

## DRED SCOTT V. SANDFORD: A PRELUDE TO THE CIVIL WAR

Faith Joseph Jackson\*

### I. INTRODUCTION

One hundred and fifty years after the end of the Civil War, historians have yet to wholly reconcile the dueling narratives of the War's cause, meaning, and repercussions.<sup>1</sup> Those still fighting the South's cause claim it was mainly a dispute addressing states' rights.<sup>2</sup> Others believe this argument to be a mask designed to sublimate slavery's role as the foremost reason for Southern secession.<sup>3</sup> Perhaps equally as important as slavery's cultural and economic implications are its pre and post-Civil War legislative and judicial consequences. Notably, the *Dred Scott*<sup>4</sup> case provides both a textual source to examine the societal, political, and legal turmoil surrounding this issue, and a tangible historical moment at which the War became an inevitability.<sup>5</sup> Though it remains a tarnish on the institution of our highest court, the *Dred Scott* case may have been a necessary evil on the route to ending the deeply entrenched establishment of slavery in this country.<sup>6</sup>

---

\* Faith Joseph Jackson is an Associate Professor of Law at Texas Southern University-Thurgood Marshall School of Law. She teaches contract law and administrative law courses, including legislation and advanced constitutional law.

<sup>1</sup> James W. Loewen, *Five Myths about Why the South Seceded*, WASH. POST, Jan. 9, 2011, [http://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD\\_story.html](http://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD_story.html).

<sup>2</sup> Paul Finkelman, *An Inescapable Conflict: The End of War and Slavery Yields a New Racial Order*, A.B.A. J., April 2011, at 45.

<sup>3</sup> See Loewen, *supra* note 1.

<sup>4</sup> See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>5</sup> See generally Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007).

<sup>6</sup> See generally *id.*

On an anniversary of the Civil War,<sup>7</sup> it may be instructive to remember the decision and its place in the events that led the United States into war against itself. The *Dred Scott* case questioned whether Blacks were or could ever be citizens of the United States.<sup>8</sup> Scott navigated the legal system for over a decade before losing his case, though he won his freedom a few short months after the decision, as Emerson's widow had married an abolitionist.<sup>9</sup> The ramifications of this decision—what may be the most notorious opinion drafted by the Supreme Court—would be systemic and far-reaching.<sup>10</sup> In addition to declaring that Blacks could not be citizens, the Court's decision would also declare the Missouri Compromise of 1820<sup>11</sup> unconstitutional. Abolitionists viewed the decision as open advocacy of slavery by the Supreme Court,<sup>12</sup> as it frustrated any restrictions Congress might have placed on the growth of slavery.<sup>13</sup>

This article will first review the foundational cracks that slavery left in the creation of the United States' Constitution. It will then examine the ensuing legislative efforts to contend with the political and societal consequences of the slavery divide. Next, it will discuss the history behind the Scott case, and the course and resolution of the case in the court system. It will then describe the notoriety of the case and the impact it had on the events leading up to the war. It will conclude with an analysis of Dred Scott's position at the locus of only real conflict that caused the war: the geopolitical strife between the agrarian, slaveholding South, and the industrialized North.

---

<sup>7</sup> Jay Clarke, *Civil War's 150<sup>th</sup> Anniversary: Commemorations, Note Celebrations in Remembering the Country's Deadliest War*, CLEVELAND.COM, (Apr. 2, 2011, 5:10 PM), [http://blog.cleveland.com/travel\\_impact/print.html?entry=/2011/04/civil-wars\\_150th\\_anniversary\\_c.html](http://blog.cleveland.com/travel_impact/print.html?entry=/2011/04/civil-wars_150th_anniversary_c.html).

<sup>8</sup> *Dred Scott*, 60 U.S. (19 How.) at 403 ("The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?").

<sup>9</sup> *Id.* at 182.

<sup>10</sup> ROBERT F. CUSHMAN & SUSAN P. KONIAK, *CASES IN CONSTITUTIONAL LAW* 126 (8th ed. 1994).

<sup>11</sup> *Dred Scott*, 60 U.S. (19 How.) at 452.

<sup>12</sup> EBONY, *PICTORIAL HISTORY OF BLACK AMERICA AFRICAN PAST TO CIVIL WAR* 237 (1971).

<sup>13</sup> WILLIAM LOREN KATZ, *MINORITIES IN AMERICAN HISTORY, SLAVERY TO CIVIL WAR 1812-1865* 75 (1974).

## II. SLAVERY IN THE UNITED STATES CONSTITUTION

Article I of the Constitution addresses Congress's construction and powers. Article I, section 2 specifically speaks to the apportioning of representatives and taxes for the thirteen states that were currently in the Union.<sup>14</sup> The Constitution's authors created a formula to determine the number of representatives appointed to each state based on the "number of *free* persons,"<sup>15</sup> and, "three fifths of all other person," or slaves.<sup>16</sup> Though this calculus considered slaves for the purposes of state representation, the slaves themselves had no vote.<sup>17</sup> This gave any state that recognized slavery greater political representation in the national legislature.<sup>18</sup> Because "cotton was king" in the South, Southern states were the primary beneficiaries of the three-fifths clause.<sup>19</sup> While Northern states became industrialized, slavery was the source of southern wealth.<sup>20</sup> As the Union expanded, adding new states, Northerners did not like the advantage afforded to the southern states who wanted to preserve "human bondage"<sup>21</sup> and who would reap both political representation and economic power from it, while spreading the Southern influence to the West.<sup>22</sup>

The three fifths clause was not the only means by which the founders established slavery as a part of their new government. Article IV, Section II, provided that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another,

---

<sup>14</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.* (During the year of 1787, in Philadelphia, the site of the first Constitutional Convention, the framers of the Constitution made a political compromise. The compromise effectively provided national sanction to the inferior status of slaves by setting their political weight at three-fifths of that of whites); EBONY, *supra* note 12, at 87.

<sup>17</sup> U.S. CONST. art. I, § 2, cl.3. During the post-Civil War years from 1865 to 1869, Congress and the states passed the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The Thirteenth Amendment made slavery illegal in the United States; the Fourteenth Amendment recognized former slaves as citizens of the United States; and the Fifteenth Amendment addressed the right of citizens of the United States to vote regardless of race. *See* U.S. CONST. amend. XIII-XV.

<sup>18</sup> *See* Missouri Compromise of 1820, 3 Stat. 545 (1820).

<sup>19</sup> KATZ, *supra* note 13, at 3 (The invention of the cotton gin in 1793 fastened slavery securely in the South. The production of cotton fabric was now more affordable, which resulted in an intercontinental demand. As the demand for cotton rose, the demand for more slaves followed suit).

<sup>20</sup> *Id.*

<sup>21</sup> Finkelman, *supra* note 2, at 45.

<sup>22</sup> KATZ, *supra* note 13, at 1.

shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”<sup>23</sup> This passage, known as the fugitive slave clause, required even states that chose to reject slavery within their borders to honor it when slave owners came looking for escaped slaves.<sup>24</sup> Finally, Article I also prevented Congress from ending the Atlantic slave trade for twenty years after the Constitution’s signing.<sup>25</sup>

### III. CONGRESSIONAL AGREEMENTS: REGULATING TERRITORY EXPANSION AND THE EXTENSION OF SLAVERY

In an effort to preserve the political balance between the slave states and free states in the Union, Congress passed legislation to address the issue of slavery.<sup>26</sup> As the Union expanded, slavery supporters and abolitionists made agreements addressing the regulation of slavery.<sup>27</sup> However, the *Scott* ruling would render these congressional restrictions on slavery’s growth unconstitutional.<sup>28</sup>

#### A. Northwest Ordinance

Following the Revolutionary War, a tract of land lying north of the Ohio River, west of Pennsylvania, and east of the Mississippi River became a territory of the United States.<sup>29</sup> This land became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota east of the Mississippi River.<sup>30</sup> Congress adopted ordinances to provide a structure of government for the newly acquired territory, and to find balance between the Eastern states and the Western states.<sup>31</sup> The Northwest Ordinance, also referred to as the

---

<sup>23</sup> U.S. CONST. art. IV, § 2, cl. 3

<sup>24</sup> *Id.*; see also Loewen, *supra* note 1.

<sup>25</sup> U.S. CONST. art. I, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).

<sup>26</sup> FERDINAND LUNDBERG, *CRACKS IN THE CONSTITUTION* 213 (1980).

<sup>27</sup> *Cf. id.*

<sup>28</sup> WALTER EHRLICH, *THEY HAVE NO RIGHTS: DRED SCOTT’S STRUGGLE FOR FREEDOM* 147–49 (1979); see also KATZ, *supra* note 13, at 75.

<sup>29</sup> *Northwest Territory in* 8 *THE NEW ENCYCLOPEDIA BRITANNICA* 795 (15th ed. 2002).

<sup>30</sup> See e.g., *id.* at 797.

<sup>31</sup> *Id.* at 795.

Ordinance of 1787,<sup>32</sup> resulted in the division of the region into five states, and made allowances for the Western states to eventually have membership in the Union.<sup>33</sup> This piece of legislation would later serve as a model for all other states that would later join the Union.<sup>34</sup> Arguably, it would come to be one of the most important laws adopted by the early settlers and government of the new nation.<sup>35</sup>

The Ordinance of 1787 not only governed the Northwest Territory, but also provided a platform for social and political democracy.<sup>36</sup> The prohibition of slavery in these states was one issue openly addressed in this platform.<sup>37</sup> This strengthened the Union states that were antislavery.<sup>38</sup>

#### B. The Missouri Compromise of 1820

The Missouri Compromise of 1820 addressed the regulation of slavery, particularly in the western portion of the United States that was developing beyond the original colonies.<sup>39</sup> This agreement, passed by Congress, regulated the extension of slavery in the United States for thirty-seven years.<sup>40</sup> It too fell victim to the Supreme Court's decision in *Dred Scott*.<sup>41</sup> In the years before the passing of the Missouri Compromise of 1820, the North experienced a population growth.<sup>42</sup> This growth created a disparity of power between

---

<sup>32</sup> Northwest Ordinance, 1 Stat. 50 (1787).

<sup>33</sup> See *id.*

<sup>34</sup> 8 THE NEW ENCYCLOPEDIA BRITANNICA 795 (15th ed. 2002).

<sup>35</sup> See Jack T. Eblen, *Origins of the United States Colonial System: The Ordinance of 1787*, 51 WIS. MAG. OF HIST. 294, 303–04 (1968).

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

<sup>37</sup> See Northwest Ordinance, 32 Journals of the Continental Congress 334, 343 (1787); Eblen, *supra* note 35, at 310.

<sup>38</sup> See Douglas R. Hurt, *Historians and the Northwest Ordinance*, 20 W. HIST. Q 261, 270 (1989); see generally Peter S. Onuf, *Northwest Ordinance and Regional Identity*, 72 WIS. MAG. OF HIST. 293 (1989).

<sup>39</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 88 (Matthew C. Cordon et al. eds., 2005).

<sup>40</sup> Missouri Compromise, 3 Stat. 545 (1820). The Missouri Compromise passed in 1820 and was repealed by the Supreme Court in *Dred Scott* in 1857, thirty seven years later. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1957)

<sup>41</sup> *Missouri Compromise of 1820*, in 7 WEST ENCYCLOPEDIA OF AMERICAN LAW 89 (Matthew C. Cordon et al. eds., 2005).

<sup>42</sup> KATZ, *supra* note 13, at 23; *Missouri Compromise of 1820*, in 7 WEST ENCYCLOPEDIA OF AMERICAN LAW 88 (Matthew C. Cordon et al. eds., 2005). Due to the lack of formal record keeping, it is unknown exactly how many immigrants arrived in the United States between 1790 and 1820. Estimates approximate that roughly a quarter of a million people made the voyage from the Old World to the New World. Settling in the ports of the cities where they

slave and free states in the House of Representatives, though the Senate remained evenly balanced.<sup>43</sup> During this period, Missouri applied for statehood in the Union.<sup>44</sup> Missouri's entrance would have allowed the slave states to procure a majority in both houses.<sup>45</sup> Simultaneously, the free territory of Maine applied to join the Union.<sup>46</sup> Missouri's supporters used Maine's application as leverage to garner anti-slave votes in Congress for Missouri's admission.<sup>47</sup>

Representative Henry Clay of Kentucky, a slave state, served as Speaker of the House.<sup>48</sup> Seeking to maintain a balance between representation of free states and slave states in the Union, Clay was adamant about and confident with the bargain he presented to the Northern states.<sup>49</sup> Clay assured the Northern states that Maine would only gain admission to the Union as a free state if Congress did not circumscribe Missouri's rights as a slave state.<sup>50</sup> Clay successfully persuaded the anti-slavery states to refrain from completely banning slavery in the Maine and Missouri territories.<sup>51</sup> This effectively prohibited slavery in the northern half of Missouri,<sup>52</sup> but slavery still existed south of the "line of 36° 30' north latitude" in the territory of the Louisiana Purchase.<sup>53</sup>

---

landed, many newcomers became residents of Baltimore, Boston, New Orleans, New York City, and Philadelphia.

<sup>43</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 88 (Matthew C. Cordon et al. eds., 2005).

<sup>44</sup> *Id.*; PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* 8 (1997).

<sup>45</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 88 (Matthew C. Cordon et al. eds., 2005).

<sup>46</sup> *Id.*; William R. Johnson, *Prelude to the Missouri Compromise: A New York Congressman's Effort to Exclude Slavery from Arkansas Territory*, 24 ARK. HIST. Q. 47, 64-65 (1965).

<sup>47</sup> *See Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 88 (Matthew C. Cordon et al. eds., 2005).

<sup>48</sup> 1 CARL SCHURZ, *LIFE OF HENRY CLAY* 126 (1893).

<sup>49</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 88 (Matthew C. Cordon et al. eds., 2005).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; SCHURZ, *supra* note 48, at 179.

<sup>52</sup> *Missouri Compromise of 1820*, 3 Stat. 545, 548 § 8 (1846).

<sup>53</sup> *Id.* ("And be it further enacted, that territory ceded by France to the United States under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited. Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any state

In 1821, before the final approval of Missouri's application for statehood, Missouri inserted a provision into its constitution prohibiting free blacks and "mulattoes"<sup>54</sup> from entering the state.<sup>55</sup> Northern representatives objected, refusing to grant final approval to Missouri's application unless Missouri removed the provision.<sup>56</sup> Representative Clay once again mediated the dispute, resulting in a second compromise that removed the discriminatory provision.<sup>57</sup> Instead, the Missouri constitution contained language prohibiting Missouri from discriminating against *citizens* from other states.<sup>58</sup> The new provision was included in the Resolution Providing for the Admission of the State of Missouri into the Union.<sup>59</sup> Subsequent to the provision change, Congress admitted Missouri and Maine to the Union.<sup>60</sup> However, the Resolution did not define who was a citizen, leaving only the implication that such a definition did not include Blacks.<sup>61</sup>

The admission of Maine as a free state and Missouri as a slave state preserved the political balance amongst the states, evenly distributing slave and free states in the Union.<sup>62</sup> Moreover, although the

or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.").

<sup>54</sup> EBONY, *supra* note 12, at 109–10. The forbidden intermingling of blacks and whites produced important codes in defining who was a slave and who was free. *Id.* This wide variety of codes was most confusing. It was imperative that a black produce "freedom papers." *Id.* If not, he or she would be presumed a slave. *Id.* The status of a *mulatto* would usually be determined by the status of the mother of the child. *Id.* Thus, if the mother was a free person, then the child was a free person. *Id.* In Alabama, a mulatto was any "person of mixed blood, descended, on the part of the mother or father, from Negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person." *Id.* In Virginia, on the other hand, a law decreed, "every person who has one-fourth part or more of Negro blood shall be deemed a mulatto as well as Negro." *Id.* Moreover, in Kentucky, possessing less than a fourth of African blood was "prima facie evidence of freedom." *Id.*

<sup>55</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 89 (Matthew C. Cordon et al. eds., 2005); MO. CONST. OF 1820, art. III, § 26, available at <http://clio.missouristate.edu/ftmiller/localhistory/docs/moconst1820.html>.

<sup>56</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 89 (Matthew C. Cordon et al. eds., 2005).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> RESOLUTION FOR THE ADMISSION OF MISSOURI (1821), reprinted in DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE UNITED STATES 226, 226 (William MacDonald ed., 1905).

<sup>60</sup> *Missouri Compromise of 1820*, in 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 89 (Matthew C. Cordon et al. eds., 2005).

<sup>61</sup> *Id.* at 89.

<sup>62</sup> Missouri Compromise of 1820, 3 Stat. 545 § 8 (1846); LUNDBERG, *supra* note 26, at 213.

slave-opposing Northern states would still outnumber the Southern states in the House, in the Senate there still existed a balance of voting power.<sup>63</sup>

The Supreme Court would rule this compromise unconstitutional in *Dred Scott*.<sup>64</sup> In the decision, Chief Justice Taney would reason that the Missouri Compromise violated the Fifth Amendment<sup>65</sup> regarding property rights afforded to citizens of the United States.<sup>66</sup> He would also rule that blacks were not citizens of the United States, which is likely the interpretation Missouri intended.<sup>67</sup>

### C. The Compromise of 1850 and the Kansas-Nebraska Act of 1854

The Missouri Compromise diffused the conflict enough to postpone further development between the warring parties for the next thirty years,<sup>68</sup> and only two states entered the Union during that time.<sup>69</sup> However, the expansion of the western territories ended this temporary resolution.<sup>70</sup> Northern congressmen sought to pass legislation to prevent the growth of slavery in the expanded western territories.<sup>71</sup> Eventually, Congress passed the Compromise of 1850, a series of laws that once again addressed the issue.<sup>72</sup> The Compromise's goal was to preserve the Union.<sup>73</sup> It included a fugitive slave law, as well as provisions denying those recognized as slaves a jury trial and the right to testify on their own behalf.<sup>74</sup> Furthermore, it allowed sla-

---

<sup>63</sup> Missouri Compromise of 1820, 3 Stat. 545 § 8 (1846); LUNDBERG, *supra* note 26, at 213.

<sup>64</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

<sup>65</sup> U.S. CONST., amend. V. ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

<sup>66</sup> *Dred Scott*, 60 U.S. at 450.

<sup>67</sup> *Id.* at 406.

<sup>68</sup> *The Compromise of 1850 and the Fugitive Slave Act*, PBS.COM, <http://www.pbs.org/wgbh/aia/part4/4p2951.html> (last visited Sept. 27, 2011).

<sup>69</sup> FINKELMAN, *supra* note 44, at 9.

<sup>70</sup> FINKELMAN, *supra* note 44, at 9; *The Compromise of 1850 and the Fugitive Slave Act*, *supra* note 68.

<sup>71</sup> FINKELMAN, *supra* note 44, at 9. A new prohibition led by northern congressmen, known as the Wilmot Proviso, ultimately failed.

<sup>72</sup> *Id.*; *The Compromise of 1850 and the Fugitive Slave Act*, *supra* note 68.

<sup>73</sup> *The Compromise of 1850 and the Fugitive Slave Act*, *supra* note 68.

<sup>74</sup> Fugitive Slave Act 1850, 9 Stat. 462 (1850); FINKELMAN, *supra* note 44, at 9. The Fugitive Slave Law of 1850 pleased the South but was met with resistance by the North.

very in most of the territories acquired in the Mexican-American War.<sup>75</sup> This included territories that prohibited slavery as recognized by the Missouri Compromise of 1820.<sup>76</sup>

Congress passed the Kansas-Nebraska Act in 1854, on the heels of the Compromise of 1850.<sup>77</sup> This Act repealed the Missouri Compromise of 1820 with respect to those territories west of Missouri.<sup>78</sup> It did not mandate slavery's establishment in these territories, but instead permitted "popular sovereignty."<sup>79</sup> Northerners opposed this, believing that the increased growth of slavery would ultimately decrease the presence of free labor in the North.<sup>80</sup> In response, Northerners formed the Republican Party.<sup>81</sup> Ultimately, the practice of popular sovereignty would lead to bloodshed as supporters of slavery in the South and opponents of slavery in the North battled for territorial rights in the Kansas territory.<sup>82</sup>

#### IV. THE DRED SCOTT CASE

##### A. The Facts of the Case

Common law allowed any person held in wrongful enslavement—who traveled legally into free territory—to sue for freedom.<sup>83</sup> Even Southern courts had held that the essence of the legislation was

<sup>75</sup> FINKELMAN, *supra* note 44, at 9. The Compromise of 1850 allowed California to enter the Union as a free state, but allowed slavery in the rest of the territories acquired in the Mexican-American War. *Id.*

<sup>76</sup> *Id.* The Fugitive Slave Law of 1850 allowed slavery in territories acquired in the Mexican-American War, including territories recognized by the Missouri Compromise of 1820 as non-slavery territories, i.e., north of the 36° 30' line. *Id.*

<sup>77</sup> The Kansas-Nebraska Act, 10 Stat. 277 (1854).

<sup>78</sup> *Id.*; FINKELMAN, *supra* note 44, at 9–10.

<sup>79</sup> The Kansas-Nebraska Act, 10 Stat. 277 (1854); FINKELMAN, *supra* note 44, at 10. The concept of "popular sovereignty," as articulated by Senator Stephen A. Douglas of Illinois, was the belief that Congress should permit settlers of a territory to decide independently whether to adopt slave territory. Thus, settlers who wanted slavery could bring their slaves into the territory. FINKELMAN, *supra* note 44, at 10.

<sup>80</sup> FINKELMAN, *supra* note 44, at 10.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; *The Kansas-Nebraska Act*, THE HISTORY PLACE,

<http://www.historyplace.com/lincoln/kansas.htm> (last visited Sept. 27, 2011). (As the violence in the battling of the territorial status grew, the death toll rose, which led to the Kansas territory earning the nickname "Bleeding Kansas.")

<sup>83</sup> *Missouri's Dred Scott Case, 1846-1857*, MISSOURI DIGITAL HERITAGE

<http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp> (last visited Oct. 17, 2011).

“once free, always free—even if you returned to slave territory.”<sup>84</sup> Both the Northwest Ordinance of 1787 and the Missouri Compromise of 1820 supported this limitation.<sup>85</sup> The Dred Scott case began when the Missouri slave traveled with his owner, Dr. Emerson;<sup>86</sup> first to Illinois and then to a fort in the northern part of the Louisiana Purchase designated a free territory by the Missouri Compromise.<sup>87</sup> Upon returning to Missouri, Scott sued for his freedom.<sup>88</sup> Before filing suit to liberate his family, Scott had made other attempts to gain their freedom.<sup>89</sup> Once he fled to the Lucas swamps, a haven for slave runaways near St. Louis, Missouri.<sup>90</sup> Scott even attempted to purchase his family’s freedom by offering his master \$300 as a down payment for his family’s freedom, which his master rebuffed.<sup>91</sup>

## B. Trial and Appellate History

Dred Scott’s suit appeared to fall squarely under accepted precedent.<sup>92</sup> His attorney argued that Scott was a free man because he had ventured into free territory.<sup>93</sup> Throughout the course of Scott’s litigation, Sandford’s counsel would provide shifting arguments in opposition to Scott’s claim for freedom. Initially, Sandford brought up the element of consent,<sup>94</sup> arguing that although the Northwest Ordinance and the Missouri Compromise granted freedom to slaves who traveled into free states, the slave owner must have consented to the travel.<sup>95</sup> Sandford’s lawyer asserted that because Dr. Emerson traveled into free territory with Dred Scott to report to

---

<sup>84</sup> See DON E. FEHRENBACHER, *THE DRED SCOTT CASE, ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 54–55 (1978); see FINKELMAN, *supra* note 44, at 21–22.

<sup>85</sup> Missouri Compromise of 1820, 3 Stat. 545 (1820); Northwest Ordinance, 1 Stat. 50 (1787).

<sup>86</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83. Dr. Emerson served as an assistant surgeon in the United States Army. In November 1833, he and Dred Scott traveled to Fort Armstrong, Illinois. This assignment would last for three years.

<sup>87</sup> Missouri Compromise of 1820, 3 Stat. 545 (1820); EBONY, *supra* note 12, at 237.

<sup>88</sup> KATZ, *supra* note 13, at 75.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; FINKELMAN, *supra* note 44, at 19.

<sup>92</sup> *Id.* at 20–22 (citing *Winy v. Whitesides*, 1 Mo. 472 (1824) (holding a slave who had been taken to Illinois was free); *Somset v. Stewart*, 1 Lofft (G.B.) 1 (1772) (holding slave status is unnatural and thus can only be created by legislation); *The Slave, Grace*, 2 Hagg. Admir. (G.B.) 94 (1827) (setting precedent not followed in the South)).

<sup>93</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

his military assignment in Illinois, it was not of his free will.<sup>96</sup> Additionally, Sandford's attorney further argued that because Emerson traveled into military jurisdiction, military law prevailed over civil anti-slavery laws,<sup>97</sup> and thus the laws that Scott relied upon were inappropriate and inapplicable. Ironically, Sandford's attorney did not question the constitutionality of these laws—the crux of Chief Justice Taney's decision—during the course of trial.<sup>98</sup> Sandford's counsel made this claim only when the case went to the Supreme Court of Missouri.<sup>99</sup> Nevertheless, the issue of constitutionality would be the turning point of Scott's case once it reached the United States Supreme Court.<sup>100</sup> Here, the case would go from a “routine” suit for Scott's freedom to “whether Congress had the authority to prohibit slavery through legislation.”<sup>101</sup>

In April 1846, Dred Scott filed a petition to sue for freedom in St. Louis Circuit Court based upon “an action of trespass for false imprisonment.”<sup>102</sup> Originally, Scott brought his suit for freedom against his late owner's wife, Irene Emerson.<sup>103</sup> On June 30, 1847, the lower state court ruled in favor of Mrs. Emerson, based upon a technicality, never addressing the “once free, always free” argument.<sup>104</sup> In December of 1847, the judge granted Scott a new trial.<sup>105</sup> In the second trial, Scott's attorney offered clear testimony to clear the technicality of proof of ownership.<sup>106</sup> As a result, the jury found for

---

<sup>96</sup> FEHRENBACHER, *supra* note 84, at 240. “Meanwhile, Dr. John Emerson of St. Louis had been trying to obtain an appointment as assistant surgeon in the United States Army. In December 1833, Emerson received his commission and reported for duty at Fort Armstrong in Illinois. He took with him a Negro slave who had previously been the property of Peter Blow and who is known in history as Dred Scott.”

<sup>97</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83; FEHRENBACHER, *supra* note 84, at 252, 256. This argument offered by Emerson's attorney disregarded the precedent set by *Rachael v. Walker*, 4 Mo. 350 (1836). *Rachael* was a slave held by an officer at military posts located in Illinois and on the Wisconsin side of the Mississippi. The court ruled in *Rachael's* favor stating that although the defendant had been required to stay at the military posts, “No authority of law or the government compelled him to keep the plaintiff there as a slave.” *Rachael*, 4 Mo. at 352, 354.

<sup>98</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>99</sup> *Id.*

<sup>100</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 401 (1857).

<sup>101</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>102</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>103</sup> FEHRENBACHER, *supra* note 84, at 249–50.

<sup>104</sup> FINKELMAN, *supra* note 44, at 21.

<sup>105</sup> *Id.*

<sup>106</sup> FEHRENBACHER, *supra* note 84, at 256.

Dred Scott and his wife, Harriet Scott.<sup>107</sup> Mrs. Emerson's attorney appealed to the Supreme Court of Missouri, which reversed the lower state court's decision with a two-to-one vote against Scott.<sup>108</sup> The appellate decision ignored the precedent case law and existing legislation that supported the lower court's decision.<sup>109</sup>

Dred Scott's attorneys filed a suit in federal court in 1854, refusing to accept the decision handed down by the Missouri Supreme Court.<sup>110</sup> At this point, Irene Emerson's brother, John Sandford, had taken ownership of the Scotts, and the Scott's two daughters had intervened as appellants.<sup>111</sup> On appeal, Scott lost again,<sup>112</sup> and he filed for certiorari to the United States Supreme Court.<sup>113</sup> Almost two years following the federal court's decision, in February of 1856 the Supreme Court heard oral arguments in the case.<sup>114</sup> However, in May of 1856, the Court postponed its ruling and instead called for the case to be re-argued in December of that same year.<sup>115</sup> In March of 1857, the Court issued its opinion, in favor of Sandford.<sup>116</sup> As far as the courts were concerned, the Scotts could not be free.<sup>117</sup>

### C. The Court's Ruling and Reasoning for Its Decision

The Supreme Court ruled that Scott was not a citizen of the United States and that the Missouri Compromise violated the Fifth Amendment of the United States Constitution because it interfered

---

<sup>107</sup> *Id.* at 257.

<sup>108</sup> FEHRENBACHER, *supra* note 84, at 264; MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>109</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>110</sup> FINKELMAN, *supra* note 44, at 23, ("By 1854, when the case reached the United States Circuit Court in St. Louis, Charles Edmund LaBeaume, a brother-in-law of Peter Blow's sons, was renting the Scotts. The Blows had grown up with Scott (their father was his first owner) and were deeply involved in helping him gain his freedom. LaBeaume in fact was instrumental in helping Scott obtain the services of Roswell Field, a Vermont-born lawyer with strong antislavery convictions. Field brought the case into federal court for one simple reason – to win Scott's freedom. Dred Scott sued John Sandford in the United States Circuit Court for battery and wrongful imprisonment.").

<sup>111</sup> *Id.* at 23, 23 n. 28.

<sup>112</sup> FINKELMAN, *supra* note 44, at 26; MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>113</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 396 (1857).

<sup>114</sup> FINKELMAN, *supra* note 44, at 27. The appellate briefs and oral arguments focused on three factors: first, whether blacks could be citizens of the United States; second, whether Congress possessed the power to prohibit slavery in the territories; and third, Whether the Missouri Compromise was constitutional.

<sup>115</sup> *Id.* at 27–28.

<sup>116</sup> *Id.* at 454.

<sup>117</sup> *Id.* at 452.

with a citizen's right to own property.<sup>118</sup> Though they could have decided Dred Scott's case without addressing the constitutional issues, Taney was determined to discuss the status of slavery in the territories and the constitutionality of the Missouri Compromise.<sup>119</sup> In its ruling, the Court did not only rule against Scott's freedom, but it also precluded any restrictions Congress may have attempted to place on the expansion of slavery.<sup>120</sup> Essentially, Taney stated, blacks "had no rights which the white man was bound to respect."<sup>121</sup>

#### D. Issues before the Court

Ultimately, the Court does not speak to the legality of the "once free, forever free" doctrine.<sup>122</sup> Instead, the Court addressed whether a "Negro of African descent could be a citizen of the United States," as well as whether the Missouri Compromise was unconstitutional in view of the Fifth Amendment.<sup>123</sup> The precise questions presented were: "1. Whether Dred Scott was a citizen of Missouri and thus entitled to sue as a United States citizen; 2. Whether Dred Scott's stay on free soil had given him a title to freedom even upon his return to Missouri; and 3. Whether the Missouri Compromise of 1820 was constitutional."<sup>124</sup>

##### 1. Whether Dred Scott was A Citizen of the United States of America

If it were determined that Dred Scott was not a citizen of the United States, then he would be unable to file suit in federal court because only citizens maintained the right to file to do so.<sup>125</sup> In the opinion Taney wrote of blacks as "inferior . . . with no rights which the white man was bound to respect."<sup>126</sup> Taney believed that the issue was "whether the descendants of such slaves, when they shall be emancipated, or born of parents who had become free before their birth, are citizens of a state, in the sense in which the word citizen is

---

<sup>118</sup> *Id.* at 451–52.

<sup>119</sup> FINKELMAN, *supra* note 44, at 36.

<sup>120</sup> KATZ, *supra* note 13, at 75.

<sup>121</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857); KATZ, *supra* note 13, at 75; MISSOURI DIGITAL HERITAGE, *supra* note 83, at 15.

<sup>122</sup> FEHRENBACHER, *supra* note 84, at 54–55.

<sup>123</sup> See *Dred Scott v. Sandford*, 60 U.S. at 403 (1857).

<sup>124</sup> LUNDBERG, *supra* note 26, at 213–14.

<sup>125</sup> *Id.* at 214.

<sup>126</sup> *Dred Scott*, 60 U.S. at 407.

used in the Constitution of the United States.”<sup>127</sup> Taney reasoned in his opinion that the word “citizen” and the term “people of the United States” were synonymous.<sup>128</sup> Taney did not believe that Scott, and those like him (slaves or ancestors of slaves) were included under the term “sovereign people,” or under the word “citizen” as used in the Constitution.<sup>129</sup> Thus, he concluded that they could not claim any of the rights and privileges provided by the Constitution.<sup>130</sup> Taney believed that this non-recognition of citizenship reached even states that chose to give a resident slave “the character of citizen, and to endow him with all its rights.”<sup>131</sup> Taney wrote that such a person “would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States.”<sup>132</sup>

## 2. Whether Dred Scott’s Stay on Free Soil Had Given Him Permanent Freedom

Dred Scott argued, pursuant to statute<sup>133</sup> and case precedent<sup>134</sup> that he became a free man once he entered free territory,<sup>135</sup> and that even if he returned to slave territory, he retained his freedom.<sup>136</sup> Taney did recognize in his opinion that Emerson took Scott to Illinois, a free territory.<sup>137</sup> However, Taney relied on a *Strader et al. v. Graham*, which made a distinction between what laws controlled in such a situation—the laws of the free state that the slaves visited or the laws of the slave state that the slaves returned to following their visit.<sup>138</sup> Based on that case, Taney concluded that even though Illinois was a free state, upon Scott’s return to Missouri, a slave state, Scott’s

---

<sup>127</sup> *Id.* at 403.

<sup>128</sup> *Id.* at 404.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Dred Scott*, 60 U.S. at 405.

<sup>132</sup> *Id.*; *See generally* U.S. CONST. art. IV, § 2.

<sup>133</sup> *See generally* Missouri Compromise of 1820, 3 Stat. 545, §8 (1846); *Northwest Ordinance*,

<sup>134</sup> FEHRENBACHER, *supra* note 84 at 54–55.

<sup>135</sup> *Dred Scott*, 60 U.S. at 452.

<sup>136</sup> *Id.*

<sup>137</sup> *Dred Scott*, 60 U.S. at 452.

<sup>138</sup> *Id.*; *Strader v. Graham* 51 U.S. 82, 83, 94 (1850) (holding that the status of the individuals involved depended upon the laws of Kentucky, the territory they returned to, and not that of Ohio, the free state they had visited.).

status was not depended upon the laws of Illinois, but rather the laws of Missouri.<sup>139</sup>

### 3. The Constitutionality of Missouri Compromise

The constitutionality of the Missouri Compromise was the third issue the Court addressed.<sup>140</sup> Taney reasoned that slaves were the property of their owners.<sup>141</sup> Moreover, the government could not deny owners their right to this property.<sup>142</sup> Any legislation Congress passed that injured the rights of the property owner would be in violation of the Fifth Amendment,<sup>143</sup> which recognized a property owner's rights of due process.<sup>144</sup>

Dred Scott supported his suit for freedom by relying on the Missouri Compromise.<sup>145</sup> Taney questioned whether Congress could pass such legislation under any of the powers granted to it by the Constitution; if not, he reasoned, the Court had to "declare it void and inoperative."<sup>146</sup> Taney stated that the Constitution affirmed the right of property in a slave; and furthermore, the owner had the right to carry the slave like any other piece of property.<sup>147</sup> Taney concluded that any congressional legislation that prohibited a citizen from having slaves in territory north of the line drawn by the legislation was unconstitutional and void.<sup>148</sup> Thus, Dred Scott and his family could not prevail under this argument.<sup>149</sup>

In ruling against Dred Scott and his family, the Court declared unconstitutional any current or future legislation restricting the growth of slavery.<sup>150</sup> Chief Justice Taney's personal ownership of

---

<sup>139</sup> *Dred Scott*, 60 U.S. at 452.

<sup>140</sup> Missouri Compromise of 1820, 3 Stat. 545, §8 (1846); LUNDBERG, *supra* note 26, at 214.

<sup>141</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 425 (1857).

<sup>142</sup> *Id.* at 450.

<sup>143</sup> U.S. CONST., amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

<sup>144</sup> *Id.*

<sup>145</sup> Missouri Compromise of 1820, 3 Stat. 545, §8 (1846).

<sup>146</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432 (1857); CUSHMAN & KONIAK, *supra* note 10, at 129.

<sup>147</sup> *Dred Scott*, 60 U.S. at 451; CUSHMAN & KONIAK, *supra* note 10, at 130.

<sup>148</sup> *Dred Scott*, 60 U.S. at 452.

<sup>149</sup> *Id.*

<sup>150</sup> KATZ, *supra* note 13, at 75.

slaves may have influenced his opinion.<sup>151</sup> His personal belief that the black man was inferior and his overall ideology brought “slavery politics” into the Court.<sup>152</sup>

#### V. INFLUENCE OF THE DRED SCOTT DECISION

Many thought that Taney had gone too far, and without cause. First, the dissenting opinions referenced the Constitution’s mandate that “Congress was . . . empowered under Article IV, Section 3, Paragraph 2, to regulate slavery in the territories.”<sup>153</sup> The Missouri Compromise clearly fell under the parameters of this provision, making it a constitutional exercise of Congressional power.<sup>154</sup> Second, the Court could have avoided any political issues had it followed its ruling in *Strader v. Graham*.<sup>155</sup> The Court ruled that every state possessed the authority to decide the status of all people within its borders; therefore, “Northern states could free visiting slaves, but the Southern states had complete discretion to decide for themselves if a slave who had lived in the North had become free.”<sup>156</sup> Furthermore, once Taney made his ruling arguing that blacks—free or enslaved—“could never be citizens,” and did not have the right to sue, many argued that there was no need for him to address the Missouri Compromise.<sup>157</sup> Once the Court concluded that Scott lacked the standing to sue, the Court “should have dismissed the case for lack of jurisdiction.”<sup>158</sup> Some would argue that all Taney wrote in the *Dred Scott* opinion addressing the Missouri Compromise was dicta.<sup>159</sup> Nevertheless, the Court had ruled.<sup>160</sup>

---

<sup>151</sup> *Id.*

<sup>152</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857).

<sup>153</sup> *Dred Scott*, 60 U.S. at 536; see also U.S. CONST. art. IV, § 3

<sup>154</sup> *Dred Scott*, 60 U.S. at 432.

<sup>155</sup> *Strader v. Graham*, 51 U.S. 82, 82–83 (1851) (holding the laws of Kentucky alone could decide upon the domestic and social conditions of the persons domiciled within its territories except so far as the powers of the States in this respect are restrained or duties and obligations imposed upon them by the Constitution of the United States); FINKELMAN, *supra* note 44, at 31.

<sup>156</sup> Paul Finkelman, *Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 33 (2007).

<sup>157</sup> *Id.* at 38.

<sup>158</sup> *Id.* at 38.

<sup>159</sup> *Id.* (Many Republicans argued that notwithstanding the Court’s ruling in *Scott v. Sandford*, the right to prohibit the practice of slavery in U.S. territories was retained by Congress because all discussion of the congressional power over slavery in the territories was dicta.)

<sup>160</sup> Finkelman, *supra* note 156, at 38.

## A. The Press, the People, and the Politicians

The sound of Taney's gavel echoed across the nation. Republican newspapers immediately brought news of the decision to print, along with their own critical opinions of the ruling.<sup>161</sup> Abolitionists voiced their fury over the opinion.<sup>162</sup> However, Frederick Douglass, an abolitionist and former slave, expressed optimism, believing that Taney's decision would help to prevent the expansion of slavery and eventually end it.<sup>163</sup> Northerners were fearful of the potential loss of jobs for white men because of the expansion of free labor, a problem they had not contended with since slavery ended in the North.<sup>164</sup> In addition, politicians responded to the *Dred Scott* decision. Politicians were uneasy that it would rupture the balance of power in Congress, affording more to the South.<sup>165</sup> Abraham Lincoln and Stephen Douglas used the decision to build support for their mutual positions in the upcoming election for the U.S. Senate, as well as the subsequent presidential nomination and election in 1860.<sup>166</sup> Lincoln and Douglas usually addressed the *Dred Scott* decision during their debates.<sup>167</sup> Lincoln invoked it to cultivate belief in a conspiracy theory that the South planned to expand slavery throughout the entire nation, including new territory and territory that was currently free.<sup>168</sup> Even before the Court announced its decision, Lincoln publicly spoke against the unethical relationship between Chief Justice Taney and President-elect Buchanan—referring to a brief dialogue shared between the two men immediately before Buchanan's inauguration address.<sup>169</sup> In that speech, Buchanan had called for the nation's support of the Court's decision.<sup>170</sup> Additionally, Stephen A. Douglas, Lincoln's political ri-

---

<sup>161</sup> *Id.* at 12.

<sup>162</sup> *Id.* at 12–13.

<sup>163</sup> EBONY, *supra* note 12, at 237; FINKELMAN, *supra* note 44, at 175; FINKELMAN, *supra* note 156, at 48.

<sup>164</sup> KATZ, *supra* note 13, at 12–13. Although at one time slavery was also present in the North, it began to disappear as early as 1777 in Vermont, concluding in New York in 1817. “In 1795 President John Adams thought that the opposition of white mechanics concerned over losing jobs to black slaves was most important.” *Id.*

<sup>165</sup> FINKELMAN, *supra* note 44, at 184–185.

<sup>166</sup> *Id.*

<sup>167</sup> H. L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION 48 (2d ed. 2005).

<sup>168</sup> FINKELMAN, *supra* note 44, at 46; Finkelman, *supra* note 156, at 46.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

val and presidential opponent, continued to defend the *Dred Scott* decision throughout the 1858 senatorial campaign.<sup>171</sup>

Despite his purportedly unbiased role as Chief Justice, Taney's goal in *Dred Scott* was political rather than legal.<sup>172</sup> A slave owner himself, Taney saw the case as an opportunity to declare that Congress lacked the power to ban slavery from the U.S. territories, thus, slavery could expand unabated by Congress.<sup>173</sup> Buchanan, who was pro-slavery and pro-South,<sup>174</sup> also sought finality regarding the issue of slavery. Buchanan considered slavery in the territories to be a "judicial question"—he openly stated that the issue was one for the Supreme Court to decide, and that he looked forward to a speedy settlement of the issue, along with acceptance of the decision once delivered.<sup>175</sup> To both men's dismay, the *Dred Scott* decision would provide the fuel for political debate during the campaigns of 1858 and 1860.<sup>176</sup>

### 1. Reactions from Newspapers

Newspapers responded to Taney's decision by using the power of print to deliver Taney's opinion to the masses.<sup>177</sup> The *New York Tribune* circulated Taney's opinion, along with Justice Curtis' dissent, in the hope of promoting the Republican cause to prohibit the extension of slavery into new territories.<sup>178</sup> Its editor, Horace Greeley, equated the validity of Taney's decision to an opinion made in a "Washington barroom."<sup>179</sup> Another Republican newspaper, the *Chicago Tribune*, called Taney's views regarding the status of blacks as non-citizens as "inhuman dicta."<sup>180</sup> Still other newspapers supported Taney's decision.<sup>181</sup> The *Richmond Enquirer* praised the Court's decision and saw it as an end to the debate over slavery.<sup>182</sup> The *New Orleans Picayune* found favor with Taney's opinion, telling its read-

---

<sup>171</sup> FINKELMAN, *supra* note 44, at 184.

<sup>172</sup> Finkelman, *supra* note 156, at 43.

<sup>173</sup> *See id.*

<sup>174</sup> FINKELMAN, *supra* note 44, at 133.

<sup>175</sup> *Id.* at 45; Finkelman, *supra* note 156, at 45.

<sup>176</sup> FINKELMAN, *supra* note 44, at 168–169; Finkelman, *supra* note 156, at 45.

<sup>177</sup> *See* Finkelman, *supra* note 156, at 45.

<sup>178</sup> *Id.* at 12.

<sup>179</sup> FINKELMAN, *supra* note 44, at 145; Finkelman, *supra* note 156, at 12.

<sup>180</sup> Finkelman, *supra* note 156, at 12.

<sup>181</sup> *See* FINKELMAN, *supra* note 44, at 128.

<sup>182</sup> *Id.*

ers that the Court and the Constitution supported the South's cause.<sup>183</sup>

## 2. The Public's Stance

The opinion discouraged most abolitionists and Northerners.<sup>184</sup> Abolitionists regarded the ruling as "open advocacy of slavery by the United States Supreme Court."<sup>185</sup> Republicans feared that the ruling—that Congress did not have the power to prohibit slavery—called into question the legitimacy of their core issue.<sup>186</sup> Outside abolitionist circles, many Northerners did not support slavery because expansion of slavery meant the threat of jobs belonging to white men.<sup>187</sup> European immigrants who had settled in the North now felt threatened by the potential that their jobs would go to slaves who had to work without pay, if slavery expanded to northern territories.<sup>188</sup> However, not all Northerners disliked slavery.<sup>189</sup> There were those who profited by supporting the "practice of the South."<sup>190</sup> Though Northern states had outlawed slavery within their borders, some Northern businessmen did not relinquish their part in the slave trade.<sup>191</sup> They comprised the majority of the owners and captains of the ships involved in the African slave trade.<sup>192</sup> Northern factories produced the tools of bondage used to hold Southern slaves.<sup>193</sup> New England industry was profitable and powerful because of the African slave trade and the business conducted with Southern slave owners.<sup>194</sup>

Most Northern supporters of the Court's decision based their support on racism, party affiliations, and commercial concerns.<sup>195</sup>

---

<sup>183</sup> *Id.*

<sup>184</sup> See Finkelman, *supra* note 156, at 5.

<sup>185</sup> EBONY *supra* note 12, at 237; FINKELMAN, *supra* note 44, at 184.

<sup>186</sup> ERIC H. WALTHER, THE SHATTERING OF THE UNION IN THE 1850S 122 (2004).

<sup>187</sup> KATZ, *supra* note 13, at 12.

<sup>188</sup> *Id.* at 79.

<sup>189</sup> *Id.* at 12.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> KATZ, *supra* note 13, at 12 (quoting Daniel Webster: "I hear the sound of the hammer, I see the smoke of the furnaces where manacles and fetters are forged for human hands." Daniel Webster, U.S. Senator, Plymouth Rock Oration (Dec. 22, 1820) *available at* <http://www.enotes.com/american-history-literature-cc/plymouth-rock-oration.>).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

Most whites, from the North and the South, did not believe in racial equality, but instead believed in white superiority.<sup>196</sup> Members of the Democratic Party wanted to end the issue of slavery and pursue their agenda of settling in the Western territories and increasing their political power.<sup>197</sup> Northern businessmen were concerned with the nation's economy.<sup>198</sup> They supported the *Dred Scott* decision, hoping that it would assist in the preservation of national commerce by ending the debate and eliminating the need to either defend or attack slavery.<sup>199</sup>

### 3. Electoral Politics

The *Dred Scott* decision profoundly influenced the political careers of Abraham Lincoln and Stephen Douglas.<sup>200</sup> During their famous debates, the *Dred Scott* decision was a core issue.<sup>201</sup> They opposed each other in the 1858 U.S. Senate race, and two years later the men would once again face each other in a run for the presidency.<sup>202</sup> Douglas defended and provided support for Taney's decision, while Lincoln attacked and opposed the ruling.<sup>203</sup> The debates would prove to be very instrumental in the outcome of both elections.<sup>204</sup>

Douglas defined his position on slavery before the *Dred Scott* decision.<sup>205</sup> In 1850, Douglas was instrumental in getting Congress' approval of the Compromise of 1850,<sup>206</sup> and he sponsored the Kansas-Nebraska Act of 1854.<sup>207</sup> Douglas believed that the adoption of slavery in a territory should be left up to the settlers of that territory; a concept known as "popular sovereignty."<sup>208</sup> These two pieces of legislation, along with Douglas' support of the *Dred Scott* decision, provided Lincoln with ammunition to support his theory that Southerners and supporters of slavery were planning to nationalize slavery

---

<sup>196</sup> FINKELMAN, *supra* note 44, at 136; Loewen, *supra* note 1.

<sup>197</sup> FINKELMAN, *supra* note 44, at 136.

<sup>198</sup> *Id.* at 137.

<sup>199</sup> *Id.*

<sup>200</sup> FINKELMAN, *supra* note 44, at 168.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 202.

<sup>203</sup> *Id.* at 168.

<sup>204</sup> *Id.* at 202.

<sup>205</sup> See FEHRENBACHER, *supra* note 84, at 178.

<sup>206</sup> *Id.* at 161, 178.

<sup>207</sup> The Kansas-Nebraska Act, 10 Stat. 277 (1854), FEHRENBACHER, *supra* note 84, at 179.

<sup>208</sup> FINKELMAN, *supra* note 44, at 10.

throughout the Union.<sup>209</sup> Fellow Democrats in both the North and the South joined Douglas as he supported and endorsed the Court's decision that Blacks, even those who were free, could never be United States citizens.<sup>210</sup>

On January 6, 1859, Douglas defeated Lincoln and was re-elected to represent the state of Illinois in the Senate.<sup>211</sup> His endorsement of *Dred Scott* was likely instrumental in this win. However, although some Democrats succeeded in the congressional elections, northern Democrats did not fare well.<sup>212</sup> The main results from this reelection were a split in the Democratic Party, a decline in Democratic poll power in crucial northern states, and the election of a Republican president in the 1860 election.<sup>213</sup>

Douglas campaigned for political office by insisting that all citizens of the United States defer to the Court's decision; that it was their duty to support this decision.<sup>214</sup> In one of the debates, Lincoln contemplated the possibility that the Court could reverse itself if faced with another plaintiff similarly situated to Dred Scott.<sup>215</sup> In his response to Lincoln, Douglas stated, "Mr. Lincoln intimates that there is another mode by which he can reverse the Dred Scott decision. How is that?"<sup>216</sup> Ironically, such a reversal would happen—not via "mob law,"<sup>217</sup> as Douglas asserted during the debate, but rather through proclamations and amendments to the United States Constitution.<sup>218</sup>

The course of Lincoln's political future would dramatically change following the *Dred Scott* decision. Even before Taney issued his ruling, Lincoln considered the potential impact it would have on public policy.<sup>219</sup> During his political campaign for both the Senate

---

<sup>209</sup> *Id.* at 46.

<sup>210</sup> *Id.* at 49.

<sup>211</sup> FEHRENBACHER, *supra* note 84, at 501.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 503.

<sup>214</sup> FINKELMAN, *supra* note 44, at 198–199.

<sup>215</sup> *Id.* at 204.

<sup>216</sup> *Id.* at 207.

<sup>217</sup> *Id.* at 51.

<sup>218</sup> EBONY, *supra* note 12 at 275; HARVEY FIRESIDE, SEPARATE AND UNEQUAL 116 (2004).

<sup>219</sup> DRED SCOTT, MR. LINCOLN AND FREEDOM, [http://www.mrlincolnanefreedom.org/content\\_inside.asp?ID=15&subjectID=2](http://www.mrlincolnanefreedom.org/content_inside.asp?ID=15&subjectID=2) (last visited Sept. 22, 2011). In January 1857, as he prepared for a speech, Lincoln wondered what would be the impact of the *Dred Scott* decision. In his notes, he concluded "that so soon as the Supreme Court decides that Dred Scott is a slave, the whole community must decide that

seat and the presidency, Lincoln openly articulated his opposition to the Court's decision.<sup>220</sup> He continued to promote, whether he believed it or not, the notion that the South and supporters of slavery were conspiring to extend slavery throughout the Union.<sup>221</sup> In his *Speech on the Dred Scott Decision*, Lincoln spoke of the historical factual errors that Taney had made in the opinion.<sup>222</sup> He also addressed Taney's incorrect assumption that public opinion of Blacks had become more favorable than at the origin of the government of the United States.<sup>223</sup> However, although Lincoln opposed Taney's decision, Lincoln was steadfast in his stance regarding racial amalgamation.<sup>224</sup> In his speech addressing the *Dred Scott* decision, Lincoln did express that the Court should have recognized Dred Scott and his family as citizens and given them at least a hearing.<sup>225</sup> However, Lincoln also made his views on race mixing very clear, stating:

I have said that the separation of the races is the only perfect preventive of amalgamation. I have no right to say all the members of the Republican party are in favor of this, nor to say that as a party they are in favor of it. There is nothing in their platform directly on the subject. But I can say a very large proportion of its members are for it, and that the chief plank in their platform—<sup>226</sup> opposition to the spread of slavery—is most favorable to that separation.

In his interpretation of the Constitution and its application to slavery, Taney would “stretch the text to fit his southern prejudices,”<sup>227</sup> “and rule African Americans out of the Constitution.”<sup>228</sup> However, Taney's opinion was unable to put an end to the slavery debate. The *Dred Scott* decision “exacerbated sectional tension, infuriated most northerners, helped set the stage for Lincoln's election to the presidency in 1860 and surely brought the nation closer to civil war.”<sup>229</sup> In accepting his nomination as the Republican candidate for the Senate, Lincoln delivered his “House Divided” speech, in which he addressed the issue of slavery:

not only Dred Scott, but that *all* persons in like condition, are rightfully slaves.” 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 388 (Roy P. Basler 1857).

<sup>220</sup> FINKELMAN, *supra* note 2, at 46, 47.

<sup>221</sup> *Id.* at 46; WALTHER, *supra* note 186, at 151.

<sup>222</sup> Abraham Lincoln, *Speech on the Dred Scott Decision*, (Jun. 26, 1857) available at <http://www.freemaninstitute.com/lincoln.htm>.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> FIRESIDE, *supra* note 218, at 117.

<sup>228</sup> *Id.* at 221.

<sup>229</sup> Finkelman, *supra* note 2, at 50.

A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved*- I do not expect the house to *fall*- but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other. Either the *opponents* of slavery, will arrest the further spread of it, and place it . . . in [the] course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new*- *North* as well as *South*.<sup>230</sup>

Throughout the course of his campaign for the Senate and presidency, Lincoln continued to speak against the infamous *Dred Scott* decision, construing it as the most important case on race relations before the Civil War.<sup>231</sup>

Although Lincoln's views on race may have been more progressive than most at that time, he did believe that Blacks and Whites were different.<sup>232</sup> In a speech given in Illinois in 1858, Lincoln spoke to the audience about these perceived differences.<sup>233</sup> He stated, "There is a physical difference between the white and black races living together on the terms of social and political equality. He, as a white man, favored, "having the superior position assigned to the white race."<sup>234</sup> Even before issuing the Emancipation Proclamation, Lincoln demonstrated his commitment to segregation by defending the deportation and colonization of slaves.<sup>235</sup> Despite popular conception of Lincoln's goals, it is a myth to say that Abraham Lincoln fought to free the slaves. Lincoln did not oppose slavery in a vacuum, but rather wanted to preserve the Union.<sup>236</sup> He knew that without putting an end to the inevitably contentious and geopolitical-ly divisive issue of slavery, the Union, along with the political power of the northern states, would be lost.<sup>237</sup>

Just as Lincoln knew slavery to be the crux of the conflict between the North and South, it also provided him with a weapon to use against the region after the war began. As the nation grew, the Southern economy remained almost entirely agricultural, unlike the heavily industrialized North, and it relied on slavery to support this

---

<sup>230</sup> WALTHER, *supra* note 186, at 151; Finkelman, *supra* note 2, at 47. Abraham Lincoln, Speech at Illinois Republican Convention, (Jun. 16, 1858) available at <http://www.pbs.org/wgbh/aia/part4/4h2934t.html> (last visited Oct. 18, 2011).

<sup>231</sup> Finkelman, *supra* note 156, at 46-47 (2007).

<sup>232</sup> *Id.* at 131.

<sup>233</sup> *Id.*

<sup>234</sup> KATZ, *supra* note 13, at 77.

<sup>235</sup> EBONY, *supra* note 12, at 271; KATZ, *supra* note 13, at 77.

<sup>236</sup> FIRESIDE, *supra* note 218, at 32; KATZ, *supra* note 13, at 78; Loewen, *supra* note 1.

<sup>237</sup> FIRESIDE, *supra* note 218, at 32, 33.

system.<sup>238</sup> To emancipate the Southern slaves would entail a collapse of much of the Southern commercial system, which then depended upon the existence of slavery.<sup>239</sup> If the North could accomplish this mission, it could hobble the South economically as well as militarily.<sup>240</sup> Thus, President Abraham Lincoln had both political and military reasons to issue the Emancipation Proclamation.<sup>241</sup> The Emancipation Proclamation's purpose was to strengthen the Union as much as it was to aid the slaves.<sup>242</sup> Nowhere is this more evident than in a letter Lincoln had written to Horace Greeley, editor of the *New York Tribune*,<sup>243</sup> in which he stated:

If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union . . . .<sup>244</sup>

## VI. CONCLUSION

It is unlikely that Dred Scott appreciated the level of significance of his signature—the letter “X”—on his suit for freedom in April 1846.<sup>245</sup> The Supreme Court's decision in his suit would cause fiery political consequences as bitterness and hostility fomented between the North and the South.<sup>246</sup> Taney's *Dred Scott* decision promised the growth across the nation of the cancer created by slavery.<sup>247</sup> As supporters of slavery lauded the Court's decision, Nor-

<sup>238</sup> KATZ, *supra* note 13, at 3.

<sup>239</sup> Loewen, *supra* note 1 (“Its labor supplies the product which constitutes by far the largest and most important portions of the commerce of the earth. . . . A blow at slavery is a blow at commerce and civilization.” *Mississippi Secession Declaration* (Jan. 9, 1861) available at [http://www.civil-war.net/pages/mississippi\\_declaration.asp](http://www.civil-war.net/pages/mississippi_declaration.asp) (last visited Oct. 18, 2011)).

<sup>240</sup> WILLIAM J. COOPER, JR., & THOMAS E. TERRILL, *THE AMERICAN SOUTH: A HISTORY* 375 (2009); Frederick J. Blue, *Constitutional and Political Factors*, in *THE AMERICAN CIVIL WAR: A HANDBOOK OF LITERATURE AND RESEARCH* 134 (Steven R. Woodworth, ed., 1996).

<sup>241</sup> Emancipation Proclamation, (Jan. 1, 1863) available at [http://www.archives.gov/exhibits/featured\\_documents/emancipation\\_proclamation/transcript.html](http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html) (last visited Oct. 18, 2011); EBONY, *supra* note 12, at 268, 272.

<sup>242</sup> EBONY, *supra* note 12, 271, 272; KATZ *supra* note 13, at 78.

<sup>243</sup> KATZ, *supra* note 13, at 77.

<sup>244</sup> Letter from Abraham Lincoln, President of United States, to Horace Greeley, Editor, *NEW YORK TRIBUNE, SPEECHES & WRITINGS*, available at <http://showcase.netins.net/web/creative/lincoln/speeches/greeley.htm> (last visited Oct. 18, 2011).

<sup>245</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

therners and abolitionists expressed their fury, recognizing the far-reaching impact of Scott's denial of freedom.

Since the war's end, many have tried to recast the conflict as a battle for states' rights, or against tariffs and taxes.<sup>248</sup> However, no historical wallpaper can obscure the fact that the South's burning desire to defend the preservation and expansion of slavery was its primary motivation to secede from the Union.<sup>249</sup> Slavery supporters believed that secession would not only maintain the system of slavery, but would also propagate the South's ideology of white supremacy.<sup>250</sup> The anti-slavery movement's compromise on geographic limitations on slavery was an attempt to elide moral and political fault lines existing at the formation of American society and written into its founding legal principles. The *Dred Scott* case unforgivingly revealed those fault lines, ratcheting up the intensity of the conflict between the North and South. It exposed a nation that was unequivocally moving toward civil war.

Dred Scott and his family did ultimately get their freedom, through extra-judicial forces.<sup>251</sup> The Scott family found emancipation at the hands of Taylor Blow, a descendent of Scott's original owner.<sup>252</sup> However, Scott's legal quest for freedom, a journey that lasted over a decade, "forced the nation to directly confront slavery"<sup>253</sup> and its evils. The *Dred Scott* decision laid bare the legal system's inability to solve such a deeply embedded problem. In ruling that all Blacks were not and could not be citizens of the United States, *Dred Scott* set the stage for the Civil War.<sup>254</sup>

---

<sup>248</sup> Loewen, *supra* note 1.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> KATZ, *supra* note 13, at 76.

<sup>252</sup> MISSOURI DIGITAL HERITAGE, *supra* note 83. Irene Emerson's husband was an abolitionist. When her husband, Dr. Calvin Chaffe, learned that his wife owned Dred Scott, he transferred ownership of the Scott family to Taylor Blow. Blow lived in St. Louis; Missouri law only allowed a citizen of the state to emancipate a slave there. Mrs. Irene Emerson Chaffee made the transfer, but only if she would receive the wages that were earned by the Scotts over the years. She received about \$750, which ironically was probably about \$50 more than had she sold them on the slave market. *Id.*

<sup>253</sup> KATZ, *supra* note 13, at 76.

<sup>254</sup> FINKELMAN, *supra* note 44, at 2.

