WAS *DRED SCOTT* CORRECTLY DECIDED? AN "EXPERT REPORT" FOR THE DEFENDANT

by
Paul Finkelman[*]

This Article offers an "expert report" for the defendant in Dred Scott*, and argues that "given the history of the writing of the Constitution, the importance of slavery to the American economy, the specific protections for slavery found in the Constitution, and the politics of the era," the "decision upholding Dred Scott's status as a slave was surely inevitable." However, from "the perspective of modern scholarship . . . it is not unreasonable to ask if the case was in fact correctly decided. To ask this question is not to defend [Chief Justice] Taney's racism" or to argue "in favor of slavery." Instead, this Article suggests "how the Court might have reached the same result that Chief Jusitce Taney reached—and why perhaps the result was constitutionally correct—without relying on racism or aggressively proslavery thought."*

---

[*] President William McKinley Distinguished Professor of Law and Public Policy, Albany Law School. I finished the last editing on this Article while I was a visiting scholar at the Graduate School of Law and Politics at Osaka University. I thank the Osaka University, and especially Professor Yutaka Takenaka for their help and hospitality.

On the 150th anniversary of the decision in *Dred Scott v. Sandford*[1] the Charles Hamilton Houston Institute for the Study of Race at Harvard Law School held a moot court reargument of the case before a panel of distinguished U.S. Court of Appeals judges chaired by Supreme Court Justice Stephen Breyer. I was one of six professors and lawyers rearguing the case. I presented the argument for John F.A. Sanford,[2] the defendant who owned Dred Scott. The following Article is drawn from my expert report prepared for the moot court argument.

I. *DRED SCOTT* IN THE COURT OF HISTORY

Setting out an argument against Dred Scott's freedom seems like a peculiar task for a twenty-first century scholar. Almost no one today defends Chief Justice Taney's opinion or the racism on which it was built. *Dred Scott* is a universally condemned decision. On those rare occasions when modern politicians, lawyers, and jurists recall the case at all, they almost always do so to express their disagreement with Taney's opinion. Remarkably, during the 2004 presidential election, President George W. Bush offered up the *Dred Scott* case when asked to name a Supreme Court decision he opposed.[3] No one imagines that President Bush has actually read the case, or even knows much about it. But his answer illustrates how *Dred Scott* has come to symbolize bad jurisprudence, or even "evil" in constitutional law.[4]

---

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

[2] John F.A. Sanford spelled his last name with only one "d," but the clerk of the court added a second "d" to the case caption. Thus his name in the case is spelled San*d*ford.

[3] The Second Bush–Kerry Presidential Debate (Oct. 8, 2004), http://www.debates.org/pages/trans2004c.html.

[4] *See generally* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

Almost all modern scholars and jurists agree that the decision was not only wrong, but pernicious and just plain bad! Charles Evans Hughes argued that *Dred Scott* was one of "three notable instances [in which] the Court has suffered severely from self-inflicted wounds."[5] Similarly, Professor Alexander Bickel, of Yale Law School, called it a "ghastly error."[6]

For more than a century members of the Court have considered *Dred Scott* to be the ultimate bad decision and cite it, almost always in dissent,[7] not for authority, but as a way of attacking those with whom they disagree on the Court. When the Supreme Court voted 8–1 to uphold racial segregation in *Plessy v. Ferguson* (1896)[8] 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*."[9] A half century later Justice Hugo Black dissented from a majority opinion in which North Carolina was allowed to deny full faith and credit to a Nevada court decree in a divorce case. Black noted that the underlying basis for the North Carolina decision (and implicitly the Supreme Court's decision upholding that result) was "the assumption that divorces are an unmitigated evil, and that the law can and should force unwilling persons to live with each other."[10] Black analogized this Court's attempt to solve the issue of divorce to the Taney Court's attempt to solve the problem of slavery. Thus, Black wrote: "today's decision will no more aid in the solution of the problem than the *Dred Scott* decision aided in settling controversies over slavery."[11]

More recently Justices Brennan and Scalia have accused majorities of acting like the *Dred Scott* Court. While dissenting in a death penalty case Brennan quoted *Dred Scott* to illustrate the way racism has long been a

---

[5] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50, 52–54 (1928). Hughes considered the other cases to be *Hepburn v. Griswold*, 75 U.S. (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*, 79 U.S. (12 Wall.) 457 (1871), which together are better known as *The Legal Tender Cases*. *Pollock* declared the federal income tax law to be unconstitutional. 157 U.S. at 586. It was effectively reversed by the Sixteenth Amendment.

[6] ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 41 (Yale University Press 1978) (1970).

[7] Justice Frankfurter cited it in a majority opinion, but as a caution to indicate what the Courts should not do. Frankfurter asserted that courts should "[refrain] . . . from avoidable constitutional pronouncements" and thought "the Court's failure in *Dred Scott v. Sandford*" was one of those "rare occasions when the Court, forgetting 'the fallibility of the human judgment,' has departed from its own practice." United States v. Int'l Union UAW-CIO, 352 U.S 567, 590–91 (1957).

[8] 163 U.S. 537 (1896).

[9] *Id.* at 559 (Harlan, J., dissenting).

[10] Williams v. North Carolina, 325 U.S. 226, 274 (1945) (Black, J., dissenting).

[11] *Id.*

factor in American law. Brennan noted that the Justices had only recently "sought to free ourselves from the burden of this history."[12] Similarly, in his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Scalia complained that the Court's decision was not based on "reasoned judgment" but only on "personal predilection" and then quoted Justice Benjamin R. Curtis's dissent in *Dred Scott* to support his position.[13]

Justices have also used *Dred Scott* when they have opposed judicial negation of state or federal law, even when the particular justice might be sympathetic to a different outcome. Thus, in refusing to strike down the State of Washington's ban on assisted suicide in *Washington v. Glucksberg*,[14] Justice David Souter dragged *Dred Scott* out of the jurisprudential closet in which it is usually kept, to argue that the Court should be cautious of second-guessing a legislature. Souter wrote:

> *Dred Scott* was textually based on a Due Process Clause (in the Fifth Amendment, applicable to the National Government), and it was in reliance on that Clause's protection of property that the Court invalidated the Missouri Compromise. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, the implication being that the Government had no legitimate interest that could support the earlier congressional compromise. The ensuing judgment of history needs no recounting here.[15]

Thus, for Souter, striking down the Washington State law would have been the equivalent of overturning the Missouri Compromise. This seems a highly exaggerated analysis. In *Dred Scott* the Court struck down a major piece of federal legislation that had regulated settlement of the western

---

[12] 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*.

[13] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 984 (1992). Casey was a case involving abortion rights. Opponents of reproductive choice often compare *Roe v. Wade*, 410 U.S. 113 (1973) to *The Dred Scott Case* on the grounds that both deny liberty to an oppressed group—fetuses and blacks. This is another example of using *The Dred Scott Case* to discredit one's opponents.

[14] 521 U.S.702 (1997).

[15] *Id.* at 758–59 (Souter, J. concurring) (citations omitted). Oddly enough, Justice Souter is the only Justice in living memory to cite *Dred Scott* favorably. In his dissent in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 150–51 n.43 (1996), he wrote: "Regardless of its other faults, Chief Justice Taney's opinion in *Dred Scott v. Sandford*, 19 How. 393, (1857), recognized as a structural matter that '[t]he new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one.'" (citing *Dred Scott*, 60 U.S. (19 How.) 393, 441 (1857)).

territories for more than a quarter of a century, at a time when western expansion and settlement was a central aspect of American political, economic, and social life. At issue in *Glucksberg* was a recently passed statute on a relatively minor issue that affected few people. Nevertheless, Souter used *Dred Scott* to underscore his opposition to unnecessary judicial interference with state laws.

Judges who cite *Dred Scott* today often see the decision as the product of an overly ideological and reactionary judge—Chief Justice Taney—who willingly overturned settled law in order to shape public policy to his own views. The decision is further condemned as a striking example of poor scholarship and weak legal reasoning. The decision was so "bad" that even judges and legal theorists with diametrically opposed views on how to interpret the Constitution agree on this conclusion. Thus, originalists argue that Taney reached an erroneous decision because he failed to follow the intent of the framers; opponents of orginalism point out—correctly I think—that this is perhaps the most originalist opinion in the Court's history.[16]

II. THE CASE AS DECIDED IN 1857

Taney's decision in 1857 finally put to rest a case that had been smoldering since 1846, and had its roots in events that took place more than a decade before that.

Dred Scott was born a slave in Virginia sometime between 1795 and 1800. By 1830 his owner, Peter Blow, had moved to St. Louis, Missouri. In 1832 Blow died and shortly thereafter Dr. John Emerson, a captain and surgeon in the Army, purchased Scott.[17]

In December 1833 the Army sent Captain Emerson to Fort Armstrong in present-day Rock Island, Illinois. At the time officers were expected to provide their own personal servants and so Emerson brought Scott with him. The Northwest Ordinance of 1787 had banned slavery in Illinois, and when the territory became a state in 1818 the state constitution also prohibited slavery. Despite the Ordinance of 1787 and the state constitution, hundreds of blacks remained in slavery in Illinois into the 1830s. These people had been held as slaves before statehood and were the descendants of slaves living in Illinois before 1787. No court ever ruled on the status of these slaves, although in other parts of the Old Northwest slaves gained their freedom directly under the Ordinance, or with statehood.[18] But, while some people lingered in slavery in Illinois until the 1840s, it was generally understood that no new slaves could be

---

[16] Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 390 (1989).

[17] *See* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY 10–14 (1995).

[18] For example, see *State v. Lasselle*, 1 Blackf. 60, 70 (Ind. 1820).

brought into the state.[19] Under Illinois law, Scott had a strong claim to freedom as soon as Emerson brought him into the state. Between 1834 and 1836 Dr. Emerson purchased land in Illinois and built a cabin on it. He almost certainly used Dred Scott to help build this cabin. These facts further supported a claim to freedom for Scott because Dr. Emerson appeared to be establishing some sort of residence or permanency in the state, even though he was in the Army.

Had Captain Emerson resided inside Fort Armstrong he might have claimed that he was exempt from local law, because he was in federal service while in Illinois. No courts accepted such an argument at this time,[20] but Illinois was notoriously hostile to free blacks and its courts might have reached such a conclusion.[21] However, by purchasing land and living on it, rather than living at Fort Armstrong, Emerson could not have made such an argument. Whether Scott might have won his freedom in Illinois, he did not sue for it in that state. Perhaps he had no interest in trying to support himself on the rough Illinois frontier. Or perhaps he did not even know he had a claim to freedom. Whatever the reason, in 1836 Scott accompanied Emerson when he was transferred to Fort Snelling, in what was then the Wisconsin Territory, and later became the state of Minnesota.

Congress had banned slavery in this region in the Missouri Compromise of 1820 and reaffirmed this ban in the Wisconsin Enabling Act of 1836. Once again, Scott was in a place where slavery was illegal, and once again he did not seek his freedom. Shortly after arriving at Fort Snelling, in either 1836 or 1837, Scott married Harriet Robinson, a slave owned by Major Lawrence Taliaferro, the Fort's Indian agent. Taliaferro was also a Justice of the Peace, and in that capacity he performed a marriage ceremony for the two slaves.[22] Some modern scholars have made much of this fact, as did lawyers for Dred Scott.[23] This analysis is based on the fact that slaves could not legally marry—because no slave could legally enter into a contract or any other legal agreement. Thus, if a Justice of the Peace performed their marriage ceremony it must be because Dred and Harriet were free. This argument, however, is not

---

[19] On lingering slavery in Illinois and the effect of the Northwest Ordinance, see PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 37–80 (2d ed. 2001).

[20] *See, e.g.,* Rachael v. Walker, 4 Mo. 350 (Mo. 1836), where the Missouri Supreme Court rejected such an argument.

[21] For discussions on the limited rights of free blacks in Illinois, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS LAW J. 415–82 (1986); FINKELMAN, *supra* note 19, 58–80; and see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 150–54 (1981).

[22] *See, e.g.*, Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1040–41 (1997).

[23] *Id.*

particularly strong because there is no actual connection between the ceremony performed by Taliaferro and any legal marriage contract.

Throughout the South slave owners used a variety of methods to solemnize marriage between their slaves. Southern masters fully understood that stable marriages between slaves were likely to produce children, which would increase the wealth of the master. Thus, they often provided ceremonies for marriages. It was quite common, for example, for ministers to perform marriages for slaves. Like a Justice of the Peace, ministers had the power to perform marriages. This does not mean, however, that such marriages between slaves were legally binding marriages, or that by allowing their slaves to marry before a minister or a Justice of the Peace, masters de facto freed their slaves. Thus, a serious understanding of the law of slavery undermines the claim that the marriage performed by Taliaferro signified any change of legal status for Dred or Harriet. They were still slaves, and still subject to the whim of their master, who could have sold them apart, and thus ended their marriage, as many slave owners did.

More significantly, in the spring of 1837, Dr. Emerson was transferred to Jefferson Barracks in St. Louis, but left Dred and Harriet at Fort Snelling, where they were hired out. Under the laws of the free states, and even under the laws of a number of slave states, the hiring of a slave in a free state *did* constitute an emancipation, because under precedents dating from the English case of *Somerset v. Stewart*,[24] decided in 1772, slavery could only exist by positive law, and without positive law, slaves taken to a free state became free.[25] Thus, even if Emerson might have claimed an exemption from federal law while he was at Fort Snelling, on the grounds that as an Army officer he was not only entitled to a servant, but expected to have one, he could certainly not argue that as an officer he was entitled to rent out a slave in a territory where slavery was banned under federal law, while he was not in that territory.

After a brief stay in St. Louis, the Army sent Emerson to Fort Jessup in Louisiana. There he met and married Eliza Irene Sanford in the spring of 1838. Immediately Emerson sent word to Fort Snelling, ordering the Scotts to come to Louisiana, to be servants in his new marital household. Dred and Harriet dutifully responded, traveling almost the entire length of the Mississippi river to reach their owner and his new wife. This is perhaps the most astounding aspect of the saga of Dred Scott. No historian has been able to explain why the Scotts would have traveled, on their own, more than a thousand miles, to reach Louisiana. They might have left their steamboat in St. Louis and melted into the large free black community there. They might have landed in the free state of Illinois and made their way north and east to freedom. They might have stopped off in the Iowa territory, where Quaker

---

[24] 98 Eng. Rep. 499, 510 (K.B. 1772).

[25] For a detailed discussion of slaves gaining their freedom through transit or residence in a free state, see FINKELMAN, AN IMPERFECT UNION, *supra* note 21.

Communities would have welcomed them. If the Scotts thought they were free, it makes no sense that they dutifully went to the deep South when Emerson commanded them to do so. The only plausible explanation is that the Scotts believed they were slaves and had no desire to live the life of fugitives. Perhaps they expected Emerson to free them at some point. Perhaps they just found their service to him to be a better alternative to fending for themselves as runaway slaves in a world where even free blacks had few rights.

In any event, the Scotts reached Louisiana in the Spring of 1838, but the following fall Emerson, his wife, and his slaves, went back to Fort Snelling. On this journey, Harriet Scott gave birth to Eliza Scott, while on board a boat north of Missouri, between the free territory that later became Iowa and the free state of Illinois. In the spring of 1840 the whole entourage returned to St. Louis, and then Dr. Emerson went on to Florida to serve in the Second Seminole War. In the fall of 1842 Emerson returned to St. Louis and left the Army. The following spring he moved to Davenport, in the Iowa Territory, where he died in December 1843.[26]

In 1846 Dred tried to purchase his freedom from Emerson's widow, but she had no interest in giving up her slaves. Thus, on April 6, 1846 Scott sued for his freedom, and that of his family. The suit was based on his residence in Illinois and the Wisconsin Territory, her residence in the Wisconsin Territory, and Eliza's birth in a free territory and subsequent residence in the Wisconsin Territory. While the suit was pending Harriet Scott gave birth to her second daughter, Lizzie. In June 1847 the case finally went to court, but Scott lost because he failed to provide a witness to prove that the defendant, Mrs. Emerson, was actually Dred Scott's owner. As Don E. Fehrehbacher noted in his prize winning study of the case, "[t]he decision produced the absurd effect of allowing Mrs. Emerson to keep her slaves simply because no one had proved they *were* her slaves."[27] In December, the judge who heard the case granted the Scotts a new trial, but Mrs. Emerson appealed this ruling to the Missouri Supreme Court. In March 1848 the Missouri Supreme Court upheld the order granting the Scotts a new trial.[28] The case was docketed for early 1848, but was postponed because of a huge fire in St. Louis as well as a cholera epidemic. Meanwhile, Irene Emerson moved to Springfield, Massachusetts, and left her business and legal affairs in the hands of her brother, John F.A. Sanford. In January 1850 *Scott v. Emerson* finally reached the St. Louis Circuit Court, where a jury of twelve white men concluded that Dred, his wife, and his children were entitled to their

[26] See FINKELMAN, *supra* note 17, at 17–20; and DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 239–49 (1978). Fehrenbacher won the Pulitzer Prize for History in 1979 for this book.

[27] FEHRENBACHER, *supra* note 26, at 254.

[28] Emmerson v. Harriet, 11 Mo. 443 (Mo. 1848) and Emmerson v. Dred Scott, 11 Mo. 413 (Mo. 1848).

freedom. Sanford, acting on behalf of his sister, appealed to the Missouri Supreme Court.

Under existing precedents, this should have been an easy victory for Scott's lawyers. Starting in 1824 the Missouri Supreme Court had consistently ruled that slaves gained their freedom through residence in free states.[29] In 1836, while Dred Scott was at Fort Snelling, the Missouri Court ruled that military officers were *not* exempt from the law of the free states, and that if an officer brought his slave to a free state or territory, that slave became free.[30] By 1850 the state supreme court had reached a similar decision in at least a dozen cases.[31] Scores of slaves had been emancipated in St. Louis in cases similar to Dred Scott's.[32] Thus, Dred Scott's victory should have been affirmed.

But, it was not. By 1852, when the case finally reached the Missouri Supreme Court, a sea change had taken place in state politics. An elected Supreme Court had replaced an appointed one, and two of the three justices were aggressively proslavery. Thus, in *Scott v. Emerson*, the Missouri Supreme Court reversed the lower court, and twenty-eight years of precedents.[33] The Scotts' hopes for freedom were once again dashed. In a frankly political opinion, Chief Justice William Scott declared:

> 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 consequences 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.[34]

The decision by the Missouri Supreme Court probably came as a relief to both Emerson's widow, Irene, and her brother, John Sanford. After nearly six years, the case seemed finally over. But it was not.

In November 1850 Irene Emerson had married Dr. Calvin C. Chaffee, a Springfield physician with antislavery leanings who would later serve in Congress as a Know Nothing (1855–1857) and as a Republican (1857–1859). Although no longer in Missouri, Irene Emerson had remained the defendant in Dred Scott's freedom suit before the Missouri state courts. Her brother continued to act on her behalf in defending the case. With the case finally settled by the Missouri Supreme Court, Irene

---

[29] Winny v. Whitesides, 1 Mo. 472, 475 (Mo. 1824).

[30] Rachael v. Walker, 4 Mo. 350, 354 (Mo. 1836).

[31] FINKELMAN, AN IMPERFECT UNION, *supra* note 21, at 217–28.

[32] David Thomas Konig, *The Long Road to* Dred Scott*: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53, 56 (2006).

[33] *See* Scott v. Emerson, 15 Mo. 576, 585 (Mo. 1852).

[34] *Id.* at 586.

cut her ties to Dred Scott and either sold him or transferred her ownership to her brother, who was a prosperous business man in New York City, but with extensive family and professional ties to St. Louis. This set the stage for a federal court case. In 1854 Scott's newest lawyer, Vermont-born Roswell Field, took over the case.[35] Field conceived a rather brilliant strategy—to bring the case into federal court under diversity jurisdiction as set out in Article III of the United States Constitution. Field argued that Scott was a free person and as such was a "citizen" of Missouri and thus entitled to sue Sanford, a citizen of New York, in federal court. Field's position assumed two points that were as yet unproved: first, that Scott was indeed free, and second, that *if* free, he was also a citizen of Missouri.

By suing in diversity—a suit between citizens of different states—Scott's lawyer assumed the outcome of the case—that Scott was actually free. This was not unusual. In freedom suits Southern state courts regularly accepted a legal fiction that the plaintiff was "free" and therefore had standing to sue. If the court ultimately ruled against the slave plaintiff, the jurisdictional issues disappeared because the defendant continued to own the slave. This is in fact what had happened in Dred Scott's cases in Missouri. However, in these state cases the second issue—the claim of "citizenship"—never arose. A black did not need to be a "citizen" of a state to sue in state court. He or she only had to be "free." But this was not true in federal court. For Scott to sue in federal court, under diversity jurisdiction, the Court had to accept the argument that a free black living in Missouri was a citizen of that state, and implicitly, a citizen of the United States.

Although a citizen of New York, Sanford continued to exert control over the Scotts. He also continued to defend the case, because the Scott family constituted a valuable asset. Since early in the litigation, Scott had been in the immediate custody of the sheriff of St. Louis County. The sheriff had been renting Scott and his family out, collecting the rent, and holding the money in escrow until the case was finally settled. By this time a tidy sum of money had accumulated.[36] The winner of the case—either Scott or his owner—would get this money once the case was finally settled. If the Scotts won, they would also become free.

Thus, in 1854 Scott sued John Sanford in United States Circuit Court for battery and wrongful imprisonment. Scott asked for $9,000 in damages. This complaint—and the claim of damages—was essentially a legal fiction, designed to bring the issue of Scott's freedom into federal court with enough of a damage claim to allow an appeal to the Supreme Court. Scott's goal was not substantial monetary damages, but only a token sum, which would prove that he was free. Scott's suit was against

---

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

[36] *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 21, at 274–76, and FINKELMAN, *supra* note 17, at 23.

John Sanford, because at this point Sanford was the one holding Scott in slavery. Historians disagree over whether this was because Irene (Emerson) Chaffee had sold or given Scott to Sanford, or because Sanford was simply acting as her agent.[37] The historical debate is of little importance. Scott sued Sanford, and Sanford never denied he was the appropriate party to be sued. Instead, he responded to the suit. Sanford knew that he was the one holding Scott in slavery. If Scott was legitimately free, Sanford was wrongfully imprisoning him. Scott did not *need* to sue Sanford to get diversity because if Sanford did not own the Scotts, his sister Irene did; and as Irene Emerson Chaffee, she was now a citizen of Massachusetts.

John Sanford responded to the new federal case by denying that the federal courts had jurisdiction over the parties because whatever he was—whether slave or free—Dred Scott could not be a citizen of Missouri. To challenge the court's jurisdiction Sanford filed a plea in abatement, asserting: "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."[38] U.S. District Judge Robert W. Wells rejected Sanford's plea, essentially concluding that *if* Dred Scott was free he must be a citizen of the state where he lived. Wells was not advocating black equality—he was after all, a slave owner originally from Virginia. But he did believe that free blacks were entitled to at least some minimal legal rights, including the right to sue in a federal court. In other words, Judge Wells believed that if Scott was free he could sue in federal court to determine if Sanford had illegally harmed him. In reaching this conclusion, Wells did not declare that Scott, or any free black, was entitled to full legal, social, or political equality in Missouri or anywhere else in the country. Wells merely held that the term "citizen" in Article III of the Constitution was equivalent to a free—non-slave—full-time resident or inhabitant of a state. If Dred Scott was in fact not a slave, then he met this minimal criterion and was a "citizen" solely for the purpose of suing in federal court.

By rejecting Sanford's plea in abatement, Judge Wells forced Sanford to defend himself on the merits of the case. Sanford responded with a series of pro forma pleas that responded in kind to Scott's pro forma complaint. Scott claimed Sanford had illegally restrained him of his liberty and committed assault and battery on him. Sanford responded that he had not unlawfully harmed Scott. Sanford did not deny that he had "gently laid his hands upon" Scott and his family. Sanford admitted that he had "restrained them of their liberty," but he asserted "he had a right to do" this because Scott was his slave.[39] In essence, Sanford

---

[37] *See, e.g.*, FEHRENBACHER, *supra* note 26, at 272–74.

[38] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 396–97 (1857).

[39] FEHRENBACHER, *supra* note 26, at 279 (quoting Missouri U.S. Circuit Court records).

admitted that he had done all the things of which Scott complained, although with a "humane" spin on the facts. But Sanford argued he was entitled to treat Scott in this manner because he legally owned Scott.

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.[40] If an Illinois court previously declared Scott free, then the result would have been different. Judge Wells might then have held, under the Full Faith and Credit Clause of the Constitution, that Missouri was obligated to recognize the judicial proceedings that had emancipated Scott. But no such proceeding had in fact ever taken place in Illinois or in the Wisconsin Territory. Thus, Scott and his family remained slaves.

Dred Scott then appealed to the U.S. Supreme Court, arguing that under the Missouri Compromise, the Wisconsin Enabling Act, and other federal and territorial laws he was free. Because he won the case, Sanford appealed nothing. Thus, the jurisdictional question—whether blacks could be citizens for purposes of diversity—was not technically before the Supreme Court. However, courts always have the right, indeed the obligation, to question their own jurisdiction. In doing so, Chief Justice Taney ruled that blacks, even if born free, could never be citizens of the United States and thus never sue in federal court. The way Taney framed the issue in his opinion indicates his determination to use the case to decide the status of blacks in America. Taney wrote:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[41]

In answering this question Taney used some of the most racist language in American jurisprudence, arguing that at the Founding blacks were either all slaves or, if free, without any political or legal rights. He declared that blacks

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

---

[40] *Id.*

[41] *Scott*, 60 U.S. at 403.

> authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[42]

According to Taney, blacks were "so far inferior, that they had no rights which the white man was bound to respect."[43] Thus, he concluded that blacks could never be citizens of the United States, even if they were born in the country and considered to be citizens of the states in which they lived. Taney in effect argued that the Constitution created a kind of dual citizenship—state and federal—and that while the states might be free to make anyone a citizen, federal citizenship was limited only to whites because it was impossible for Taney to imagine that the southern founders of the nation would have agreed to the Constitution if blacks were to be citizens.

Taney also held that Congress did not have the power to ban slavery in the territories because its power to regulate the territories was limited to only setting up a basic structure of government. Otherwise, the territories would be treated like colonies, which Taney argued ran counter to the fundamental nature of American history. Thus, Congress did not have the power to ban slavery in the territories. Finally, Taney also argued that, even if Congress could regulate the territories it could not ban slaves because slaves were a constitutionally protected form of private property, and indeed a specially protected form of property. He argued the Bill of Rights applied to Federal territories—that in effect the Constitution "followed the flag"[44]—and thus:

> 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.[45]

The racism of the decision and its proslavery implications have consigned Taney's opinion to infamy in constitutional law. Abraham Lincoln's incisive criticism of the opinion in his debates with Stephen A. Douglas in 1858 and the following two years have further made the case an anathema for constitutional law scholars. Thus its characterization as a "self-inflicted wound"[46] and a "ghastly error."[47]

---

[42] *Id.* at 404–05.

[43] *Id.* at 407.

[44] The Supreme Court would reach a completely different conclusion in the *Insular Cases* after the Spanish American War. Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Dowdell v. United States, 221 U.S. 325 (1911). For a short summary of all these cases, see PAUL FINKELMAN & MELVIN I. UROFSKY, LANDMARK DECISIONS OF THE UNITED STATES SUPREME COURT 131–32 (2003). More recently, the Court has at least determined that the Constitution has followed the flag at least ninety miles—to the U.S. military base at Guantanamo. *See* Rasul v. Bush, 542 U.S. 466 (2004) and Hamdan v. Rumsfeld, 548 U.S.(2006).

[45] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

[46] HUGHES, *supra* note 5, at 52–54. Hughes considered the other cases to be *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), and *Pollock v. Farmers' Loan & Trust*

III: A PLAUSIBLE ARGUMENT FOR SANFORD IN THE CONTEXT OF 1857 AND THE PROSLAVERY CONSTITUTION OF 1787

From the perspective of modern scholarship, however, it is not unreasonable to ask if the case was in fact correctly decided. To ask this question is not to defend Taney's racism. Nor is it an argument in favor of slavery. This argument does rest in part on the conclusion of many modern scholars, that the Constitution of 1787 was, whether we like it or not, a document that protected slavery in a variety of ways. This argument also recognizes that from the 1790s until 1860 most of the policies of the national government favored slavery and abetted its expansion. This was especially true from 1821 until Lincoln took office in 1861.

The rest of this Article suggests, in the form of an expert report, how the Court might have reached the same result that Chief Justice Taney reached—and why perhaps the result was constitutionally correct—without relying on racism or aggressively proslavery thought. This is not an exercise in counterfactual history, or pseudo "what if" history. Rather, it is an argument based on the history and context of the times, and based on legal arguments and theories that were available and understood in 1857, when the U.S. Supreme Court decided the case. It is important in thinking about this historical argument to remember that *Dred Scott* was argued before the adoption of the Fourteenth Amendment provided a constitutional definition of citizenship. In 1857 there was no clear definition in the Constitution of what constituted American citizenship. Indeed, the definition of citizenship found in the Fourteenth Amendment was a direct response to *Dred Scott* and an emphatic reversal of Chief Justice Taney's holdings on citizenship.

As noted at the beginning of this Article, this expert report was initially prepared for a mock trial held at Harvard Law School in the spring of 2007 before a panel of federal judges, chaired by Justice Stephen Breyer.

IV. EXPERT REPORT

1. This case presents two major questions: 1) Was the decision by Chief Justice Taney in 1857 inevitable? 2) Was Chief Justice Taney's decision constitutionally correct, or at least constitutionally defensible?

2. Taney's decision involved three separate legal issues: 1) jurisdiction and Dred Scott's standing to sue; 2) the meaning of the Territories Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 2; and 3) the relationship of the Fifth Amendment to slavery in the territories.

Co., 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 the *Legal Tender Cases*. 79 U.S. (12 Wall.) 457 (1870). *Pollock* declared the federal income tax law to be unconstitutional. It was effectively reversed by the Sixteenth Amendment.

[47] BICKEL, *supra* note 6, at 41.

Tied to all these issues is a fourth issue about the nature of the U.S. Constitution: Was the Constitution a proslavery compact that provided special protection for slavery?

3. To answer the two major questions of "inevitability" and "correctness" I have set out eight separate legal issues (A-H) that can be understood through the lens of history. My last question (I) is not technically legal, but is central to the history of this case.

> A. Assuming that Dred Scott has a claim to freedom, as an African American, does he have standing to sue in U.S. courts under diversity?
>
> B. Can Congress regulate the territories under Article IV, Section 3, Clause 2 of the Constitution, which gives Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States?"
>
> C. If Congress can pass "needful rules" for the territories, may Congress ban slavery in the territories?
>
> D. In the Missouri Compromise and other statutes, did Congress actually intend to emancipate slaves with bans on slavery in the territories?
>
> E. May Congress, by a mere statute banning slavery in a territory, emancipate a slave brought into that territory?
>
> F. If Congress did not intend to free any slaves with the Northwest Ordinance or the Missouri Compromise, or if Congress is precluded from freeing slaves by mere statute, what was the practical effect of the ban on slavery in the Missouri Compromise?
>
> G. Did the antebellum U.S. Constitution specifically protect slavery, and did that protection extend to the federal territories?
>
> H. Was the State of Missouri obligated to recognize Dred Scott's freedom if he was entitled to freedom while living in the Wisconsin Territory?
>
> I. Given the make-up of the Supreme Court in 1857, was the outcome inevitable?

A. Assuming that Dred Scott Has a Claim to Freedom, as an African American Does He Have Standing to Sue in U.S. Courts Under Diversity?

4. Jurisdiction in this case is based on diversity. Dred Scott claims to be free and thus a citizen of Missouri, and therefore entitled to sue John Sanford, a citizen of New York. To sustain this, Scott would need to prove that free blacks living in Missouri are citizens of that state. Clearly, as I demonstrate below, this is not the case. Dred Scott, even if free, is not a citizen of Missouri, and thus not able to sue in diversity.

5. Dred Scott was able to sue for his freedom in a Missouri state court because Missouri does not require that plaintiffs or defendants in its courts be citizens of that state or of any state. Any *free* person, including aliens, had access to the courts of Missouri. In the state court Scott asserted his freedom, and the courts allowed that suit to go forward on the ground that *if* free, he had standing to sue in Missouri courts. He won his freedom before a jury in St. Louis, which followed long-standing precedent that Missouri slaves gained their freedom if their masters brought them to free jurisdictions. This decision was entirely based on state law. On appeal, the Missouri Supreme Court reversed the state's common law on this issue, and in *Scott v. Emerson*, 15 Mo. 576 (1852), determined that Dred Scott was still a slave. The issue of citizenship was irrelevant to the jurisdictional issues in this suit. This case was argued and decided entirely on state grounds, and Scott's lawyers apparently raised no federal questions in the Missouri courts.

6. Scott then brought a new case in the U.S. Circuit Court for the District of Missouri under diversity jurisdiction. Here he asserted that he was entitled to freedom under federal law (the Missouri Compromise), and that *if* free, he was a citizen of Missouri and could sue John Sanford in diversity because Sanford was a citizen of New York. Diversity jurisdiction is based on Art. III of the Constitution: "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States." U.S. CONST. art. III, § 2, cl. 1. The language here is clear. Only citizens of states can sue in diversity.

7. In his plea in abatement John Sanford argued that blacks could never be citizens of the United States and thus never sue in diversity. Sanford did not base his plea in abatement on Scott's status as a slave, but on his race. The U.S. Circuit Judge, Robert Wells, who heard the case, rejected Sanford's plea, allowed the case to go forward, but then sided with Sanford on the merits. Scott appealed the outcome of the case, but not the jurisdictional ruling. Since Sanford won the case, he did not appeal any aspect of the case. Nevertheless, in his "Opinion of the Court" in *Dred Scott v. Sandford*, Chief Justice Taney revisited the jurisdictional question and accepted Sanford's argument that blacks could *never* be citizens of the United States. Taney's position is overbroad and incorrect on historical grounds. 60 U.S. (19 How.) 393, 404–05 (1857). As Justice Curtis pointed out in his dissent, free blacks were citizens of a number of states at the time of the founding. They could vote on the same basis as whites in New York, Pennsylvania, New Jersey, North Carolina, Massachusetts, New Hampshire, and the soon-to-be fourteenth state, Vermont. At least one African American, Wentworth Cheswill, had held public office in New Hampshire by this time. Surely only a citizen of a state could hold public office in the state. ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619–1895: FROM THE COLONIAL PERIOD TO THE AGE OF FREDERICK DOUGLASS 437–38 (Paul Finkelman ed., 2006).

8. Chief Justice Taney was also incorrect in asserting that the right to sue in diversity depends on United States citizenship. In his opinion

Chief Justice Taney claimed that diversity jurisdiction required that citizens suing in diversity had to be citizens of the United States, and that there is a single standard for what constitutes a United States citizen. The U.S. Constitution gives no hint of what constitutes U.S. citizenship, short of birth in the United States or naturalization. The Constitution allows Congress to create a uniform rule for naturalization, but does not otherwise define citizenship. With the exception of the qualifications for various offices, almost all references to citizenship in the Constitution are references to *state* citizenship. Except for holding federal office, rights of citizenship are vested in individuals through their state citizenship. Thus, the only relevant question for diversity jurisdiction, in 1787 or 1857, is whether a person was a citizen of a state. A state citizen could sue in diversity. In 1857, just as today, someone who was not a citizen of a state could not sue in diversity.

9. Under the antebellum Constitution each state was empowered with the right to decide who was a citizen and who was not. Similarly, each state determined what the qualifications were for voters or office-holders. Article I of the Constitution, for example, states that the right to vote for a U.S. Congressman is based on the right to vote for members of the state legislature. U.S. CONST. art. I, § 2. Free blacks who could vote for members of state legislatures in New York, Massachusetts, or North Carolina in 1787 must have been citizens of their states and of the United States. Otherwise, we would have a situation where people who are not citizens of the United States, and according to Chief Justice Taney *could never be* citizens of the United States, were able to vote in congressional elections and for members of the electoral college in presidential elections. The Constitution, contrary to Chief Justice Taney's argument, does not use race as a qualification for citizenship, although the states are free to do so. Clearly Chief Justice Taney is wrong in saying that no black can be a citizen of a state or of the United States.

10. However, the relevant question here is not who might be a citizen of the United States. It is in fact a quite narrow question: even if he was a free man under Missouri law or was entitled to freedom under either federal law or Missouri law, was Dred Scott a citizen of Missouri?

11. The Missouri Constitution of 1820 does not define who is a citizen of that state. However, in referring to the right to hold office, the right to vote, and other rights and privileges of citizenship, the Constitution persistently uses the term "free white," as in "the number of representatives" in the legislature will be apportioned "according to the number of free white male inhabitants," or that officeholding will be restricted to "free white male[s]." MO. CONST. art. III, §§ 3–6 (1820). The franchise is also restricted to someone who is a "free white male citizen of the United States." MO. CONST. art. III, § 10 (1820). This language concedes (as Chief Justice Taney does not) that there might be free black citizens of the United States, but they are not considered citizens of Missouri. Amendment III to the state constitution, ratified in 1848–1849, apportioned representation according to "the number of free white

inhabitants of the State." MO. CONST. amend. III (1820). Significantly, this language eliminated the word "male," thus basing representation on the entire free white population, including white aliens who would be eligible for citizenship in the future. However, blacks, whether slaves or free, were not counted for representation in the state legislature under the state constitution because they were not considered to be part of the citizenry. They were not *represented* in the legislature. That is because in Missouri, blacks, free or slave, were not citizens of the state and could never become citizens. Thus they were not entitled to be "represented" in the legislature.

12. The statutes of Missouri also show that free blacks were not considered citizens in that state. "An act more effectively to prevent free persons of color from entering into this State, and for other purposes," prohibited free blacks from entering the state, and provides for their expulsion for a first offense and imprisonment if they returned. Act of Feb. 23, 1843, 1843 Mo. Laws 66, "An Act Concerning Free Negroes and Mulattoes" required free blacks legally residing in the state to procure licenses to remain there. 1845 Mo. Laws 392, § 7. "An Act Respecting Slaves, Free Negroes and Mulattoes" made it a crime to teach a free black to read and also prohibited free blacks from migrating to the state. 1847 Mo. Laws 103. The year Chief Justice Taney decided this case Missouri reiterated its policy by providing immediate imprisonment or fines for any free blacks entering the state, except those working on steamboats. Act of March 3, 1857, 1857 Mo. Laws 82–83. It would be possible to provide many more examples of such harsh laws regulating the lives of free blacks in Missouri. Clearly, however, the laws discussed above are sufficient to show that in 1857 Dred Scott could never be considered a citizen of Missouri, even if free.

13. Chief Justice Taney was incorrect in asserting that blacks could not be citizens of the states for diversity purposes. However, Dred Scott could not have been a citizen of Missouri. Nor could he be considered a citizen of Virginia, where he was born a slave. Whether free or not, he was not a citizen of any state. Thus, the jurisdictional issue was not only inevitable, but properly settled. Under our Constitution, in 1857, citizenship (except for naturalized immigrants) was left entirely to the states. Dred Scott was clearly not a citizen of Missouri, and Chief Justice Taney was on strong legal ground in denying him the right to sue in federal court under diversity jurisdiction.

14. As an aside, it is theoretically possible that Dred Scott might have avoided this jurisdictional issue by seeking a direct appeal from the decision of the Missouri Supreme Court on the ground that the Missouri Supreme Court had misconstrued various federal statutes, including the Missouri Compromise of 1820 and the Wisconsin Enabling Act. Act of April 20, 1836, ch. 54, 5 Stat. 10. However, Scott's attorneys failed to raise these federal questions, and the Missouri Supreme Court ultimately decided the case entirely on state law grounds, thus precluding a direct appeal to the U.S. Supreme Court. Had Scott followed this route,

however, and avoided the jurisdictional issue, the outcome of the case, as I outline below, would have been the same.

B. Can Congress Regulate the Territories Under Article IV, Section 3, Clause 2 of the Constitution, Which Gives Congress Power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States?"

15. In his opinion of the Court, Chief Justice Taney argued for an absurdly narrow reading of the Territories Clause of the Constitution, which gives Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. Taney argued that this clause only applied to the territories owned by the United States in 1787. Taney argued 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.

Dred Scott v. Sandford, 60 U.S. (19 How.) 394, 432 (1857).

16. In his Pulitzer Prize winning study of the case, Don 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." FEHRENBACHER, *supra* note 26, at 367. Indeed, Taney's argument here is absurd and cannot be taken seriously.

17. From almost the beginning of the nation, Congress continually passed elaborate statutes for the regulation of the territories. Under this clause, Congress purchased Louisiana from France and created territorial governments in the region. Congress similarly acquired and governed Florida and later annexed Texas.

18. Some of these acts acquiring new territories and governing them were passed and signed into law by legislators and presidents who were themselves Founders. It is simply impossible to argue, as Taney did, that Presidents Washington, Adams, Jefferson, Madison, Monroe, John Quincy Adams, and Jackson acted unconstitutionally in signing such laws and appointing officials to govern the territories. It is equally important to note that in the first three decades under the Constitution no one in Congress, including the many framers who served in the House and Senate, questioned the power of Congress to pass all "needful" rules for governing the territories. Similarly, in his concurring opinion, Justice John Catron rejected Chief Justice Taney's claim that Congress could not pass laws to regulate the territories. Catron noted that:

> It is due to myself to say, that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

Dred Scott, 60 U.S. at 522–23.

19. While Taney's position on the territories question has no basis in history or the law of the time, the constitutionality and interpretation of the Missouri Compromise's ban on slavery in the territory north and west of Missouri remains open.

C. If Congress Can Pass "Needful Rules" for the Territories, May Congress Ban Slavery in the Territories?

20. From the beginning, Congress regulated slavery in some territories. The Northwest Ordinance was initially passed by the Congress under the Articles of Confederation and then re-enacted by the first Congress. Congress allowed slavery in the Southwest territories and what became the states of Louisiana and Florida. The history of the early nation is clear: Until the debate over the Missouri Compromise, no one doubted that Congress could ban or allow slavery in the territories. Chief Justice Taney's assertion that Congress has no power to regulate slavery in the territories simply has no basis in the history of the new nation or in the text of the Constitution.

21. Congress may regulate slavery in the territories because Congress has an obligation to protect the property of settlers in the territories. As I outline below, Chief Justice Taney was correct in arguing that slavery was a form of privately held property that has special constitutional protection. Thus, Chief Justice Taney cannot be correct that Congress lacks the power to regulate slavery in the territories. On the contrary, it would seem that it has not only the power, but at least in some circumstances has an obligation to regulate and *protect* slavery in the territories. Otherwise, slave owners would be effectively barred from settling in federal territories because without laws, including a fugitive slave law and a slave code, it would be impossible to maintain slavery in the territories. Clearly Congress must be able to protect the property of settlers in the territories, especially slave property. Furthermore, if Congress can ban slavery from the territories, as it did in the Northwest Ordinance, then under the Constitution, Congress can, and should, provide for the return of fugitive slaves from the territories, as in fact it did in the Northwest Ordinance.

D. In the Missouri Compromise and Other Statutes, Did Congress Actually Intend to Emancipate Slaves with Bans on Slavery in the Territories?

22. While Congress banned slavery in the Northwest Territory, there is no evidence that Congress intended the ban to actually emancipate any slaves or take slaves from any owners. As I demonstrate in Chapters 2 and 3 of my book, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, FINKELMAN, *supra* note 19, after the adoption of the Northwest Ordinance, the United States government made no attempt to actually free any slaves in the territories.

23. Slavery and bondage lingered in present-day Indiana throughout the territorial period. Slave owners there included Indiana Territorial Governor William Henry Harrison and various other officials. In addition to slaveholding, many migrants brought slaves with them as "indentured servants," whose indentures ran for as long as ninety-nine years. Human bondage was rampant in the Indiana Territory. FINKELMAN, *supra* note 19, at 37–57.

24. Slavery continued throughout the territorial period and existed in Indiana at the time of statehood. In 1820, four years after statehood, the Indiana Supreme Court ruled, in *State v. Lasselle*, 1 Blackf. 60, 62 (Ind. 1820), that all slaves in the state were free under the 1816 Constitution. A year later, in *In re Mary Clark*, 1 Blackf. 122, 126 (Ind. 1821), the same court held that adult blacks could not be held as indentured servants in Indiana. These two cases brought an end to all bondage in Indiana. Significantly, slavery in Indiana ended through the implementation of the state's first constitution. The Northwest Ordinance had not freed a single slave in Indiana.

25. In 1809 Congress divided Indiana into two territories: Indiana and Illinois. The new Illinois Territorial Governor, Ninian Edwards, brought his slaves into the territory. At the time of statehood, in 1818 there were about 1,200 slaves and blacks held in bondage under long-term indentures. The 1818 Illinois Constitution provided: "Neither slavery nor involuntary servitude shall hereafter be introduced into this state otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." ILL. CONST. art. VI, § 1 (1818). The provision said nothing about freeing those blacks already in the state who were held in bondage. The constitution also allowed slaves to be brought into the state for up to a year to work in the salt mines at "Shawneetown." ILL. CONST. art. VI, § 2 (1818). Finally, the constitution confirmed existing indentures, even if they were for life, and required the registration of blacks held in bondage. ILL. CONST. art. VI, § 3 (1818). Bondage and slavery continued in Illinois until the 1847 constitution finally banned all slavery in the state. ILL. CONST. art XII, §16 (1847).

26. Like the Northwest, Congress banned slavery in the territories north of Missouri in the Missouri Compromise. But we know that blacks, including Dred Scott and Harriet Robinson (who became his wife), were held in bondage there. No federal officials at Fort Snelling attempted to

free Scott or Robinson. On the contrary, military and civilian officers, including Lawrence Taliaferro, the Indian Agent stationed near Fort Snelling, held slaves in the Wisconsin Territory, despite the Missouri Compromise. Congress never lifted a finger to stop this practice and never authorized any process to emancipate slaves brought into the territory. The executive branch likewise did not stop the practice of owning slaves in the territory.

27. The history of territorial bans on slavery is that they may have discouraged slave owners from moving into the territories, but they did not actually liberate any slaves.

28. More importantly, neither the executive branch nor Congress attempted to use the statutes to free any slaves in the territories. Furthermore, with the exception of one failed attempt in the early Northwest Territory, no territorial government official tried to free slaves. On the contrary, territorial governors and territorial legislatures persistently petitioned Congress to allow slavery in the Northwest. While Congress never acted on these petitions, neither did Congress or the executive branch take steps to end slavery in the territories.

29. The logical conclusion from this history is that whatever the bans on slavery meant, they were not intended to actually liberate people brought into the territories. Territorial officials never tried to free slaves. At Fort Snelling, military and civilian officials of the U.S. government did not take steps to secure Dred Scott's freedom. On the contrary, federal officials allowed him to be treated as a slave, and even allowed him to be rented out to various whites while his owner (Dr. John Emerson) was elsewhere.

E. May Congress, by a Mere Statute Banning Slavery, Emancipate a Slave Brought into the Territory?

30. In his Opinion of the Court, Chief Justice Taney asserts that freeing a slave for merely bringing the slave into a federal territory would be a taking in violation of the Fifth Amendment.

31. It is clear, as set out in part C of this report, that neither Congress nor the executive branch ever attempted to use bans on slavery to emancipate slaves. Slaves brought into federal territories where slavery was prohibited by federal law were *never* declared free by federal courts.

32. Fifth Amendment jurisprudence was underdeveloped in 1857. It is hard to know what "takings" meant at the time. But surely, if takings meant anything, it meant, as the Court set out in *Calder v. Bull*, that:

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislature power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature

> (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority.

3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted).

An example of such a law, according to Justice Samuel Chase would be "a law that takes property from A. and gives it to B." *Id.* If the plaintiff's contention is correct, then the federal government took Captain Emerson's property from him, merely because Captain Emerson brought that property into the Wisconsin Territory. In effect this would be taking from A to give to B. This is precisely the kind of law that Justice Chase finds to be incompatible with a Republican form of government. Alternatively, freeing Dred Scott through the mere passage of a law would constitute a taking of private property "for public use," which would require some form of due process hearing and "just compensation." U.S. CONST. art. V.

33. After the Revolution, five states adopted gradual abolition laws. These laws freed no slaves then living in these states. Rather, the laws only mandated that the children of all slave women would be born free, subject to an indenture. These states understood that however wrong slavery might be, it was equally wrong to take property away from bona fide owners with a mere statute. Two other states, Massachusetts and New Hampshire, ended slavery through their constitutions, as did the fourteenth state, Vermont. These emancipations were part of the organic law of the states, and by definition, could not be "unconstitutional." The history of these laws suggests the strong respect the Founding generation had for private property—even property in slaves. Thus, the strongly antislavery legislatures in New England and the Middle Atlantic states refused to free slaves outright by statute because it would violate fundamental principles of law. Privately held property was not subject to seizure or dissolution by statute.

34. The first Congress was equally protective of private property. Thus, the Fifth Amendment to the U.S. Constitution prevents the government from taking property from someone "without due process of law." The Amendment further provides that "private property [shall not] be taken for public use without just compensation." U.S. CONST. art. V.

35. The statutory interpretation suggested by Dred Scott violates the principles that the legislature cannot take property from A and give it to B. If the Missouri Compromise operated to take property from a property owner, merely because the owner brought that property into a federal territory, then it would seem the law operated arbitrarily and in violation of basic principles of both the Constitution and natural law. Such a takings would also violate the Fifth Amendment. Chief Justice Taney's holding on this point is clearly correct as a matter of mid-nineteenth century constitutional jurisprudence. This is especially true if, as I will discuss in part G of this report, slavery was a constitutionally protected form of property.

36. Even if Congress did have the power to ban slavery in the territories and also had the power to emancipate slaves brought into the territories, Dred Scott could not be deemed free merely by his master taking him to the territory. The most minimal notion of due process required that Scott ask a court to free him, and that his owner have a right to contest that freedom. Dr. Emerson might have had a legitimate claim that as an Army officer he was exempt from the Missouri Compromise because he was not a permanent resident of the territory. Because the Army has always allowed officers to bring slaves with them as servants, Emerson may have been exempt from any operation of the Compromise. These were issues and claims that could only be settled as courts interpreted what the Missouri Compromise actually meant and required. Indeed, any person bringing a slave into the territory would have had at minimum, a right to defend his property claim in a court.

F. If Congress Did Not Intend to Free Any Slaves with the Northwest Ordinance or the Missouri Compromise, or if Congress is Precluded from Freeing Slaves by Mere Statute, What Was the Practical Effect of the Ban on Slavery in the Missouri Compromise?

37. What then, did the ban on slavery in the Missouri Compromise actually mandate or require? This is not an easy question to answer because there was no litigation or explication on the meaning of the Compromise before *Dred Scott v. Sandford* when the Court held it unconstitutional. However, on the theory that a court should do its best to interpret a statute in a way that presumes its constitutionality, there are a few ways of thinking about the Compromise.

38. The ban on slavery in the Missouri Compromise surely prohibits the creation of a slave system there. The territorial government, for example, might have been debarred from passing a territorial slave code. The government might pass laws banning the sale of slaves. It might pass a law allowing anyone held in bondage to seek freedom under the old common law action through a writ of homine replegiando. Laws such as these would not violate the Fifth Amendment because they would not deny masters due process.

39. The ban on slavery in the Compromise might also be seen as allowing, or requiring, the territorial government to expel slaves from the territory. Thus, someone like Dr. Emerson might be warned that he had to remove his slave, or face the loss of the slave.

40. But, the ban on slavery might also have been interpreted to allow some flexibility. For example, a master with slaves in his possession traveling from eastern Missouri to western Missouri might have found it convenient or necessary to travel in the territory north of the state of Missouri, in the area that became Iowa. Similarly, a master traveling from Missouri to Texas might have had the right to pass through present-day Kansas or Nebraska with his slaves. A court might legitimately have concluded that while slavery as an institution could not be established in

the territory that later became Iowa or Kansas, a master did have a right of transit to cross the territory with his slaves. For example, in 1799 New York had allowed visiting masters to keep their slaves in the state for up to nine months, but not keep them there permanently. A reasonable interpretation of the Missouri Compromise might have been that no new slaves could be brought into the territory by settlers planning to live there. The test of freedom for a slave would be the master's "intention to reside." Under this test, a military officer, living in the territory for a short time, would be able to keep a slave. Such an "intentionality" test would have also avoided the arbitrary and unconstitutional nature of the takings aspects of the law, if the law meant what Dred Scott claims it meant. Masters moving into the territory would be on notice that they could not keep slaves in the territory if they ceased to be in transit, and actually took up residence in the territory, voting in territorial elections, or buying property in the territory.

41. It would also be reasonable to simply conclude that the ban on slavery in the Missouri Compromise is unconstitutional because it would operate as a "takings," as John Sanford contends in this case.

42. This conclusion is bolstered when we consider the special place slavery has in the American constitutional order.

G. Did the Antebellum U.S. Constitution Specifically Protect Slavery and Did That Protection Extend to the Federal Territories?

43. An understanding of the way in which the Constitution of 1787 protected slavery is central to evaluating the *Dred Scott* decision. Because the Constitution specifically protected slavery—unlike any other form of property—it is reasonable to argue that the thrust of Chief Justice Taney's opinion was correct: Slave property commands special constitutional consideration. It would take many pages to set out fully the arguments on this issue, so I will be briefly outline them. For a complete discussion of this issue, with full citations to primary sources, I refer the Court to chapter one of my book *Slavery and the Founders: Race and Liberty in the Age of Jefferson.* FINKELMAN, *supra* note 19, at 3, and to my article, *The Founders and Slavery: Little Ventured, Little Gained.* 13 YALE J. L. & HUMAN. 413, 425–31 (2001).

44. The word "slavery" did not appear in the original U.S. Constitution. This is not, as some people have argued, because the Founders were "embarrassed" by slavery or because they assumed it would soon disappear. At the Philadelphia Convention delegates from the South made it clear that slavery was not going to disappear. Throughout the debates delegates referred to slaves and "Negroes." In the end the delegates kept the word "slave" out of the Constitution because they believed this was necessary to help gain support for the Constitution in the North. During a debate over the slave trade clause, Gouverneur Morris proposed that the clause specifically use the term "slave." Connecticut's Roger Sherman, who voted with the Deep South to

allow the trade, objected to the term slave, declaring he "liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people." George Clymer of Pennsylvania "concurred" with Sherman. In the North Carolina ratifying convention, James Iredell, who had been a delegate in Philadelphia, explained that "The word *slave* is not mentioned" because "the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned." FINKELMAN, *supra* note 19, at 6. Thus, southerners avoided the term because they did not want to unnecessarily antagonize their colleagues from the North. As long as they were assured of protection for their institution, the southerners at the Convention were willing to do without the word "slave." *Id.* The issue here was not that slavery was wrong, but that using the word might harm ratification in New England and Pennsylvania, where many voters believed slavery was wrong. *Id.*

45. The Constitution specifically protected slavery in a number of places. Among other things, the Constitution:

> (A) Gave the slave states extra representatives in Congress for their slaves, U.S. CONST. art. I, § 2, cl. 3;
>
> (B) Guaranteed that the federal government would suppress slave rebellions and slave insurrections, U.S. CONST. art. I, § 8, cl. 15 and U.S. CONST. art. IV, § 4;
>
> (C) Guaranteed that the African slave trade could not be abolished until at least 1808, U.S. CONST. art. I, § 9, cl. 1 and U.S. CONST. art. IV;
>
> (D) Prohibited taxes on exports, thus preventing both the states and federal government from indirectly taxing slavery by taxing the export crops of the South, which at the time were the most important exports produced in the nation, U.S. CONST. art. I, § 9, cl. 5 and U.S. CONST. art. I, § 10, cl. 2;
>
> (E) Counted slaves in determining presidential electors, thus giving the slave states extra influence in electing presidents, U.S. CONST. art. II, § 1, cl. 2 (Without these extra electors the slave-holding Thomas Jefferson would never have been able to defeat the non-slave-holding John Adams in the 1800 election);
>
> (F) Protected the right of a master to recover a fugitive slave who escaped to a free state, U.S. CONST. art. IV, § 2, cl. 3; and
>
> (G) Made it structurally impossible to end slavery through a constitutional amendment by requiring that three-fourths of the states ratify any amendment. U.S. CONST. art. V. Had the fifteen slave states that existed in 1861 remained in the Union, and continued to support slavery, *to this day* those states would be able to block a constitutional amendment to end slavery.

46. In addition to the many protections of slavery in the Constitution, the structure of the document prevented any end to slavery

by Congress. The government created in 1787 was one of limited powers and no one at the time believed Congress had any power to regulate the domestic institutions of the states. Thus, when South Carolina's delegate General Charles Cotesworth Pinckney returned from the Convention he bragged to his state's House of Representatives: "We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states." FINKELMAN, *supra* note 19, at 9. Similarly, at the Virginia ratifying convention, Edmund Randolph, who was also a delegate to the Philadelphia Convention, denied the Constitution posed any threat at all to slavery. He challenged opponents of the Constitution to show, "*Where* is the part that has a tendency to the *abolition of* slavery?" He answered his own question asserting, "Were it right here to mention what passed in [the Philadelphia] convention . . . I might tell you *that the Southern States, even South Carolina herself, conceived this property to be secure*" and that "there was not a member of the Virginia delegation who had *the smallest suspicion of the abolition of slavery*." *Id.* at 10.

47. Slavery is the only form of property specifically protected by the Constitution. These protections were built into the Constitution because everyone understood that slaves were a unique and peculiar form of property. Southern delegates also understood that some Northerners wanted to destroy slavery. During one heated debate Pierce Butler of South Carolina declared that, "The security the South[er]n States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do." FINKELMAN, *supra* note 19, at 20. Southern delegates and their many northern allies made sure that the Constitution prevented this.

48. We should not be shocked that the Constitution protected slavery. Next to real estate, slaves were the most valuable form of privately held property in the United States in 1787. Many of the most prominent leaders of the Revolution were slaveholders, including George Washington, General Charles Cotesworth Pinckney, Henry "Lighthorse Harry" Lee, Thomas Jefferson, Patrick Henry, and George Mason. Key figures at the Constitutional Convention were also slaveowners, including James Madison, Edmund Randolph, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler, George Mason, James Iredell, and the presiding officer of the Convention, George Washington. We should hardly be surprised that these national leaders protected their most valuable and troublesome form of property.

49. Given the proslavery nature of the Constitution, Chief Justice Taney was correct in asserting that slave property was protected by the Fifth Amendment, and that taking slaves away from people entering the territories would violate the letter and the spirit of the U.S. Constitution. Even the leading abolitionists of the day recognized that the Constitution was a proslavery compact, what William Lloyd Garrison called a

"covenant with death" and "an agreement with Hell." FINKELMAN, *supra* note 19, at 3. We may not like that analysis, but it was clearly correct and thus, Taney's decision was a logical implementation of it.

H. Was the State of Missouri Obligated to Recognize Dred Scott's Freedom if He Was Entitled to Freedom While Living in the Wisconsin Territory?

50. Even if Congress did have the power to ban slavery in the territories, and even if those laws allowed for the emancipation of slaves brought into those territories, Missouri was under no obligation to enforce those laws. The general principle of American law at the time was that, with the exception of fugitive slaves, each state had the power to determine the status of people within its jurisdiction. The Supreme Court affirmed this in *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851).

51. In *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (K.B. 1772), Lord Chief Justice Mansfield held that a slave brought into England was entitled to a writ of habeas corpus, and could not be held in England against his will. Thus, any master bringing a slave into England risked losing that slave, *if* the slave asserted his or her right to freedom. However, the case did not mandate that all slaves in England were immediately free.

52. In *The Slave, Grace*, 2 Hag. Adm. 94 (1827), Lord Stowell ruled that a slave who had lived in England, but did not assert her claim to freedom there, could not later claim freedom in a court outside of England. This is precisely the situation of Dred Scott. He may have had a claim to freedom while at Fort Snelling, but he failed to assert that claim at that time, and instead returned to Missouri, apparently without any coercion from his master. Indeed, at one point Dred and Harriet Scott traveled alone from Fort Snelling to Louisiana, where Captain Emerson had been posted. This illustrates their voluntary return to a slave jurisdiction and their abandonment of any claim to freedom.

53. Had Dred Scott vindicated his freedom while in Illinois, where he also lived, the Missouri courts, under Full Faith and Credit, would be obligated to respect this result. But, Scott did seek his freedom while at Fort Armstrong in Illinois. Similarly, had the Scotts won their freedom while in the Wisconsin Territory, Missouri would be obligated, by comity and by the Supremacy Clause, U.S. CONST art. VI, cl. 2, to respect the judgment of federal territorial court. But, since there was no judgment granting the plaintiffs their freedom in any court, Missouri was not obligated to recognize some inchoate right to freedom Dred Scott might have had in either Illinois or the Wisconsin Territory.

I. Given the Make-up of the Supreme Court in 1857, Was the Outcome Inevitable?

54. In 1857, 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 slave owner 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.

55. However, this geographic balance was deceptive. Only two of the justices—Daniel and Curtis—had been appointed by Northern presidents. The rest had been appointed by Southern, slaveholding presidents. Moreover, of the four Northerners, only one, McLean, was a known opponent of slavery. Within days of his inauguration, Jackson nominated McLean to the Supreme Court. McLean was never really a Jacksonian and quickly gravitated to the Whig Party and ultimately to the Republican Party, which was committed to stopping the spread of slavery into the territories. As an Ohio Supreme Court Justice he had expressed his distaste for slavery,[48] and almost immediately after joining the Court he wrote concurrences and dissents designed to protect the North from the aggressively proslavery Court and a national government dominated by southern slaveholders and their northern doughface allies.[49] By 1850, McLean was the Court's only Justice openly hostile to slavery. By 1856 he was a leading candidate for the Republican presidential nomination, and would have the second most votes at that Party's convention.

56. Although from Massachusetts, Curtis was not even moderately antislavery. As a young lawyer Curtis had unsuccessfully defended the rights of slave owners in *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (Mass. 1836), the most significant Northern case on the precise issue of *Dred Scott*—whether a slave became free when a master voluntarily brought him into a free state. For the rest of his career, Curtis was tied to the conservative Cotton Whigs in Massachusetts. His brother was a United States Commissioner under the Fugitive Slave Law of 1850. His eventual dissent in *Dred Scott* probably surprised most people in Massachusetts who knew him. However, while most Republicans cheered the dissent, it was not motivated by hostility towards slavery or sympathy for the Free Soil arguments of the Republican Party. Rather, it was a conservative response to what Curtis saw as Taney's radical and dangerous departure from the long-standing spirit of compromise over slavery found in the Whig Party and most of the Democratic Party.

57. The other two Northerners on the bench—Nelson and Grier—were typical Northern Democrats who regularly genuflected towards slavery. Because the national Democratic Party was controlled by the

---

[48] *See* Ohio v. Carneal *in* OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823 133, 135 (Ervin H. Pollack ed., 1952). *See also* Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. (forthcoming 2009).

[49] See the McLean concurrences and dissents in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 503 (1841) (McLean, J., concurring); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 660 (1842) (McLean, J., dissenting); *Strader v. Graham*, 51 U.S. (10 How.) 82, 97 (1850) (McLean, J., concurring); and *Moore v. Illinois*, 55 U.S. (14 How.) 13, 21 (McLean, J., dissenting) (1852).

Southern majority within the Party, most Northern Democrats—such as Nelson and Grier—always supported slavery and were known, insultingly, as "doughfaces"—Northern men with Southern principles. Nelson and Grier could be counted on to support slavery, along with the five Southerners on the Court. Nelson and Grier hoped for a moderate opinion, upholding Scott's status as a slave, but not dealing with either the Missouri Compromise or the status of free 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.

58. The other five members of the Court were Southerners with strong personal and family ties to slavery. Chief Justice Taney came from a wealthy and well-connected Maryland family that made its fortune in landholding, slaves, and tobacco planting. 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 five-year term in the Maryland Senate. During this period he began to manumit his own slaves, not out of any hostility to slavery, but because he apparently had no need for them. His failure to sell his slaves suggests that as a young man he may have had some moral qualms about trafficking 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 a seething, angry, uncompromising supporter of the South and slavery and an implacable foe of racial equality, the Republican Party, and the antislavery movement.

59. In the early 1830s, as Attorney General under President Andrew Jackson, Taney argued that blacks in the United States had no political or legal rights, except those they "enjoy" at the "sufferance" and "mercy" of whites. Foreshadowing his later *Dred Scott* opinion, 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 of right." CARL BRENT SWISHER, ROGER B. TANEY 154 (Archon Books 1961) (1935). 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 Attorney General Taney asserted, "They [blacks] were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term *citizens*." *Id.* Thus, although not a slave owner, Chief Justice Taney was a longtime opponent of any rights for free blacks and a committed friend of slavery.

60. The other Southerners on the Court were universally supportive of slavery. They differed only on the margins. Justice Wayne was a firm supporter of slavery but was also a committed nationalist and an advocate of a strong federal government. In that respect he reflected the politics of his patron, Andrew Jackson. Wayne understood that the Constitution

protected slavery, and thus he correctly equated federal power and a strong national government with support for the South's most important economic and social institution. When his home state of Georgia seceded in 1861, Wayne, the proslavery nationalist, remained on the federal bench.

61. Catron was a moderate proponent of national power because it could protect the South from Northern antislavery forces. Like Wayne, Catron would remain on the bench when his home state of Tennessee left the Union in 1861. Justice Campbell was deeply committed to states' rights, while Justice Daniel was fanatical in his support of slavery and states' rights, and in his opposition to black rights. In 1861 Campbell would leave the Court to join the Confederacy. Daniel died in 1860 but certainly would have joined the Confederacy had he been alive.

V. JUSTICE CURTIS'S DISSENT

The Court's vote in *Dred Scott* was 7 to 2. Justice John McLean and Justice Benjamin R. Curtis wrote long and impressive dissents. For reasons that have more to do with politics than legal or historical analysis, Justice Curtis's dissent became an instant favorite of the opponents of Chief Justice Taney's opinion. The seventy-two-year-old McLean was by this time a moderate opponent of slavery. He had dissented in the overwhelmingly proslavery decision of *Prigg v. Pennsylvania*,[50] and his dissent here was not unexpected. McLean was also an active Republican, who had been a candidate for his party's nomination in 1856 and still hoped to be nominated in 1860.[51] Leading Republicans, who had their own candidates for 1860, or were themselves candidates, were thus cautious about making too much of McLean's quite admirable effort. Thus, for example, while the Republican editor, Horace Greeley, published copies of the Curtis dissent to stimulate support for Republicans, he did not print and distribute the McLean dissent because he did not want to bolster McLean's presidential ambitions.

Curtis, on the other hand, was a well-known conservative who had never shown any interest in antislavery. As noted above, as a young lawyer he had defended the right of a visiting southerner to bring a slave into Massachusetts. His arguments in that case, *Commonwealth v. Aves*,[52] would have been appropriate for defending Dr. Emerson's right to bring Dred Scott into Illinois or the Wisconsin Territory. Thus, his dissent could hardly have been anticipated. His stinging rebuke of Taney was a pleasant surprise to opponents of slavery and supporters of the power of Congress to prohibit slavery in the federal territories.

---

[50] 41 U.S. (16 Pet.) 539, 658 (1842).

[51] 2 JAMES T. HAVEL, U.S. PRESIDENTIAL CANDIDATES AND THE ELECTIONS 30 (1996). Abraham Lincoln was one of the candidates for the vice presidential nomination.

[52] 35 Mass. (18 Pick.) 193 (Mass. 1836).

But, was Curtis on strong legal or historical ground? Curtis is clearly correct that at the time of the Founding blacks were citizens of a number of states. I make this point in the expert report at paragraphs 7–9 and 13. On this point, Chief Justice Taney's argument is unpersuasive. Thus, the Court, following Curtis, ought to reverse that portion of Chief Justice Taney's opinion which denies that blacks can be citizens of the United States for purposes of diversity jurisdiction. But, as I note in paragraphs 10–12 of the expert report, free blacks have never been considered citizens of Missouri or Virginia. Thus, Dred Scott, even if entitled to be free, cannot sue in diversity as a citizen of a state because he is not a citizen of the state in which he resides, Missouri, and he is not a citizen of the state in which he was born, Virginia.

Justice Curtis tried to avoid this issue by arguing that the question of standing to sue was not legitimately before the court because no one had appealed it. Thus, he tried to duck the issue by simply asserting that it is not

> within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it.[53]

The problem, of course, is that a court's jurisdiction is *always* legitimately before a court, and need not be raised by any of the litigants. No one, for example, argued in *Marbury v. Madison*,[54] that the court had no jurisdiction to hear the case. Chief Justice Marshall, however, ruled on that ground, and decided the case accordingly.

Justice Curtis also argued that Scott was a citizen of the United States because "the free native-born citizens of each State are citizens of the United States," and "[t]hat as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States."[55] However, this only proves, once again, that Chief Justice Taney was wrong on whether blacks could be citizens of the United States. It does not prove that Dred Scott or Harriet were citizens of the United States or any particular state, because neither was a "free native-born citizen," nor were Dred or Harriet "free colored persons born within some of the States."[56] Rather, both were born slaves. Presumably, (short of amending the Constitution) the only way a non-citizen can become a citizen is by naturalization. Clearly, neither Dred Scott nor Harriet were naturalized citizens. Justice Curtis notes that "the naturalization laws apply only to white persons."[57] Thus, Dred Scott is not

---

[53] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 590 (1857)(Curtis, J., dissenting).

[54] 5 U.S. (1 Cranch) 137 (1803).

[55] *Dred Scott*, 60 U.S. at 588.

[56] *Id.* at 588.

[57] *Id.* at 586.

a citizen of the United States any more than he is a citizen of Missouri. Other free blacks, born in states like Massachusetts, might be free citizens of their state and the nation, but the Virginia-born *slave*, Dred Scott, is not a citizen of the United States or any state.

Justice Curtis also makes much of the fact that Dred Scott and Harriet Robinson were "married" by the Indian agent—Harriet's owner at the time—in Fort Snelling. He argues they were "lawfully" married in the Wisconsin Territory.[58] But, the evidence of this is not entirely clear. That they had a ceremony does not mean they were legally married. It only means that, like most slave owners, Dr. Emerson believed that there should be some ceremonial aspect to Dred Scott's union with Harriet. This ceremony does not prove, as Curtis asserts, that "they were absolutely free persons, having full capacity to enter into the civil contract of marriage."[59] Millions of slaves were married by ministers throughout the South, and those ministers had the full legal capacity to perform marriages between free people. The marriages for slaves were, *in form*, just like the marriages for free people. But, in substance, they were not bona fide marriages.

After their marriage Dred and Harriet were hired out to people at Fort Snelling, never paid wages, and worked as unfree laborers. They then went to Louisiana when Dr. Emerson summoned them to come. They then returned to Fort Snelling with Dr. Emerson, and then later went back to Missouri with him. At no point did they claim to be free, ask any court to adjudicate their freedom, or in any way act like free people. Even if they were free in Fort Snelling, the act of twice returning to a slave state at the command of Dr. Emerson suggests that they waived any claim to freedom. Significantly, when Dr. Emerson went to Louisiana, he left Dred and Harriet at Fort Snelling and then later summoned them to come to Louisiana. They were not under the direct control of Emerson at the time, but without demanding wages, or in any other way asserting their freedom, they dutifully obeyed Emerson's command, and traveled to him to resume their lives as his slaves.

VI. CONCLUSION

The Taney Court has been chastised for issuing a "political" decision that was outside the acceptable boundaries of American law and politics. Such a criticism is historically untenable.

In 1820 Congress banned slavery in the territory north and west of Missouri, along the 36° 30′ line. From that point until the decision in this case Congress never again placed any significant restriction on slavery in the territories. Nor did Congress restrict the creation of new slave states.

In 1845 Congress annexed Texas, bringing into the Union what some have called "An Empire for Slavery." The law providing for the

---

[58] *Id.* at 599.
[59] *Id.*

annexation of Texas allowed the state to be subdivided into as many as five states at some time in the future, thus giving the slave states the expectation of up to ten new slave state senators.

In the Compromise of 1850, Congress allowed slavery in the newly acquired territories of the Mexican Cession. Some of these territories were north of the 36° 30° line, where slavery was banned under the Missouri Compromise. This was the first important modification of the Missouri Compromise.

In 1854 Congress passed the Kansas–Nebraska Act, which allowed slavery in almost all of the existing western territories, and thus repealed the Missouri Compromise for most of the remaining federal territories. The Nebraska Territory included not only Kansas and Nebraska, but the present day states of North and South Dakota, Wyoming, Montana, and part of Colorado. Thus, after 1854 slavery was allowed in all of the federal territories *except* present-day Minnesota, Idaho, Oregon, and Washington. In 1856 the Republican Party ran on a platform dedicated to repealing the Kansas–Nebraska Act. Running a popular national hero, John C. Frémont, the new party won eleven states, but failed to win either a popular or an electoral majority. This showed that the majority of voters in the nation were comfortable with allowing slavery in the territories. Rather than being out-of-step with the politics of the time, Chief Justice Taney's decision appeared, at the time, to simply finish off the job of opening the territories to slavery that Congress had started with the annexation of Texas and continued with the Mexican Cession, the Compromise of 1850, and the Kansas–Nebraska Act.

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. Given the make-up of this Court, the decision upholding Dred Scott's status as a slave was surely inevitable. Moreover, given the history of the writing of the Constitution, the importance of slavery to the American economy, the specific protections for slavery found in the Constitution, and the politics of the era, this decision was also probably correct.