The Dred Scott Case, Slavery, and the Politics of Law

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IN 1846 DRED SCOTT, A SLAVE living in St. Louis, sued in a Missouri state court to prove that he, his wife, Harriet, and his two daughters, Eliza and Lizzie, were legally entitled to their freedom. Eleven years later the United States Supreme Court, by a vote of 7–2, rejected Scott's claim. Speaking for the Court, Chief Justice Roger Brooke Taney reached two major conclusions. First, he held that blacks, even if free, could never be considered citizens of the United States, and thus they did not have a right to sue in federal courts. Second, Taney held that Congress lacked the power to prohibit slavery from any federal territories, and so the Missouri Compromise, passed in 1820, which banned slavery in the vast territories north and west of the state of Missouri, was unconstitutional. This decision affected Dred Scott personally, but because Chief Justice Taney addressed issues beyond the scope of Scott's immediate claim, the case had an enormous effect on the politics of the nation.

This case has often puzzled historians and legal scholars. Why did Chief Justice Taney reach such sweeping and "big" conclusions? Why not limit his decision to a narrower result? He surely could have done this and still held Scott to be a slave. But, instead, he chose to undermine the basis of sectional compromise as it had been known in the United States since 1820.

In this essay I offer some suggestions as to why Taney acted as he did. I also provide what I hope is a clear and understandable analysis and summary of the case itself that can be helpful to scholars who are not specialists in law. In doing so, I also try to show how the Dred Scott case is relevant to modern theories of constitutional law, especially regarding original intent. Although no longer good law, the case still affects how Americans think about law, the Supreme Court, and the Constitution.

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An Overview of the Dred Scott Case

The case began simply enough. Dred Scott wanted to be free. Unlike most slaves, however, Scott had what he believed was a legal claim to his freedom. For many years Scott had been the slave of Dr. John Emerson, an Army surgeon who had taken him to live on military bases in the free state of Illinois and later to Fort Snelling, in what is today St. Paul, Minnesota. At that time present-day Minnesota was part of the Wisconsin Territory. In 1846 Scott filed suit in a Missouri court to gain freedom for himself, his wife, Harriet, and their two children. Scott argued that living in those free jurisdictions had made him and his family free, and once free they remained free, even after returning to Missouri.[1]

In 1847 Scott lost on technical grounds. In 1848 the Missouri Supreme Court granted Scott the right to a new trial, and in January 1850 Scott and his family won their freedom in a St. Louis court. A jury of 12 white men in Missouri concluded that Scott's residence in a free state and a free territory had made him free. However, in 1852 the Missouri Supreme Court reversed this result.

In 1854 Scott turned to the federal courts and renewed his quest for freedom in the United States Circuit Court in Missouri. There Judge Robert W. Wells upheld Scott's right to sue in a federal court, but, after a trial, rejected his claim to freedom. Scott remained a slave.

Scott then appealed to the United States Supreme Court. In 1857 that court, in a seven-to-two decision, held that Scott was still a slave. In his "Opinion of the Court" Chief Justice Taney declared: (a) that no black person could ever be a citizen of the United States and thus blacks could not sue in federal courts; and (b) that Congress did not have the power to prohibit slavery in the federal territories, and thus, the Missouri Compromise of 1820 was unconstitutional, as were all other restrictions on slavery in the territories.

A Bad Decision

Perhaps no legal case in American history is as famous—or as infamous—as *Dred Scott v. Sandford.*[2] Few cases were as politically divisive when they were decided; few have taken on such symbolic meaning. The case dramatically affected the politics of the immediate prewar years. During and after the Civil War the case continued to have an impact on American law and politics. *Dred Scott* came to symbolize the high point of racism in American law, but it also helped lead to the adoption of the Fourteenth Amendment, which has been the fountainhead of racial equality in the 20th century.

Dred Scott has also taken on the appearance of the ultimate "bad decision" for people of differing political and legal philosophies. Charles Evans Hughes,

who later became chief justice himself, argued that in *Dred Scott* the Court "suffered severely from self-inflicted wounds." Similarly, Professor Alexander Bickel, of Yale Law School, called it a "ghastly error."[3]

Conservative jurists and legal scholars cite *Dred Scott* as the Court's most notorious decision. Justice Felix Frankfurter believed courts should "refrain ... from avoidable constitutional pronouncements" and thought "the Court's failure in *Dred Scott*" was one of those "rare occasions when the Court, forgetting 'the fallibility of the human judgment,' has departed from its own practice."[4] Similarly, in a 1992 dissent Justice Antonin Scalia complained that the Court's decision 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 have power to declare what the Constitution is, according to their own views of what it ought to mean."[5]

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* (1896) Justice John Marshall Harlan, the lone dissenter, compared the Court's decision to *Dred Scott:* "In 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." 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." 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."[6]

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, argues that judges who fail to follow original intent are simply "enforcing their own morality upon the rest of us and calling it the Constitution."[7] 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 has written:

> 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.[8]

As Chief Justice John Marshall observed in *McCulloch v. Maryland* (1819), "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."[9]

Because all modern commentators believe *Dred Scott* was a misguided or even pernicious decision, 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 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 "the apogee of the living Constitution doctrine during the nineteenth century."[10]

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.... It 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.[11]

Commenting on this passage, the constitutional scholar Sanford Levinson noted, "Taney sounds altogether like Robert Bork, who pronounced original intent the only legitimate modality of constitutional interpretation."[12] Similarly, Justice Thurgood Marshall wrote that "the original intent of the phrase, 'We the People,' was far too clear for 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."[13] Marshall's point was that the original intent of the Constitution was to promote slavery and racism, and thus original intent analysis was suspect.

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. Commentators and scholars can still score points against a modern decision they dislike, if they can label it "like *Dred Scott.*"

A Complex and Confused Case

Despite its reputation as a "bad" decision, *Dred Scott* is one of the most significant cases in American Constitutional history. The description of the case as found in the official reports of the United States Supreme Court suggests its importance and complexity. Each of the nine justices on the Court wrote an opinion in the case—the only time before the Civil War that this occurred. The opinions range in length 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 with a handful of pages summarizing the lawyers' arguments, consume 260 pages of *United States Reports.*

In *Dred Scott* Chief Justice Taney declared unconstitutional the Missouri Compromise, which prohibited slavery in all of the federal territories north and west of the state of Missouri. This was only the second Supreme Court decision to strike down a federal law. Moreover, it was the first case in which the Supreme Court held unconstitutional a major federal statute. The only other antebellum decision to strike down a federal act—*Marbury v. Madison* (1803)—held unconstitutional a minor portion of the Judiciary Act of 1789.[14]

Contrast between *Marbury v. Madison* and *Dred Scott*

The contrast between *Marbury* and *Dred Scott* is striking. *Marbury* began as a

politically motivated case designed to embarrass President Thomas Jefferson, but in the end it produced very little political fallout. The case was not even very important to William Marbury and his coplaintiffs. These businessmen and land speculators were denied the opportunity to serve for five years as justices of the peace—a position that offered little opportunity for either financial gain or public glory. They surely did not need this trivial office.

Dred Scott was almost the exact opposite of *Marbury.* It began as a private lawsuit, with no hidden political agenda, but in the end it became a major political case with enormous contemporary significance. Unlike William Marbury, Dred Scott was vitally concerned with the outcome of the case because his freedom, and that of his wife and two daughters, was at stake. The Scotts would have remained slaves had white friends not subsequently purchased and manumitted them.[15]

The statute overturned in *Dred Scott* was not an insignificant clause of an elaborate law, but was rather the linchpin of a major legislative and sectional accommodation—the Missouri Compromise—that had helped the nation to avert a conflict over slavery in the territories for more than three decades. The decision not only invalidated the Missouri Compromise itself, but also undermined a major power that Congress had exercised since 1803—the right to pass laws regulating territories acquired since the Revolution.

On the other hand, the most important aspect of *Marbury* was its long-term impact on the development of American jurisprudence. In his opinion Chief Justice John Marshall deftly established the power of the Supreme Court to overturn acts of Congress through judicial review. Thus *Marbury* was crucial for the development of American jurisprudence. It is still favorably cited today, as it has been ever since 1803. Indeed, by establishing judicial review of federal laws it is arguably the most important case in Supreme Court history.

Dred Scott is just the opposite. It has virtually no precedential value; actions by Congress and the executive branch during the Civil War effectively reversed Taney's decision. Justices rarely cite the case, except as an example of a "bad" decision, and no modern judge would rely on its logic, reasoning, or holding.

But if *Dred Scott* has been more or less a jurisprudential dead end, it had an enormous constitutional and political impact. It provoked more comment—and more heated debate—than any other Supreme Court decision in the four decades before the Civil War. It became a central political issue in the 1858 congressional elections and the 1860 presidential election. Privately produced pamphlet editions made the justices' opinions accessible to the general public. In the 13th, 14th, and 15th amendments, which respectively ended slavery, made blacks citizens of the nation and the states in which they lived, and prohibited racial discrimination in voting, the nation emphatically negated Taney's three most important conclusions—that Congress could not ban slavery from the territories,

that blacks could never be citizens of the United States, and that African Americans "had no rights which the white man was bound to respect."[16]

Moreover, unlike *Marbury, Dred Scott* at least initially had an enormous impact on the power of Congress. The case meant that slavery would be legal in all existing federal territories. Had it not been for the Civil War, *Dred Scott* would have dictated federal policy on slavery in the territories until the nation was able to end slavery or amend the Constitution; in 1857 neither seemed likely. Unlike *Marbury, Dred Scott* was known to virtually everyone in the United States, and most Americans had strong opinions about it.

Why did the Supreme Court spend so much energy on this case? How did the Court rationalize its decision? Why did the Court reach such a controversial result? Why is the case still synonymous with bad—even evil—decision making? Why was it so important to American politics? The answers to these questions begin with a discussion of the problem of slavery in the territories.

Slavery in the Territories

In 1787 the old Congress, operating under the Articles of Confederation, passed the Northwest Ordinance. This law prohibited "slavery and involuntary servitude" in all of the American territories north and west of the Ohio river—that is, the present-day states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and the eastern portion of Minnesota. After the Constitution went into effect the new Congress reaffirmed the Northwest Ordinance.[17]

In 1803 the United States purchased Louisiana from France. Most of this vast territory was north and west of the southernmost point on the Ohio river. In 1819 Missouri asked to be admitted to the Union. This led to a heated debate in Congress. Northerners argued that, because most of Missouri was north and west of the Ohio River, it should enter the Union as a free state. Southerners argued that the Northwest Ordinance did not apply to the Louisiana Purchase, but only applied to those territories owned by the United States in 1787. They also argued that, because the Ohio River ended when it flowed into the Mississippi, the Ordinance could only apply to land east of the Mississippi.

After heated debate in both 1819 and 1820, Congress finally passed what is known as the Missouri Compromise in 1820. The compromise had three parts. First, Maine (which had been part of Massachusetts) entered the Union as a free state. Second, Missouri entered the Union as a slave state. Third, slavery was "forever prohibited" in all the federal territories north and west of Missouri. Section Eight of the law declared: "That in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude (36° 30'), not included within the lim-

its of the state [of Missouri] ... slavery and involuntary servitude ... shall be, and is hereby, forever prohibited."[18] Dred Scott would later claim to be free because he lived in Illinois, which was made free by the Northwest Ordinance (and the Illinois constitution) and in what is today Minnesota, which was made free by the Missouri Compromise.

Many southerners were unhappy with the Missouri Compromise. Some believed it was a bad bargain, while others thought it was also unconstitutional. Northerners, on the other hand, viewed the Compromise as almost akin to the Constitution itself, as a fundamental part of the American compact. Many northerners also saw it as an almost sacred pledge to keep slavery out of the west.

For the next quarter of a century the Compromise helped defuse the issue of slavery in the territories. During this period only two new states, Arkansas and Michigan, entered the Union. The dynamics of slavery in the territories dramatically changed in 1845 and 1846, as Texas entered the Union and the United States went to war with Mexico. The likely outcome of the war—the acquisition of new territories—led northern Congressmen to endorse a new prohibition on slavery in any territory acquired from Mexico. The prohibition, introduced into Congress as the Wilmot Proviso, ultimately failed. It did, however, raise sectional tensions. After the war Congress seemed paralyzed by the question of slavery in the new western territories.

Congress broke through this deadlock with the Compromise of 1850. The Compromise was actually a series of laws dealing with slavery and other sectional problems. The Compromise banned the public sale of slaves in the District of Columbia, which pleased the North. However, the Compromise also included a new, and extremely harsh, fugitive slave law that denied alleged slaves a jury trial or the right to testify on their own behalf, while providing that the law be enforced by newly appointed federal commissioners as well as federal marshals and if necessary the army. The Fugitive Slave Law of 1850 pleased the South but led to a great deal of resistance throughout much of the North. The Compromise also brought California into the Union as a free state, but allowed slavery in the rest of the newly acquired territories, including those that were north of the 36° 30' line established by the Missouri Compromise.

Four years later, in the Kansas-Nebraska Act, Congress repealed the slavery prohibition of the Missouri Compromise as it applied to the territories west of Missouri. Thus the ban on slavery no longer applied to the territories that make up present-day Kansas, Nebraska, and all or part of the Dakotas, Montana, Colorado, and Wyoming. Congress did not actually establish slavery in these territories; rather, it adopted the concept of "popular sovereignty" articulated by Senator Stephen A. Douglas of Illinois. A Democratic presidential hopeful, Douglas believed that the settlers of a territory should decide for themselves whether or not to adopt slavery. Under popular sovereignty settlers who wanted

to keep their slaves could bring them into the territory. Northern opponents of popular sovereignty argued that the presence of slaves would drive out free labor. Hostility to this partial repeal of the Missouri Compromise led to the formation of the Republican Party in the North. By 1856 popular sovereignty had degenerated into a minicivil war in Kansas, known as "Bleeding Kansas," as southerners and northerners battled over the status of slavery in that territory.

It was in the context of these events—the opening of vast western territories to slavery, the violence of "bleeding Kansas," and the creation of a new political party dedicated to stopping the spread of slavery into the West—that the Supreme Court decided the Dred Scott case in the spring of 1857.

Who Was Dred Scott?

Dred Scott was born a slave in Virginia, around 1800.[19] In 1818 Scott's master, Peter Blow, moved to Alabama and then in 1830 relocated to St. Louis, Missouri. Blow took his property—Dred Scott—with him as he migrated west. Blow died in 1832, and by the late fall of 1833 Dr. John Emerson, a surgeon in the United States Army, had purchased Scott. From December 1, 1833 until May 4, 1836 Emerson served as the post physician at Fort Armstrong, which was located in Illinois near the present-day city of Rock Island. Throughout this period Scott also lived at the fort.[20]

Illinois was a free state, and Scott might have claimed his freedom under its Constitution. The two and a half years that Dred Scott spent there were sufficient to emancipate him.[21] 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. Even if he had known of this right, it is unlikely that 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, and felt that freedom on the Illinois frontier was not terribly advantageous. But most likely Scott failed to assert a claim to freedom while in Illinois because as an illiterate slave on an isolated Army base he did not know that he could become free.

In 1836 the army evacuated Fort Armstrong, and Dr. Emerson, with Scott in tow, relocated to Fort Snelling, in what is today 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.

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 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. This was extraordinary and significant.

Under the laws of the southern states, slaves could never be legally married. They could live together, often with the blessings of their masters, white clergymen, or slave preachers, or simply after exchanging vows "until death or master do part," but whatever the form a slave marriage took, the marriage was not legally recognized. For three important reasons no southern state allowed slaves to be married in the eyes of the law. First, 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. Second, a civil marriage is a contract, and no American slave state allowed slaves to make contracts or in any other way perform legally binding acts.[22] Finally, recognition of slave marriages might have led slaves to claim other rights: the right to raise their own children; the right to refuse to testify against one's spouse in a prosecution, and so on.

Besides these legal issues, recognition of slave marriages would have undermined the proslavery argument that slaves were childlike, immoral, and incapable of lasting affection and love. 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 mixture of sentiment and sensation. Their griefs are transient."[23] Beliefs like this allowed masters to separate slave families whenever convenient 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.

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 yet after the marriage Taliaferro *gave* Harriet Scott to Emerson, who continued to treat the couple as his slaves. This would indicate that neither Taliaferro nor Emerson thought the Scotts were legally free. Whatever their masters believed, the fact that the Scotts were living in a free jurisdiction and that with the knowledge and consent of their owners they were married in a civil ceremony could have been used as proof that they were in fact 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, for 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. Some free state courts made a distinction between bringing a slave, and bringing slavery, into a free jurisdiction. The difference was simple. A master travelling 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.[24]

Emerson might have made the claim that as a military officer he should be allowed to bring his slave into a free jurisdiction, because it was convenient or necessary for him to provide his own domestic servants.[25] 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. Thus, his hiring out of the Scotts was an unequivocal violation of the Missouri Compromise and the Northwest Ordinance.

In November 1837 Dr. Emerson received new orders. The Army sent him to Fort Jesup in Louisiana. There he 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. For more than twenty years Louisiana courts had upheld the freedom of slaves who had lived in free jurisdictions.[26] Had the Scotts claimed their freedom in Louisiana, in 1838, it would have been an open-and-shut case. But, once again they did not seek their freedom. It is likely that they simply lacked knowledge, and even if they had such knowledge, it is not clear that at this point in their lives they were ready to challenge their bondage.

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 sued for their freedom or simply tried to escape from slavery. The trip down the Mississippi River to Louisiana took them by numerous towns in Iowa and Illinois, where they might have escaped. They could also have jumped ship in St. Louis, and melted into that city's free black

population. Instead, unaccompanied by their owner, or evidently any other person with authority over them, they travelled 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 so they did not seek their freedom.

Their sojourn in the Deep South was brief. In October the Army transferred Emerson back to Fort Snelling, where he remained until May 1840. During this trip, on a Mississippi River steamboat that was north of the state of Missouri, Harriet Scott gave birth to her first child, Eliza. 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.

In May 1840 Dr. Emerson went 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 Dred and Harriet Scott remained in St. Louis, 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. During part of this time an army captain rented Dred Scott and took him to the new state of Texas. Scott returned to St. Louis in early February 1846 and tried to purchase freedom for himself and his family. Irene Emerson refused to sell Scott to himself, and in April 1846 Scott sued for his freedom and that of his wife and children.[27]

Dred Scott Sues for Freedom

In 1846 Dred Scott's case seemed like an easy one to win. In 1824, in *Winny v. Whitesides*, the Missouri Supreme Court freed a slave who had been taken to Illinois. 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. In this period Missouri was one of the most liberal states in the nation on this question. Courts in Kentucky, Louisiana, and Mississippi also upheld the freedom of slaves who had lived in a free state or territory.[28]

These decisions were based on the legal theory, first articulated in the English case of *Somerset v. Stewart* (1772), 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:

> So 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.[29]

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.

In *The Slave, Grace* (1827), the English High Court of Admiralty modified the *Somerset* rule.[30] 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 *Slave Grace* precedent.[31] Courts in Missouri, Kentucky, and Louisiana continued to free slaves who had lived or worked in free jurisdictions. Well after *Slave Grace* the Missouri Courts continued to liberate slaves who had lived in the North. Thus, Scott's lawyers expected him to win his freedom.

Initially this did not happen. At 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 owned him. In December 1847 the judge ordered a new trial, but Irene Emerson's attorneys challenged this order before the Missouri Supreme Court. In June 1848 the Missouri Supreme Court sided with Dred Scott. Two continuances, a major fire, and a cholera epidemic delayed the case for more than a year and a half. Finally, in January 1850 the case went to trial. 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 thus if the jurors determined he had in fact lived in a free state or territory, they should find him free. The jury sided with Scott and his family. This result was consistent with Missouri precedents dating from 1824.

Reluctant to lose her four slaves, Irene Emerson had her lawyers appeal to the Missouri Supreme Court. In late 1849 or early 1850 she 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, John F. A. Sanford, continued to act on her behalf in defending the case.[32]

In 1852, in *Scott v. Emerson,* the Missouri Supreme Court reversed the lower court and declared that Scott was still a slave. The decision was frankly political. It was made, 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.[33]

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

In the Federal Court

The decision by the Missouri Supreme Court may have come as a relief to both Emerson and Sanford. After nearly six years, the case seemed finally over. In reality, however, it was only entering a new phase.

Shortly before the Missouri Supreme Court decided *Scott v. Emerson,* one of Scott's lawyers died and another left the state. In 1854 Scott's new lawyers began a new case, this time in the federal courts. Scott now sued John Sanford, who, although a citizen of New York, exerted control over the Scotts. Sanford 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, a Vermont-born lawyer with strong antislavery convictions. Field then brought the case into federal court.

Dred Scott sued John Sanford in United States Circuit Court for battery and wrongful imprisonment. Scott asked for $9,000 in damages. This complaint was something of a legal fiction, designed to bring the issue of Scott's freedom into the 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, either as the owner of Scott or as the legal representative of Irene (Emerson) Chaffee, Sanford was the one holding Scott in slavery. If Scott was legitimately free, Sanford was wrongfully imprisoning him.[34]

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 he had the power to hear the case. In legal terms, this is known as "jurisdiction," or "the authority by which courts and judicial officers take cognizance of and decide cases [and] the legal right by which judges exercise their authority."[35] A court, even the Supreme Court of the United States, can only hear a case if it has "jurisdiction" over the issues and parties involved. To offer a simple example: if one citizen of Kansas sued another citizen of Kansas over an auto accident that took place in Kansas, the case could only be heard by a court in Kansas. A court in Nebraska or Missouri (or any other state) would not have "jurisdiction" over the two people from Kansas or the event—the accident—that took place in Kansas.

The jurisdiction of the federal courts is limited to a number of rather well defined areas. One of those areas is suits between citizens of different states. This jurisdiction, known as "diversity jurisdiction," is based on a clause in Article III, Section 2, Paragraph 1, of the Constitution that allows citizens of one state to use the federal courts to sue citizens of another state. This is called "diversity jurisdiction" because there is a diversity of state citizenship between the plaintiff and defendant in the suit. Dred Scott sued in diversity, claiming that he was a citizen of Missouri and that the defendant, John Sanford, was a citizen of New York.[36]

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 that Scott was a "citizen" of Missouri. Sanford's response was in the form of a plea in abatement, which 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."[37] In essence Sanford argued that no black could be a citizen of Missouri, and thus even if Dred Scott was free, the federal court did not have jurisdiction to hear the case.

Judge Wells rejected Sanford's plea. Wells, a slaveowner originally from Virginia, neither advocated black equality nor opposed 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. He merely held that the term "citizen" in Article III of the Constitution referred 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.

THE CASE IN THE FEDERAL COURT

By rejecting Sanford's plea in abatement, Judge Wells forced Sanford to defend himself in court. Sanford did not deny that he had "gently laid his hands upon" Scott and his family or that he had "restrained them of their liberty." Rather, he stated "he had a right to do" this because Scott was his slave.[38]

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 Scott had previously been declared free by a court in Illinois then the result would have been different. Judge Wells might then have held that Missouri was obligated to recognize the judicial proceedings that had emancipated Scott, under Article IV, Sec. 1, of the Constitution, which provided: "Full Faith and Credit shall be given each state to the public Acts, Records, and judicial Proceedings of every other State." No such proceeding had ever taken place in Illinois or elsewhere. Thus, Scott and his family remained slaves.

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. 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 as a free soil Democrat he 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. Johnson was a "veteran of many famous court battles" who "added luster to any legal cause that he undertook" and "made opposing attorneys apprehensive."[39]

Blair sought other attorneys to assist him, but no one stepped forward. Antislavery lawyers and politicians had always been available to take important cases involving slavery to the Supreme Court. For example, in *United States v. The Amistad* (1841) 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 seized a ship that eventually landed off the coast of Connecticut.[40] 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.[41]

Yet no prominent antislavery lawyer offered to join Blair. The only plausible 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.[42] No one could have foreseen 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.

The briefs and the oral arguments, which lasted four days,[43] 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 until the following year and scheduled reargument on two crucial questions: (a) whether the plea in abatement was legitimately before the Supreme Court; and (b) whether a free Negro could be a citizen of a state, or of the United States, and as such sue in federal court.

In December 1856 the Court heard new arguments on these two issues and on the constitutionality of the Missouri Compromise. The case was now attracting 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 opposed the anti-slavery movement. His presence showed that even political conservatives had become concerned that the Taney Court might overturn the Missouri Compromise and thus destroy what remained of sectional harmony in the nation. What had begun in 1846 as an attempt by Scott to gain freedom for himself and his family 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 later argued that the Court intentionally delayed the case in order to avoid giving ammunition to that party in the upcoming election. In his "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.

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 suggested. 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 had he given his dissent in May of that year, it might very well have helped him get that nomination.[44] 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.

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.

The Court was politically out of balance as well. The Court was a Democratic

stronghold, at a time when the Party was dominated by its southern, proslavery wing. Every justice except Curtis had been appointed by a Democrat, although by 1857 McLean had rejected his Democratic roots and was openly affiliated with the new Republican Party. The other two northerners on the Court—Nelson and Grier—were Democrats generally considered to be "doughfaces"—northern men with southern principles. They could be counted on to support slavery along with the five southerners on the Court.

Chief Justice Taney came from a wealthy and well-connected Maryland family that made its fortune in landholding, slaves, and tobacco planting. Initially a Federalist, he served in the state legislature from 1799–1800, but he broke with the party when it failed to support the War of 1812. In 1816 he won a 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 of 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. By the 1850s Taney was an intense, 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 *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, as attorney general Taney argued: "They [blacks] are 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*."[45] Thus, although not a slaveowner, Chief Justice Taney was a longtime opponent of any rights for free blacks.

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 and federal power. Justice Campbell and Catron, on the other hand, were more sympathetic to states' rights. Justice Daniel was almost a fanatic 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, while Catron and Wayne would remain loyal to the United States. Daniel died in 1860, but would doubtless have joined the Confederacy had he been alive.

The two northern Democrats on the Court, Justices Grier and Nelson, were certainly not secessionists. Indeed, they 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.[46]

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 "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.[47] 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.

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* (1850). 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.[48]

The facts of *Strader* were somewhat different from those of *Dred Scott*, but the legal precedent in *Strader* could easily 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 U.S. Supreme Court, Chief Justice Taney rejected both arguments, declaring that "every State has an undoubted right to determine the status or domestic condition, of the persons domiciled within its territory."

Taney also argued that the Northwest Ordinance was no longer in force and thus could not free a slave. But even if it had been in force, Taney asserted, Congressional legislation for a particular territory "could have no force beyond" the limits of that territory.

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 anti-slavery 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 Samuel Nelson, a New York Democrat, 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 could 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 on the basis of his residence in either Illinois or the Wisconsin Territory?

THE JURISDICTIONAL QUESTION

In order to reach these issues, the Supreme Court first had to deal with the jurisdictional issue, just as Judge Wells had done. This raised a confusing technical question. Despite its complexity this question went to the heart of the case and later became a major political issue after the Court handed down its decision.

If blacks could be citizens of states, then Dred Scott had an apparent right to sue John Sanford in federal court. However, if blacks could not be citizens, then Dred Scott could not legally sue in a federal court and the case was not legitimately before the Supreme Court and the Court would have to dismiss it.

Thus the following double quandary emerged. The Southern majority 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 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 that 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.

Taney, however, thought that the question of citizenship was legitimately before the Court. He argued that the right of a black to sue in federal court was also before the Supreme Court, even if neither of the parties raised the question, because every court has a right to consider, on its own, whether it has jurisdiction to hear a case. On this point he was probably on firm legal ground, even though a number of his colleagues disagreed. However, the way he 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, guaranteed 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.[49]

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 standing to sue in federal courts. Here he 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, however, seems to be at odds with the text of the Constitution itself. Indeed, throughout the Constitution notions of national citizenship are tied to state citizenship. The right to vote for national legislators, for example, which is found in Article I, Sec. 2 of the Constitution, was tied to the states. Article III, Sec. 2 provides for a right to sue in federal courts when "Citizens of different States" sued each other. Article IV, Sec. 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.[50] According to 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."[51]

But Taney had other ideas. He claimed that

> in 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.[52]

Taney based this novel argument entirely on race. In a slanted and one-sided history of the founding period that ignored the fact that free blacks had voted in a number of states at the time of the ratification of the Constitution, 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 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 and secures to citizens of the United States. On the contrary, they were at that time considered 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 Government might choose to grant them. ...[They were] so far inferior, that they had no rights which the white man was bound to respect.[53]

He concluded that blacks could never be citizens of the United States, even if born in the country and considered citizens of the states in which they lived.

This dual citizenship 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.[54]

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 that the Missouri Compromise was unconstitutional. Many Republicans would later argue that everything Taney said about the Missouri Compromise was *dicta*—a statement made by a judge that is unnecessary to the outcome of the case. Taney's critics held that the Chief Justice's superfluous discussion of the Missouri Compromise was irrelevant and unnecessary to the decision and thus not legally binding. In 1858 Congressman Calvin C. Chaffee (who had married Irene Sanford Emerson) asserted that "The *dictum* of the Court is a very different affair from a *decision*."[55] 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*.

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. His goal was to settle, finally and forever, and 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 there was the clause in the Constitution that explicitly gave Congress the power to regulate the territories. The 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.

THE TERRITORIES CLAUSE

Article IV, Section 3, Paragraph 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. Congress had often exercised its power under this clause, prohibiting slavery in some territories and allowing it in others. In the Kansas-Nebraska Act (1854) 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 Chief Justice Roger B. 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 representing 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.[56]

In his Pulitzer Prize–winning study of the case, D. E. Fehrenbacher correctly described this thoroughly unpersuasive argument as "ten pages of rambling, repetitious prose" that is "difficult ... to take seriously." As Fehrenbacher noted, Taney "quoted no framers of the Constitution, cited no court decision in support of his bizarre explication."[57] 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. 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. He argued this power did not come from the territories clause of Article IV, Sec. 3, Paragraph 2. Rather, he said it came from the preceding paragraph in Article IV, which said: "New States may be admitted by the Congress into this Union." 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."[58] Taney's argument here was 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 or treating it as a "colony."

The weakness of his argument did not stop Taney, who was determined, as few justices have been, to reach a specific result. His goal was to prohibit Congressional regulation of slavery in the territories, and any argument, it seems, would do the trick. But even if, as he asserted, Congress had only minimal power to prepare the territories for statehood, there was no reason why that minimal power could not include the right to prohibit slavery. So he turned to the Bill of Rights to plug the hole in his territories clause argument.

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 he argued that Congress could not violate the Bill of Rights in the territories. This seems reasonable and persuasive. To illustrate, he said that

> no 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.

Taney further argued that Congress could not prohibit the right to a jury trial or deny people their right against self-incrimination.[59]

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." 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."[60] In an analysis that scholars would later call "substantive due process," 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.[61]

For many commentators, at the time and since, Taney's argument proved too much. No one believed that the Fifth Amendment prohibited Congress from banning dangerous, pernicious, or morally offensive property from federal jurisdictions. In the nineteenth century states banned liquor and lottery tickets from their jurisdictions. 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 special form of property that required special laws, and might be prohibited on grounds of public safety or public policy.

Taney 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:

> The 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 guaranteed 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.[62]

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

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, he in effect was trying to preempt all political discussion and debate. There was, after all, no point in debating an issue if Congress could not pass legislation on it. Taney expected that political debate over the issue would end because politicians would accept his resolution of the problem.

While this expectation seems naive, Taney had some good reasons for believing he could accomplish this goal. Since the end of the Mexican-American War in 1847 the nation had been bitterly divided by the problem of slavery in the territories. During the war northern congressmen had backed the Wilmot Proviso, which would have banned slavery in all land acquired from Mexico. 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.[64] By 1850 the North had parity in the Senate, but in the Compromise of 1850, Congress nevertheless allowed 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, in the Kansas-Nebraska Act, with a free state majority in both the House and the Senate, Congress repealed the Missouri Compromise's slavery prohibition as it applied to territories that 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 felt

he was 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, pledged to stopping the spread of slavery into the West. The new party made an excellent showing but lost the election. With hindsight we see that the 1856 election was a prelude to the Republican victory in 1860. But Taney may have 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 in the territories. From Taney's perspective the Republican Party was a dangerous, sectional organization that might push the nation toward civil war. He rejected the premises of the Republicans—that slavery was an evil that must, in the words of Lincoln, be put "in course of ultimate extinction."[65] 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' être* 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 Americans, including President-elect James Buchanan, wanted the Supreme Court to settle the issue of slavery in the territories once and for all. In his inaugural address, delivered just two days before Taney announced his opinion, Buchanan said that the issue of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States" and would "be speedily and finally settled." Buchanan pledged to "cheerfully submit" to this decision, as he believed would "all good citizens."[66]

The Politics of Law

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

Two justices, McLean and Curtis, presented 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:

> At 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.[67]

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

Republicans embraced the dissents. Horace Greeley, the 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 responded to the decision with outrage, calling Taney's opinion "wicked," "atrocious," "abominable," and a "collation of false statements and shallow sophistries." The paper thought Taney's decision had no more validity than the opinions one might hear expressed in any "Washington bar-room." The *Chicago Tribune* declared that Taney's statements on black citizenship were "inhuman dicta."[68]

THE REPUBLICAN FEAR OF A CONSPIRACY

For many Republicans, including Abraham Lincoln, the case posed a grave threat to the free states and to democracy. 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 singlehandedly guided through Congress, the Kansas-Nebraska Act (1854), 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 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 chat with 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.[69] 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 (like Buchanan, from Pennsylvania) had kept the president-elect fully informed about the progress of the case and the internal debates within the Court. So, when Buchanan urged the nation to support the decision, he already knew what Taney would say. Republican suspicions of impropriety turn out to be fully justified. There may have been no on-going conspiracy, but collusion abounded. The Court and the president-elect worked closely to get the nation to accept it the decision.

THE NATIONALIZATION OF SLAVERY

In 1858 Abraham Lincoln launched his bid for the U.S. Senate with an address to the Illinois Republican Convention known as the "House Divided Speech." In that famous 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.

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."[70] In an 1859 speech Lincoln warned that some future Supreme Court case would be like a "second Dred Scott decision" and would make "slavery lawful in all the States."[71]

Such a case, *Lemmon v. The People*, was on its way through the New York courts. The Lemmons were Virginians moving to Texas. The fastest route, although hardly the most direct, was to sail from Norfolk to New York City, and then change for a ship heading directly to New Orleans. In 1852 they came to New York with their eight slaves. While there, a black dock worker obtained a writ of habeas corpus and a local judge ruled that under New York law the "eight colored Virginians," as the judge called them, became free the moment their owner brought them into the state. This decision was consistent with precedents dating from the *Somerset* case (1772). In 1857 a New York court upheld this decision, but in the aftermath of *Dred Scott* the state of Virginia appealed this decision to New York's highest court. In 1860 that court upheld the original ruling in favor of freedom. Republicans predicted that an appeal to the U.S. Supreme Court would lead to the "second Dred Scott decision" that Lincoln feared.[75]

In 1859 Senator Salmon P. Chase of Ohio, who would become Chief Justice after Taney's death, predicted that if the Democrats won the presidency in 1860 there would be a new decision, allowing slavery in the North "just as after the election of Mr. Buchanan the Dred Scott case was decided in favor of the claim to carry slavery into the territories." Discussing *Lemmon*, Chase asked, "What will the decision be?"

> It will be just as they claim, that they can take their slaves into New York over the railroads of New Jersey, through Pennsylvania and through Ohio, Indiana, Illinois ... to any state of the North, and that they can hold them there during all the time that it is convenient for them to be passing through. In other words, it is a decision in favor, not of the African slave trade, but of the American slave trade, to be carried on in the free states.[73]

The *Springfield Republican* asked, "If slavery is a national institution, recognized, protected, and carried into the territories, why does not the same authority recognize, protect, and carry it into all the several states?"[74]

Republicans focused—with fear—on the last paragraph of Justice Samuel Nelson's concurring opinion in *Dred Scott.* There Nelson had declared, as if he had the *Lemmon* case in mind:

> A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on Business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.[75]

Had the Civil War not intervened it is likely that this case would have reached the Court and led to the "second Dred Scott decision" that Lincoln feared would nationalize slavery.

THE DEMOCRATIC RESPONSE

While northern Republicans viewed *Dred Scott* as a threat to their party and their region, Democrats, North and South, saw the decision as a valiant attempt to finally resolve the problem of slavery in the territories. They happily deferred to the Supreme Court to solve this seemingly impossible political issue. Stephen A. Douglas of Illinois, while running for reelection to the United States Senate in 1858, asserted that "The right and province of expounding the Constitution, and construing the law, is vested in the judiciary established by the Constitution." Unlike his opponent, Abraham Lincoln, Douglas declared, he had "no warfare to make on the Supreme Court." Douglas was also happy to endorse the Court's

holding that free blacks could never be citizens of the United States. He asserted:

> I am opposed to negro equality. I repeat that this nation is a white people—a people composed of European descendants—a people that have established this government for themselves and their posterity, and I am in favor of preserving not only the purity of the blood but the purity of the government from any mixture or amalgamation with inferior races.[76]

The *New York Journal of Commerce* declared that opponents of Taney's opinion, the Republicans, stood for "revolution and anarchy." Other northern Democratic papers took similar positions. Noting that the problem of slavery in the territories had been settled by the nation's highest court, the *New York Herald* boldly asserted: "disobedience is rebellion, treason, and revolution."[77] Similarly, *The Washington Union* argued that "whoever now seeks to revive sectionalism arrays himself against the constitution, and consequently against the Union."[78]

Northern Democrats were relieved that, as the *Herald* put it, "the supreme law is expounded by the supreme authority," and thus the divisive issue of slavery in the territories would be gone forever. The official organ of the Buchanan administration, the *Washington Union,* crowed,

> The democratic party is now enjoying its greatest triumph—not merely that they have elected their candidates and secured four more years of party ascendancy in the executive branch of the government, but that their victory has been won on the most momentous issue that ever divided the public mind, and that their political triumph has been confirmed and endorsed by the highest judicial tribunal known to the Constitution.

The paper declared that "the sectional question" was "settled, and that henceforth sectionalism will cease to be a dangerous element in our political contests."[79]

Southern Democrats were equally jubilant. South Carolina's *Charleston Daily Courier* cheered the Supreme Court's ruling "that the Missouri Compromise is unconstitutional ... and that free negroes have no rights as citizens, under the Constitution of the United States." The paper's editors "confidently believe[d]" that the decision would "settle these vexed questions forever, quiet the country, and relieve it of abolition agitation, and tend greatly to perpetuate our Union—our Constitutional Union—the greatest political boon ever vouchsafed by God to man."[80]

The decision in the end did none of these things. Instead, it exacerbated sectional tensions, infuriated most northerners, helped set the stage for Lincoln's election to the presidency in 1860, and surely brought the nation closer to civil war.

Epilogue

In response to the *Dred Scott* decision the black abolitionist Frederick Douglass displayed remarkable optimism. 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 bail 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.[81]

The end of slavery came more quickly than Douglass could have imagined. On June 19, 1862, President Abraham Lincoln signed legislation ending slavery in the territories. The Congress and the president ignored Taney's views on the Constitutional powers of the government to regulate slavery in the territories. Within six months Lincoln issued the Emancipation Proclamation. Secession, Civil War, and Republican rule had effectively, if not actually, rewritten the Constitution. Slavery no longer had a special constitutional protection. Indeed, it now had almost no protection at all. United States soldiers had already ended slavery for tens of thousands of slaves. Before the war ended nearly 200,000 of those blue-coated troops had black faces. Too old to serve himself, Frederick Douglass personally recruited over a hundred blacks in upstate New York, including his two sons. In his newspaper Frederick Douglass "issued a stirring call, 'Men of Color, to Arms!'"[82] People who were written out of the Constitution in 1857 helped rewrite the constitutional arrangements only a few years later.

In early 1865 Congress passed, and sent on to the states, the 13th amendment, which ended slavery. A year later Congress passed the 14th Amendment. Ratified in 1868, the Amendment made all people born in the United States citizens of the state in which they lived as well as citizens of the nation. *Dred Scott* was now a dead letter.

Dred Scott did not live to see the demise of the case that bore his name. Shortly after the decision the sons of Dred Scott's first owner, Peter Blow, purchased Scott and his family. The Blow brothers then freed the Scotts. Thus, the negative results of the case were in fact short-lived. Dred Scott remained a free

man, and something of a celebrity, from May 26, 1857 until his death, a few months later, on February 17, 1858.[83]

Chief Justice Taney died on October 12, 1864, before the nation so emphatically rejected his judicial handiwork. But by then he surely understood the depth of his failure in *Dred Scott.* His decision had helped put in motion forces that ended the controversy over slavery in the territories, but not in the way that he wanted.

In February 1865 the United States Senate debated a bill to appropriate money to honor the recently deceased chief justice. The Senate bill would have provided money for a bust of the late chief justice to be placed with busts of all other deceased justices. This was almost a pro forma honor. No other justice had ever been denied his place in the pantheon of American jurists.

But no other justice was like Roger B. Taney. At the time of his death, in 1864, he was denounced and vilified. He was the author of the Supreme Court's opinion in *Dred Scott v. Sandford,* and that was enough for antislavery senators, like Charles Sumner of Massachusetts, to oppose having his bust placed beside all other departed justices. Sumner argued that "If a man has done evil during his life he must not be complimented in marble." Sumner noted that England had never honored the hated Chief Justice Jeffries, "famous for his talents as for his crimes." Like Jeffries, the justice from Maryland had been "the tool of unjust power." Neither deserved honor. Taney had "administered his last justice wickedly, and degraded the judiciary of the country, and degraded the age." He was not to be remembered by a marble bust, but left to be dealt with in the works of scholars. There, Sumner confidentially predicted, "the name of Taney is to be hooted down the page of history."[84]

After Sumner's speech, Chief Justice Taney's reputation has fluctuated. He was on the Court for nearly thirty years and wrote many important opinions. Much of his jurisprudence on economic issues is highly regarded by many scholars. But in the end his reputation, and that of the antebellum Court, turns on *Dred Scott.*

Notes

[1] The freedom claims for the four slaves were all different. See n. 27 below.

[2] *Dred Scott v. Sandford,* 19 How. 393 (1857), sometimes abbreviated as *Dred Scott.*

[3] C. E. Hughes, *The Supreme Court of the United States* (New York: Columbia U. P., 1928): 50. Hughes, who was a private citizen when he wrote this, considered the other cases to be *Hepburn v. Griswold,* 8 Wall 603 (1870), and *Pollock v. Farmers' Loan and Trust Company,* 157 U.S. 429 (1895). *Hepburn* denied the power of the United States to issue paper money. The court reversed this decision two years later in *Knox v. Lee* and *Parker v. Davis,* 12 Wall. 457 (1872), which together are better known as the *Legal Tender Cases. Pollock* declared the federal income tax law to be unconstitutional. It was

effectively reversed by the Sixteenth Amendment. A. M. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale U. P., 1978): 41.

[4] *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567, 590–91 (1957).

[5] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L. Ed. 2d 674, 785 (1992). Scalia quoting from *Dred Scott v. Sandford*, 19 How. 393, 621 (1857) (Curtis, J., dissenting). *Planned Parenthood* 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.

[6] *Plessy v. Ferguson,* (Harlan, J., dissenting), U.S. 163 (1896): 559. *Williams v. North Carolina*, 325 U.S. 226, 275 (1945) (Black, J., dissenting). *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; Brennan dissented, in part citing *Dred Scott.*

[7] Bork quoted in P. Finkelman, "The Constitution and the Intentions of the Framers: The Limits of Historical Analysis," *University of Pittsburgh Law Review* 50 (1989): 395.

[8] L. W. Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan, 1988): 2. On this subject, see H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (1985): 885. For a discussion of the problems of applying historical scholarship to original intent analysis, see Finkelman, "The Constitution and the Intentions of the Framers."

[9] *McCulloch v. Maryland*, 4 Wheat. 316, 407, 415 (1819).

[10] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 700.

[11] *Dred Scott*, 19 Howard: 421.

[12] Sanford Levinson, "Slavery in the Canon of Constitutional Law," *Chicago-Kent Law Review* 68 (1993): 1107.

[13] Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," *Harvard Law Review* 101 (1987): 4. 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 mindset akin to those of the Taney Court who decided *Dred Scott.*" C. T. Rowan, "Equality as a Constitutional Concept," *Maryland Law Review* 47 (1987): 14.

[14] *Marbury v. Madison*, 1 Cr. 137 (1803). For a succinct discussion of this case, see Herbert A. Johnson, "The Supreme Court Declares Its Independence: Judicial Review of Federal Statutes," in John W. Johnson, ed., *Historic U.S. Court Cases, 1690–1990: An Encyclopedia* (New York: Garland Publishing, 1992): 63–67.

[15] Walter Ehrlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (Westport, Conn.: Greenwood Press, 1979): 182–83.

[16] *Dred Scott*: 404–05.

[17] On the history of the slavery prohibition in the Ordinance, see P. Finkelman,

Slavery and the Founders: Race and Liberty in the Age of Jefferson (Armonk, N.Y.: M. E. Sharpe, 1996): 34–79.

[18] "Missouri Enabling Act," Act of March 6, 1820, 3 *United States Statutes at Large* 548.

[19] Scott is listed in an 1818 property tax record as being "over sixteen years old." Paul McStallworth, "Scott, Dred," in R. W. Logan and M. R. Winston, eds., *Dictionary of American Negro Biography* (New York: W.W. Norton, 1982): 548. Most scholars agree he was probably born between 1795 and 1805.

[20] Ehrlich's *They Have No Rights* is the best study of Scott's life and the complicated facts surrounding the case. The most important and comprehensive book on the case itself and its political impact is Don E. Fehrenbacher's Pulitzer Prize–winning *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford U. P., 1978).

[21] 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. P. Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: U. of North Carolina Press, 1981): 96–98, 150–55; Finkelman, *Slavery and the Founders*, 34–79; and P. Finkelman, "Slavery, the 'More Perfect Union,' and the Prairie State," *Illinois Historical Journal* 80 (1987): 248–69. A handy collection of the Illinois laws dealing with slavery and race is found in Stephen Middleton, ed., *The Black Laws in the Old Northwest: A Documentary History* (Westport: Greenwood Press, 1993).

[22] Under Roman law slaves could enter into some kinds of binding contracts. See Alan Watson, "Thinking Property at Rome," in P. Finkelman, ed., *Slavery and the Law* (Madison: Madison House, 1996).

[23] Thomas Jefferson, *Notes on the State of Virginia*, reprinted in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* (New York: Penguin Books, 1975): 187.

[24] Southern states also recognized this, in such cases as *Lydia v. Rankin*, 2 A.K. Marshall (Ky.) 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*, 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, *An Imperfect Union*.

[25] In 1850 lawyers for Irene Emerson would make such arguments before the Missouri Supreme Court. Ehrlich, *They Had No Rights*, 56. However, the Missouri Supreme Court rejected such arguments by a military officer in *Rachael v. Walker*, 4 Mo. 350 (1836).

[26] The first Louisiana case on this subject is *Adelle v. Beauregard*, 1 Mart. O.S. 183 (1810). The most important case is *Lunsford v. Coquillon*, 2 Mart. L. S. 401 (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, *An Imperfect Union*, 206–16. See also J. K. Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State U. P., 1994): 250–88.

[27] 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, and so she was also free.

Why did Dred Scott suddenly sue for his freedom when he had not made 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, 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 only in 1846 Scott did discover he had a strong legal claim to freedom. He may have learned this from sympathetic whites, including the sons of his former master, Peter Blow. 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. (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.) Anderson, or someone else in the church, may have informed Harriet Scott that she was legally entitled to her freedom. 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.

[28] *Winny v. Whitesides*, 1 Mo. 472 (1824). The other Missouri cases are discussed in Finkelman, *An Imperfect Union*, 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. Lydia v. Rankin*, 2 A.K. Marshall (Kentucky) 467 (1820); *Lunsford v. Coquillon*, 2 Mart. L. S. 401 (1824), and *Harry v. Decker & Hopkins*, Walker (Mississippi) 36 (1818).

[29] *Somerset v. Stewart*, 1 Lofft (G.B.) 1 (1772). For a full discussion of *Somerset* see Wm M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974) 86, reprinted in P. Finkelman, ed., *Articles on American Slavery* vol. 11, *Law, the Constitution, and Slavery* (New York: Garland, 1989): 570; Wm M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell U. P., 1978); and David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823* (Ithaca: Cornell U. P., 1975). On the history of the application of *Somerset* in the United States see Finkelman, *An Imperfect Union.*

[30] *The Slave, Grace*, 2 Hagg. Admir. (Great Britain) 94 (1827).

[31] In the 19th 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. A precedent is a "case or

decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law" (*Blacks Law Dictionary* [4th ed., St. Paul: West Publishing Co., 1968]: 1340). Thus, a case from another jurisdiction (or even another state or country) can be a precedent, even if it is not binding on a particular court. A binding precedent is one issued by a court that has the authority to compel another, lower court, to follow its rule. Thus, a decision by the U.S. Supreme Court is usually considered to be a binding precedent on all other courts in the U.S. However, a decision of one state supreme court would not be a binding precedent on another state supreme court.

[32] Sanford, a prosperous New York merchant with strong personal and professional ties to St. Louis, actually spelled his name with only one "d." However the United States Supreme Court reporter mistakenly thought his name was Sandford. Hence, the case is called *Scott v. Sandford.*

[33] *Scott v. Emerson*, 15 Mo. 576, 586 (1852).

[34] 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. Ultimately, as D. E. Fehrenbacher concluded, "it makes little difference whether Sanford was acting as owner, agent, or executor when he accepted the role of defendant," in part because "the 'validity' of the case did not depend upon the source of his authority over the Scotts, but merely upon whether he had exercised such authority" (Fehrenbacher, *Dred Scott Case*, 274).

[35] *Blacks Law Dictionary*: 991.

[36] 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 sued Sanford because he lived in New York, and this allowed for a diversity of citizenship that allowed the case to come into the federal courts. However, this argument makes no sense. Had Scott not sued Sanford, he would have sued Dr. Emerson's widow, Irene Sanford Emerson Chaffee, who was by this time 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).

[37] *Dred Scott*, 19 Howard at 393–94.

[38] Record of the Circuit Court case, quoted in Fehrenbacher, *Dred Scott Case*: 279.

[39] Fehrenbacher, *Dred Scott Case*: 282.

[40] 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*, 15 Pet. (U.S.) 518 (1841). For a further discussion of this case see also Howard Jones, *Mutiny on the Amistad* (New York: Oxford U. P., 1987), and P. Finkelman, *Slavery in the Courtroom* (Washington: Library of Congress, 1985): 222–39.

[41] *Jones v. Van Zandt*, 5 How. (U.S.) 215 (1847); *Moore v. Illinois*, 14 How. (U.S.) 13 (1852). Chase also argued, and won on a technicality, *Norris v. Crocker*, 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 P. Finkelman, "Fugitive Slaves, Midwestern Racial Tolerance, and the Value of 'Justice Delayed,'" *Iowa Law Review* 78 (1992): 89.

[42] Indeed, initially the Supreme Court headed in that direction, with a draft opinion by Justice Samuel Nelson that dodged the issues of black citizenship and the validity of the Missouri Compromise. But, as will be clear later in this essay, the Court eventually jettisoned that plan in favor of a strongly proslavery opinion by Chief Justice Taney.

[43] Today oral arguments before the Supreme Court rarely take up more than a few hours. In the 19th century it was not uncommon for arguments take a day or two. The four days devoted to this case indicate how important the court thought it was.

[44] Only in the last half of the 20th century have Supreme Court justices been 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 political office as United States Ambassador to the United Nations.

[45] Unpublished Opinion of Attorney General Taney, quoted in Carl Brent Swisher, *Roger B. Taney* (New York: Macmillan, 1935): 154.

[46] 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. P. Finkelman, "The Treason Trial of Castner Hanway," in Michael Belknap, ed., *American Political Trials* (rev. ed., Westport: Greenwood Press, 1994): 77–96.

[47] The case is *Commonwealth v. Aves*, 18 Pick. 193 (1836), which Curtis lost; it is discussed at length in L. W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard U. P., 1957): 59–69, and in Finkelman, *An Imperfect Union*: 103–28.

[48] *Strader v. Graham*, 10 Howard (U.S.) 82 (1850). The status of fugitive slaves found in the North was governed by Article IV, Section 2, Par. 3 of the United States Constitution and not by state law.

[49] *Dred Scott*: 403.

[50] 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 a state, but still be a citizen of the United States. See *Hepburn v. Ellzey*, 2 Cranch (U.S.) 445 (1805) and *Prentiss v. Brennan*, 19 F. Cas. 1278 (1851). This issue is discussed in J. H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: U. of North Carolina Press, 1978): 248–86.

[51] Kettner, *The Development of American Citizenship*: 328.

[52] *Dred Scott*: 405.

[53] *Dred Scott*: 404–05.

[54] Article IV, Sec. 2, ¶ 1 of the Constitution declares: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[55] *Congressional Globe* 35th Congress, 1st Session: 852–55, quoted in Fehrenbacher, *Dred Scott Case*: 473.

[56] *Dred Scott*: 432.

[57] Fehrenbacher, *Dred Scott Case*: 367.

[58] Ibid.: 446.

[59] *Dred Scott*: 449, 450.

[60] *Dred Scott*: 450.

[61] There are two kinds of "due process" in constitutional law: procedural and substantive. Procedural due process guarantees fair and unbiased procedures in a trial, hearing, or some other forum. Substantive due process deals with the denial of a right without a good reason, even if the process—the procedure—of denying the right is fair. A law violates substantive due process when it exceeds the reasonable and constitutional authority or power of the legislature that passed the law. According to Prof. L. H. Tribe of Harvard Law School, an action violates substantive due process when the action, while adhering to the forms of law, unjustifiably abridges the Constitution's fundamental constraints upon the content of what government may do to people in the name of "law." As the Supreme Court put the matter most succinctly in *Hurtado v. California* (1884), "Law is something more than mere will exerted as an act of power.... [I]t exclud[es], as not due process of law ... special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." L. H. Tribe, "Substantive Due Process of Law," in L. W. Levy, *Encyclopedia of the American Constitution* (New York: Macmillan, 1986): 1796.

[62] *Dred Scott*: 451–52.

[63] *Dred Scott*: 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 two-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." 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. Wiecek, *Sources of Antislavery Constitutionalism*: 190–98, 255, 265–67.

[64] 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.

[65] "House Divided Speech," of Lincoln at Springfield, June 16, 1858, in Paul M. Angle, ed., *Created Equal? The Complete Lincoln-Douglas Debates of 1858* (Chicago: U. of Chicago Press, 1958): 3.

[66] James Buchanan, "Inaugural Address," 4 Mar. 1857, in James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 6 (New York: Bureau of National Literature, 1897): 2962.

[67] *Dred Scott*: 572–73 (Curtis, J., dissenting).

[68] Both papers quoted in Fehrenbacher, *Dred Scott Case*: 417.

[69] *Congressional Globe* 35th Congress, 1st Session, 941, quoted in Fehrenbacher, *Dred Scott Case*: 473.

[70] "House Divided Speech": 7.

[71] Abraham Lincoln, "Speech at Columbus, Ohio," in R. P. Basler, ed., *The Collected Works of Abraham Lincoln* (9 vols., New Brunswick: Rutgers U. P., 1953–55), 3: 404. See also 3: 421, 423.

[72] The Lemmon case is discussed extensively in Finkelman, *An Imperfect Union*, 285–338. New York's highest court was, and still is, called the New York Court of Appeals.

[73] *New York Evening Post*, 31 Aug. 1859.

[74] *Springfield Republican*, 12 Oct. 1857.

[75] *Dred Scott*, at 468.

[76] Speech of S. A. Douglas at Chicago, 9 Jul. 1858, in Angle, *Created Equal?*: 20–21.

[77] Both papers quoted in Fehrenbacher, *Dred Scott Case*, 420, 418.

[78] *Washington Union*, 11 Mar. 1857, p. 2.

[79] Ibid. *Herald* quoted in Fehrenbacher, *Dred Scott Case*, 418.

[80] *Charleston Daily Courier*, 9 Mar. 1857.

[81] Frederick Douglass, *The Dred Scott Decision: A Speech Given to the American Anti-Slavery Society, May 11, 1857* (Rochester, 1857).

[82] Benjamin Quarles, *Frederick Douglass* (New York: Atheneum, 1970): 205.

[83] Ehrlich, *They Have No Rights*: 182–83.

[84] Charles Sumner, *Congressional Globe* 38 Cong. 2nd Sess. (23 Feb. 1865): 1012–13. See Swisher, *Roger B. Taney*: 581–82.