SCOTT V. SANDFORD: THE COURT'S MOST DREADFUL CASE AND HOW IT CHANGED HISTORY

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INTRODUCTION

Dred Scott v. Sandford[1] is unquestionably the most controversial decision in Supreme Court history. While the case's holding and doctrine are no longer jurisprudentially important, its historical and cultural impact can hardly be overestimated. Though surely an exaggeration, it has been said that the case caused the Civil War. While other forces caused secession and the War, *Dred Scott* surely played a role in the timing of both. After the War, the Thirteenth and Fourteenth Amendments were in part designed to overturn its holding. In the modern era, politicians, lawyers, and jurists recall *Dred Scott*, almost always to express their disagreement with the case. Remarkably, during the 2004 presidential election, President George W. Bush offered up *Dred Scott* when asked to name a Supreme Court decision he opposed.[2] President Bush's answer may reflect his general ignorance about the Supreme Court, but it also illustrates how *Dred Scott* has come to symbolize bad jurisprudence, or even "evil" in constitutional law.[3]

Despite its reputation as a "bad" decision, *Dred Scott* is one of the most significant cases in American constitutional history. A simple description of the case as found in *U.S. Reports* suggests its importance and complexity. Each of the nine Justices on the Court wrote an opinion in the case: only one of a few times before the Civil War that this occurred.[4] The opinions range in size from Justice Robert C. Grier's half-page concurrence to Justice Benjamin R. Curtis's seventy-page dissent. Chief Justice Taney's "Opinion of the Court" is fifty-four pages long. The nine opinions, along

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1. 60 U.S. (19 How.) 393 (1857).

2. Second Bush-Kerry Presidential Debate (Oct. 8, 2004), *available at* www.debates.org/pages/trans2004c.html.

3. *See generally* MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

4. *See, e.g.*, Smith v. Turner, 48 U.S. (7 How.) 283 (1849).

with a handful of pages summarizing the lawyers' arguments, consume 260 pages of *U.S. Reports*. The end result of this massive flow of ink was a decision which declared unconstitutional that portion of the Missouri Compromise which prohibited slavery in all of the federal territories north and west of the state of Missouri. In addition, the Court held that Congress had no power to ever regulate slavery in the territories, despite the fact that Congress had been doing so since the Articles of Confederation Congress passed the Northwest Ordinance in 1787,[5] and the Congress under the United States Constitution reaffirmed that law.[6] Finally, in a ruling that shocked and angered many Northerners, the Court held that free blacks, even in Northern states where they could vote and hold office, could never be considered citizens of the United States or be protected by the United States Constitution.

When first decided, there was strong support for the decision in some parts of the nation and deep hostility in other parts. Today, a century and a half after the case, it seems as though no one defends the outcome of the case or Chief Justice Taney's analysis.[7] This fact makes the case significantly different from most other controversial decisions. Most other deeply controversial decisions are controversial because there is substantial disagreement over the outcome, holding, or analysis. Most controversial decisions have their supporters and opponents. They are controversial—and remain controversial—because people disagree over their meaning, validity, or legitimacy. This is not the case with *Dred Scott*. Today it is virtually impossible to find anyone who supports Taney's decision or the outcome of the case. As the articles in this symposium show, *Dred Scott* is at the center of controversies that are almost entirely one-sided. Scholars debate *why* the decision was wrong, not if it was wrong. Even those scholars[8] who argue that parts of the decision are consistent with mid-nineteenth-century understandings of the Constitution or with the original intent of the Framers[9] don't actually endorse the decision. My own view is that the decision is indeed consistent with the original intention of the majority of the delegates

5. Act of July 13, 1787, ch. 8, 1 Stat. 50, 51 n.(a).

6. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

7. A number of scholars—I include myself in this group—acknowledge that the decision, or at least parts of it, is consistent with mid-nineteenth-century understandings of the Constitution or with some of the Framers' original understanding of the Constitution.

8. I would include myself in this category.

9. *See, e.g.*, PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (2d ed. 2001) [hereinafter FINKELMAN, SLAVERY]; Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 395 (1989) [hereinafter Finkelman, *Constitution*].

at the Philadelphia Convention. But this conclusion is an argument against intentionalism, rather than an argument in favor of the decision.

In 1857, when the decision came down, it was possible to find numerous supporters of Taney's reasoning, analysis, and conclusions. Southerners generally applauded the decision, and many were ecstatic over it.[10] Most Northern Democrats accepted it and even praised it. They hoped it would forever end debate over slavery in the territories and, thus, eliminate the newly formed Republican Party as a political force in the North. However, by this time a majority of Northern voters had rejected the Democrats and their spineless support for slavery.[11] Thus, most Northerners were stunned and appalled by the decision. Horace Greeley, the editor of the New York *Tribune*, the nation's leading Republican paper, responded to the decision with outrage, declaring that Taney's opinion was "entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room."[12]

I. MODERN USES OF *DRED SCOTT*

While modern scholars and jurists might not endorse Greeley's caustic assessment, most agree that the decision was not only wrong, but also pernicious and just plain bad! For example, a former Justice, Charles Evans Hughes, who later returned to the Court as Chief Justice, argued that *Dred Scott* was one of "three notable instances [in which] the Court has suffered

10. The Charleston *Mercury* praised the decision, declaring it was "not easy to overrate [it]," but at the same time correctly predicted that the decision would "precipitate rather than retard" the "final conflict between Slavery and Abolitionism," and warned against Southerners "abandon[ing]" themselves "to the delirium of a premature triumph." *The* Dred Scott *Case*, MERCURY (Charleston), Apr. 2, 1857, *reprinted in* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 131 (1997).

11. This assertion is based on the presidential election of 1856. In that year, the infant Republican Party nominated John C. Frémont, a political newcomer with no experience as an officeholder. Nevertheless, despite Frémont's lack of political experience and the newness of the Party, the Republicans carried eleven of the sixteen free states, including three of the four most populous. By the time Taney announced the *Dred Scott* decision, Republicans had taken over most of the state governments in the North.

12. Horace Greeley, *Editorial*, TRIBUNE (N.Y.), Mar. 7, 1857, *reprinted in* FINKELMAN, *supra* note 10, at 144, 145.

severely from self-inflicted wounds."[13] Similarly, Professor Alexander Bickel of Yale Law School called it a "ghastly error."[14]

Modern Supreme Court Justices see *Dred Scott* as the ultimate bad decision and cite it not for authority but as a way of attacking those with whom they disagree on the Court. Conservative jurists and legal scholars cite *Dred Scott* as the Court's most notorious example of the judiciary overstepping it bounds. For example, Justice Felix Frankfurter believed courts should "refrain[] from avoidable constitutional pronouncements" and thought "the Court's failure in *Dred Scott v. Sandford*" was one of those "rare occasions when the Court, forgetting 'the fallibility of the human judgment,' has departed from its own practice."[15] Similarly, in a 1992 dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Antonin Scalia complained that the Court's decision was not based on "reasoned judgment" but only on "personal predilection."[16] He then implied that the decision in *Casey* was no more legitimate than *Dred Scott*. Scalia wrote,

> Justice Curtis's warning [in his dissent in *Dred Scott*] is as timely today as it was 135 years ago: "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."[17]

More progressive jurists and scholars have also used *Dred Scott* as a symbol of mistakes made by the Court. When the Supreme Court voted 8–1 to uphold racial segregation in *Plessy v. Ferguson*[18] Justice John Marshall Harlan, the lone dissenter, compared the Court's decision to *Dred Scott*: "In

13. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). Hughes considered the other cases to be *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). *Hepburn* denied the power of the United States to issue paper money. Two years later the Court reversed its decision in *Hepburn*, upholding the use of paper money in *Knox v. Lee* and *Parker v. Davis*, 79 U.S. (12 Wall.) 457 (1871), which together are better known as the *Legal Tender Cases*. In *Pollock* the Court declared the federal income tax law to be unconstitutional. This decision was effectively reversed by the Sixteenth Amendment.

14. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 41 (Yale Univ. Press 1978) (1970).

15. United States v. UAW-CIO, 352 U.S. 567, 590–91 (1957) (footnotes omitted).

16. 505 U.S. 833, 984 (1992) (Scalia, J., dissenting).

17. *Id.* Justice Scalia quoted from *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting). *Casey* was a case involving abortion rights. Opponents of reproductive choice often compare *Roe v. Wade*, 410 U.S. 113 (1973), to *Dred Scott* on the grounds that both deny liberty to an oppressed group—fetuses and blacks. This is another example of using *Dred Scott* to discredit one's opponents.

18. 163 U.S. 537 (1896).

my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."[19] A half century later, Justice Hugo Black dissented from a majority opinion, saying, "today's decision will no more aid in the solution of the problem than the *Dred Scott* decision aided in settling controversies over slavery."[20] More recently, while dissenting in a death penalty case Justice William J. Brennan, Jr., quoted *Dred Scott* to illustrate the way racism has long been a factor in American law. Justice Brennan noted that the Justices had only recently "sought to free ourselves from the burden of this history."[21]

Dred Scott is also used when a Justice opposes judicial negation of state or federal law, even when the particular Justice might be sympathetic to a different outcome. Thus, in refusing to strike down the State of Washington's ban on assisted suicide, Justice David Souter dragged *Dred Scott* out of the jurisprudential closet in which it is usually kept to argue that the Court should be cautious of second guessing a legislature.[22] Souter wrote,

> . . . *Dred Scott* was textually based on a Due Process Clause (in the Fifth Amendment, applicable to the National Government), and it was in reliance on that Clause's protection of property that the Court invalidated the Missouri Compromise. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, the implication being that the Government had no legitimate interest that could support the earlier congressional compromise. The ensuing judgment of history needs no recounting here.[23]

Judges who cite *Dred Scott* today often see the decision as the product of an overly ideological and reactionary judge—Chief Justice Taney—so

19. *Id.* at 559 (Harlan, J., dissenting).

20. Williams v. North Carolina, 325 U.S. 226, 275 (1945) (Black, J., dissenting).

21. McCleskey v. Kemp, 481 U.S. 279, 343–44 (1987) (Brennan, J., dissenting). McCleskey, an African American, had been sentenced to death in Georgia. In appealing his death penalty McCleskey presented overwhelming evidence that race was a major factor in death sentences and that blacks who killed whites, as McCleskey had, were 4.3 times more likely to be sentenced to death than defendants (white or black) who killed blacks. The Supreme Court rejected these statistics in upholding the death penalty. Justice Brennan dissented in part, citing *Dred Scott*.

22. *See* Washington v. Glucksberg, 521 U.S. 702, 756 (1997).

23. *Id.* at 758–59 (Souter, J., concurring) (citations omitted). Oddly enough, Justice Souter is the only Justice in living memory to cite *Dred Scott* favorably. In his dissent in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995), he wrote,

> Regardless of its other faults, Chief Justice Taney's opinion in Dred Scott v. Sandford, 19 How. 393 (1857), recognized as a structural matter that "[t]he new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one."

Id. at 150 n.43 (alteration in original) (quoting Dred Scott v. Sandford 60 U.S. (19 How.) 393, 441 (1857)).

bent on shaping public policy his way that he was willing to rely on poor scholarship and weak legal reasoning. The decision was so "bad" that even judges and legal theorists with diametrically opposed views on how to interpret the Constitution agree on this conclusion.

The debate over the use of "original intent" analysis in constitutional interpretation illustrates the universal rejection of Taney's decision. Proponents of original-intent analysis argue that the Court must interpret the Constitution according to the intentions of the Framers. They claim that their approach eliminates personal preference from judicial interpretation. Former federal judge Robert H. Bork, for example, argued that judges who fail to follow original intent are simply "enforcing their own morality upon the rest of us and calling it the Constitution."[24] Opponents of original-intent analysis argue for what is called a "living Constitution." They contend that the Framers used open-ended, indeterminate language in the Constitution precisely because they did not want future generations to be concerned about their intent. They argue that unlike a statute, which sets out narrow and precise language to deal with a specific issue, a Constitution is designed to articulate general principles that must be applied to changing circumstances. Moreover, they argue the Framers themselves did not believe in original intent. As the Pulitzer Prize–winning historian Leonard W. Levy wrote,

> The failure of the Framers to have officially preserved and published their proceedings seems inexplicable, especially in a nation that promptly turned matters of state into questions of constitutional law; but then, the Framers seem to have thought that "the original understanding at Philadelphia," which Chief Justice William H. Rehnquist has alleged to be of prime importance, did not greatly matter.[25]

Opponents of originalism fondly quote Chief Justice John Marshall's observation in *McCulloch v. Maryland* that "we must never forget that it is a *constitution* we are expounding," and that this Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[26]

Because all modern commentators believe *Dred Scott* was misguided, even pernicious, proponents of original-intent analysis have labored to prove that *Dred Scott* was not a decision based on original intent. Instead, supporters of original-intent analysis argue that *Dred Scott* resulted from

24. Finkelman, *Constitution*, *supra* note 9, at 395 (internal quotations omitted).

25. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 2 (1988). On this subject, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For a discussion of the problems of applying historical scholarship to original intent analysis, see Finkelman, *Constitution*, *supra* note 9.

26. 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

Taney's desire to impose his own personal views on the law. Thus, in 1976 Justice William Rehnquist (later Chief Justice), a strong advocate of original-intent analysis, wrote that *Dred Scott* is "[t]he apogee of the living Constitution doctrine during the nineteenth century . . . ."[27]

However, jurists and legal scholars opposed to original-intent analysis point to *Dred Scott* as a prime example of original intent and use it to illustrate the danger of such legal thinking. They note that Taney based much of his argument on original-intent analysis. Taney wrote,

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . [I]t must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[28]

Commenting on this passage, my co-editor on this symposium, Sanford Levinson noted that Taney "sound[ed] altogether like Robert Bork, who pronounced original intent the only legitimate modality of constitutional interpretation . . . ."[29] Similarly, Justice Thurgood Marshall wrote that "[t]he original intent of the phrase, 'We the People,' was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, Chief Justice Taney penned the following passage in the *Dred Scott* case . . . ." Marshall then quoted Taney's language to the effect that blacks "were not intended to be included" under the word "citizens" in the Constitution.[30]

27. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700 (1976).

28. Dred Scott, 60 U.S. (19 How.) at 426.

29. Sanford Levinson, *Slavery in the Canon of Constitutional Law*, *in* SLAVERY AND THE LAW 89, 103 (Paul Finkelman ed., 1997).

30. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987) (internal quotations omitted) (quoting *Dred Scott*, 60 U.S. (19 How.) at 404). This understanding of *Dred Scott* and original intent is not limited to law professors and judges. Carl T. Rowan, a nationally syndicated newspaper columnist wrote, "Thus, when someone comes to me talking about 'strict construction' and 'original intent,' I assume immediately that I face a mind-set akin to those of the Taney Court who decided *Dred Scott* . . . ." Carl T. Rowan, *Equality as a Constitutional Concept*, 47 MD. L. REV. 10, 14 (1987).

The use of *Dred Scott* by proponents and opponents of original-intent analysis underscores the importance that modern scholars and jurists place on distinguishing their views from those of Taney. The willingness of politicians, jurists, and scholars of all political stripes to use *Dred Scott* in debates over modern issues illustrates the importance of the case to American history and American legal culture. A century and a half after it was decided, *Dred Scott* remains the quintessential "bad case" in our history. Jurists, commentators and scholars can still score points against a modern decision they dislike, if they can label it "like *Dred Scott*."

II. A PECULIARLY CONTROVERSIAL CASE

The universal rejection of *Dred Scott* makes it different from almost all other controversial cases. Usually important and controversial cases have both their detractors and their defenders. For example, many Americans hate *Roe v. Wade*,[31] but others embrace the decision. More than three decades after the decision, political contests still turn on whether a candidate endorses or opposes *Roe*. At one time *Lochner v. New York*[32] was seen as the twentieth-century equivalent of *Dred Scott*, and a whole period of our constitutional history is known as the "*Lochner* Era."[33] Twenty-five years ago it was virtually impossible to find anyone who defended the result in *Lochner*. Who could support the idea that businesses should be allowed to exploit workers by allowing them (or requiring them) to work absurdly long hours? Yet today *Lochner* seems less frightening to many scholars. In a nation of hard workers, with many professionals (especially young lawyers) working absurdly long hours and many more people holding down two jobs, the "exploitation" of bakers in New York may not seem so horrible. Moreover, in recent years neo-conservative scholars and proponents of law and economics have argued that the case was correctly decided because it allowed for individuals to take more control over their own economic destiny. These scholars argue the case was actually a positive development in American law.[34]

Doctrinally, *Lochner* seems less dangerous today and more protective of liberty than it once did. When the case was first decided the Court's substantive due process argument was seen by many progressives as a

31. 410 U.S. 113 (1973).

32. 198 U.S. 45 (1905).

33. 2 MELVIN UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 558–60 (2d ed. 2002).

34. *See* David Bernstein, *The Supreme Court and "Civil Rights" 1886–1908*, 100 YALE L.J. 725, 733–36 (1990).

threat to the ability of the states to protect the weakest members of society. However, in subsequent cases—such as *Meyer v. Nebraska*[35] and *Pierce v. Society of Sisters*[36]—the Court used substantive due process to protect minority rights and expand civil liberties. In *Roe*[37] the Court once again used substantive due process to protect civil liberties and the civil rights of women. In light of these cases, at least the theoretical basis of *Lochner* has gained support, even if, on the merits, most scholars have little use for the outcome of the case. Thus, *Lochner* no longer rivals *Dred Scott* as the most reviled decision in Supreme Court history. Only *Plessy*,[38] upholding "separate but equal" segregation in public transportation, might rival *Dred Scott*. Yet, some modern scholars argue that the case was not unreasonably decided and that it was in fact inevitable.[39] Other scholars argue that the standard in the case—"separate but equal"—if enforced, would have provided more equality and opportunity for blacks than did integration.[40] Thus, the civil rights activist/scholar Derrick Bell can find some value in the doctrine of *Plessy*,[41] but finds no redeeming value in *Dred Scott*.

Significantly, when the Court decided *Plessy*, the lone dissenter, Justice John Marshall Harlan, predicted that the case would "in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*."[42] However, the universal distaste for *Plessy* is a relatively recent development. Indeed, as late as 1954 the Supreme Court refused to overturn *Plessy*, even as it also refused to apply the logic of "separate but equal" to schools.[43] However, as noted, when it was decided *Dred Scott* generated instant, although not universal, hostility throughout the North.

35. 262 U.S. 390 (1923).

36. 268 U.S. 510 (1925).

37. 410 U.S. 113 (1973).

38. 163 U.S. 537 (1896).

39. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). For a critique of this position, see Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973 (2004) (book review).

40. *See* Derrick A. Bell, *Bell, J., Dissenting*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185, 186–87 (Jack M. Balkin ed., 2001).

41. *See id.*

42. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

43. The holding in *Brown* was narrowly confined to schools and technically did not overturn *Plessy* as a general rule. In *Brown* the court held,

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

Many Northern politicians, lawyers, newspaper editors, and clergymen condemned it.

Less than a dozen years after the decision it was impossible to find any support for Chief Justice Taney's position. The Civil War, the Emancipation Proclamation, and two constitutional amendments had effectively reversed all of Taney's holdings on race and slavery. Repeated acts by Congress during and immediately after the War affirmed that Taney's assertions of the lack congressional power to regulate the territories had been effectively reversed.

III. THE NORTHERN HOSTILITY TO *DRED SCOTT* AND THE EMERGENCE OF LINCOLN

Immediately after the decision, Horace Greeley, the Republican editor of the New York *Tribune* published a pamphlet edition of Chief Justice Roger B. Taney's opinion, paired with the withering dissent of Justice Benjamin R. Curtis.[44] This action was a function of Greeley's sharp political instincts. Greeley correctly believed that an easily available text of the Taney opinion, set off against Curtis's powerful dissent, would help the Republican cause.

Writing in the *Tribune*, the nation's leading Republican paper, Greeley responded to the decision with outrage, calling Taney's opinion "wicked," "atrocious," "abominable," and a "collation of false statements and shallow sophistries." The *Tribune* declared that Taney's decision had no more validity than the opinions which might be expressed in any "Washington barroom." The *Chicago Tribune*, another important Republican paper, declared that Taney's statements on black citizenship were "inhuman dicta."[45]

The black abolitionist, Frederick Douglass, called the decision "devilish" and the "judicial incarnation of wolfishness."[46] However, Douglass optimistically predicted that, in the long run, the decision would help the antislavery movement. Rather than being depressed by the decision, Doug-

44. THE CASE OF DRED SCOTT IN THE UNITED STATES SUPREME COURT: THE FULL OPINIONS OF CHIEF JUSTICE TANEY AND JUSTICE CURTIS, AND ABSTRACTS OF THE OPINIONS OF THE OTHER JUDGES; WITH AN ANALYSIS OF THE POINTS RULED AND SOME CONCLUDING OBSERVATIONS (New York, Tribune Assoc., 1860). Greeley also published the same 104-page pamphlet through a second publisher, "Horace Greeley & Co."

45. Both papers are quoted in DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 417 (1978).

46. Frederick Douglass, The *Dred Scott* Decision: Speech at New York, on the Occasion of the Anniversary of the American Abolition Society, (May 11, 1857), *reprinted in* FINKELMAN, *supra* note 10, at 169, 174.

lass found his "hopes were never brighter."[47] Douglass assumed that the reaction to this decision would lead to more support for abolitionists and thus put greater pressure on slavery. He confidently predicted that the "National Conscience" would not be "put to sleep by such an open, glaring, and scandalous tissue of lies . . . ."[48] The election of 1860 would vindicate his faith in the nation, or at least in the majority of voters in the North.

Douglass was of course correct. In the long run, and in what would prove to be the short run, Taney's opinion was a key catalyst in creating the crisis that would lead to Lincoln's election, secession, civil war, and the end of slavery. It would be too much to argue that the *Dred Scott* decision caused the Civil War; causation is never a simple matter. Surely the conflict over slavery would have eventually led to a breakdown of the Union. But, *Dred Scott* had a great deal to do with the way this drama unfolded and with the timing of the War.

The most important impact of *Dred Scott* was in its effect on presidential politics. This played out in two ways. To put the case most directly: *Dred Scott* helped create Abraham Lincoln as a national politician and at the same time it undercut the position of Stephen A. Douglas as a national politician. This in turn set the stage for the splintering of the Democratic Party and the rise of Lincoln as a national figure. I will turn back to these party politics issues in a moment, but first it is important to understand what Chief Justice Taney held in *Dred Scott* and why that mattered for national politics.

IV. DRED SCOTT'S CLAIM

In 1846 the Missouri slave Dred Scott began a lawsuit to gain his freedom. He had two claims for this freedom: that he had lived in a free state (Illinois) and that he had lived in a United States territory (what was then the Wisconsin Territory and what is today Minnesota) where slavery was prohibited under federal law (the Missouri Compromise of 1820).[49] To understand the significance of the case and Taney's decision, it is important to set out, in some detail, the law and facts surrounding these two claims.

Dred Scott was born a slave in Virginia sometime between 1795 and 1800.[50] In 1818 Scott's owner, Peter Blow, left Virginia with Dred Scott in

47. *Id.*

48. *Id.*

49. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545; J. Res. of Mar. 2, 1821, 3 Stat. 645.

50. Scott is listed in an 1818 property tax record as being "more than sixteen years old." Paul McStallworth, *Scott, Dred*, *in* DICTIONARY OF AMERICAN NEGRO BIOGRAPHY 548 (Rayford W. Logan & Michael R. Winston eds., 1982).

tow, eventually settling in St. Louis, Missouri, in 1830. Blow died in 1832 and the next year Dr. John Emerson, a U.S. Army surgeon, purchased Scott. From December 1, 1833, until May 4, 1836, Scott lived at Fort Armstrong, which was located in Illinois near the present-day city of Rock Island, where Dr. Emerson was the post physician.[51]

Illinois was a free state, and Scott might have claimed his freedom under its constitution. The claim for this freedom was rooted in the theory of law, first articulated in *Somerset v. Stewart*, decided by the Court of King's Bench in 1772.[52] In that case, Lord Chief Justice Mansfield ruled that slavery could exist only if there was positive law supporting the *status* of slave and that if a slave entered a free jurisdiction, the slave would instantly become free, because there was no law allowing the person to be held as a slave. Most American jurisdictions, North and South, accepted this precedent, although many free states allowed masters some rights of transit or temporary sojourn with their slaves.[53] Starting in 1824[54] Missouri consistently held that slaves gained their freedom if their masters allowed them to work in a free state or live in a free state for more than a very short time. The two and a half years that Dred Scott spent in Illinois were sufficient to emancipate him either under Missouri law or Illinois law.[55]

Dred Scott did not, however, claim his freedom during this period. Most probably, he simply did not know that under Illinois law he had a right to his liberty. But, even if he had known of this right, it is unlikely that at Fort Armstrong Scott would have found a lawyer to take his case. In the 1830s some Illinois attorneys were willing to fight for a slave's freedom, even if the slave had no money to pay them. But, such activist attorneys were not found in the remote area around Fort Armstrong. It is also possible that Dred Scott had no strong interest in seeking his freedom at that time, in that place. He may have found Dr. Emerson a tolerable master

51. One of the best studies of Scott's life and the complicated facts surrounding the case is WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM (1979). The most important and comprehensive book on the case itself and its political impact is FEHRENBACHER, *supra* note 45.

52. 98 Eng. Rep. 499 (K.B. 1772).

53. For a complete history of this issue, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981). Until 1841 New York allowed masters to bring slaves into the state for up to nine months; until 1847 Pennsylvania gave masters a six months right of sojourn.

54. Winny v. Whitesides, 1 Mo. 472 (1824).

55. Illinois was never a strong supporter of black rights or racial equality, and slaves visiting there for a short period of time could expect little support for freedom from the state's courts. But, the state did not allow slavery or allow slaves to be kept there for long periods of time. *See* FINKELMAN, *supra* note 53, at 96–98, 150–55; FINKELMAN, SLAVERY, *supra* note 9, at 57–79; Paul Finkelman, *Slavery, the "More Perfect Union," and the Prairie State*, 80 ILL. HIST. J. 248 (1987). A handy collection of the Illinois laws dealing with slavery and race is found in STEPHEN MIDDLETON, THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY 269–329 (1993).

and felt that freedom on the Illinois frontier was not terribly advantageous. Most likely, Scott failed to assert a claim to freedom while in Illinois because, as an illiterate slave on an isolated Army base, he never learned that he could become free.

In 1836, following Black Hawk's War, the Army evacuated Fort Armstrong, and Dr. Emerson, with Scott, ended up in Fort Snelling, in what was then the Wisconsin Territory and today is the state of Minnesota. The Missouri Compromise "forever prohibited" slavery in this region. Thus, when Dr. Emerson and Dred Scott crossed the Mississippi River north of the state of Missouri, they entered territory where all slavery had been prohibited by an act of Congress. In addition to the Missouri Compromise, Scott had another federal statutory claim to freedom when he took up residence at Fort Snelling. Two weeks before Emerson and Scott headed to Fort Snelling, Congress passed the Wisconsin Enabling Act, creating the Wisconsin Territory.[56] This new territory encompassed most of the present-day states of Wisconsin, Minnesota, and Iowa. The Missouri Compromise, with its ban on slavery, remained in effect, but the Wisconsin Enabling Act reinforced this ban by two new clauses. Section 12 of the Enabling Act declared that settlers in the territory would "enjoy" all "the rights, privileges, and advantages, granted and secured" under the Northwest Ordinance of 1787 and also "be subject to all the conditions and restrictions and prohibitions" of the Ordinance.[57] This was a direct reference to Article VI of the Northwest Ordinance which declared, "There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . . ."[58] The Wisconsin Enabling Act further declared that the laws of Michigan were to be in force in the territory until they were repealed or modified.[59] Michigan also prohibited slavery.[60] Thus, the Missouri Compromise, the Northwest Ordinance, the Wisconsin Enabling Act, and the laws of Michigan all prohibited slavery in the territory into which Dr. Emerson brought Dred Scott and kept him for a number of years.

Dred Scott remained at Fort Snelling from May 1836 until April 1838. During this period he met and married Harriet Robinson, a slave owned by

56. Act of Apr. 20, 1836, ch. 54, 5 Stat. 10 (establishing a territorial government of Wisconsin). This law went into effect on July 23, 1836.

57. *Id.* § 12, 5 Stat. at 15.

58. Act of July 13, 1787, ch. 8, 1 Stat. 50, 53 n.(a).

59. Act of Apr. 20, 1836, ch. 54, § 12, 5 Stat. 10, 15.

60. *See generally* Roy E. Finkenbine, *A Beacon of Liberty on the Great Lakes: Race, Slavery, and the Law in Antebellum Michigan*, *in* THE HISTORY OF MICHIGAN LAW 83 (Paul Finkelman & Martin J. Hershock eds., 2006).

Major Lawrence Taliaferro, the Indian Agent stationed near Fort Snelling. Taliaferro was also a justice of the peace, and in that capacity he performed a formal wedding ceremony for his slave and her new husband.[61] This was extraordinary and significant, and while not giving Dred Scott a new claim to freedom, the formal marriage provided another factual basis for his claim that he became free while he lived at Fort Snelling.

Under the laws of the Southern states, a slave could never be *legally* married. Slave couples, of course, "married" each other throughout the South. Often a master performed a ceremony for his slaves. Sometimes white clergymen or slave preachers consecrated slave unions. Some slaves simply announced they were married or went to their masters to ask permission to live as a couple. Often slave communities developed their own ceremonies exchanging vows such as "until death or master do part." Slaves understood the precarious nature of their personal lives.

But whatever form a slave union took, a marriage between two slaves itself was not legally recognized.[62] No Southern state allowed slaves to be married under the eyes of the law for three important reasons. First, as law students learn in family law, a marriage is a contract between three parties—the two spouses and the state. Slaves could never have a legal marriage because American slaves could not be parties to contracts.[63] No American slave state allowed slaves to make contracts or in any other way perform legally binding acts, including marriages. Second, a legal recognition of slave marriages would have undermined the property interest of masters. Such marriages might have limited the right of the master to sell one of the partners. Finally, recognition of slave marriages might have led slaves to claim other rights. The legal right to marry implies the right to raise your own children, and under common law a husband or wife cannot be compelled to testify against his or her spouse in a prosecution. A husband at common law had a duty to protect his wife from assaults from others, but slaves could never protect their wives from the assaults of their masters or overseers.[64]

Besides these legal issues, recognition of slave marriages would have undermined the proslavery argument that slaves were childlike, immoral,

61. Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1050 (1997).

62. After the Civil War all of the former slave states gave legal recognition to these unions by allowing former slaves to register as married couples.

63. Under Roman law slaves could enter into some kinds of binding contracts. *See* Alan Watson, *Thinking Property at Rome*, *in* SLAVERY & THE LAW 419 (Paul Finkelman ed., 1997).

64. *See* State v. David, 49 N.C. (4 Jones) 353 (1857) (upholding the conviction of a slave who tried to prevent an overseer from beating his wife).

and incapable of love, sexual fidelity, or even lasting affection. Most slaveowners agreed with the racist assumptions of Thomas Jefferson that "love seems with them [blacks] to be more an eager desire, than a tender delicate mixture of sentiment and sensation. Their griefs are transient."[65] Most masters similarly agreed with the legal theorist Thomas R.R. Cobb that rape of a slave was "almost unheard of"[66] because rape took place when there was no consent, and, as Cobb asserted, "the known lasciviousness of the negro, renders the possibility of its occurrence very remote."[67] Racist beliefs such as these allowed masters to separate slave families whenever convenient or economically necessary without suffering any great pangs of conscience. The recognition of slave marriages would have undermined the cultural assumptions of slavery as well as its legal basis.

Thus, the civil marriage of Dred Scott and Harriet Robinson before a justice of the peace might indicate that both Major Taliaferro and Dr. Emerson believed the two slaves had become free. The fact that Taliaferro, acting in his official capacity as a justice of the peace, performed the marriage himself would further support this analysis and could have led to an argument that the marriage itself constituted a de facto manumission of the slaves. However, after the marriage, Taliaferro gave Harriet Scott to Emerson, who continued to treat the couple as his slaves. This suggests that neither Taliaferro nor Emerson thought the Scotts were legally free.

Whatever their masters believed, the facts that the Scotts were living in a free jurisdiction and were married in a civil ceremony with the knowledge and consent of their owners *could* have been used as proof that they were in fact free. Such an analysis would have gone like this: only free people were entitled to a civil marriage; Dred Scott and Harriet Robinson had a civil marriage; thus, they had to be free. But, once again Dred Scott made no attempt to gain his freedom.

In October 1837 the Army transferred Emerson to Jefferson Barracks in St. Louis. Because the trip down the Mississippi at that time of year was dangerous, Emerson left Dred and Harriet Scott at Fort Snelling where he rented them to other people. This fact could have significantly buttressed their subsequent claims to freedom. By leaving the Scotts at Fort Snelling and hiring them out at a profit, Emerson was in fact bringing the system of slavery itself into the Wisconsin Territory. Courts in a number of states had often made a distinction between bringing a slave and bringing slavery into

65. Thomas Jefferson, *Notes on the State of Virginia*, *reprinted in* THE PORTABLE THOMAS JEFFERSON 23, 187 (Merrill D. Peterson ed., 1975).

66. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY § 107, at 100 (1858).

67. *Id.*

a free jurisdiction. The difference was simple. A master traveling from one slave state to another—say from Virginia to Missouri—might have to pass through a free state, like Illinois or Indiana. That brief transit through a free state did not bring the institution of slavery into the state and might not be seen as imposing slavery on the state. However, if the master worked the slave or hired the slave out, then the institution of slavery itself would have been in the state, and the slave might legitimately claim his freedom.[68]

While living at Fort Snelling, Emerson might have made the claim that as an army officer he should be allowed to bring his slave to a military post in a free jurisdiction, because it was convenient or necessary for him to provide his own domestic servants.[69] Or, he might have claimed that while in military service in a free jurisdiction, he was exempt from local laws prohibiting slavery. But, once Emerson left Fort Snelling he could surely claim no immunity from laws prohibiting slavery. There was certainly no reason why an army officer posted in a slave state had any reason to leave a slave in a free jurisdiction and hire that slave out for his own profit. Thus, his hiring out of the Scotts was an unequivocal violation of the Missouri Compromise, the Northwest Ordinance, and the Wisconsin Enabling Act.

In November 1837 the Army sent Dr. Emerson to Fort Jesup in Louisiana. There he quickly met, courted, and, on February 6, 1838, married Eliza Irene Sanford (who usually went by the name Irene). Emerson now wanted his slaves, and in April they joined him in Louisiana. When the Scotts arrived in Louisiana they might have sued for their freedom in that state. For more than twenty years Louisiana courts had upheld the freedom claims of slaves who had lived in free jurisdictions.[70] Had the Scotts claimed their freedom in Louisiana in 1838, theirs would have been an open-and-shut case. But, once again, they did not seek their freedom. It is likely that they simply had no knowledge that the Louisiana courts rou-

68. Southern states also recognized this, in such cases as *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467 (1820), and *Winny v. Whitesides*, 1 Mo. 472 (1824). Some American courts, however, freed any slave brought within their jurisdiction. In *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836), for example, the Massachusetts Supreme Judicial Court held that slaves became free the moment they were brought into the state. This issue is discussed at length in FINKELMAN, *supra* note 53.

69. In 1850 lawyers for Irene Emerson would make such arguments before the Missouri Supreme Court. EHRLICH, *supra* note 51, at 56. However, the Missouri Supreme Court had long before rejected such arguments by a military officer in *Rachael v. Walker*, 4 Mo. 350 (1836).

70. The first Louisiana case on this subject is *Adelle v. Beauregard*, 1 Mart. (o.s.) 183 (La. 1810). The most important case is *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401 (La. 1824). Louisiana declared slaves free if they had lived in free territories, free states, or foreign countries, like France, where slavery was not legal. For a discussion of the cases in Louisiana, see FINKELMAN, *supra* note 53, at 206–16; *see also* JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 250–88 (1994).

tinely freed slaves who had lived in free jurisdictions. But, even if they had such knowledge, it is not clear that at this point in their lives they were ready to challenge their bondage or try to make a life for themselves as free people in rural northern Louisiana.

The more interesting question is not why the Scotts failed to sue for their freedom but why they came to Louisiana at all. Dr. Emerson had left them in Minnesota, which was part of a free territory. They knew people there, and probably could have found help if they had sought their freedom or simply tried to escape from slavery. The trip down the Mississippi River to Louisiana took them past numerous towns in Iowa and Illinois where they might have left the ship and asserted their freedom. They could also have jumped ship in St. Louis and melted into that city's growing free black population. Instead, unaccompanied by their owner, or evidently any other person with authority over them, they traveled over a thousand miles in order to reach Dr. Emerson. Given their subsequent attempts to become free after Emerson's death, we can only assume that at the time the Scotts found their bondage to be mild and their lives reasonably happy. Emerson had let them marry, had kept them together as a couple, and apparently treated them well enough to prevent them from seeking their freedom. He may also have told them that eventually he would free them, and the Scotts may have not only believed him, but also thought that gaining a legal manumission was worth the wait. So, they journeyed to Louisiana.

Their sojourn in the Deep South was brief. Within five months the Army transferred Emerson back to Fort Snelling, where he remained from October 1838 until May 1840. During this trip, on a Mississippi River steamboat that was north of the state of Missouri—that is, in territory made free by the Missouri Compromise—Harriet Scott gave birth to her first child, who she named Eliza after Dr. Emerson's bride. Thus, Eliza Scott was born on a boat in the Mississippi River, surrounded on one side by the free state of Illinois and on the other side by the free territory of Wisconsin. Under both state and federal law Eliza was born "free."

In May 1840 the Army sent Dr. Emerson to Florida to serve in the Seminole War. On his way there he left his wife and slaves in St. Louis. In August 1842 the Army discharged Emerson, and he returned to St. Louis. He later moved to Iowa, a free territory, but left Dred and Harriet in St. Louis where they were hired out to various people. In December 1843 the forty-year-old Emerson died suddenly. His widow, Irene, inherited his estate. For the next three years, the Scotts worked as hired slaves with the rent going to Irene Emerson. In early February 1846, Dred tried to purchase freedom for himself and his family, but Irene Emerson refused to sell Scott

to himself. In April 1846 Scott filed suit for his freedom and that of his wife and two children.[71]

V. THE SUIT FOR FREEDOM

Why did Dred Scott suddenly sue for his freedom when he had failed to make such a claim while living in free jurisdictions and had failed to try to escape when his master abandoned him at Fort Snelling? Perhaps Emerson had promised Scott his freedom—or at least the right to purchase his freedom—and when his master died suddenly without providing for it, Scott felt it was time to seek another route to liberty. This theory would explain Scott's behavior during his years at Forts Armstrong and Snelling and his unsupervised trip to Louisiana.

It is also conceivable that Scott did not discover his freedom claims until 1846. He may have learned this from sympathetic whites, including the sons of Peter Blow, his former master. Sometime after his return to St. Louis, Scott had renewed contact with the Blows who began to provide financial aid for his litigation. It is also possible that Harriet Scott first discovered the family's claim to liberty. While in St. Louis she had joined Rev. John R. Anderson's Second African Baptist Church. Rev. Anderson had been born a slave, but later purchased his freedom and became a typesetter for Elijah P. Lovejoy, an antislavery editor in Alton, Illinois.[72] Anderson, or someone else in the church, may have informed Harriet Scott that she was legally entitled to her freedom.[73] By whatever means they discovered the possibility they could be free, when Dred and Harriet Scott understood this—and decided to act on it—they easily found attorneys to take their case. Given the state of Missouri law, they fully expected to win their case.

Scott's lawyers assumed his case was an easy one to win. In 1824, in *Winny v. Whitesides*, the Missouri Supreme Court freed a slave who had

71. The freedom claims of the four slaves were all different. Dred Scott based his freedom on residence in Illinois and the Wisconsin Territory. Harriet Scott based her claim on residence in the Wisconsin Territory. Eliza Scott, their older daughter, based her claim on her birth on the Mississippi River *north* of the state of Missouri, in what was clearly free territory, and on her subsequent residence in the free Wisconsin Territory. Their younger daughter, Lizzie, was apparently born in St. Louis after the lawsuit began. Her freedom was based on the claim that her mother was already free at the time of her birth, so she was also free.

72. In 1837 a proslavery mob from St. Louis crossed the Mississippi into Alton, in an attempt to destroy Lovejoy's press, where he published the only antislavery newspaper in the region, the *Alton Observer*. A member of the mob shot and killed Lovejoy while he attempted to defend his press. Lovejoy became the first martyr in the abolitionist movement.

73. VanderVelde & Subramanian, *supra* note 61, at 1084–85.

been taken to Illinois.[74] In the next thirteen years the Missouri court heard another ten cases on this issue, always deciding that slaves gained their freedom by either working in a free jurisdiction or living there long enough to be considered a resident.[75] In this period Missouri was one of the most liberal Southern states on this question.[76] It was not, however, the only slave state to reach this result. Courts in Kentucky, Louisiana, and Mississippi also upheld the freedom of slaves who had lived in a free state or territory.[77]

These decisions were based on the legal theory, first articulated in the English case of *Somerset v. Stewart*,[78] that the status of a "slave" was so contrary to the common law and natural law that only the enactment of specific legislation could support it. In *Somerset*, Lord Mansfield, Chief Justice of the Court of King's Bench, declared that

> [s]o high an act of dominion [as the enslavement of a human being] must be recognized by the law of the country where it is used. . . . The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; . . . it's so odious, that nothing can be suffered to support it, but positive law.[79]

Under the *Somerset* precedent, when a master took a slave into a jurisdiction that lacked laws establishing slavery the slave reverted to his natural status as a free person. Once he gained that status, he remained free.

74. 1 Mo. 472, 475–76 (1824).

75. The other Missouri cases are discussed in FINKELMAN, *supra* note 53, at 218–28. The last of these, *Rachael v. Walker*, 4 Mo. 350 (1836), led to the freedom of a slave who been taken to military bases in the North and in federal territories where slavery was illegal. These facts are almost identical to those in *Dred Scott*.

76. Hundreds of successful freedom suits were never appealed, and thus there are no reports of these cases. Records for nearly 300 cases for St. Louis County (which includes the city of St. Louis) can be found in a database of the St. Louis Circuit Court Records Project developed by the Missouri State Archives and Washington University in St. Louis. These cases often contain multiple parties, so the nearly 300 cases involve many more individual slaves. I thank David T. Konig at Washington University in St. Louis for this information. These records can be found at Washington University, St. Louis Circuit Court Historical Records Project, http://stlcourtrecords.wustl.edu (last visited Jan. 21, 2007). For a discussion of these cases and the materials on the web site, see David Thomas Konig, *The Long Road to* Dred Scott*: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53 (2006).

77. *See* Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467 (1820); Lunsford v. Coquillon, 2 Mart. (n.s.) 401 (La. 1824); Harry v. Decker & Hopkins, 1 Miss. (1 Walker) 36 (1818).

78. 98 Eng. Rep. 499 (K.B. 1772).

79. *Id.* at 510. For a full discussion of *Somerset*, see DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823 (1975); William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974), *reprinted in* 11 ARTICLES ON AMERICAN SLAVERY: LAW, THE CONSTITUTION, AND SLAVERY 570 (Paul Finkelman ed., 1989); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760–1848, at 20–39 (1977) [hereinafter WIECEK, SOURCES]. On the history of the application of *Somerset* in the United States, see FINKELMAN, *supra* note 53, at 70–125.

In *The Slave, Grace*, the English High Court of Admiralty modified the *Somerset* rule.[80] Grace, a West Indian slave, had been taken to England but then returned to Antigua with her master. She sued for her freedom only after returning to Antigua. Lord Stowell, speaking for the English court, held that Grace was still a slave. Stowell found that residence in England only suspended the status of a slave. Without positive law, the master could not control a slave in England, and could not force a slave to leave the realm. But if a slave did return to a slave jurisdiction, as Grace had, then the law of England would no longer be in force and the person's status would once again be determined by the laws of the slave jurisdiction.

For the most part Southern states did not initially follow the *The Slave, Grace* precedent.[81] Courts in Missouri, Kentucky, and Louisiana continued to free slaves who had lived or worked in free jurisdictions. Well after the *The Slave, Grace* decision, courts in Missouri continued to liberate slaves who had lived in the North. Thus, Scott's lawyers no doubt expected him to win his freedom.

However, in a trial before the St. Louis Circuit Court in June 1847, Scott lost because of a technicality—he was suing Irene Emerson for his freedom but he had no witness who could prove she now owned him. In December 1847 the trial judge ordered a new trial, which would give Dred Scott a chance to prove who owned him. Irene Emerson's attorneys challenged this order before the Missouri Supreme Court. In June 1848 the Missouri Supreme Court sided with Dred Scott, granting him the right to a new trial.[82] Two continuances, a major fire, and a cholera epidemic delayed the case until January 1850, when the judge in the St. Louis Circuit Court charged the jury that residence in free jurisdictions would destroy Scott's status as a slave, and if the jurors determined he had in fact lived in a free

80. Rex v. Allan (The Slave, Grace), 2 Hagg. 94, 166 Eng. Rep. 179 (Adm. 1827).

81. In the nineteenth century American courts regularly cited English cases and often followed them. English cases decided after the Revolution had value as intellectual "precedents" but were obviously not binding on American courts. The prevalence of American courts citing "foreign law" for its precedential and moral value contrasts sharply with Justice Antonin Scalia's historically inaccurate outbursts denouncing the use of foreign law as somehow being inconsistent with the intentions of the Framers or past practice. For example, in *Lawrence v. Texas*, Justice Scalia wrote, "this Court . . . should not impose foreign moods, fads, or fashions on Americans." 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (alteration in original) (internal quotations omitted) (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)). Similarly, in his concurrence in *Sosa v. Alvarez-Machain*, Justice Scalia asserted that the "Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving view of foreigners." 524 U.S. 692, 750 (2004) (Scalia, J., concurring) (citation omitted). Similarly, in his dissent in *Roper v. Simmons*, he denounced Justice Kennedy's majority opinion, noting that "'[a]cknowledgement' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment—which is surely what it parades as today." 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (emphasis omitted).

82. *See* Emmerson v. Harriet, 11 Mo. 413 (1848); Emmerson v. Dred Scott, 11 Mo. 413 (1848).

state or territory, they should find him free. The jury sided with Scott and his family. A jury of twelve white men in Missouri concluded that Scott's residence in a free state and a free territory had made him free. This result was consistent with Missouri precedents dating from 1824. Emerson, reluctant to lose her four slaves, appealed this decision to the Missouri Supreme Court. By this time she had left the state and the case was actually being managed by her brother, John F.A. Sanford.[83]

VI. IN THE MISSOURI SUPREME COURT AND THE LOWER FEDERAL COURT

In 1852, in *Scott v. Emerson*, the Missouri Supreme Court reversed the lower court and declared that Scott was still a slave.[84] The decision was frankly political. The court decided the case not on the basis of legal precedent, but because of popular prejudice. Chief Justice William Scott stated,

> Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.[85]

Thus, Chief Justice Scott overturned twenty-eight years of Missouri precedents.

The decision by the Missouri Supreme Court probably came as a relief to both Emerson and her brother. After nearly six years, the case seemed finally over. However, the case was only entering a new phase.

In late 1849 or 1850, Irene Emerson had left Missouri for Springfield, Massachusetts. In November 1850 she married Dr. Calvin C. Chaffee, a Springfield physician with antislavery leanings who later became a Republican congressman. Although no longer in Missouri, Irene Emerson remained the defendant in Dred Scott's freedom suit before the Missouri state courts. Her brother, a prosperous New York merchant with strong personal and professional ties to St. Louis, continued to act on her behalf in defending the case. This set the stage for a federal court case. In 1854 Scott's

83. Sanford actually spelled his name with only one "d." However, when the case went to the U.S. Supreme Court, the Supreme Court reporter mistakenly thought his name was San*d*ford. Hence, the case is called *Scott v. Sandford*.

84. *See* Scott v. Emerson, 15 Mo. 576, 585 (1852).

85. *Id.* at 586.

fourth lawyer, Vermont-born Roswell Field, took over the case.[86] Field conceived a rather brilliant strategy: to bring the case into federal court under diversity jurisdiction. Article III of the United States Constitution allows citizens of one state to sue citizens of another state in federal court. Field argued that Scott, as a free person, was a "citizen" of Missouri and thus entitled to sue Sanford, a citizen of New York, in federal court. Field's position assumed two points that were as yet unproved: first, that Scott was indeed free, and second, that *if* free, he was also a citizen of Missouri.

The first jurisdictional argument assumed the outcome of the case—that Scott was free. This was not unusual. In freedom suits Southern state courts regularly accepted a legal fiction that the plaintiff was "free" and therefore had standing to sue. If the court ultimately ruled against the slave plaintiff, the jurisdictional issues disappeared because the defendant continued to own the slave. However, in these state cases the second issue—the claim of "citizenship" never arose. A black did not need to be a "citizen" of a state to sue in state court. He or she only had to be "free."

But this was not true in federal court. For Scott to sue in federal court, under diversity jurisdiction, the Court had to accept the arguments that a free black could be a citizen of a state and a citizen of the United States. Furthermore, the federal court had to accept the assumption that a black living in Missouri, if free, was a citizen of Missouri.

Although a citizen of New York, Sanford continued to exert control over the Scotts. He also continued to defend the case, because the Scott family constituted a valuable asset. Since early in the litigation, Scott had been in the immediate custody of the sheriff of St. Louis County. The sheriff had been renting Scott and his family out, collecting the rent, and holding the money in escrow until the case was finally settled. By this time a tidy sum of money had accumulated. The winner of the case—either Scott or his owner—would get this money once the case was finally settled.

By 1854, when the case reached the United States Circuit Court in St. Louis, Charles Edmund LaBeaume, a brother-in-law of the Blow sons (whose father had been Scott's first owner), was renting the Scotts. The Blows had grown up with Scott and were deeply involved in helping him gain his freedom. LaBeaume was instrumental in helping Scott obtain the services of Roswell Field. Field brought the case into federal court for one simple reason—to win Scott's freedom.

Dred Scott sued John Sanford in United States Circuit Court for battery and wrongful imprisonment. Scott asked for $9,000 in damages. This

86. *See generally* KENNETH C. KAUFMAN, DRED SCOTT'S ADVOCATE: A BIOGRAPHY OF ROSWELL M. FIELD (1996).

complaint was essentially a legal fiction, designed to bring the issue of Scott's freedom into federal court. Scott did not expect to win any substantial monetary damages from Sanford, but rather, he hoped to win a token sum, which would prove that he was free. Scott's suit was against John Sanford, because at this point Sanford was the one holding Scott in slavery. Historians disagree over whether this was because Irene (Emerson) Chaffee had sold or given Scott to Sanford or because Sanford was simply acting as her agent. The historical debate is of little importance. Scott sued Sanford and Sanford never denied he was the appropriate party to be sued. Instead, he responded to the suit. Sanford knew that he was the one holding Scott in slavery. If Scott was legitimately free, Sanford was wrongfully imprisoning him.[87]

A. The Jurisdictional Issue and the Plea in Abatement

Before he could evaluate Scott's claim, Federal District Judge Robert W. Wells first had to determine if the court had jurisdiction to hear the case. This issue centered on Roswell Field's assertion that *if* Dred Scott was free, then he must be a citizen of Missouri for purposes of diversity jurisdiction, and thus he could sue Sanford, who was a citizen of New York.[88]

Sanford responded by denying that the court had jurisdiction over the parties. Sanford did not deny that he was a citizen of New York or that Scott resided in Missouri, but he did deny that Scott was a "citizen" of Missouri. Sanford's response was in the form of a plea in abatement, which

87. Sanford's involvement in the case has long been a subject of controversy. Initially he simply took care of his sister's business interests in St. Louis and, thus, managed the case after Irene left the city. In the federal cases he is referred to as Dred Scott's owner. Whether he was the actual owner is unclear. It is possible that Irene Emerson sold the Scotts to her brother when she left the state. Sanford consistently maintained he owned the Scotts in all litigation in the federal courts, but there is no evidence of a transfer of the slaves to him. After the case ended, moreover, the children of Dred Scott's former master purchased him and his family from Mrs. Irene (Emerson) Chaffee, and not from Sanford. Thus, it is possible that Sanford never owned the Scotts, but exerted control over them while acting as his sister's agent. As their *de facto* owner, Sanford may have seen no reason to dispute Dred Scott's claim that Sanford was the proper defendant, since he actually held them in slavery. Some scholars have also argued that Sanford acted as the executor for Dr. Emerson's estate, although this seems highly unlikely, since there is no evidence that he ever was appointed to that position. Moreover, by 1854, when the federal case began, the Emerson estate had been fully settled.

88. Scholars and politicians have questioned the legitimacy of Scott's suit on the grounds that Sanford did not actually own Scott. These commentators have argued that Scott therefore had no diversity claim because he could not sue Sanford. The implication is that there was something illegitimate about making Sanford the defendant just to get diversity jurisdiction and move the case to federal court. However, this argument makes no sense. If Sanford was not Scott's owner then Scott belonged to Irene Emerson Chaffee, who by this time was a citizen of Massachusetts. Thus, either way Scott would have been able to make a claim that there was diversity of state citizenship between the plaintiff (Scott) and the defendant (either Irene Chaffee or John Sanford).

effectively asked the Court to stop—or "abate"—the case immediately and throw Scott's suit out of court on the grounds that the court had no jurisdiction to hear the case.

In his plea in abatement, Sanford argued that "Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves . . . ."[89] In essence, Sanford argued that no black could be a citizen of Missouri, and thus even if Dred Scott were free, the federal court did not have jurisdiction to hear the case.

Judge Wells rejected Sanford's plea. Wells, a slaveowner originally from Virginia, was certainly neither an advocate of black equality nor an opponent of slavery. But he did believe that free blacks, even in the South, were entitled to minimal legal rights, including the right to sue in a federal court. Scott, in other words, would have a right to sue in federal court to determine if Sanford had illegally harmed him. In reaching this conclusion, Wells did not declare that Scott, or any free black, was entitled to full legal, social, or political equality in Missouri or anywhere else in the country. Wells merely held that the term "citizen" in Article III of the Constitution was equivalent to a free—non-slave—full-time resident or inhabitant of a state. If Dred Scott was in fact not a slave, then he met this minimal criterion and was a "citizen" solely for the purpose of suing in federal court.

B. The Case in the Federal District Court

By rejecting Sanford's plea in abatement, Judge Wells forced Sanford to defend himself on the merits of the case. Sanford offered a series of pro forma pleas that responded in kind to Scott's pro forma complaint. Scott claimed Sanford had illegally restrained him of his liberty and committed assault and battery on him. Sanford responded that he had not unlawfully harmed Scott. Sanford did not deny that he had "gently laid his hands upon" Scott and his family. Sanford admitted that he had "restrained them of their liberty" but he asserted "he had a right to do" this because the Scotts were his slaves.[90] In essence, Sanford admitted that he had done all the things of which Scott complained, although with a "humane" spin on the facts. But Sanford argued he was entitled to treat Scott in this manner because he legally owned Scott.

89. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 396–97 (1857).
90. FEHRENBACHER, *supra* note 45, at 279 (quoting Missouri U.S. Circuit Court records).

In May 1854 the case went to trial where Judge Wells told the jury that Scott's status was to be determined by Missouri law. Since the Missouri Supreme Court had already decided that Scott was a slave, the federal jury upheld his status as a slave. If an Illinois court had previously declared Scott free, then the result would have been different. Judge Wells might then have held that, under the Full Faith and Credit Clause of the Constitution, that Missouri was obligated to recognize the judicial proceedings that had emancipated Scott.[91] But, no such proceeding had in fact ever taken place in Illinois or in the Wisconsin Territory. Thus, Scott and his family remained slaves.

VII. BEFORE THE SUPREME COURT

The next stop in Dred Scott's legal odyssey was the United States Supreme Court. An appeal would be more expensive than the Blows, by now Scott's main financial patrons, could afford. Moreover, this was not a case that Scott's lawyer, Rosewell Field, was able to finance or even argue. However, Montgomery Blair, a Washington lawyer well connected to Missouri politics, agreed to take the case for free. Blair was not an opponent of slavery per se and did not care particularly how slavery affected blacks. But he was a member of the Free Soil wing of the Democratic Party and thus opposed the spread of slavery into the territories. He would later join the Republican Party and serve as Lincoln's Postmaster General. Sanford, meanwhile, retained Missouri's proslavery United States Senator, Henry S. Geyer, and more importantly, Reverdy Johnson. This Maryland politician was one of the most distinguished constitutional lawyers in the nation as well as a close friend of Chief Justice Taney. According to historian Don Fehrenbacher, Johnson was a "veteran of many famous court battles" who "added luster to any legal cause that he undertook" and who "made opposing attorneys apprehensive."[92]

Blair sought other attorneys to assist him, but no one stepped forward. Curiously few antislavery politicians or lawyers saw the potential danger—or opportunity—that this case presented. Antislavery lawyers and politicians had often been available to take important slavery cases to the Supreme Court. In *United States v. The Amistad*, former President John Quincy Adams argued on behalf of a shipload of Africans who had recently—and illegally—been imported from Africa to Cuba, where they

91. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State.").

92. FEHRENBACHER, *supra* note 45, at 282.

seized a ship which eventually landed off the coast of Connecticut.[93] Similarly, Senator William H. Seward of New York argued *Jones v. Van Zandt* before the Supreme Court in 1847, and Senator Salmon P. Chase argued the less well-known case of *Moore v. Illinois* in 1852. Both involved whites accused of helping fugitive slaves escape.[94]

Oddly, no prominent antislavery lawyer offered to join Blair. The only sensible explanation for this is that no one in the antislavery community appreciated the importance of Dred Scott's appeal. Doubtless, most lawyers expected the Supreme Court to reject Dred Scott's claim to freedom, but to do it on narrow grounds, which would set no new precedent. In 1851 the Court held in *Strader v. Graham*[95] that each state had the power to decide for itself the status of all people within its jurisdiction. Under this precedent, Missouri was not required to recognize any "free" status that Dred Scott might have acquired while living in Illinois or at Fort Snelling. Relying on *Strader*, the Court might simply, and without any great fanfare, have affirmed that Dred Scott was still a slave. Initially the Court planned to follow this route with Justice Samuel Nelson writing an opinion. Had the Court followed this route the case would not have been controversial, and it is unlikely that more than a handful of modern scholars would even know of the case. Thus, when the case first went to Washington it seems likely that most politicians and abolitionists expected an unimportant decision. No one foresaw Taney's sweeping assault on the Missouri Compromise or black rights.

Dred Scott appealed to the Supreme Court in December 1854, alleging that Judge Wells had made an error in charging the jury that Dred Scott was not entitled to his freedom. The appeal reached Washington too late for the 1854 term, so the Supreme Court held the case over for the December 1855 term and finally heard arguments in February 1856.

93. The Amistad was a Spanish ship carrying slaves between two Cuban ports. The slaves revolted, killing most of the crew and forcing the survivors to steer the ship to Africa. The crew sailed the ship east in the day, but north and west at night. Eventually the ship was brought into a port in Connecticut by the United States Coast Guard. After protracted litigation, the Supreme Court ruled that the "Amistads," as the slaves were known, could neither be prosecuted for murder on the high seas nor returned to their Cuban owners. The case is reported as *United States v. The Amistad*, 40 U.S. (15 Pet.) 518 (1841). For a further discussion of this case, see HOWARD JONES, MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY (1987), and PAUL FINKELMAN, SLAVERY IN THE COURTROOM 222–39 (1985).

94. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847). Chase also argued, and won on a technicality, *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851), the only antislavery victory before the Supreme Court in the 1850s. For a discussion of this case and the surrounding events and litigation, see Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of "Justice Delayed,"* 78 IOWA L. REV. 89 (1992).

95. 51 U.S. (10 How.) 82 (1851).

The briefs and the oral arguments, which lasted four days,[96] focused on whether blacks could be citizens of the United States, the power of the Congress to prohibit slavery in the territories, and the constitutionality of the Missouri Compromise. In May the Court postponed a decision and scheduled reargument for the following term on two crucial questions: (1) whether the plea in abatement was legitimately before the Supreme Court; and (2) whether a free Negro could be a citizen of a state, or of the United States, and, as such, bring a suit in federal court based on diversity jurisdiction.

In December 1856 the Court heard new arguments on these two issues and also asked questions about the constitutionality of the Missouri Compromise. Significantly, none of the attorneys had briefed this issue. By this time the case had attracted increased public attention. In this round the eminent constitutional lawyer George T. Curtis, the brother of Supreme Court Justice Benjamin R. Curtis, joined Blair in arguing for Scott's freedom. George T. Curtis was a political conservative who opposed the anti-slavery movement. His presence showed that even conservatives had become concerned that the Taney Court might overturn the Missouri Compromise and destroy what remained of sectional harmony in the nation. What had begun in 1846 as an attempt by the Scotts to gain their freedom had become a case with potentially monumental legal and political significance.

Underscoring the political potential of the case was its timing. The Court declined to render a decision in the spring of 1856 just as the presidential campaign was heating up. Republicans would later argue that the Court intentionally delayed the case in order to avoid giving ammunition to that party in the upcoming election. In his "A House Divided" speech in 1858, Abraham Lincoln suggested that the delay was part of a deliberate conspiracy to overturn the Missouri Compromise, force slavery into the territories, and elect James Buchanan president.[97]

Some of the Justices may have wanted to avoid making a decision that would affect presidential politics. However, this is quite different from the kind of conspiracy that Republicans later charged. Such a far flung conspiracy seems unlikely, in part because Justice John McLean—who would eventually write a stinging dissent in the case—voted for the delay. McLean was vying for the 1856 Republican presidential nomination, and

96. Although the nineteenth-century Court often allowed arguments far longer than those today, the four days devoted to this case indicate how important the Court thought it was.

97. *See* Abraham Lincoln, "A House Divided": Speech at Springfield, Illinois, (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953) [hereinafter LINCOLN WORKS].

had he given his dissent in May of that year it would have helped him in his quest for that nomination.[98] The ambitious McLean surely had a strong personal and political reason for trying to get the Court to decide the case in the spring of 1856, but, like the other Justices, he supported the call for reargument. The Justices were divided on a number of aspects of the case and believed that further argument would clarify the issues. In any event, if their goal was to keep the case out of presidential politics, it ultimately backfired, as the case became a central issue in the 1860 presidential campaign.

A. The Judges

The Court that heard Dred Scott's case was geographically balanced. Four justices—James Wayne of Georgia, John Catron of Tennessee, Peter V. Daniel of Virginia, and John A. Campbell of Alabama—were slaveholding Southerners; one—Chief Justice Roger B. Taney—was a former slaveowner from Maryland, a slaveholding border state; and four—John McLean of Ohio, Robert C. Grier of Pennsylvania, Samuel Nelson of New York, and Benjamin R. Curtis of Massachusetts—were Northerners who had never owned slaves.

However, this geographic balance was deceptive. Only two of the justices—Daniel and Curtis—had been appointed by Northern presidents. The rest had been appointed by Southern, slaveholding presidents. Moreover, of the four Northerners, only one, McLean, was a known opponent of slavery. A loyal Democrat when President Andrew Jackson had appointed him to the Court, McLean had rejected the proslavery position of his party and was the Court's only Justice openly hostile to slavery. By 1856 he had abandoned the Democratic Party and its proslavery policies and had become a Republican. Although from Massachusetts, Curtis was not even moderately antislavery. As a young lawyer Curtis had unsuccessfully defended the rights of slaveowners in *Commonwealth v. Aves*,[99] the most significant Northern case on the precise issue of *Dred Scott*—whether a slave became free when a master voluntarily brought him into a free state.

98. Only in the last half of the twentieth century did Supreme Court Justices become divorced from politics. Justice McLean was a viable candidate for the Republican nomination in 1856 and 1860. Chief Justice Chase considered seeking a presidential nomination from the Bench. In 1916 Justice Charles Evans Hughes left the Court to accept the Republican nomination for the presidency. In the 1940s Justice William O. Douglas was considered as a possible vice presidential candidate. In the 1960s Justice Arthur Goldberg left the bench to accept the political office as United States Ambassador to the United Nations. His replacement, Justice Abe Fortas, provided political advice to President Lyndon Johnson.

99. 35 Mass. (18 Pick.) 193 (1836). For a full discussion of this case, see FINKELMAN, *supra* note 53, at 103–14.

For the rest of his career, Curtis was tied to the conservative Cotton Whigs in Massachusetts. His brother was a United States Commissioner under the Fugitive Slave Law of 1850. His eventual dissent in *Dred Scott* probably surprised most people in Massachusetts who knew him. However, while most Republicans cheered the dissent, it was not motivated by hostility towards slavery or sympathy for the Free Soil arguments of the Republican Party. Rather, it was conservative response to what Curtis saw as Taney's radical and dangerous departure from the long-standing spirit of compromise over slavery found in the Whig Party and most of the Democratic Party.

The other two Northerners on the bench—Nelson and Grier—were typical Northern Democrats who regularly genuflected towards slavery. Because the national Democratic Party was controlled by the Southern majority within the Party, most Northern Democrats—such as Nelson and Grier—always supported slavery and were known, insultingly, as "doughfaces"—Northern men with Southern principles.[100] Nelson and Grier could be counted on to support slavery, along with the five Southerners on the Court. Nelson and Grier hoped for a moderate opinion, upholding Scott's status as a slave but not dealing with either the Missouri Compromise or the status of blacks in the nation. Scott's attorneys could expect little support from these two Justices who had consistently supported the South in Supreme Court cases dealing with slavery.[101]

The other five members of the Court were Southerners with strong personal and family ties to slavery. Chief Justice Taney came from a wealthy and well-connected Maryland family that made its fortune in landholding, slaves, and tobacco planting. A Federalist member of the state legislature in 1799–1800, he broke with the party when it failed to support the War of 1812. In 1816 he won a five-year term in the Maryland Senate. During this period he began to manumit his own slaves, not out of any hostility to slavery, but because he apparently had no need for them. His failure to sell his slaves suggests that as a young man he may have had some moral qualms about dealing in human beings. But by the time he became Andrew Jackson's Attorney General in 1831, Taney was a firm supporter of the right to own slaves and a staunch opponent of black rights.

100. It was said that the Northern Democrats had faces of dough that the Southerners could shape into anything they wanted.

101. Only once did Grier fail to fully support the South. In 1851 the Fillmore Administration had initiated treason prosecutions against white abolitionists and free blacks who had refused to aid in the capture of fugitive slaves at Christiana, Pennsylvania. Grier, who heard the case while riding circuit, held that refusal to support the law—even resistance to the law—did not constitute treason, although he would have upheld indictments under the 1850 Fugitive Slave Law. *See* Paul Finkelman, *The Treason Trial of Castner Hanway*, *in* AMERICAN POLITICAL TRIALS 77 (Michal R. Belknap ed., rev. ed. 1994).

By the 1850s Taney was a seething, angry, uncompromising supporter of the South and slavery and an implacable foe of racial equality, the Republican Party, and the antislavery movement.

In the early 1830s, as President Andrew Jackson's Attorney General, Taney had argued that blacks in the United States had no political or legal rights, except those they "enjoy" at the "sufferance" and "mercy" of whites. Foreshadowing his later *Dred Scott* opinion, as Attorney General Taney had been ready to deny blacks any political or constitutional rights. He wrote that blacks "even when free" were a "degraded class" whose "privileges" were "accorded to them as a matter of kindness and benevolence rather than right." Despite the fact that free blacks in a number of states had voted at the time of the adoption of the Constitution, in the 1830s Taney, as Attorney General, argued, "They [blacks] were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term *citizens*."[102] Thus, although not a slaveowner, Chief Justice Taney was a longtime opponent of any rights for free blacks and a committed friend of slavery.

The other Southerners on the Court were universally supportive of slavery. They differed only on the margins. Justice Wayne was a firm supporter of slavery but was also a committed nationalist and an advocate of a strong federal government. In that respect he reflected the politics of his patron, Andrew Jackson. Wayne understood that the Constitution protected slavery, and thus he correctly equated federal power and a strong national government with support for the South's most important economic and social institution. When his home state of Georgia seceded in 1861, Wayne, the proslavery nationalist, remained on the federal bench. Catron was a moderate proponent of national power because it could protect the South from Northern antislavery forces. Like Wayne, Catron would remain on the bench when his home state of Tennessee left the Union in 1861. Justice Campbell was deeply committed to states' rights, while Justice Daniel was fanatical in his support of slavery and states' rights and in his opposition to black rights. In 1861 Campbell would leave the Court to join the Confederacy. Daniel died in 1860 but would doubtless have joined the Confederacy had he been alive.

In sum, the Court that heard Dred Scott's case was unlikely to support his bid for freedom. Seven Democrats—five proslavery Southerners and two Northern doughfaces—dominated the Court. Justice Curtis, while not a Democrat, was a conservative tied by politics and family connections to the

102. Roger Taney, Unpublished Opinion of Attorney General Taney, *quoted in* CARL BRENT SWISHER, ROGER B. TANEY 154 (1935).

"Cotton Whigs" of Massachusetts, who were usually supportive of Southern interests. In 1836, as a young attorney Curtis had defended the right of a master to bring a slave into Massachusetts.[103] Curtis's position on slavery was, at best, uncertain when Dred Scott's case came before the Court. Only one Justice, John McLean, openly opposed slavery.

B. The Compromise Not Taken

While the Taney Court was unlikely to support Dred Scott's appeal, it need not have taken the extreme proslavery position that eventually emerged. The Court might have avoided any great political issues by simply reaffirming the ruling of *Strader v. Graham*.[104] In that case the Court had held that, with the exception of runaway slaves who had to be returned to their owners, every state had complete authority to decide for itself the status of all people within its borders. Thus, the Northern states could free visiting slaves, like Dred Scott, but the Southern states had complete discretion to decide for themselves if a slave who had lived in the North had become free.[105]

The facts of *Strader* were somewhat different from those of *Dred Scott*, but, nevertheless, the legal precedent in *Strader* could have been applied to *Dred Scott*. Christopher Graham was the owner of three slave musicians who boarded Jacob Strader's steamboat without Graham's permission and then escaped to Canada. Under Kentucky law, a steamboat owner was liable for the value of any slaves who escaped under these circumstances. Strader argued that he did not owe Graham money for the slaves because they were free. Graham had previously allowed them to travel to Indiana and Ohio where they worked as musicians. Strader asserted that under the laws of those states the slaves became free and once free, they remained free. Strader also argued that the slaves had become free under the Northwest Ordinance. The Kentucky courts denied these claims, and on appeal to the United States Supreme Court, Chief Justice Taney rejected both arguments, declaring that "[e]very State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory . . . ."[106] Taney also concluded that the Northwest Ordinance ceased to be in force once the territory it

103. The case is *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, which Curtis lost. This case is discussed at length in LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 59–69 (1957), and in FINKELMAN, *supra* note 53, at 103–28.

104. 51 U.S. (10 How.) 82 (1851).

105. *Id.* at 93. The status of fugitive slaves found in the North was governed by Article IV, Section 2, Clause 3 of the United States Constitution and not by state law.

106. *Id.*

governed became a state. Thus, the Ordinance could not affect the status of slaves who entered Indiana or Ohio. Therefore Graham's slaves had not been emancipated by the Ordinance when they visited Ohio and Indiana. But even if the Ordinance had been in force, Taney asserted that congressional legislation for a particular territory "could have no force beyond" the limits of that territory. Thus, once they left the territory, they abandoned any claims to freedom based on the Ordinance. This analysis would apply to *Dred Scott*.

Strader was not perfectly analogous to *Dred Scott*. Graham's slaves had never sued for their freedom. They were already in Canada by the time Graham sued Strader. Moreover, the Kentucky court did not deny (as the Missouri court had) that slaves living in a free state became free. The Kentucky court merely asserted that a short visit to a free state would not end their bondage. Nevertheless, the legal principle of *Strader* would have allowed the Taney Court to settle *Dred Scott* without controversy. Most observers, in fact, expected the Court to reaffirm the principles of *Strader* that every state had the authority to determine the status of people in its jurisdiction. This may explain why the antislavery community initially ignored *Dred Scott.*

At first the Court seemed to be moving in the direction of using *Strader* to settle the case. In February 1857 Justice Nelson began drafting an opinion that was to serve as the "Opinion of the Court." Nelson's draft, which eventually became his concurring opinion, avoided all of the controversial aspects of the case. He asserted that Scott was not free because his status turned on Missouri law, and that Missouri had already declared Scott to be a slave. Had the Court wished to avoid controversy, this was the path.

In the end, the Court did not avoid controversy, because the proslavery Justices wanted a decision that would deal with the constitutionality of the Missouri Compromise and the rights of free blacks. In essence, by rejecting the Nelson approach, these Justices sought confrontation rather than compromise.

For at least a decade, the nation had faced constant political turmoil over the status of slavery in the territories. Northern resistance to the Fugitive Slave Law of 1850 further heightened sectional tensions. Even as Justice Nelson wrote his opinion, the Southerners on the Court, especially Justice James M. Wayne of Georgia, pushed for a more comprehensive result. They wanted Taney to write an opinion that would settle—in favor of the South—the issues of slavery in the territories and the rights of free blacks. If the Court held the Missouri Compromise to be unconstitutional, then all the territories would be open to slavery. If the Court declared that

blacks could never be citizens of the United States, then alleged fugitive slaves and their white friends might be less able to resist the 1850 Fugitive Slave Law.

The Southern majority on the Court wanted Taney to decide three questions in favor of the South:

1. Could blacks sue in federal court as state citizens and as citizens of the United States?
2. Did Congress have the power to prohibit slavery in the territories? In other words, was the Missouri Compromise constitutional?
3. Was Missouri obligated to recognize Dred Scott's freedom based on his residence in either Illinois or the Wisconsin Territory?

C. The Jurisdictional Question

In order to reach these issues, the Supreme Court first had to address the jurisdictional issue, just as Judge Wells had needed to do in the federal district court. This raised a confusing and technical question. Despite its complexity, this question went to the heart of the case and later became a major political issue after the Court issued its decision.

If blacks could be citizens of states, then Dred Scott had an apparent right to sue John Sanford in federal court in order to test his status. However, if blacks could not be citizens, then Dred Scott, even if legitimately entitled to be free, could not legally sue in a federal court, and the case was not legitimately before the Supreme Court. If this were true, then the Court could not hear or decide the case, but could only dismiss it for want of jurisdiction.

The following double quandary emerged. The Southern majority on the Court wanted Taney to rule that blacks could never be citizens of the United States and never sue in federal court as "citizens of a state." However, such a conclusion should have immediately ended the case, because if Dred Scott could not sue, then his case could not be heard, and Chief Justice Taney was obligated to dismiss the case. If this happened, then Taney could not rule on the constitutionality of the Missouri Compromise.

On the other hand, if Taney ruled on the constitutionality of the Missouri Compromise, he would presumably first have to acknowledge the Court's jurisdiction in the case, and that meant affirming (or at least not reversing) Judge Wells's ruling on the citizenship question—a ruling that allowed free blacks to sue in federal courts.

Some of the Justices did not believe the question of black citizenship was even before the Court. In the circuit court John Sanford had filed the

plea in abatement asking Judge Wells to immediately dismiss Dred Scott's suit on the grounds that a black could never be considered a citizen. Judge Wells had ruled against the plea in abatement but then sided with Sanford on the question of Dred Scott's freedom. Thus, no one appealed the ruling on the plea in abatement. When Scott appealed to the United States Supreme Court, he did not ask the Court to review Judge Wells's ruling that he had a right to sue, because Wells had ruled in his favor. On the other hand, because Sanford won the case he did not appeal any aspect of it. Because neither side appealed Judge Wells's ruling on the plea in abatement, some of the Justices argued that the question of citizenship itself was not legitimately before the Court.

VIII. THE DECISION

Ultimately, Taney did not dismiss the case but, in a bold move, denied that blacks could sue in federal court and then still addressed the other constitutional issues before him. His decision, in the end, would be so controversial because it was so audacious.

A. Free Blacks Under Taney's Constitution: "They Had No Rights"

Even though no one appealed the ruling on the plea in abatement, Taney correctly concluded that the right of a black to sue in federal court was legitimately before the Supreme Court. Thus, he had to address the issue of black citizenship and the right of free blacks to sue in diversity in federal court. Taney believed this was so because every court has a right to consider, on its own, whether it has jurisdiction to hear a case. On this point Taney was probably on firm legal ground, even though a number of his colleagues disagreed. However, the way Taney framed the issue in his opinion indicates his determination to use the case to decide the status of blacks in America. Taney wrote,

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[107]

Taney argued that free blacks—even those allowed to vote in the states where they lived—could never be citizens of the United States and have

107. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403 (1857).

standing to sue in federal courts. Here Taney set up the novel concept of dual citizenship. He argued that being a citizen of a state did not necessarily make one a citizen of the United States.

Taney's argument was at odds with the text of the Constitution itself. Throughout the Constitution, references to national citizenship are almost always tied to state citizenship. The right to vote for national legislators, for example, which is found in Article I, Section 2 of the Constitution, was tied to the states. Article III, Section 2 provides for a right to sue in federal courts when "Citizens of different States" sued each other. Article IV, Section 1 requires the states to grant citizens of other states equal "Privileges and Immunities," which implies that citizenship in one state gives you certain rights as a citizen throughout the country. Thus, before *Dred Scott*, most Americans assumed that anyone who was considered a citizen of a state was also a citizen of the United States.[108] According to historian James H. Kettner, the leading expert on this issue, by 1857 the United States had "a long popular and judicial tradition of considering the two [state and national citizenship] as inseparable dimensions of the same status."[109]

Taney had other ideas. He claimed that

> [i]n discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State.[110]

Taney based this novel argument entirely on race. He offered a slanted and one-sided history of the Founding period, which ignored the fact that free blacks had voted in a number of states at the time of the ratification of the Constitution. Ignoring this history, the Chief Justice argued that at the founding of the nation blacks were either all slaves or, if free, without any political or legal rights. He declared that blacks

> are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which the instrument provides for and secures to citizens of the United States. On the contrary, they were at that time [1787] con-

108. The opposite was not true. It was possible to be a citizen of Washington, D.C., or a federal territory, and thus not be a citizen of state, but still be a citizen of the United States. *See* Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805); Prentiss v. Brennan, 19 F. Cas. 1278 (C.C.N.D.N.Y. 1851) (No. 11,385). This issue is discussed in JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 248–86 (1978).

109. KETTNER, *supra* note 108, at 328.

110. *Dred Scott*, 60 U.S. (19 How.) at 405.

> sidered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[111]

According to Taney, blacks were "so far inferior, that they had no rights which the white man was bound to respect . . . ."[112] Thus, he concluded that blacks could never be citizens of the United States, even if they were born in the country and considered to be citizens of the states in which they lived.

This dual citizenship, for example, meant that Massachusetts, where blacks were full and equal citizens, could not force its notions of citizenship on the slave states. It also meant that Southern states did not have to grant privileges and immunities, or any other rights, to the free black citizens of Massachusetts and other Northern states.[113] The implications for this argument were profound, since in Massachusetts and few other Northern states blacks were voters and officeholders.

Having reached this conclusion, however, it seems that Taney could not then consider the constitutionality of the Missouri Compromise. If Dred Scott had no right to sue in federal court, then the Supreme Court should have dismissed the case for lack of jurisdiction. In his dissent Justice Benjamin R. Curtis argued precisely this point. However, the logic of the argument did not stop the determined Chief Justice, who went on to declare the Missouri Compromise unconstitutional.

Many Republicans would later argue that everything Taney said about the Missouri Compromise was dicta, which was unnecessary to the outcome of the case. Taney's critics asserted that the Chief Justice's superfluous discussion of the Missouri Compromise was irrelevant and unnecessary to the decision, and thus not legally binding, because they argued he had no jurisdiction to decide this issue once he ruled on the citizenship question. In 1858 Congressman Calvin C. Chaffee (who had married Irene Sanford Emerson) asserted that "[t]he *dictum* of the Court is a very different affair from a *decision*."[114] From 1857 onward, Republicans argued that despite the *Dred Scott* decision, Congress retained the right to prohibit slavery in territories because all discussion of the congressional power over slavery in the territories was dicta.

111. *Id.* at 404–05.

112. *Id.* at 407.

113. Article IV, Section 2, Clause 1 of the Constitution declares, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

114. CONG. GLOBE, 35th Cong., 1st Sess., 852–55, *quoted in* FEHRENBACHER, *supra* note 45, at 473.

B. The Status of Slavery in the Territories Under Dred Scott

Whether it was dicta or not, Taney was determined to discuss the constitutionality of the Missouri Compromise and the status of slavery in the territories. His goal was to settle, finally and forever—in favor of the South—the status of slavery in the territories. To do this Taney had to overcome two strong arguments in favor of congressional power over slavery in territories. First was the clause in the Constitution that explicitly gave Congress the power to regulate the territories. Second was the political tradition, dating from the Northwest Ordinance, that Congress had such a power. Taney accomplished this through an examination of two separate provisions of the Constitution: the Territories Clause and the Fifth Amendment.

1. The Territories Clause

Article IV, Section 3, Clause 2 of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Congress had always assumed this clause gave it the power to govern the territories. As we have seen, Congress had often exercised its power under this clause, prohibiting slavery in some territories and allowing it in others. In the Kansas-Nebraska Act,[115] Congress had even reversed course, allowing slavery in territories where it was previously prohibited. Except for the occasional voice of Southern protest, no one seemed to doubt that Congress had the power to prohibit slavery in the territories. No one, that is, except for Chief Justice Taney.

In order to find the Missouri Compromise unconstitutional, Taney reread the Territories Clause in a way that few others had ever considered plausible. Taking his cue from a handful of extreme proslavery Democrats, including Senator Geyer who represented Sanford before the Supreme Court, Taney argued that the Territories Clause in Article IV only applied to those territories the United States owned in 1787. Taney wrote that the clause was

> confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.[116]

115. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

116. *Dred Scott*, 60 U.S. (19 How.) at 432.

In his Pulitzer Prize winning study of the case, Don E. Fehrenbacher correctly described this thoroughly unpersuasive argument as "[t]en pages of rambling, repetitious prose" that is "difficult to take . . . seriously." As Fehrenbacher noted, Taney "quoted no framers of the Constitution, cited no court decisions in support of his bizarre explication."[117] Absurdly, Taney argued that the Framers did not contemplate the acquisition of any new territories and, because they had none in mind, the Clause could not be applied to them.[118] He was wrong on two counts. The Framers already had their eye on acquiring New Orleans, which was then in Spanish hands. Moreover, the entire Constitution was written with expectations of a changing world. The logical extension of Taney's argument would be to prohibit congressional regulation of anything invented or discovered after 1787.

Taney conceded that Congress had the power to provide a minimal government in the territories, at least at the earliest stages of settlement.[119] He argued this power did not come from the Territories Clause. Rather, it came from the preceding clause in Article IV, which said, "New States may be admitted by the Congress into this Union . . . ."[120] This provision of the Constitution, Taney believed, allowed Congress to provide the initial government for a territory but nothing beyond that. Taney implied that allowing Congress to actually govern the territories would be equivalent to "establish[ing] or maintain[ing] colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure . . . ."[121] Taney's argument here was silly and absurd. In 1857 the United States had held some territory (what later became the eastern tip of Minnesota) for the entire period since the adoption of the Constitution without making it a state. But neither had Congress treated the territory as a "colony."

The weakness of his argument on the Territories Clause did not stop Taney, who was determined, as few Justices have been, to reach a specific result. Weak arguments or faulty logic would not stand in his way. His goal was to prohibit congressional regulation of slavery in the territories, and any argument, it seems, would do the trick.

Taney must have understood the inherent weakness of his arguments about the lack of congressional power to govern the territories. Even if, as Taney asserted, Congress had only minimal powers to prepare the territories for statehood, there was no reason why that minimal power could not

117. FEHRENBACHER, *supra* note 45, at 367.
118. *See Dred Scott*, 60 U.S. (19 How.) at 438.
119. *See id.* at 447.
120. U.S. CONST. art. IV, § 3, cl. 1.
121. *Dred Scott*, 60 U.S. (19 How.) at 446.

include the right to prohibit slavery. Thus, Taney turned to the Bill of Rights to plug the hole in his Territories Clause argument.

2. The Fifth Amendment

In his discussion of the Bill of Rights, Taney wanted to accomplish two goals. Most obviously he wanted to overrule the prohibition on slavery in the Missouri Compromise. Secondarily, he wanted to make a preemptive strike against popular sovereignty by ruling that territorial legislatures could not ban slavery. Taney achieved these goals with three interrelated arguments.

First Taney argued that Congress could not violate the Bill of Rights in the territories. This seems reasonable and persuasive. As an example, Taney asserted,

> [N]o one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.[122]

Taney further argued that Congress could not prohibit the right to a jury trial or deny people their right against self-incrimination.[123]

Having established the obvious—that the Bill of Rights applied to the territories—Taney turned to the second part of his argument: that forbidding slavery in the territories violated the Due Process and Just Compensation Clauses of the Fifth Amendment, which declared that under federal law no person could "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken . . . without just compensation."[124] Taney contended that

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[125]

In one of the earliest uses of "substantive due process" analysis, Taney argued that no law could be constitutional if it arbitrarily denied a person his property merely for taking that property into a federal territory.

For many commentators, at the time and since, Taney's argument proved too much. No one believed that the Fifth Amendment prohibited

122. *Id.* at 450.
123. *Id.*
124. U.S. CONST. amend. V.
125. *Dred Scott*, 60 U.S. (19 How.) at 450.

Congress from banning dangerous, pernicious, or morally offensive forms of property from federal jurisdictions. In the nineteenth century, states banned things like liquor and lottery tickets from their jurisdictions. The states clearly had the power to act against such types of property, even if the Commerce Clause or some other provision of the Constitution empowered Congress to regulate such goods.[126] Congress surely had the same power in federal jurisdictions. For example, Congress, which had full lawmaking power for the District of Columbia, allowed local officials there to ban abolitionist publications just as the Southern states did. Since the Confederation period, Congress had always considered slavery to be a special sort of property that could be banned, in part because it was not normal property, but could only exist if supported by positive law. The Northwest Ordinance and the Missouri Compromise both showed that slavery was a form of special property that required special laws and might be prohibited on grounds of public safety or public policy.

Taney, however, simply turned this argument inside out. He argued that slavery was indeed a special form of property, but one that deserved greater protection. Thus he wrote,

> [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.[127]

Thus, Chief Justice Taney declared that any prohibition on slavery in the territories violated the Fifth Amendment. Even the people of a territory could not ban slavery through the territorial legislature. Taney wrote,

> And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.[128]

126. *See, e.g.*, The License Cases, 46 U.S. (5 How.) 504 (1847); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

127. *Dred Scott*, 60 U.S. (19 How.) at 451–52.

128. *Id.* at 451. Both of Taney's arguments on congressional power in the territories could have been powerfully turned against slavery. Taney's argument that Congress had no general power to legislate for the territories might have been used to assert that Congress had no power to pass any law *creating* or allowing slavery in the territories. Similarly, Taney's Fifth Amendment argument created a

Like the Missouri Compromise, under Taney's interpretation of the Constitution, popular sovereignty was also unconstitutional.

IX. THE LAW AS POLITICS

Taney's goals in Dred Scott were more political than legal. He could easily have upheld Dred Scott's slave status without commenting on the constitutionality of the Missouri Compromise or the rights of free blacks. But Taney hoped to resolve the festering problem of slavery in the territories so that it would no longer be a central issue in American politics. By declaring Congress had no power to ban slavery from the territories, Taney, in effect, was trying to preempt all political discussion and debate on this issue. There was, after all, no point in debating an issue if Congress could not pass legislation on it. Taney seemed to expect that when the Court ruled against congressional power over slavery in the territories, political debate over the issue would end. Taney believed, or at least hoped, that politicians would accept his resolution of the problem.

A. The Logic of Taney's Opinion

While in hindsight this expectation seems naive, Taney had some good reasons for believing he could accomplish this goal. Since the end of the Mexican War in 1847, the nation had been bitterly divided—traumatized—by the problem of slavery in the territories. During the Mexican War, Northern Congressmen had backed the Wilmot Proviso, which would have banned slavery in all land acquired from Mexico, known as the Mexican Cession. The House of Representatives, with its large Northern majority, supported the proviso, while the Senate, where the South had a temporary advantage, defeated the proviso.[129] By 1850 the North had parity in the Senate, but in the Compromise of 1850 Congress nevertheless al-

double-edged sword against slavery. The full text of the Due Process Clause declared "nor shall any person . . . be deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V. Taney argued that it was a violation of "due process" to take property from people who merely entered a federal jurisdiction. By applying that logic to the slaves themselves, abolitionists might have argued that it was a denial of "liberty" to allow someone to be enslaved in a federal territory. Numerous abolitionists, including Theodore Dwight Weld, Salmon P. Chase (a future Chief Justice), and William Goodell made such arguments. *See* WIECEK, SOURCES, *supra* note 79, at 190–98, 255, 265–67.

129. Seats in the House of Representatives are based on population. The North, with its much larger population, had far more seats in the House than the South. In the Senate, each state had two seats, and throughout this period, the North and South usually had either the same number of Senate seats, or one section had an advantage of two or four seats for a short time. For example, in 1845 both Texas and Florida entered the Union, giving the South a four seat advantage in the Senate until 1846 and 1848 when Iowa and Wisconsin entered the Union. The admission of California in 1850 gave the North a permanent advantage in the Senate.

lowed slavery in all of the Mexican Cession except California. This huge territory encompasses most of the present-day states of New Mexico, Arizona, Utah, Nevada, and Colorado. Finally, in 1854, with a free state majority in both the House and the Senate, Congress passed the Kansas-Nebraska Act,[130] which repealed the Missouri Compromise's slavery prohibition as it applied to territories, which included present-day Kansas, Nebraska, and all or part of the Dakotas, Montana, Colorado, and Wyoming. By 1857 slavery was legal in all but a handful of territories—those encompassing the present-day states of Minnesota, Oregon, Washington, and Idaho. In *Dred Scott*, Taney may have seen himself as doing little more than finishing the job Congress had begun in 1850: opening all federal lands to slavery.

Taney may have also felt there was a political mandate for his decision. In the election of 1856, the new Republican party emerged and pledged to stop the spread of slavery into the West. The new party made an excellent showing. Running a national hero, John C. Frémont—the great "Pathfinder of the West"—the Party carried eleven of the sixteen free states. But this was not enough to defeat Pennsylvania's James Buchanan, who swept the South and carried five free states. With hindsight we see that the 1856 election was a prelude to the Republican victory in 1860, but Taney interpreted the Democratic victory as a mandate for a continued deregulation of the territories and a national rejection of the free soil principles of the Republicans.

The main goal of the Republican Party was to prevent the spread of slavery to the territories. From Taney's perspective the Republican Party was a dangerous, sectional organization that might push the nation toward civil war. Taney rejected the premises of the Republicans—that slavery was an evil which must, in the words of Lincoln, be put "in course of ultimate extinction."[131] Taney believed the Republican Party was an evil and hoped his decision would put it on the course of ultimate extinction.

If the nation accepted his ruling—that Congress could not prohibit slavery in the territories—then the *raison d'etre* for the Republicans would disappear, the sectional party would die, and the nation could go back to politics as usual. Meanwhile, the settlement of the continent, which Taney like so many other Americans believed was part of the nation's "manifest destiny," could continue.

Many people in the country, including President-elect James Buchanan, wanted the Supreme Court to settle the issue of slavery in the terri-

130. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).
131. Lincoln, *supra* note 97, at 461.

tories once and for all. In his inaugural address, delivered just two days before Taney announced his opinion, Buchanan had said that the issue of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States." Knowing the Court would soon decide *Dred Scott*, Buchanan declared that the issue of slavery in the territories would "be speedily and finally settled." Buchanan pledged to "cheerfully submit" to this decision, as he believed would "all good citizens."[132]

Buchanan's prophecy was ill-fated. Instead, Taney's decision—and the legitimacy of that decision—became the focus of political debate in the nation. The ruling on the Missouri Compromise provided Republicans with political ammunition for the political campaigns of 1858 and 1860.

Two Justices, McLean and Curtis, offered extensive dissents to Taney's opinion. Curtis in particular undermined most of Taney's historical arguments, showing that blacks had voted in a number of states at the Founding. He noted that

> [a]t the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.[133]

Thus, they were constituent members of the nation and could not now be denied the right to claim citizenship.

Republicans around the nation embraced the dissents. As noted earlier in this article, Horace Greeley, the Republican editor of the New York *Tribune* published a pamphlet edition of Taney's opinion and the Curtis dissent to help the Republican cause. Greeley's paper, the nation's leading Republican Paper, responded to the decision with outrage, calling Taney's opinion "wicked," "atrocious," "abominable," and a "collation of false statements and shallow sophistries." Similarly, the *Chicago Tribune* declared that Taney's statements on black citizenship were "inhuman dicta."[134]

132. James Buchanan, Inaugural Address (Mar. 4, 1857), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2961, 2962 (James D. Richardson ed., 1897).

133. *Dred Scott*, 60 U.S. (19 How.) at 572–73 (Curtis, J., dissenting).

134. Both papers are quoted in FEHRENBACHER, *supra* note 45, at 417.

B. The Republican Fear of a Conspiracy

For many Republicans, including Abraham Lincoln, the case symbolized the grave threat to the free states and to democracy itself posed by Chief Justice Taney and the Supreme Court. When nominated to run for the Senate in 1858, Lincoln spoke of a conspiracy to nationalize slavery that had been hatched by Taney, President James Buchanan, and Lincoln's opponent, Stephen A. Douglas. He saw the conspiracy as beginning with the Compromise of 1850, which Douglas had almost single-handedly guided through the House of Representatives; the Kansas-Nebraska Act, which Douglas had sponsored; and then the *Dred Scott* decision. The final step in this process would be to open up the free states to slavery.

A conspiracy dating from the Compromise of 1850 to overturn the Missouri Compromise seems a bit far-fetched, but the actions of both Taney and Buchanan gave it some credibility. In his inaugural address, Buchanan pledged to support the Court's decision in *Dred Scott*. He delivered this speech just two days before the Court announced the outcome of the case. As he walked to the podium to take the oath of office and give his inaugural address, Buchanan stopped to briefly confer or chat with Chief Justice Taney. The crowd at the inauguration witnessed this conversation, and Americans later read about it in their newspapers.

Republicans publicly speculated that in this conversation Taney had told Buchanan what the Court was about to decide. Senator William Henry Seward of New York would later claim that the "whisperings" between Taney and Buchanan were part of a conspiracy to hang "the millstone of slavery" on the western territories.[135] Only a few minutes after this "whispering," Buchanan urged the nation to accept and support the forthcoming decision in *Dred Scott*. Seward, Lincoln, and other Republicans claimed that during the public "whisperings" Taney told Buchanan how the Court would decide the case.

We will never know what Taney said to Buchanan, but we now know that Buchanan *already* knew what the Court was going to decide. In a major breach of Court etiquette, Justice Grier, who, like Buchanan, was from Pennsylvania, had kept the President-elect fully informed about the progress of the case and the internal debates within the Court. When Buchanan urged the nation to support the decision, he already knew what Taney would say. Republican suspicions of impropriety turned out to be fully justified. There may have been no ongoing conspiracy, but collusion

135. CONG. GLOBE, 35th Cong., 1st Sess. 941, *quoted in* FEHRENBACHER, *supra* note 45, at 473.

abounded. The Court and the President-elect worked closely to get the decision Buchanan and Taney wanted and to get the nation to accept it.

Lincoln also articulated, as did other Republicans, that *Dred Scott* was the first step in a Democratic conspiracy to nationalize slavery. In his "A House Divided" speech, Lincoln warned that continued Democratic rule would soon lead to a nationalization of slavery. Lincoln told his fellow Republicans, "We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme* Court has made *Illinois* a *slave* state."[136] Lincoln was convinced that the "logical conclusion" of *Dred Scott* was that what one "master might lawfully do with Dred Scott, in the free state of Illinois, every master might lawfully do with any other *one*, or one *thousand* slaves, in Illinois, or in any other free State."[137]

In his speeches in the 1858 senatorial campaign and his debates with Douglas, Lincoln stressed the illegality of the *Dred Scott* decision and the dangers it posed for the nation. He lost the 1858 election to the incumbent, Senator Stephen A. Douglas, but in the process Lincoln became his party's most articulate critic of Chief Justice Taney. In 1859 Lincoln campaigned throughout the North on behalf of Republicans. Once again he stressed the dangers of *Dred Scott*. For example, in a speech in Columbus he warned that some future Supreme Court case would be like a "second Dred Scott decision" and would make "slavery lawful in all the States."[138] By the spring of 1860, Lincoln had emerged as a dark horse candidate for the presidency. Virtually unknown two years earlier, he capitalized on Chief Justice Taney's opinion by attacking it. In 1860 he would gain his party's nomination and the presidency. Even before he took office, seven states would declare themselves out of the Union. The decision that Taney hoped would end sectional strife instead hurried the nation into war. As I noted at the beginning of this article, it is wrong to think that *Dred Scott* caused the Civil War. A breakdown of the Union over slavery was inevitable. But, the decision set the stage for the War. It provided Lincoln with the ammunition he needed to become his party's leader. This allowed the Republicans to nominate a Midwestern moderate who could carry the crucial states of the lower North—Illinois, Indiana, and Pennsylvania—and win the election.

While most opponents of slavery had condemned the decision, the black abolitionist and former slave Frederick Douglass saw hope in this

136. Lincoln, *supra* note 97, at 467.

137. *Id.* at 464–65.

138. Abraham Lincoln, Speech at Columbus, Ohio (Sept. 16, 1859), *in* 3 LINCOLN WORKS, *supra* note 97, at 400, 404; *see also id.* at 421, 423.

most dreadful case. He told a New York audience, "You will readily ask me how I am affected by this devilish decision—this judicial incarnation of wolfishness! My answer is, and no thanks to the slaveholding wing of the Supreme Court, my hopes were never brighter than now." Douglass believed that the decision would raise "the National Conscience." Moreover, he saw in the decision the beginning of the great cataclysm that could destroy slavery:

> The Supreme Court of the United States is not the only power in this world. It is very great, but the Supreme Court of the Almighty is greater. Judge Taney can do many things, but he cannot perform impossibilities. He cannot bale out the ocean, annihilate this firm old earth, or pluck the silvery star of liberty from our Northern sky. He may decide, and decide again; but he cannot reverse the decision of the Most High. He cannot change the essential nature of things—making evil good, and good, evil.[139]

Douglass was more correct then he could have imagined. Thus, while we consider the legacy of *Dred Scott* we must remember that the case led to the crisis of the Union, secession, and Civil War. The War not only preserved the Union but ended slavery and allowed the nation to rewrite the Constitution, and thus bring about "a new birth of freedom."[140] Ironically, the end of slavery would probably not have come so quickly, or perhaps even so completely, had it not been for Chief Justice Taney's overreaching opinion in *Dred Scott*.

139. Frederick Douglass, The Dred Scott Decision: Speech Delivered, in Part, at the Anniversary of the American Abolition Society (May 14, 1857), *in* TWO SPEECHES BY FREDERICK DOUGLASS 27, 31 (1857).

140. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* 7 LINCOLN WORKS, *supra* note 97, at 22, 23.