, sued to void the 'Sarah clause' in Thomas' will, and to force her sale back into slavery through auction, with the proceeds going to the estate, and thence to them.<sup>35</sup> The grandchildren won this relief before a state trial court, and after losing, Charles Miller petitioned the Supreme Court of Florida, seeking a reversal and a ruling that he acted legally under the authority of a valid will.<sup>36</sup>

Eight years before this dispute reached the Florida high court, the Supreme Court of the United States decided *Dred Scott v. Sandford*, 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (1856). *Dred Scott* was the notorious case in which an African American man, Dred Scott, filed a lawsuit in a Missouri federal district court, seeking freedom for himself, his wife Harriet, and their two children.<sup>37</sup> Scott won in the district court, but then was re-enslaved by the pens of the majority-voting U.S. Supreme Court justices, lead by Roger Taney, on the grounds that the district court below

---

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 397-399, 19 How. 393, 15 L.Ed. 691 (1856); *see also* Don E. Fehrenbacher, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 239-49 (Oxford U. Press 1978).

## *Winter for Purehearts*

By Michael Cavendish\*

could not have properly exercised subject matter jurisdiction over Scott's plaintiffcy.<sup>38</sup>

Because of its extreme notoriety, and since it was decided well before *Miller v. Gaskins*, *Dred Scott* was likely known to the Supreme Court of Florida Justices deciding *Miller*, and probably seemed to be a natural analogue to the controversy before them in some respects.

Not unlike Justice Taney's extreme narrowness of focus on subject matter jurisdiction, the Supreme Court of Florida framed *Miller* solely as a will contest that would be decided by divining whether the Sarah clause in Thomas' will was effective or void. Following the customs of the law of estates, the first thing the *Miller v. Gaskins* court did was look to the testator's intent in framing the Sarah clause in the will.<sup>39</sup> Thomas had, in the five clauses preceding it, bequeathed the other men and women residing at his farm in slavery to his heirs; he gave a grandson a woman named Nelly, and to his granddaughter he gave a woman named Rose.<sup>40</sup> And in each of those preceding bequests, Thomas had referred to the bequeathed people as slaves, viz. "my slave Nelly."<sup>41</sup> But in the Sarah

---

<sup>38</sup> *See id.*

<sup>39</sup> *Miller*, 11 Fla. 73, 1864 WL 1117 at \*2-3.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

## *Winter for Purehearts*

By Michael Cavendish\*

clause, he had only referred to Sarah by her name, without the crippling title of ‘slave.’<sup>42</sup>

The *Miller v. Gaskins* court turned the Sarah clause in Thomas’ will over and over like a prism, looking at every angle, importing probable intent into his every word. And afterwards, the Court decided that Thomas did mean to place Sarah under Charles Miller’s ‘trusteeship,’ but not his ownership or control.<sup>43</sup>

What Thomas wanted for Sarah had been done before. As early as a half-decade before *Miller* issued, the Virginia Supreme Court had approved a will releasing several African Americans formerly held as slaves into freedom.<sup>44</sup> George Washington famously provided in his own will that the persons held as slaves at his home were to be freed upon his death.<sup>45</sup>

All that was left of the work the *Miller* court gave to itself at this point was to decide whether the Sarah clause was valid. At this point, the Florida Justices very probably looked to *Dred Scott* again. But perhaps it was not Justice Taney’s majority opinion from which they would draw their inspiration.

---

<sup>42</sup> *See id.* at \*1.

<sup>43</sup> *Id.* at \*3.

<sup>44</sup> *Pleasants v. Pleasants*, 6 Va. (2 Call.) 270 (1799).

<sup>45</sup> Paul Finkelman, “*Let Justice Be Done, Though the Heavens May Fall*”:

*The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 329 (1994).

## *Winter for Purehearts*

By Michael Cavendish\*

Justice Taney's *Dred Scott* opinion repeatedly apologized<sup>46</sup> for the decision he was writing. He forlornly offered that while certainly African Americans were part of the same human family that the Declaration of Independence declared "created equal," there was also, to his mind, incontrovertible proof that the Framers of the Constitution intended to exclude blacks as citizens and full-fledged people.<sup>47</sup>

Not so with the concurring opinions in *Dred Scott*. The concurring opinions were bullying. The *Dred Scott* concurring justices added their sundry thoughts atop Taney's moping formalism in turns, scourging the notion that Scott could be considered 'a man' as of the time they were writing.<sup>48</sup> They beat away at Scott's humanity as if it were a garish piñata.

---

<sup>46</sup> See for example *Dred Scott*, 60 U.S. at 405 ("it is not the province of the court to decide the . . . injustice . . . or impolicy of these laws [ . . .]"), 407 ("It is difficult . . . to realize the state of public opinion in relation to that unfortunate race . . . when the Constitution of the United States was framed and adopted . . . [b]ut the public history . . . displays it in a manner too plain to be mistaken."), 426 ("No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give . . . the Constitution a more liberal construction [ . . .]").

<sup>47</sup> See *id.* at 407, 411-412.

<sup>48</sup> These ranged from the perfunctory, *id.* at 469 ("the plaintiff is a slave, and therefore not entitled to sue in a court of the United States")(Grier, J.,

## *Winter for Purehearts*

By Michael Cavendish\*

To justify the propriety of the institution of slavery, they invoked the historical example of England, and then the Romans.<sup>49</sup> They went far beyond Taney's pale, eager to outdo one another in adding just one more reason to keep Scott shackled. The dark enthusiasm of the concurring justices seeps through the text of their opinions even today.

---

concurring) and at 529 ("Scott . . . is a slave, and was so when this suit was brought.")(Catron, J., concurring), to the punctilious, *id.* at 470 ("the plaintiff was not a *citizen* of the State of Missouri . . . but was a *negro of African descent* [ . . . ])(Daniel, J., concurring)(emphasis in the original), to the pseudo-Mosaic, *id.* at 475 ("Now the following are truths which a knowledge of the history of the world . . . compels . . .the African negro race have never been acknowledged as belonging to the family of nations [ . . .]")(Daniel, J., concurring), to the quasi-genocidal *id.* at 475-76 ("[a slave] is himself strictly *property*, to be used in subserviency to the interests, the convenience, or the will, of his owner [ . . .]")(Daniel, J. concurring)(emphasis in the original). Douglas R. Egerton has made the insightful comment that as to someone held in slavery against their will, magistracy of this type is nothing more than the doings of a well dressed mob. D.R. Egerton, *HE SHALL GO OUT FREE: THE LIVES OF DENMARK VEASEY* 181 (1999 Madison House Pub.).

<sup>49</sup> *Dred Scott*, 60 U.S. at 477-80, (Daniel, J., concurring), and at 490 (Campbell, J., concurring). The majority opinion also blamed the origin of the institution of American slavery upon England. *See id.* at 407-08.

## *Winter for Purehearts*

By Michael Cavendish\*

Perhaps writing with the *Dred Scott* concurrences in mind, to cap the analysis of the Sarah clause, the *Miller v. Gaskins* court penned what is incontrovertibly the most shameful sentence in the whole history of Florida law:

*There is no evil against which the policy of our laws is more pointedly directed than that of allowing slaves to have any other status than that of pure slavery.*<sup>50</sup>

The trial court would be affirmed. Sarah would be sold into slavery all over again. Following this sentence, those were foregone conclusions.

#### IV. ANTICANON

*Miller v. Gaskins* is what some constitutional law theorists are labeling an ‘anticanon.’<sup>51</sup> If a case like *Brown v. Board of Education* and its ‘separate is not equal’ message is considered a ‘canon’<sup>52</sup> of

---

<sup>50</sup> *Miller*, 11 Fla. 73, 1864 WL 1117 at \*4.

<sup>51</sup> See for example Sharon E. Rush, *The Anticanonical Lesson of Huckleberry Finn*, 11 CORNELL J.L. & PUB. POL’Y 577-78 (Summer 2002); Richard Primus, *Canon, Anticannon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998);

<sup>52</sup> In certain recitations of constitutional theory every anticanon needs a canon, a case shining that light of agreed right-ness, to complement it. It may be that the complementary cannon to *Miller v. Gaskins* is actually an English case decided some eighty years before Florida plunged into the depths of “pure slavery”—*Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep.

## *Winter for Purehearts*

By Michael Cavendish\*

constitutional law for its normative right-ness, an opinion like *Miller* is considered the opposite, a case somehow pushed so far away from the generally agreed way that things ‘ought to be’ that its very normative wrong-ness, its absence of virtue, allows it to instruct theorists and students alike as a negative example; an anti-canon.<sup>53</sup>

---

499, 499 (K.B. 1772); *see also generally* Steven M. Wise, *THOUGH THE HEAVENS MAY FALL* 179-184 (2005 Da Capo/Perseus Press). In that opinion, a Jamaican black man who lived in slavery, James Somerset, traveled to England and sued there for his freedom, much like Dred Scott would many years later. *Id.* In deciding *Somerset*, the Chief Justice of the King’s Bench, Lord Mansfield, ruled in favor of Mr. Somerset’s freedom. *Id.* In what would have created the bitterest irony for Dred Scott had it been brought to his attention, what enabled Lord Mansfield to find slavery illegal as a matter of substantive law was the fact that England had no written constitution or bill of rights that excluded blacks, while at the same time, blacks and whites were not treated unequally by the common law. *See* Finkelman, *supra* note 45 at 325-26. Had England at the time of the opinion had a written bill of rights, James Somerset might have met Dred Scott’s same fate.

<sup>53</sup> Professor Mark Graber has explained the canon/anticanon concept, albeit without the labels, thus: “[c]ontemporary constitutional theory rests on [these] premises. *Brown v. Board of education* was correct [ . . . ] *Dred Scott v. Sandford* was . . . wrong.” Mark A. Graber, *Desparately Ducking*

## *Winter for Purehearts*

By Michael Cavendish\*

*Dred Scott* is a well known anticannon. *Dred Scott* has now been cited or discussed in excess of 4000 times in judicial opinions and scholarly legal literature.<sup>54</sup> Hardly a year goes by in which two or three legal intellectuals in the academy or on the bench do not pick it up and turn it over, looking for some further lesson to impart from it.<sup>55</sup>

*Miller v. Gaskins*, in contrast, has been ignored, cited in but one other legal opinion<sup>56</sup>--for a banal rule of substantive law relating to the testator's intent under a will—and briefly mentioned in a history book<sup>57</sup> on the Supreme Court of Florida. That *Miller* has been so overlooked ought to be remedied, since it contains anticanonical lessons of equal value to those found in *Dred Scott*.

---

*Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (Summer 1997).

<sup>54</sup> These can be counted with the use of a citation aggregator such as West's online *Key Cite* feature.

<sup>55</sup> *See for example* Graber, *supra* note 53 at 272 (“Proponents of judicial restraint maintain that [the opinion] demonstrates the evils that result when federal justices prevent the elected branches of government from resolving major social disputes. Originalists maintain that [the opinion] demonstrates the evils that result when constitutional authorities fail to be tethered by precedent [ . . .]”).

<sup>56</sup> That opinion is *Rewis v. Rewis*, 84 So. 93 (Fla. 1920).

<sup>57</sup> *See* Manley, *supra* note 3 at 195.

## *Winter for Purehearts*

By Michael Cavendish\*

Return to the sentence. Focus on the fourth word, “evil.” In the sentence, evil is used to label two objects; freedom, or a “status [other] than that of pure slavery,” and also a type of equity or leniency in the law, that quality that would allow Thomas’ humanitarian will to be done.<sup>58</sup> The sentence marries two legal ideas, personal freedom in the human rights context and freedom of intent from the common law tradition, and by fiat assigns a moral/religious value to them, a value that is exactly the opposite of the value that the vast majority of contemporary civilized thought and the vast majority of legal and judicial scholarship would assign to those ideas. “Evil,” as used here, is dehumanizing to Sarah; a usage that paints her humanity as anti-moral, anti-jurisprudential, and even anti-theological. It is a usage that is also inappropriately uncivil.<sup>59</sup>

Words eight through eleven, “policy of our laws,” are the *Miller* court’s attempt to shoehorn an artificial *volksgeist*,<sup>60</sup> the use of the myth-

---

<sup>58</sup> See *Miller*, 11 Fla. 73, 1864 WL 1117 at \*4.

<sup>59</sup> By uncivil, I refer not to a complaint over manners but rather to a usage of language that both obscures the substantive legal issue at hand and robs the subject of that language of their dignity. See Michael Cavendish, *Civility In Written Advocacy*, THE BENCHER 10-11 (July/August 2005).

<sup>60</sup> *Volksgeist* was a German romantic idea coined by Herder, suggesting that each people had their own recognizable “special genius,” that led to the unsurprising follow-on idea that each nation or culture of peoples should be left to cultivate this special quality of theirs. See this definition

## *Winter for Purehearts*

By Michael Cavendish\*

invoking “our,” into an appeal to public policy. “Our” as used here is an interpolation of a notion of a homogenous folk group and their supremacy, a supremacy that takes precedence over anything else.

The final two words in the sentence, “pure slavery,” connote a totalitarian approach to lawfinding. The *Miller* court wanted no exceptions, no shades of gray in their slave law. It was to be “pure slavery” for Florida, with no room for questioning or dissent. “Pure slavery” also suggests a kind of search for purity—purity of ideology in the white supremacist ideas that lurked behind Florida’s pro-slavery laws.

Viewing the sentence as a whole against the backdrop of my dissective efforts, I can sketch two preliminary lessons that reveal some of the danger *Miller* presents.

The sentence is *historicist*. Historicity is the practice of according value to something, across a spectrum of like things, in accordance with the perceived legitimacy or brilliancy of its historical pedigree.<sup>61</sup> At the time *Miller* issued, many citizens in Florida, and particularly within

---

at sparknotes.com online study guide,

[http://www.sparknotes.com/history/european/1848/terms/term\\_29.html](http://www.sparknotes.com/history/european/1848/terms/term_29.html)

(accessed August 2, 2006).

<sup>61</sup> For a good introduction to the potential problems created by historicist elements in legal thought, and an introduction to the concept of historicity, see Richard A. Posner, *FRONTIERS OF LEGAL THEORY* 168-192 (Harvard Univ. Press 2004).

## *Winter for Purehearts*

By Michael Cavendish\*

Middle Florida, were wrapped in a false sense of history that, according to its adherents, extended the institution of human slavery and the corresponding tenet of white supremacy from times immemorial up to their present.<sup>62</sup> These historical ideas were wildly inaccurate, although not to the Court's perception of history. Florida had been a pro-slavery territory only for a matter of decades at the time, there was half a nation north of Florida that disagreed with the propriety of slavery, and Great Britain, Florida's new 'mother country' after annexation, had abolished slavery decades earlier. The historicist ideas imbued in *Miller's* awful sentence essentially masked within a popular legend or fake folk history some very blunt, brutal political and cultural preferences as to where the teeth of the law would bite.<sup>63</sup>

The sentence is also *imperialist*. I use the term imperialism here to mean a group's continuum of behavior that trends toward the aggressive and that is directed against other groups by both formal and informal means.<sup>64</sup> The *Miller v. Gaskins* court did not just decide the case before it.

---

<sup>62</sup> For an example of this, look no further than reports of the public remarks of Alexander Stephens, the Vice President of the Confederacy, who lauded slavery and racial inequality as the "cornerstones" of the southern nation. Finkelman, *supra* note 45 at 348.

<sup>63</sup> See Posner, *supra* note 61 at 168.

<sup>64</sup> I borrow this definition from G. Randal Hornaday, who used the term in a review of the same cultural phenomenon that gave rise to *Miller v.*

## *Winter for Purehearts*

By Michael Cavendish\*

The *Miller* court wanted slavery for “our,” for “us,” for all of Florida, and beyond, for the great-great-grandchildren of the justices. This was an exportation of an ideology with the goal of ensconcing it in perpetuity, up in the fancied ether.

*Miller*’s brand of imperialist lawgiver is anathema to a free society because the imperialist’s frame of reference is that he will decide the law before deciding the case, putting the interest of whatever the source of the imperialism is, be it a regime or an idea, ahead of the rights or interests of the lawsuit parties. The calling card of this imperialism, as I use the concept, is not the substance of the idea being pushed, it is the pushing itself, and the attendant subjugation of rights, responsibilities, comity, polity, process, pluralism, intellectual rigor, or due process. It is the bending of all of these hallmarks of a free society to the imperialists’ wants or will.

Here is why these anticanonical lessons, these faults of thought, require the result that the opinion is dangerous. A legacy of *Miller v. Gaskins* is that it marked a kind of ‘winter for purehearts.’ To most, that description paints what must have seemed to Florida blacks and white abolitionists of the era to be the bitterest nadir in that period of slaveocracy in Middle Florida—a time when it seemed that the law, the

---

*Gaskins*—the pre-Civil War slave culture of the U.S. South. G. Randal Hornaday, *The Forgotten Empire: Pre-Civil War Southern Imperialism*, 36 CONN. L. REV. 225, 233 (Fall 2003).

## *Winter for Purehearts*

By Michael Cavendish\*

just laws, had vanished and would not return. But consider that common experience and history teach that there were people living then, as there are now,<sup>65</sup> for whom there is painted an opposite bleakness; their despair at the deliberate advance of the Union troops the year the opinion issued, freeing chained men and women from plantations one mile at a time, spoiling the mythical Eden imagined by the planters and their families. One winter ended, the other, what the overwhelming majority of Americans would describe as the false winter, persists. And this despairing fact, the very existence of antipodal views of the right-ness of the times surrounding the case, the fact that there are, somewhere, accepting hands waiting for the cold knife that is that terrible sentence, is precisely why *Miller* is a danger that ought to be studied instead of forgotten. *Miller v. Gaskins* is an anticannon if ever there was one. Like *Dred Scott*, it is an American legal opinion and a part of American legal heritage in need of thousands of discussions.

---

<sup>65</sup> See for example Amy Keller, *Hate in the Sunshine State*, FLORIDA TREND Vol. 49, No. 6, 80-84 (September 2006)(cataloguing active white supremacist hate groups in Florida).