

THE *DRED SCOTT* DECISION AND ITS REPUDIATION

ONE HUNDRED AND FIFTY YEARS AGO TODAY – on March 6, 1857 – the Supreme Court of the United States decided the case of *Dred Scott v. Sandford*,¹ and denied freedom to a family of slaves living in Missouri before the American Civil War. *Dred Scott* is today almost universally condemned; almost every unflattering thing that could be said about it has been said about it. One writer has done us a favor by compiling many of them:

“...the worst [decision] ever rendered by the Supreme Court[,]”...“the worst constitutional decision of the nineteenth century,” “the worst atrocity in the Supreme Court’s history,” “the most disastrous opinion the Supreme Court has ever issued,” “the most odious action ever taken by a branch of the federal government,” a “ghastly error,” “a tragic failure to follow the terms of the Constitution,” “a gross abuse of trust,” “a lie before God,” “an abomination,” and “judicial review at its worst.”...In the words of former Chief Justice Charles Evans Hughes, the *Dred Scott* decision was a “self-

¹ 60 U.S. (19 How.) 393 (1857). The name of the defendant was actually John *Sanford*, not *Sandford*. The misspelling was the result of a clerical error that was never corrected by the Supreme Court.

inflicted wound” that almost destroyed the Supreme Court.²

***Dred Scott*, as a shorthand term for the worst kind of judicial decision, has long served a purpose in politics. If a particular decision is deemed offensive by one political group or another, it can usefully be labeled as “another *Dred Scott*.” Both the right and the left on the political spectrum have engaged in this sort of shorthand.³**

² Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press: Cambridge, 2006), at 15-16 [internal footnotes and references omitted]. One clarification should be made about Charles Evans Hughes’ famous description of *Dred Scott* as a “self-inflicted wound[.]” The relevant comment appears in his *The Supreme Court of the United States: Its Foundation, Methods and Achievements* (Columbia University Press: New York, 1928), consisting of lectures Hughes delivered at Columbia University when he was not the Chief Justice nor on the Court at all. Hughes had been Associate Justice of the Supreme Court from 1910 to 1916, when he stepped down to run for President. He was appointed as Chief Justice in 1930, two years after his book appeared. See http://supreme.lp.findlaw.com/supreme_court/justices/pastjustices/hughes.html, last visited January 26, 2007. A few minutes with Google will confirm the author’s observation about adjectives currently applied to *Dred Scott*. As of November, 2006, the decision had been called “infamous,” 9810 times; “notorious” 225 times; “dreadful” 45 times; “racist” 42 times; “shameful” 11 times; “horrendous” 29 times; “horrible” 15 times; and “hideous” twice. As of January, 2007, the case had been referred to as “odious” 15 times. It was referred to as “controversial” 107 times, but the word “controversial” might mean almost anything, as could “problematic,” which was used twice. More positive references were: “landmark,” used 100 times, and “much-maligned” – a term which implies some sympathy – used only once. I searched for uses of other possible positive descriptions for the decision – such as “unfairly criticized,” “unjustly maligned,” “correctly decided,” “authoritative,” and “well-reasoned,” among others – but found none of them. I found the word “wonderful” applied to the *Dred Scott* decision once, but I believe that was supposed to be sarcasm.

³ In contemporary America, it is more common for the right than for the left to speak in this way, and what we frequently encounter is comparisons between *Dred Scott* and *Roe v. Wade*, the 1973 abortion decision. In fact, *Dred Scott* made an intriguing appearance in one of the presidential debates in October, 2004, during which the president pledged not to appoint anyone to the Supreme Court who would render another decision like *Dred Scott*. See http://vienna.usembassy.gov/en/us/pres_debate2.htm, last visited November 24, 2006. For a liberal writer’s summary of conservative commentary making the comparison, see Timothy Noah, *Why Bush Opposes Dred Scott*, <http://www.slate.com/id/2108083/>, last visited July 6, 2006. For a conservative law professor’s condemnation of both *Dred Scott* and *Roe v. Wade*, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011 (2003). Those on the left have not been quite as active in the recent past in comparing a disfavored decision with *Dred Scott*. But in the early decades of the 20th Century, while the Supreme Court was in the habit of invalidating federal and state social legislation – often dealing with employees’ wages, hours, and working conditions – the left would invoke *Dred Scott* as frequently as the right does today. When, in 1935, the Supreme Court invalidated a federal law requiring pensions for railway employees, [*Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240 (1935)], law professor and future Supreme Court Justice Felix Frankfurter condemned it as “A *Dred Scott* Decision,” in an unsigned editorial in *The New Republic* magazine which he co-authored with a colleague at Harvard Law School. See “A *Dred Scott* Decision,” *The New Republic*, May 22, 1935, at 34-35, discussed (and the authors identified) in William E. Leuchtenburg, *The Supreme Court Reborn* (Oxford University Press: New York and Oxford, 1995), at 45-46 and fn. 31 thereto. When

It is not my purpose today to compare *Dred Scott* to any other decision. I will leave to my audience to decide whether anyone is correct today or was correct yesterday in comparing disfavored opinions to *Dred Scott*. I do not believe that *Dred Scott* is bad because it is like some other decision which is bad. I do not believe it is awful by analogy. I believe it is awful all on its own.

I. THE DECISION

Once in a while it is possible to encounter someone who is willing to defend the Supreme Court’s decision in *Dred Scott*,⁴ but that occurs only once in a very *great* while. As we all know, the conventional wisdom about something can be wrong, so frequently that the term “conventional wisdom” is often used only sarcastically. But the conventional wisdom about *Dred Scott* is right: the decision was and remains a judicial abomination. I am not condemning the decision because it violates *current* standards not applicable at the time it was rendered. Rather, it was an abomination under the standards applicable in 1857. So that you will know why I think so, let me discuss what the case dealt with and what it decided. First, let me dispel some possible misconceptions about the case. *Dred Scott* was not a case about whether

other decisions striking down New Deal legislation were rendered, other commentators often compared them to *Dred Scott*. William E. Leuchtenburg, *The Supreme Court Reborn*, *supra* at 97, 105, and 123.

⁴ Some of such people are cranks. Thomas J. DiLorenzo, an economist by trade, published an attack on Abraham Lincoln in which he commented on the *Dred Scott* decision, although the text of his work showed that he had little idea what the case actually held. In *The Real Lincoln* (Three Rivers Press: New York, 2003), at 123, DiLorenzo wrote: “The 1857 *Dred Scott* decision had just ruled that slavery was constitutional and that the document would have to be amended in order to end slavery.” But not all are cranks. A reputable and careful scholar, Mark A. Graber, has just published a work entitled *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press: Cambridge, 2006), contending that *Dred Scott* is defensible. I cannot now undertake a review of that argument, but I believe it to be mistaken – mistaken in interesting and instructive ways, but mistaken nonetheless.

the Constitution allowed states to have slavery if they wanted. The decision was handed down in 1857, before the Civil War, before the Emancipation Proclamation, and before the Thirteenth Amendment outlawing slavery. No one involved in the *Dred Scott* case disputed the fact that the Constitution recognized the existence of slavery. *Dred Scott* was also not a case of a fugitive slave. No one ever contended that Dred Scott or any of his family had run away; he and his family went where their master told them to go and stayed where their master told them to stay.

Here are the facts about the slave family that turned to both the state and federal judicial systems in their hopes of gaining freedom, and about what happened afterwards. In the first part of our story, dealing with the decision itself, the prominent actors were Dred Scott and his family, a medical doctor, and a Chief Justice of the United States. In the second part of our story, dealing with the repudiation of that decision, the prominent actors were a second medical doctor and a second Chief Justice.

Dred Scott was an African-American slave owned, at one time, by a man named Peter Blow, who in 1830 moved to St. Louis, Missouri.⁵ When Peter Blow arrived in St. Louis, he had a household consisting of his wife, Elizabeth Blow, their seven children, and six slaves.⁶ Peter

⁵ Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford University Press: Oxford and New York, 1978), at 239. Fehrenbacher won the Pulitzer Prize in History for this work, and deservedly so; it is a model of thorough historical analysis. Anyone who wishes to understand the *Dred Scott* decision would do well to start with a reading of the decision itself, followed immediately by a reading of Fehrenbacher.

⁶ *Id.*

Blow, who died just two years after moving to St. Louis,⁷ sold one of his slaves before he died, and after he died, another slave, named “Sam,” was sold to satisfy creditors of Peter’s estate.⁸

Here we encounter the first of the two doctors prominently involved in the story I am telling today. This doctor was a slaveholder. Dr. John Emerson, also a resident of St. Louis, bought one of Peter Blow’s slaves – it is unclear whether it was Sam or the other slave – and the slave known to us as “Dred Scott” is the one Dr. Emerson bought.⁹ A copy of a portrait of Dred Scott is included in your materials as Exhibit A.

Dr. Emerson was originally an Easterner and had graduated from the University of Pennsylvania medical school in 1824. He arrived in Missouri in 1831 and shortly afterwards was hired as a civilian doctor at Jefferson Barracks in St. Louis.¹⁰ Later he was able to receive a commission as an Army surgeon. Throughout his nine years in the Army,¹¹ he must have driven his superiors to distraction. Emerson never seemed to be happy.¹² He was constantly complaining about

⁷ *Id.*

⁸ *Id.* at 240.

⁹ *Id.* According to one of the Blow family, however, Dr. Emerson bought Dred Scott from Peter Blow, not from Peter’s estate. “On June 30, 1847, Henry Taylor Blow testified in Dred Scott’s circuit court trial for freedom that Peter Blow sold Scott to Dr. Emerson. Emerson’s attorneys did not object to this testimony or cross-examine Blow on its accuracy, so it is probable this is the manner in which the ownership of Dred Scott passed to Dr. Emerson.” <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp>, last visited February 2, 2007.

¹⁰ Don E. Fehrenbacher, *supra* note 5, at 242.

¹¹ He entered the Army in 1833 and left the service in 1842. Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857* (University of Georgia Press: Athens (Ga.) and London, 2006), at 141-142.

¹² He was “a poor physician and a chronic malcontent.” Peter Irons, *A People’s History of the Supreme Court* (Penguin: New York, 1999 [rev. 2006]), at 158.

various maladies, ranging from syphilis to rheumatism to some unspecified liver disorder.¹³ No matter where he was posted, he appears to have complained about it. In 1833 the Army sent him to Ft. Armstrong, at Rock Island, Illinois, to which he moved along with his slave, Dred Scott.¹⁴ Emerson stayed at Ft. Armstrong for two and a half years, during which time he kept Dred Scott in bondage despite Illinois' laws against slavery. The Army closed Ft. Armstrong in 1836 and ordered Emerson to Ft. Snelling, in what was then part of Wisconsin Territory but was reorganized into Iowa Territory two years after Dr. Emerson arrived there. (It is now part of Minnesota.¹⁵) Both Wisconsin and Iowa Territories were in the northern part of the Louisiana Purchase, obtained by the United States from France in 1803, and by virtue of the Missouri Compromise of 1820, they were free territory – that is, free from slavery. The Missouri Compromise was an arrangement involving separate pieces of legislation, in which Congress admitted Missouri to the Union as a slave state, admitted Maine as a free state, and prohibited slavery in the Louisiana Territory north of Missouri's longest southern boundary. (Included in your materials as Exhibit B is the portion of the Missouri admission bill that prohibited slavery in the northern part of the Louisiana Territory.) Thirty-four years later, in 1854, Congress repealed the prohibition against slavery north of the southern Missouri boundary in the infamous Kansas-

¹³ Don E. Fehrenbacher, *supra* note 5, at 243-245.

¹⁴ Austin Allen, *supra* note 11, at 141.

¹⁵ *Id.* Specifically, it is in St. Paul. See <http://www.mnhs.org/places/sites/hfs/index.html>, last visited February 2, 2007. See also <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp>, last visited February 2, 2007.

Nebraska Act that ignited a firestorm of protest in the North and, as we will see, the *Dred Scott* decision had something to say about the Missouri Compromise. However, throughout Dr. Emerson's lifetime, the Missouri Compromise line separating freedom from slavery remained in effect.

While Dr. Emerson and Dred Scott were at Ft. Snelling, Dred Scott married a woman named Harriet Robinson, who may or may not have ever been a slave,¹⁶ but she certainly came to be regarded as one and Emerson was considered her legal owner.¹⁷

In 1837, Dr. Emerson had registered enough complaints to get a reassignment to Jefferson Barracks in Missouri, but he didn't take his two slaves along when he went back; he hired them out, leaving them in Wisconsin territory. Shortly after Dr. Emerson arrived back at Jefferson Barracks, he received orders for Ft. Jesup, Louisiana.¹⁸ After reaching Ft. Jesup, Emerson discovered that he hated the place and repeatedly complained about it to the Army, but at least one good thing happened to him while he was there – he met and married Eliza Irene Sanford (usually called by her middle name, Irene) in early 1838. He sent for Harriet and Dred Scott, who made the journey from free territory to slave state later that year.¹⁹

Still later in 1838, Dr. Emerson's constant complaining paid off and he received a transfer back to Ft. Snelling in free Wisconsin

¹⁶ See Lea VanderVelde and Sandhya Subramanian, "Mrs. Dred Scott," 106 YALE L. J. 1033 (1997).

¹⁷ The precise circumstances of this change in ownership are not entirely clear. <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp>, last visited February 2, 2007.

¹⁸ Don E. Fehrenbacher, *supra* note 5, at 244.

¹⁹ *Id.* at 245.

territory. John and Irene Emerson, as well as their slaves, Harriet and Dred Scott, traveled back to Ft. Snelling. During the trip, Harriet gave birth to a daughter, Eliza, on a steamer proceeding north up the Mississippi River, in free territory.²⁰ Another daughter, Lizzie, was born later, in Missouri. The Emersons and the Scotts remained together at Ft. Snelling until 1840, when Dr. Emerson was transferred to Florida. He did not take his wife or slaves with him; they stayed in Missouri, in northern St. Louis County, where Irene Emerson's father had a plantation.²¹

While in Florida, Emerson continued his complaining ways. He told his superiors he was ill with a remittent fever. He asked for a transfer back to Ft. Snelling, or anywhere with a "cold climate." He wrote the Surgeon General to complain that two junior officers had received better assignments than he, and he wanted some time off to pursue further studies so that he could get a promotion. His superiors obviously decided that they had had enough of Dr. Emerson, and so, relying on a reduction in force order, the Army gave him an honorable discharge in 1842.²² He went back to St. Louis, could not establish a medical practice there, and the following year proceeded to Davenport, Iowa Territory, where he started to set up a practice. His wife, who had not initially gone with him to Davenport, joined him there but only a month later, in December, 1843, John Emerson died.²³ He was 40 years

²⁰ *Id.* at 246.

²¹ <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp>, last visited February 2, 2007.

²² Don E. Fehrenbacher, *supra* note 5, at 247.

²³ *Id.* at 248.

old. After his death, Irene returned to Missouri, where apparently Harriet and Dred Scott had remained. Both before and after the doctor's death, Mrs. Emerson hired them out to various persons.²⁴

On April 6, 1846, Harriet and Dred Scott filed petitions for freedom in the St. Louis County, Missouri, Circuit Court, copies of which are included in your materials, together with transcriptions, as Exhibits C & D. Dred Scott's petition said that he was "a man of color,...claimed as a slave by one Irene Emerson,...widow of the late Dr. John Emerson..." The petition recounted, with some inaccuracy, his travels with Dr. Emerson, and prayed for leave to file a legal action for his freedom.²⁵ Harriet filed a similar petition.²⁶ In each case the circuit judge granted leave to proceed with the action, and in each case the judge ordered that the petitioner "be not subject to any severity on account of [the] application for freedom ." After being allowed to sue, the Scotts filed complaints against Irene Emerson for false imprisonment. (Although Dred Scott and Harriet filed separate actions,²⁷ the parties later entered into a stipulation in the Missouri state court that only Dred Scott's case against Irene Emerson would proceed, with all parties to be bound by the result. Later, when the federal action was filed, it was prosecuted in the name of Dred Scott, as plaintiff, but sought relief for Harriet and Dred Scott and their

²⁴ <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp>, last visited February 2, 2007.

²⁵ Transcribed at http://library.wustl.edu/vlib/dredscott/transcripts/scott_01.html, last visited February 3, 2007.

²⁶ Transcribed at http://library.wustl.edu/vlib/dredscott/transcripts/scott_02.html, last visited February 3, 2007.

²⁷ Separate actions may have been required under the rules of pleading applicable in Missouri at the time. See Don E. Fehrenbacher, *supra* note 5, at 656-657 n. 2.

daughters Eliza and Lizzie.²⁸ It may have been a legal error for Harriet to have dropped her separate actions because there is some reason to believe that she had a stronger case than her husband – for example, if she had been born free in free territory, as may have been the case.²⁹ But their lawyers always treated their cases as if they were the same, without any legal or factual distinctions between them.)

The Scotts' petitions started them on an eleven-year legal odyssey through the state circuit court, the state supreme court, the federal circuit court, and ultimately the United States Supreme Court. Essentially the Scotts, through their lawyers, relied on the legal doctrine, well-established in Missouri when the legal actions were begun, that by taking the Scotts into free territory, Dr. Emerson had emancipated them. Further, under another well-established legal principle, once the Scotts were free, they were always free.³⁰

The Scotts lost their first action in the Missouri state court because of an elementary error committed by their trial counsel. The circuit court judge granted a new trial, and after much delay trial was held and the Scotts won a jury verdict in their favor. Irene Emerson appealed to the Missouri Supreme Court, but the case was again delayed for various reasons. As it happened, the delay worked to the advantage of Mrs. Emerson, because while her appeal was pending an election was held, and the voters changed the makeup of the majority of the Missouri Supreme Court. In 1852, that court issued an opinion

²⁸ Don E. Fehrenbacher, *supra* note 5, at 663 n. 25.

²⁹ See Lea VanderVelde and Sandhya Subramanian, "Mrs. Dred Scott," 106 YALE L. J. 1033 (1997).

³⁰ Peter Irons, *supra* note 12, at 159.

which overturned previously settled law, and held that the status of slavery reattached to the Scotts when they returned to Missouri from free territory. No longer was it the law that once free, forever free. The verdict in favor of Dred Scott was reversed.³¹ No appeal was taken to the U.S. Supreme Court from the Missouri Supreme Court decision.

In 1853, the Scotts brought an action for their freedom in the United States Circuit Court for the District of Missouri against John Sanford, Irene Emerson's brother who either had come to own or claimed to own the Scotts. Sanford resided in New York, and the Scotts remained in Missouri. The Scotts invoked the jurisdiction of the federal court under the diversity of citizenship clause of the Constitution, which states "[t]he judicial Power shall extend...to Controversies...between citizens of different States..."³² Sanford filed a challenge to the court's jurisdiction, on the grounds that the plaintiff's ancestors had been brought to America as slaves, and so he was not a citizen of Missouri. The federal judge overruled the challenge to the court's jurisdiction and allowed the case to proceed. The matter was presented to a federal jury in 1854 on stipulated facts, and the federal judge in essence directed a verdict in favor of Sanford on the merits. Following the verdict, the federal court granted judgment against Dred Scott, and the case went to Washington.

The case came to the United States Supreme Court headed by Chief Justice Roger B. Taney,³³ the first of two Chief Justices involved

³¹ <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp>, last visited February 3, 2007.

³² U.S. CONST. art III, § 2, cl. 1.

³³ The name was pronounced as if it had been spelled "Tawney."

in our story. Taney was from Maryland, born into a prominent and established family in 1777. He had been a successful trial lawyer in his home state while also active in politics. At various times he served in the lower house of the Maryland legislature, in the state senate, and as Maryland's Attorney General. In the 1820's he became a supporter of Andrew Jackson, who won the 1828 presidential election and was reelected four years later. During his first term, Jackson appointed Taney to serve as United States Attorney General, and Taney loyally supported Jackson in his fight against the Bank of the United States, a federally-chartered bank that Jackson contended was an anti-democratic center of power and privilege. At the beginning of Jackson's second term, Jackson appointed Taney as Secretary of the Treasury to help in the battle against the bank. Taney was rejected by the Senate, which at that time contained too many bank supporters, but as Acting Treasury Secretary, Taney carried out his president's wishes to redirect federal deposits to various state banks instead of to the Bank of the United States. In 1835, Chief Justice John Marshall died in office, and Jackson nominated Taney to replace him. The 1834 election having increased the number of Jackson supporters in the Senate, Taney was confirmed in March of 1836.³⁴

It is sometimes said of Roger Taney that he was personally opposed to slavery, and there is some evidence that, during the first half

³⁴ See generally James F. Simon, *Lincoln and Chief Justice Taney* (Simon & Schuster: New York, 2006), at 5-26, and <http://www.treasury.gov/offices/management/curator/collection/secretary/taney.htm>, http://en.wikipedia.org/wiki/Roger_B._Taney, and http://www.oyez.org/justices/justice/?justice=chief-justices/roger_b_taney, all last visited January 18, 2007.

of his life, he held moderately anti-slavery sentiments.³⁵ For instance, in 1819, Taney defended an abolitionist preacher on charges of preaching a sermon designed to incite a slave rebellion. In the course of his successful defense, Taney told the jury that slavery must be gradually “wiped away”.³⁶

Whether Taney continued to hold this view privately is unknown. What is known is that once he ascended to the national political stage, he never gave voice to that belief again and acted contrary to it. As Attorney General, he rendered an opinion that African Americans were not citizens of this country, foreshadowing the decision, more than two decades later, in the *Dred Scott* case.³⁷ And it is to that opinion, which Chief Justice Taney wrote, that we now turn.

There has been a debate among scholars about what the Supreme Court truly held in the *Dred Scott* case, and whether the Chief Justice actually spoke for a majority of the Court. Each justice wrote a separate opinion, concurring in the decision or, in the case of two justices, dissenting from it, and one is free to go through each opinion and count up how many voted for or against one or the other of the conclusions set forth in Taney’s opinion. But I agree with the leading historian of the *Dred Scott* decision, who concluded that the Chief Justice’s opinion should be treated as the opinion of the Court.³⁸ Taney certainly *claimed* that his opinion was that of the Court, and no other justice clearly

³⁵ James F. Simon, *supra* note 32, at 9.

³⁶ *Id.* at 11-12.

³⁷ *Id.* at 16-17.

³⁸ Don E. Fehrenbacher, *supra* note 5, at 333-334.

disputed the claim.³⁹ And the public mind has always *regarded* Chief Justice Taney's opinion as the opinion of the Court.

For all of the length of Taney's opinion – and it covers 55 pages – its main conclusions can be stated relatively briefly. (We will leave aside the Court's holding on a rather arcane issue of procedure which was, by the way, about the only thing the Court got right.) I must warn you that if you have never read the language of Chief Justice Taney's opinion, it is worse than you think. If you have read his language, it is worse than you remember.

The Court held that under the Constitution, African Americans, whether slave or free, were not and could not be citizens of the United States. The Court considered the time period it thought to be relevant, namely, just before and at the time of the ratification of the Constitution, and said that those who wrote and ratified the Constitution never intended to include African Americans within the political community created by it.⁴⁰ The Chief Justice apparently concluded that United States citizenship of both parties was a requirement for the federal courts' exercise of jurisdiction under the diversity of citizenship clause. In the course of his opinion on this jurisdictional issue, Chief Justice Taney said the following, in words of profound ugliness that are still painful to read:

**It is difficult in this day to realize the state
of public opinion which prevailed in the
civilized and enlightened portions of the world**

³⁹ Dissenting Justice Benjamin Curtis hinted at a difference between Taney's *opinion* and the majority's *decision*. "I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case." 60 U.S. (19 How.) at 564 (Curtis, J., dissenting).

⁴⁰ 60 U.S. (19 How.) at 404.

at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They [African Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit....This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute...⁴¹

According to Taney, the federal court had no jurisdiction to entertain Dred Scott's action against Sanford. Despite his determination that the federal court lacked jurisdiction, Taney continued with his opinion, stating that Congress lacked any authority to forbid slavery in federal territories. Specifically, he held unconstitutional the provision of the Missouri Compromise banning slavery in the northern Louisiana Purchase – and that included the area of Ft. Snelling. His primary argument was that the Constitution did not grant Congress any authority to regulate slavery in federal territories, and his secondary argument was that the Constitution affirmatively protected property rights in slaves. He stated:

⁴¹ 60 U.S. (19 How.) at 407.

...[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And 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.⁴²

The Court remanded the case to the trial court with instructions to dismiss for lack of jurisdiction. That order meant that Dred Scott and his family had to remain in slavery. As it happened, however, they were set free. The Blow family – for whom Dred Scott worked before he was sold to Dr. Emerson – bought them and set them free. Unfortunately, Dred Scott fell ill, and he died in September of 1858. It is unclear exactly what happened to his family after his death, but it may be that Harriet and their daughter Eliza died only a few years later. The Scotts’ other daughter, Lizzie, may have lived longer.⁴³

I lack the time to explore all or even most of the serious problems with Chief Justice Taney’s opinion.⁴⁴ A few points will do. Let me address, initially, Taney’s opinion that African Americans were not and had never been citizens:

⁴² *Id.* at 450.

⁴³ Don E. Fehrenbacher, *supra* note 5, at 568-569.

⁴⁴ The leading historian of the decision spent 53 pages discussing Taney’s opinion, most of that discussion consisting of withering criticism. Don E. Fehrenbacher, *supra* note 5, at 335-388.

***First.* Throughout his opinion on citizenship, Taney went far beyond the issue of citizenship of a particular state – in this case, Missouri. The jurisdictional issue was whether Dred Scott was, at the time the action was filed, a citizen of Missouri as he alleged. No doubt was raised in the case that the defendant was a citizen of New York. If Dred Scott was a citizen of Missouri, then the federal court had jurisdiction under the diversity of citizenship clause.⁴⁵ Except for aliens naturalized as citizens under federal law, citizenship in the United States had been treated either as a matter of state law. The Constitution states that electors of members of the House of Representatives shall have the qualifications of electors for the most numerous branch of the legislature in each state.⁴⁶ Yet Chief Justice Taney discussed United States citizenship as a matter separate from state citizenship, which he seemed to believe was required for diversity of citizenship *in addition to* state citizenship. The result was that his ruling denying citizenship to African Americans had nationwide effect.**

***Second.* In the infamous passage I quoted a few moments ago, Taney said that for one hundred years before the adoption of the Constitution, blacks had no rights that whites were “bound to respect,” and that it had been a universal belief of whites in Europe and America that blacks could be subjected to slavery. In fact, the Chief Justice’s statement was false. I am not the first one to point out⁴⁷ that Taney’s**

⁴⁵ U.S. CONST. art III, § 2, cl. 1.

⁴⁶ U.S. CONST. art I, § 2, cl. 1.

⁴⁷ I am indebted to Peter Irons, *supra* note 12, at 173, for the reference to Blackstone. Senator Charles Sumner, a radical Republican senator from Massachusetts before and during the Civil War, also denounced Taney’s error in stating that the entire civilized world was united in believing that Africans could be enslaved, although he did not mention Blackstone. Sumner made his denunciation during the course of a

position was refuted by Blackstone's *Commentaries on the Laws of England*, first published in 1765, a work well-known in America, both before and after the Constitution was ratified:

[The British] spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* [at that instant] a freeman.⁴⁸

Third. The Chief Justice attempted to bolster his conclusion that African Americans, whether slave or free, could not be United States citizens by referring to two passages of the Constitution which had nothing to do with the issue: the provision that Congress could not forbid the foreign slave trade until 1808⁴⁹ and the infamous fugitive slave clause.⁵⁰ These provisions were obviously irrelevant. Nothing in either one said anything about citizenship, either denying it or granting it and certainly neither citizenship to anyone *not* a slave.⁵¹

Taney's opinion failed to address one provision of the Constitution which did indeed bear upon the issue of citizenship for free African Americans. Let me read the language verbatim:

Senate debate after Taney's death in which he opposed the creation of a bust to honor Taney. Paul Finkelman, ed., *Dred Scott v. Sandford: A Brief History with Documents* (Bedford/St. Martin's: Boston & New York, 1997), at 224-225.

⁴⁸ Quoted at http://www2.wwnorton.com/college/english/nael/18century/topic_2/blackstone.htm, last visited February 14, 2007. In his third edition, Blackstone revised his language at the end of the passage to indicate that "the master's right to [the slave's] service may probably still continue." *Id.*

⁴⁹ U.S. CONST. art I, § 9, cl. 1.

⁵⁰ U.S. CONST. art. IV, § 2, cl. 3.

⁵¹ Contrary to the Chief Justice, neither of these provisions shows, "conclusively" or otherwise, that "the negro race [constitutes]...a separate class of persons,...not regarded as a portion of the people or citizens of the Government" created by the Constitution.⁶⁰ U.S. (19 How.) at 411.

“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” The phrase “other persons” meant *slaves*. No distinction was made between free whites and free blacks. The provision dealt with the related matters of direct taxation and apportionment in the House of Representatives. A free person, without regard to color (other than the exception made for untaxed Indians), was entitled to be represented in Congress and was subject to being taxed by it. Thus a free person, white or black, received both the burdens of government as well as the benefits of government.

This provision was suggestive of citizenship, if not necessarily conclusive, and it was Chief Justice Taney’s duty to discuss it. But he failed to refer to this provision, even in passing.⁵²

Fourth. Taney’s conclusion that African Americans were excluded from United States citizenship under the Constitution was inconsistent with the fact that when it was adopted, free black males were allowed to vote in ten of the thirteen original states.⁵³ Chief Justice Taney’s view was that African Americans could not be United States citizens because were not included within the political community, but he could not

⁵² “Here, then, was a clause of the Constitution that plainly separated slaves from free Negroes, and more than that, it appeared to make the latter a part of the ‘people’ upon whom the federal government was to be founded. It is therefore perhaps significant that Taney preferred to overlook this clause. It was *never mentioned* in the whole opinion.” Don E. Fehrenbacher, *supra* note 5, at 352-353 [emphasis in original].

⁵³ Sean Wilentz, *The Rise of American Democracy* (Norton: New York, 2005), at 712. In his dissent, Justice Benjamin Curtis noted the existence of five of those states. *Dred Scott v. Sandford*, 60 U.S. (19 How.) at 572-573 (Curtis, J., dissenting).

explain the fact that a majority of the original states allowed free African Americans to vote.

Let me now raise a few points about his second major conclusion: that Congress lacked authority to forbid slavery in federal territories.

***First.* I'll start with the issue of whether the Court should even have addressed it at all. Once Chief Justice Taney had determined that Dred Scott was not a citizen for purposes of the diversity of citizenship clause, that should have ended the case. Without diversity, then the "judicial power" of the United States did not extend to the controversy. That meant not only the judicial power of the federal Circuit Court, but also the judicial power of the federal Supreme Court. Given his own conclusion on citizenship, the Chief Justice had no authority to declare the Missouri Compromise line unconstitutional.⁵⁴**

***Second.* Despite the jurisdictional obstacle that his own opinion on citizenship had created for him, Chief Justice Taney then proceeded to declare unconstitutional that portion of the Missouri Compromise that prohibited slavery in the northern part of the Louisiana Purchase territory. The Constitution expressly grants Congress the authority to "make all needful Rules and Regulations respecting the Territory or**

⁵⁴ The Chief Justice's explanation about why the Court could go beyond the issue of citizenship was wholly unpersuasive. 60 U.S. (19 How.) at 428: "The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court." Normally that is true – *except* when the initial "correction" results, by the express terms of the Constitution itself, in the forfeiture of *all* federal jurisdiction. Also, the trial court was not asked to, and did not, rule on the constitutionality of the Missouri Compromise line. The trial judge instructed the jury that the law was with the defendant, Sanford. No "other material error[]" existed that the Supreme Court could have corrected. Similarly unpersuasive was the explanation of concurring Justice James Wayne. 60 U.S. (19 How.) at 456 (Wayne, J., concurring): "But in a case brought to this court, by appeal or by writ of error from a *Circuit Court of the United States*, we begin a review of it not by inquiring if this court has jurisdiction, but if that court has it..."[Emphasis in original.] Perhaps that is the place to *start*. But the reason discovered for denying jurisdiction to the Circuit Court applies with the same degree of force to the Supreme Court. Thus, regardless of the beginning of the inquiry, the end will be the same.

other Property belonging to the United States,”⁵⁵ and the Chief Justice essentially held that this did not mean what it said. He distinguished almost out of existence an 1828 opinion by Chief Justice John Marshall holding that “[i]n legislating for [the territories] Congress exercises the combined powers of the general and of a State government.”⁵⁶ His treatment of both the clear language of the Constitution and of Marshall’s earlier opinion show that Taney was bound and determined to push toward a certain result rather than to follow the authorities where they should have led him.

In denying the authority of Congress to forbid slavery in federal territories, Taney engaged in a painful misreading of the history of the Northwest Ordinance, which was enacted by the old Congress under the Articles of Confederation in 1787, the same year of the national constitutional convention, and then reenacted by the first Congress under the Constitution.⁵⁷ The Ordinance, included in your materials as Exhibit E, prohibited slavery in the territory northwest of the Ohio River. While the Ordinance did not apply to Missouri Compromise territory,⁵⁸ it was evidence that the authors of the Constitution did not intend to deny Congress the authority to forbid slavery in federal territories. (Certainly those who wrote and ratified the Constitution were aware of the Northwest Ordinance, and those who reenacted the

⁵⁵ U.S. CONST. art IV, §3, cl. 2.

⁵⁶ *American and Ocean Ins. Cos. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

⁵⁷ 60 U.S. (19 How.) at 616-617, referring to 1 Stat. at Large 50 (August 7, 1789).

⁵⁸ The Northwest Territory later became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. <http://www.historicaldocuments.com/NorthwestOrdinance.htm>, last visited January 21, 2007.

Northwest Ordinance after the ratification of the Constitution were aware of the Constitution. In fact, some of the members of the Constitutional Convention were in the new Congress that reenacted the Northwest Ordinance.⁵⁹⁾ Taney constructed a weird scenario in which the old Congress under the Articles did not act as a Congress in enacting the Northwest Ordinance, but rather as a sort of agent of thirteen individual sovereign nations who all agreed to give up their right to allow slavery in the Northwest Territory.⁶⁰ This argument was nonsense. The Northwest Ordinance was not unanimous. It passed with a vote of eight out of thirteen states, as the Articles allowed. Also, under Taney’s interpretation, Congress under the Articles had more power than Congress under the Constitution. This idea would have come as a shock to the framers, who wrote a new Constitution for the primary reason that the national government under the Articles was too weak.⁶¹ Further, one would expect that the Congress under the Articles would have stated that it acted as agent for these sovereign nations, but it did not. The Northwest Ordinance was enacted, in the words of the Ordinance itself, “by the United States in Congress assembled”.⁶²

⁵⁹ Abraham Lincoln’s famous Cooper Union address, delivered in early 1860 when he was a dark horse candidate for the Republican nomination for president, was a well-researched and highly-effective defense of Congressional authority to forbid slavery in the territories, in which Lincoln relied heavily on the evidence of the Northwest Ordinance. *See, generally*, Harold Holzer, *Lincoln at Cooper Union* (Simon & Schuster: New York, 2004).

⁶⁰ 60 U.S. (19 How.) at 435: “[The Northwest Ordinance] was [enacted] by a Congress, representing the authority of these several and separate sovereignties and acting under their authority and command (but not from any authority derived from the Articles of Confederation).”

⁶¹ Don E. Fehrenbacher, *supra* note 5, at 371-372.

⁶² Northwest Ordinance, found online at <http://www.historicaldocuments.com/NorthwestOrdinance.htm>, last visited January 21, 2007.

And *third*. Taney’s invocation of the Fifth Amendment to the U. S. Constitution was very odd, to say the least. He referred to the Fifth Amendment’s guarantee that no person may be deprived of life, liberty, or property without due process of law, and used this provision as support for his conclusion that Congress could not outlaw slavery in the territories. At first, Taney correctly quoted the Fifth Amendment, but he started to misquote it, referring to the right of *citizens* not to be deprived of life, liberty, or property without due process of law. As you can see from the text of the Amendment itself, Exhibit F, it protects the rights of *persons*, not just *citizens*. Having denied African Americans the right of citizenship earlier in his opinion, the Chief Justice apparently felt more comfortable in recasting the language of the Fifth Amendment in such a way as to deny its application to noncitizens. In other words, Taney had to change the plain language of the Fifth Amendment so that he could protect the right of a citizen-slaveholder to take slaves into federal territories. Had he truly faced the implications of the word “person” as used in the Fifth Amendment he might have been forced to realize that Dred Scott was a person entitled to his liberty.⁶³

I won’t go on. *Dred Scott* fully deserves all of the criticism it has received, both at the time it was delivered, and now. Practically

⁶³ The Chief Justice more than once referred to African Americans as “persons.” 60 U.S. (19 How.) at 403: “[T] he plea [in abatement] applies to that class of persons only whose ancestors were negroes of the African race and imported into this country and sold and held as slaves.” 60 U.S. (19 How.) at 404: “The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty?” 60 U.S. (19 How.) at 411: “[T]here are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons...” 60 U.S. (19 How.) at 425: “The question with which we are now dealing is whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim.”

everything that could have been wrong with the decision *was* wrong with it.⁶⁴

The decision officially banished an entire population of nearly four and a half million men, women, and children, from the American civic and political community, when their only fault was that they or their forebears had been the victims of slavery. There were nearly four million slaves at that time, and Taney’s opinion removed any lingering hope they might ever have entertained that they could maintain an action in federal court to obtain their freedom. There were almost half a million free African Americans, and Taney’s opinion judicially snatched away legal rights to sue in federal court.⁶⁵ And if those were not enough, Chief Justice Taney declared that of almost a million and a half square miles of territorial lands possessed by the United States in 1857⁶⁶ – lands that eventually became the states of Minnesota, Oregon, Kansas, Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, and Arizona – the federal government could not keep a single square inch of it as free soil. All of it was open to slavery.

⁶⁴ “[Chief Justice Taney] misread history, twisted legal precedent, and bent the Constitution out of shape, all to achieve his predetermined goal of promoting the extension of slavery into the territories....To be more blunt, Taney’s opinion was a travesty of the judicial craft, riddled with obvious errors and outright lies.” Peter Irons, *supra* note 12, at 176.

⁶⁵ According to the U.S. Census for 1860 – the census nearest in time to both the *Dred Scott* decision and the bombardment of Ft. Sumter, which began the Civil War – there were 3,953,760 slaves and 488,000 free blacks in America. The total American population, free and slave, in that year was 31,443,321. See www.civilwarhome.com/population/1860.htm and www.infoplease.com/ipa/A0922246.html, both last visited December 27, 2006.

⁶⁶ See <http://www.enchantedlearning.com/usa/states/area.shtml>, last visited January 21, 2007. I added the total square miles of all states admitted after 1857, except for West Virginia (which was created from within the boundaries of Virginia), Alaska (not acquired until after the Civil War), and Hawaii (not acquired until after the Civil War). The total area of the United States in 1857, including all states and territories, was 2,870,084 miles. *Id.* [after subtracting the areas of Alaska and Hawaii from the current area of the United States.]

And there was something else about the decision that greatly alarmed the anti-slavery public in the North, and that was the possibility of extending slavery into the free states. Abraham Lincoln charged that there had been an express conspiracy, involving Chief Justice Taney, two U. S. presidents, and Senator Stephen Douglas, to make slavery “alike lawful in *all* the States, *old* as well as *new* – *North* as well as *South*.”⁶⁷ We sometimes forget that this charge of conspiracy was the major point of Lincoln’s famous “House Divided” Speech, which formally opened Lincoln’s 1858 campaign for the Senate against Stephen Douglas. Now, there was no evidence of such a conspiracy – none existed then, and none has surfaced since – and as the senatorial campaign wore on, Lincoln dropped the conspiracy argument in favor of a second one, which was much more compelling. The logic of *Dred Scott* itself had the potential to be construed to forbid *states* from outlawing slavery. As Lincoln explained it,⁶⁸ *Dred Scott* stated that the right of a white person to hold a black person in slavery was “distinctly and expressly affirmed in the Constitution.” Because neither the Constitution nor laws of any state may destroy a right so enshrined in the Constitution, it then followed that no state could forbid slavery. In other words, *if that logic held*, freedom could have been forbidden under the Constitution. It can never be known for certain whether the Supreme Court would have gone as far as this, given the opportunity. My guess is that not even the Taney Court would have tried to get away

⁶⁷ Don E. Fehrenbacher, ed., *Lincoln: Speeches and Writings 1832-1858* (Library of America: New York, 1989), at 426 (The “House Divided” Speech at Springfield, June 16, 1858).

⁶⁸ *Id.* at 714 (Lincoln’s Reply, Fifth Lincoln-Douglas Debate at Galesburg, October 7, 1858).

with such a second *Dred Scott* decision. But the Court would have had to undo some of the first *Dred Scott* decision to avoid rendering the second.

II. THE AFTERMATH

I do not believe that *Dred Scott* caused the American Civil War, which erupted just four years later. It is more likely that *Dred Scott* influenced the *timing* of the war. The decision was one of several major events in the 1850's that aggravated the tensions between North and South.⁶⁹ The confluence of these factors helped build up the Republican Party and to fragment the Democratic Party so that in 1860 Abraham Lincoln, the Republican, was elected president. That election caused the secession crisis and, ultimately, the Civil War.⁷⁰

***Dred Scott* was hailed in the South and by Southern sympathizers in the North. It was denounced in much of the North. Moderate anti-slavery politicians and speakers, such as Abraham Lincoln, tended to condemn *Dred Scott's* holding that Congress could not prohibit slavery**

⁶⁹ The other two were the 1854 Kansas-Nebraska Act, which repealed the Missouri Compromise line, and the proposed Lecompton Constitution for Kansas, a proslavery document that a proslavery minority of settlers attempted to impose upon the free-soil majority.

⁷⁰ The *Dred Scott* decision favorably affected Abraham Lincoln's political career and helped him secure the Republican nomination and the 1860 election. In 1857, Lincoln was a successful and politically active trial lawyer who lacked a significant following outside his adopted home state of Illinois. It was his series of debates against Senator Stephen Douglas in 1858 that attracted a great deal of public attention throughout the country. In the 1858 senatorial campaign debates, each party sent stenographers (we would call them court reporters) to take down every word spoken during the debates and had them published in their party newspapers. After the election the debate transcripts were published in book form, and made widely available. During the debates, *Dred Scott* was one of the main subjects for discussion. Abraham Lincoln was thus introduced to many people throughout the country in the context of his criticism of *Dred Scott*. See James F. Simon, *supra* note 32, at 139: "And with his attack on *Dred Scott*, Lincoln had grasped an issue that resonated politically in Illinois and throughout the northern and western states."

in the territories. Abolitionists were more likely to condemn the portion of the holding that African Americans could not be citizens of the United States, and they often quoted back the infamous passage in Chief Justice Taney’s opinion about how blacks had no rights that whites were bound to respect. Well-known speakers and writers like Frederick Douglass denounced Taney’s language,⁷¹ but so did others whose names are less familiar today.

Listen to Frances Ellen Watkins, a black woman born of free parents in Maryland, speaking a couple of months after the decision in 1857:

...I stand at the threshold of the Supreme Court and ask for justice, simple justice. Upon my tortured heart is thrown the mocking words, “You are a negro; you have no rights which white men are bound to respect”!⁷²

Listen to Charles Lenox Redmond, an African American speaker at the Massachusetts Anti-Slavery Society later in the same year:

I look at Massachusetts, and I see our State, as an entire State, silently acquiescing in the recent disgraceful decision given by Judge Taney in the United States Supreme Court, whereby it is declared that the black man in the United States has no rights which the white man is bound to respect! Shame on Judge Taney! Shame on the United States Supreme Court!⁷³

⁷¹ <http://teachingamericanhistory.org/library/index.asp?document=772>, last visited January 29, 2007.

⁷² http://faculty.washington.edu/qtaylor/speeches/harper_liberty.htm, last visited January 29, 2007.

⁷³ http://faculty.washington.edu/qtaylor/speeches/remond_discourse.htm, last visited January 29, 2007.

Neither Ms. Watkins nor Mr. Redmond could have known, in 1857, that *Dred Scott* would have only a short lifespan as a controlling judicial decision. They did not know that *Dred Scott* would come to be what one scholar called “the most frequently overturned decision in history.”⁷⁴ It came to be overturned in several ways.

One way it was overturned was by being ignored by the Lincoln Administration, which took power on March 4, 1861. On that day, Chief Justice Taney had to sit in uncomfortable silence as Lincoln gave his first inaugural address in which he all but promised that he would ignore *Dred Scott*.⁷⁵ Thereafter, Lincoln and his cabinet acted in accordance with his view that *Dred Scott* was not binding. During the first year of the Lincoln Administration, his Secretary of State granted an American passport to an African American, described as “a citizen of the United States.”⁷⁶ In June of 1862 Congress passed, and Lincoln

⁷⁴ Derrick A. Bell, Jr., *Race, Racism, and American Law* (Little, Brown: Boston, 1973), at 21, quoted in Don E. Fehrenbacher, *supra* note 5, at 580.

⁷⁵ Lincoln said:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit...while they are also entitled to very high respect and consideration...by all other departments of the government....At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties...the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal....

Don E. Fehrenbacher, ed., *Lincoln: Speeches and Writings 1859-1865* (Library of America: New York, 1989), at 220-221 (The First Inaugural Address).

⁷⁶ Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (University of Chicago: Chicago, 1961), at 57.

signed, a law forbidding slavery in the federal territories.⁷⁷ And in November of the same year Lincoln’s Attorney General issued an opinion declaring that free African Americans were indeed citizens of the United States.⁷⁸

Dred Scott was, of course, conclusively overruled by the three Civil War Amendments to the Constitution, all ratified within five years of Lee’s surrender at Appomattox Court House in April, 1865. The Thirteenth Amendment abolished slavery “within the United States, or any place subject to their jurisdiction,” and gave Congress authority to enforce that prohibition, thus overturning *Dred Scott*’s pronouncement that Congress could not forbid slavery in the territories. The Fourteenth Amendment – which contains the well-known guarantees of due process of law and equal protection of the laws – also directly overruled *Dred Scott* by granting citizenship to “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof...” And the Fifteenth Amendment guaranteed all citizens of the United States the right to vote regardless of “race, color, or previous condition of servitude.”

But there was another method by which *Dred Scott* was overturned, one that does not receive the attention it deserves.⁷⁹ To tell you about it, let me now introduce John Rock, the second of the two doctors of significance to our story. This individual had a few things in common with John Emerson, the first doctor I spoke to you about.

⁷⁷ Don E. Fehrenbacher, *supra* note 5, at 575.

⁷⁸ *Id.* at 575-576.

⁷⁹ For example, even as meticulous a chronicler of the *Dred Scott* case as Don E. Fehrenbacher, *supra* note 5, does not even mention John Rock.

Both were male American physicians; both were named John; both had spent some time in Pennsylvania where both had attended medical school. Each of them had health problems that resulted in an early death, John Emerson at the age of 40 and John Rock at the age of 41. And each of them exhibited a certain degree of restlessness. But Emerson's restlessness was that of the quarrelsome person who is never happy, never truly at home. Rock's restlessness was of the intellectual nature; he was always wanted to know more, to do more, to be more.

John S. Rock was born in New Jersey in 1825, and was fortunate enough to have had parents who valued education and kept him in school until he was 19 years of age⁸⁰ – quite a long period of formal education for the time, especially considering that his parents were not rich. Most of his education, however, appears to have resulted from his own efforts. He started out as a teacher, and spent four years in that profession in a one-room schoolhouse. He was a good teacher, but didn't wish to remain as a teacher forever. He wanted to study medicine, and found two physicians who allowed him the use of their library and gave him private lessons even as he continued teaching.⁸¹ After he learned as much as he could from the two doctors, Rock wanted to attend medical school, but medical schools in the area refused to admit him. So, instead of studying medicine, Rock studied dentistry, completing those studies in 1849. He moved to Philadelphia in 1850 and started a dental practice there, and the following year he won a silver medal for false teeth he fashioned. He was able to find a medical school that admitted him, and

⁸⁰ Clarence G. Contee, *The Supreme Court Bar's First Black Member*, located online at http://supremecourthistory.org/04_library/subs_volumes/04_c01_j.html (last visited February 22, 2006).

⁸¹ *Id.*

he earned his M.D. degree in 1852.⁸² Thus, by the age of 27, Rock had worked as a schoolteacher for four years, had spent three years as a practicing dentist, and had been awarded the degree of doctor of medicine. A year after he earned his medical degree, Rock moved to Massachusetts and became a leader in the abolition movement in Boston, as well as a supporter of the then young Republican Party. He was a powerful orator, as we can discover by reading verbatim records of his speeches that still exist today.⁸³ Almost a year to the day after the *Dred Scott* decision, Dr. Rock spoke at meeting in Faneuil Hall in Boston to commemorate the Boston Massacre of 1770 and to protest *Dred Scott*. I would like to read a portion of that speech, but a few words of explanation are necessary. Dr. Rock referred to Caleb Cushing, and for our purposes it's enough to know that Caleb Cushing was a prominent supporter of *Dred Scott*. Also, when he used the word "government," he was not using it as we use it today to mean our permanent political structures; rather, he meant a *political administration* or *political dynasty*. This is what he said:

We ought not to come here simply to honor those brave men who shed their blood for freedom, or to protest against the Dred Scott decision, but to take counsel of each other, and to enter into new vows of duty. Our fathers fought nobly for freedom, but they were not victorious. They fought for liberty, but they got slavery....Sooner or later, the clashing of arms

⁸² *Id.*

⁸³ See John S. Rock, address delivered at Faneuil Hall [date of delivery March 5, 1858], part of the annual Crispus Attucks Day observance organized in response to the *Dred Scott* decision, located online at <http://faculty.washington.edu/qtaylor/speeches/rock.htm>, last visited December 22, 2006. See also John S. Rock, address on enfranchisement, 1850 [date of delivery unknown; date of publication February 8, 1850], located online at <http://www.state.nj.us/state/history/rock.html>, last visited January 4, 2007.

will be heard in this country, and the black man's services will be needed: 150,000 freemen capable of bearing arms...and three quarters of a million of slaves, wild with the enthusiasm caused by the dawn of the glorious opportunity of being able to strike a genuine blow for freedom, will be a power which white men will be "bound to respect."...Judge Taney may outlaw us; Caleb Cushing⁸⁴ may show the depravity of his heart by abusing us; and this wicked government may oppress us; but the black man will live when Judge Taney, Caleb Cushing and this wicked government are no more....⁸⁵

By speaking of “this wicked government,” Dr. Rock condemned the political dynasty dedicated to protecting slavery which had controlled the White House, the Supreme Court, and much of Congress for years. And he had great reason to despise the then-reigning political dynasty; I am sure it did not escape your attention that Dr. Rock referred to *himself* in that passage as a black man, for so he was. *That* was the reason that he could not, at first, attend a medical school. Except for the American Medical College, which Dr. Rock attended, other medical schools refused to admit African Americans.

Even John Rock’s receipt of the degree of doctor of medicine did not complete his education. In 1860 he began to study law – one did not

⁸⁴ Caleb Cushing was a public official and judge from Massachusetts who served as President Franklin Pierce’s Attorney General from March 1853 until three days before the *Dred Scott* decision. See http://en.wikipedia.org/wiki/Caleb_Cushing, last visited January 4, 2007. As Attorney General, Cushing rendered an opinion that African-Americans were not American citizens and so could not obtain U.S. passports. Don E. Fehrenbacher, *supra* note 5, at 361. After he left the Attorney General’s office, Cushing “deliver[ed] one of the strongest public speeches in the North endorsing the Dred Scott decision,” *Id.* at 627, note 3, even though, while in Congress twenty-one years before, he had given “an impassioned speech” in support of an antislavery amendment to the bill admitting Arkansas to the Union. *Id.*

⁸⁵ John S. Rock, *supra* note 81, address delivered at Fanueil Hall.

have to attend law school in those days, and in fact most aspiring lawyers did not – and the following year he was licensed to practice law in Massachusetts.⁸⁶ But, while admission to the Massachusetts bar was important, it was not Dr. Rock’s ultimate goal as a lawyer; he wanted to be admitted to the bar of the Supreme Court of the United States.

While Roger Taney remained as Chief Justice, Dr. Rock had no hope for admission.⁸⁷ It can hardly be doubted that Taney would never admit an African American lawyer to the bar of the Supreme Court. Dr. Rock had to wait to fulfill his ambition; as it happened, he had to wait until near the end of the Civil War.

Chief Justice Taney had turned eighty within weeks of his decision in *Dred Scott*. In those days before a true retirement plan for the judiciary, Taney, aged and infirm, continued to work because he badly needed his paycheck.⁸⁸ He remained in office throughout most of the Civil War, even though he had little or no affection for the Union

⁸⁶ Clarence G. Contee, *supra* note 78.

⁸⁷ Dr. Rock was not excluded (as might be supposed) by any rule that members of the U. S. Supreme Court bar had to be citizens, and that citizenship was forbidden to African-Americans by the *Dred Scott* decision written by Chief Justice Taney. No such rule exists now, nor did it exist in the 1850’s or 1860’s. Citizenship has never been a requirement for admission to the bar of the United States Supreme Court. In *Bradwell v. Illinois*, 83 U. S. 130 (1872), the Supreme Court rejected a female lawyer’s challenge (based on the privileges and immunities clause of the 14th Amendment) to the Illinois Supreme Court’s denial of her application to practice law, noting in part: “This right [to practice law] in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State.” *Id.* at 139. Rule 5(1), Rules of the U. S. Supreme Court, the current rule stating bar admission requirements, does not refer to citizenship. *Cf. Application of Griffiths*, 413 U.S. 717 (1973), holding that citizenship requirements for state bar admission violate the equal protection clause of the 14th Amendment.

⁸⁸ For a snapshot of Taney’s financial and physical woes near the end of his life, see James F. Simon, *Lincoln and Chief Justice Taney* (Simon & Schuster: New York, 2006), at 245-246 and 261-265. See also Don E. Fehrenbacher, *supra* note 5, at 574.

over whose judicial department he presided.⁸⁹ Taney was a Confederate sympathizer and remained so until the date of his death on October 12, 1864.⁹⁰ It is said that one should not speak ill of the dead – and some in the North were able to muster a kind word or two about Taney’s supposed good traits⁹¹ – but many Union supporters ignored that maxim when they learned that the author of *Dred Scott* had died. A New York lawyer, George Templeton Strong, wrote in his diary, “The Hon. old Roger B. Taney has earned the gratitude of his country by dying at last. Better late than never.”⁹² Strong added: “Curious coincidence that the judge whose opinion in the Dred Scott case proved him the most faithful of slaves to the South should have been dying while his own state, Maryland, was solemnly extinguishing slavery within her borders by voting on her new anti-slavery constitution....Two ancient abuses and evils were perishing together....”⁹³

Taney’s death provided Lincoln the opportunity to appoint a chief justice. Lincoln waited two months to fill the vacancy, in part because he had his own November re-election to worry about but also partly because of Lincoln’s concerns about the person he eventually

⁸⁹ “The Chief Justice, in plain words, was a copperhead, and ever more emphatically so as the war progressed.” Don E. Fehrenbacher, *supra* note 5, at 574.

⁹⁰ “Taney’s death on October 12, 1864, put an end to the anomaly of a nation’s fighting a war with its highest judicial officer bound in sympathy to the enemy.” *Id.* at 577.

⁹¹ *Id.* at 577-578.

⁹² Allan Nevins and Milton Halsey Thomas, eds., *The Diary of George Templeton Strong* (University of Washington Press: Seattle & London, 1988), at 250.

⁹³ *Id.* at 250-251.

nominated, Salmon P. Chase, who is the second of the two Chief Justices who figures prominently in this story.

In some ways Chase was similar to the man he replaced. Like Taney, Chase had been a trial lawyer, and a good one. Like Taney, Chase had been active in state politics, having served as Governor of Ohio and U.S. Senator from that state. Like Taney, Chase had served in the cabinet of the president who nominated him to the Supreme Court. Indeed, both had been Secretary of the Treasury; even though Taney had been rejected by the Senate, he nonetheless served in that post for several crucial months. Both were diligent and hard-working. But there the similarities seem to end.

Unlike Taney, who always enjoyed the confidence and support of his president, Salmon P. Chase was not close to Abraham Lincoln. Despite being a fine treasury secretary, a fact that Lincoln appreciated, Chase had a difficult tenure in Lincoln's cabinet. The real problem with Chase was that he combined an absence of any sense of humor with scheming self-righteousness and apparently unrelenting presidential ambitions.⁹⁴ That was all too much for even a tolerant man like Lincoln to endure forever.⁹⁵ Chase had a habit of offering his resignation from

⁹⁴ Unlike Seward, who after joining the cabinet came to realize that Lincoln was “the best of us all” and who therefore resolved to be loyal to the president – *see* Doris Kearns Goodwin, *supra* note ____, at 364-365 – Chase continued to nurse presidential ambitions and tried, unsuccessfully, to receive the Union (Republican) Party’s nomination in 1864. *Id.* at 603 *et seq.*

⁹⁵ “I have only one doubt about his appointment,” Lincoln told one senator, even though it is unlikely that Lincoln had “only one” doubt. “He is a man of unbounded ambition and has been working all his life to become President. That he can never be; and I fear that if I make him Chief Justice, he will simply become more restless and uneasy, and neglect the place, in his strife and intrigue to make himself President.” Quoted in James F. Simon, *supra* note 32 at 267-268. To at least one other person, Lincoln was blunt. “According to [Navy Secretary Gideon] Welles, Lincoln told a friend ‘that he would rather have swallowed his buckhorn chair than to have nominated Chase’ for the post.” Page Smith, *Trial By Fire: A People’s History of the Civil War and Reconstruction* (McGraw-Hill: New York, 1982), at 524.

the cabinet when things didn't go quite his way, and for his part Lincoln got into the habit of rejecting those resignations – that is, until the summer of 1864, when Chase offered his resignation because of an issue involving customs patronage, and Lincoln stunned Chase by accepting the resignation.⁹⁶

Despite his faults, Chase was the best candidate for the job. He had a first-rate intellect, an excellent education in law and public affairs, and the support of powerful senators, especially Charles Sumner of Massachusetts. And there was something else about Chase: Unlike Taney, Chase had fairly advanced racial views. Chase understood the misery that white America had inflicted upon black America, and he felt a moral and religious calling to alleviate that misery to the extent he could. As a lawyer in private practice he had defended so many fugitive slaves that he was given the nickname of “Attorney General for Runaway Negroes.”⁹⁷ Unlike Taney, Chase never changed his sentiments after achieving national prominence.

In the end, Lincoln recognized Chase's virtues as well as his vices, and on December 6, 1864, the president nominated him to be Chief Justice of the United States. The Senate quickly confirmed him.

The importance of Chase's confirmation as Chief Justice was clear to John Rock, who wrote a letter to Senator Charles Sumner, on December 17, 1864. This is what he wrote:

Hon. Sir & Friend:

⁹⁶ David Herbert Donald, *Lincoln* (Simon & Schuster: New York, 1995), at 507-508.

⁹⁷ Mark E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford University Press: Oxford and New York, 1991), at xiv. According to Doris Kearns Goodwin, *Team of Rivals* (Simon & Schuster: New York, 2005), at 113, the nickname was “Attorney General for the Negro.” Perhaps he was called both names (and others).

Again permit me to ask the favour of your influence in my behalf. I believe it will be a matter of great benefit to me to be admitted to the bar of the S.C.U.S. [Supreme Court of the United States] We now have a great and good man for our Chief Justice, and with him I think my color will not be a bar to my admission. As you are acquainted with him and coming from this Commonwealth I take the liberty to ask you to consult with him....

Hoping to hear from you soon, I have the Honor to be, Dear Sir, Your obt. Servant

John S. Rock⁹⁸

Four days later, Senator Sumner sent Dr. Rock's letter to Chief Justice Chase with a letter of his own:

My Dear Chase,

Please read the enclosed letter & let me know what I shall do with regard to it.

Mr. Rock is an estimable colored lawyer, who, as you will see, is cordially recommended by Govr. Andrew & others in the public service. He is one of several colored lawyers in Mass. Who practise [sic] in all our courts, & are always received with courtesy....

I know not how far the Dred Scott decision may stand in the way.

Of course, the admission of a colored lawyer to the bar of the Supreme Court would make it

⁹⁸ C. Peter Ripley, ed. *The Black Abolitionist Papers, Vol. V: The United States, 1859-1865* (University of North Carolina Press: Chapel Hill and London: 1992), at 308-310 [emphasis in original].

difficult for any restriction on account of color to be maintained any where. Street cars would be open afterwards.

**Ever Yours, Charles
Sumner⁹⁹**

Evidently Sumner had not heard from Chase by early January, and so Sumner wrote the Chief Justice a reminder, to which Chase responded, “Not forgotten.”¹⁰⁰ Chase still remembered Sumner’s inquiry on January 21, when he raised the subject of Rock’s admission during a Supreme Court conference. We have the benefit of Chase’s diary entry for that day:

...I mentioned that I was informed that motion for admission [to bar] of colored lawyer of Massachusetts wd be made and asked advice – no one inclining to speak I said I would take silence as indicating willingness to leave the matter to my discretion as Ch. Justice, intimating that I shd admit without hesitation – then one after another nearly all expressed the opinion that the rule must govern & that in it there was no disqualification on ground of color – One queried as to citizenship & I said I wd. direct the motion to be made for admission & [h]ave it argued: but this not being insisted on, we adjd. with the understanding that colored men qualified could be admd without regard to complexion – progress!¹⁰¹

⁹⁹ Beverly Wilson Palmer, ed. *The Selected Letters of Charles Sumner, Vol. 2: November 1859 – April 1865* (Northeastern University Press: Boston, 1990), at 259-260.

¹⁰⁰ *Id.* at 260, note 3.

¹⁰¹ John Niven, ed. *The Salmon P. Chase Papers, Vol. 1: Journals, 1829-1872* (Kent State University Press: Kent and London, 1993), at 519.

On January 31, 1865, the United States House of Representatives approved the Thirteenth Amendment to the Constitution – which, when ratified by three-quarters of the states later that year, would outlaw slavery – and John Rock was in the House chamber to witness the momentous vote. On the following day, he appeared before the United States Supreme Court, in the old Senate chamber where it was located at the time, for another momentous occasion – one specifically pertaining to him. A correspondent for the *New York Tribune* described the scene as follows:

The black man was admitted....By Jupiter, the sight was grand! ‘Twas dramatic, too. At three minutes before eleven o’clock in the morning, Charles Sumner entered the Court-room, followed by the negro applicant for admission... At eleven, the procession of gowned Judges entered the room, with Chief Justice Chase at their head....[T]he Senator from Massachusetts arose, and in composed manner and quiet tone said: “May it please the Court, I move that John S. Rock, a member of the Supreme Court of the State of Massachusetts, be admitted to practice as a member of this Court.” The grave to bury the Dred Scott decision was in that one sentence dug; and it yawned there, wide open, under the very eyes of some of the Judges who had participated in the judicial crime against Democracy and humanity....¹⁰²

George Templeton Strong, the lawyer-diarist from New York, expressed a similar thought. After noting the vote in favor of the Thirteenth Amendment, Strong wrote: “Who thought four years ago that John

¹⁰² Quoted in Charles Warren, *The Supreme Court in United States History, Vol. Two: 1836-1918* (Little, Brown: Boston and Toronto, 1922 & 1926), at 411-412.

Brown would march so fast. And here has the Supreme Court of the United States just been admitting a colored person one of its attorneys and counselors, on the motion of Charles Sumner!!! I can scarce believe the evening papers. The dust that was Roger B. Taney must have shivered in its tomb....”¹⁰³ The scene is illustrated in Exhibit G.

Of course, more had yet to be done for the damage caused by *Dred Scott* to be repaired. The Thirteenth Amendment would not be ratified until December of 1865. The Fourteenth Amendment would not be ratified until July of 1868, nor the Fifteenth Amendment until March of 1870. And even after such ratifications the ghost of *Dred Scott* would return on occasion. In 1896 the Supreme Court undercut the Fourteenth Amendment severely when it adopted what came to be known as the “separate but equal” doctrine – endorsing a concept foreign to the text and contrary to the spirit of that Amendment. It is no wonder that Justice John Harlan, the lone dissenter in the case of *Plessy v. Ferguson*,¹⁰⁴ said, “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.”¹⁰⁵ And we know that it wasn’t until the next century that the movement for civil rights gathered sufficient political and judicial influence for the Civil War amendments to be truly enforced. And we also know that in 1872, the Supreme Court –

¹⁰³ Quoted in Page Smith, *supra* note 93, at 556. It is worth noting, however, that on the same date that Dr. Rock was solemnly admitted to the bar of the U. S. Supreme Court, he was nonetheless required to obtain a permit from the Provost Marshal so that he could return to his home in Massachusetts, because at that time African Americans – whether they were members of the Supreme Court bar or not – were forbidden from leaving Washington “without a license from the military authority.” Charles Warren, *supra* note 100, at 412.

¹⁰⁴ 163 U.S. 537 (1896).

¹⁰⁵ 163 U.S. at 559 (Harlan, J., dissenting).

essentially the same court that admitted John Rock, with little change in its membership – found no constitutional problem with Illinois’ refusal to admit Myra Bradwell to the practice of law for the sole reason that she was female.¹⁰⁶

But there is no mistaking the importance of what happened on February 1, 1865, when the Supreme Court repudiated its decision in *Dred Scott*. It was unfortunate that John Rock never had the opportunity to argue a case before the Supreme Court. He had never been in good health, and when he was in Washington, D.C., for his swearing-in to the bar – as well as to witness the passage of the Thirteenth Amendment – he came down with an illness from which he never fully recovered. He died in December, 1866, at the age of 41 years.¹⁰⁷ Although John Rock appeared before the Supreme Court only once, at the time he was admitted, he had a far greater and more lasting impact on the Supreme Court than many lawyers who have argued to that Court on numerous occasions.

It is tempting to end the story here. Yet there is one more fact that deserves to be known – a fact which has been overlooked but which is, I believe, of some significance. The fact is that Dr. Rock was not the only lawyer sworn in to the Bar of the Supreme Court on February 1, 1865. The correspondent for the *New York Tribune* whose account was quoted above may be excused for not paying the other lawyer much attention; the reporter had no access to Chase’s private thoughts. We, however,

¹⁰⁶ *Bradwell v. Illinois*, 83 U.S. 130 (1872).

¹⁰⁷ Clarence G. Contee, *supra* note 78.

have no such excuse; while we cannot read Chase's mind, we can read his diary. His entry for the first of February contains the following:

...Went to capitol – told that Sumner was in the Court Room with cold. [“colored”] lawyer whose admission he was about to move. [W]hen Judges seated Sumner made the motion – & introduced Mr. Rock – I recognized the introduction as usual & said “the clerk will administer the oath to Mr. Rock.” He then introduced Mr. Balch whom I took to be another cold. man. I recognized him also & said “Mr. Balch will proceed to the clerk’s desk and be qualified” – I purposely avoided the slightest deviation from my usual formula in admitting whites – Mr. Balch was[,] as I learned, a white man[.]¹⁰⁸

I don't know why Chief Justice Chase thought that Mr. Balch was an African American rather than a European American. Probably the light was bad. Perhaps also the Chief Justice wasn't even paying attention. (This would not have been the first time nor the last that a judge has been distracted during court proceedings.) But I do think that this was a curious and rather telling event. This was the same Supreme Court in which, only eight years before, Chief Justice Taney was so convinced of the critical importance of a legal distinction between white and black Americans that he would do just about anything – he would distort or falsify history, he would conceal or ignore or distinguish almost out of existence relevant authorities, he would commit crimes against logic and common sense – all to enshrine that legal distinction in the United States Constitution. And yet Taney's successor as Chief Justice was introduced to two persons, one black and the other white, on the same day, in the

¹⁰⁸ John P. Niven, ed., *supra* note 99, at 521.

same place, and for the same purpose, and Chief Justice Chase at first could not even notice a racial distinction between the two.

I now request your permission to depart from my intention of discussing only the *Dred Scott* decision and its immediate aftermath without any attempt to draw lessons for or analogies to the present day and our current circumstances. Don't worry. I have no plans to ring the alarm bell in support of or opposition to any particular decision or policy or program. What I will suggest is modest in scope but at the same time of potential help in evaluating the hot topics of today and tomorrow. One hundred and fifty years ago the Supreme Court reached a hideous result because it distorted history, forgot logic, and violated abiding principles of Constitutional interpretation and basic justice. One hundred and fifty years from now, there may be a gathering somewhere in America similar to this one. The bad news for us is that those Americans may condemn something we do or allow to be done today, contending that it distorts history, forgets logic, and violates abiding principles of Constitutional interpretation and basic justice. The good news for us is that we have it within our power to judge ourselves before later generations do so – and to decide whether anything we do or tolerate today might not someday be regarded as an abomination to later generations of Americans.