



Curriculum Units by Fellows of the Yale-New Haven Teachers Institute
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The Supreme Court and American Society: The Dred Scott Case

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by John Buell

Objectives

Rationale

As a general rule high school students are aware that there is a Supreme Court in the United States. Most will agree that it is important and that it has some kind of power. They will recite the mantra repeated since elementary school that “the legislative branch makes the law, the executive branch carries out the law, and the judicial branch interprets the law”. Very few, however, will understand what is meant by “interpret the law” and most will be surprised to learn that the Court can “make the law” as well. Many students are aware in a general way that the Supreme Court has ruled on some important issues that have played a role in their lives -- abortion, segregation and the rights of the accused to name a few -- but they have little understanding of how and why the Court has decided such issues. Very few will be able to name even a few of the current members of Supreme Court and only the most dedicated political junkie will be able to name them all.

There are very good reasons for this level of ignorance (which is merely a reflection of the same level of ignorance found in the general public). The Supreme Court is an unusual institution in American government and its modes of operation are puzzling to the layman and often defy simple explanation. Unlike the other government leaders, its members avoid the media and appear there infrequently. Except when they are up for confirmation or when they resign or die, their personal lives are not the subject of public attention or debate. Aside from the clues gleaned from questioning during oral arguments (and usually reported only in high brow media such as NPR or the New York Times), the public has little idea of the discussions and debates that go on between justices or of the political perspectives of the individual justices. The only official record of its actions are the majority, concurring and dissenting opinions that are usually written in a legalistic style that most Americans find difficult to fully comprehend. This is of course just how the Court wants it. The justices are meant to be seen, not as opinionated, fallible, emotional, ordinary human beings, but as highly skilled practitioners of a legal craft that is somehow outside of politics and based entirely on essential legal principles that by definition have intrinsic value.

It should not be difficult to appeal to the teenager’s naturally cynical and rebellious nature and encourage them to tear down this veil of seemingly mysterious power. Most will be excited to disobey the command “to pay no attention to the man behind the curtain” and consider how these extraordinary, but still human,

individuals arrive at their decisions that can have such a significant impact on our lives. Although a proper examination of the Supreme Court can and should take place in a civics class, the first opportunity to do so in a student's high school career usually occurs in U.S. History I which, in New Haven, is generally taught in the tenth grade. It is in this course that the Constitution is considered within the historical context of its creation. The time pressure of the curriculum usually allows for only a cursory examination, focusing mostly on the compromises required at the Constitutional Convention, the separation of powers (when the mantra is repeated again) and checks and balances. The role of the Supreme Court is usually not really considered in any detail at this point in the course because in 1787 and for many decades afterward the role of the Court was not fully defined.

At first it may appear that the Dred Scott Case is not the best avenue to a better understanding of the Supreme Court. It was decided at a time when the nation was riven by sectional differences that have no real parallels in recent times. Chief Justice Roger Taney's "Opinion of the Court" which was rendered on the case has been almost universally derided ever since as a bad decision -- the product of an overly ideological and reactionary judge relying on poor scholarship and weak legal reasoning in an effort to shape public policy 1. The case has no precedential value since actions by Congress, the executive branch and state governments soon reversed the decision 2. The only reason justices have cited the case since then has been as an example of bad law. In 1896, for example, Justice Harlan attacked the majority opinion in *Plessy v. Ferguson* as being no more legitimate than *Dred Scott* and Justice Antonin Scalia did the same in a decision from which he was dissenting in 1992 3.

It is precisely because of its notoriety, however, that the Dred Scott case provides an opportunity for high school students to consider the power of the Supreme Court, its potential misuse, and its limitations. The case arose at a time when the Court could conceivably have played the role of a powerful arbiter to settle once and for all the issues that were tearing the nation apart. For many Americans of that time, and for many more today, the Court was and is an institution above politics empowered by the Constitution (admittedly with some ambiguity) to settle disputes by rendering decisions based on the essential American values upon which Americans are supposed to agree. Theoretically its power is absolute and once a decision is handed down, the other branches of government and the state government have no choice but to comply. This of course is not the case. Despite its theoretical power, the Court must operate within the political and social constraints of its time. The Dred Scott case provides an excellent illustration of what happens when the Court overreaches and brazenly attempts to enter the political realm. The vigorous public reaction and the responses of political leaders help to demonstrate the impotence of the Court in attempting to force a resolution on the question of slavery.

Using *Dred Scott* as a window on the contemporary role and function of the Supreme Court presents particular challenges, but should still be attempted. All of us teaching history in high school regularly seek to emphasize the relevance of our subject matter to our students as a tool for understanding the present and providing the basis for making decisions about the future. The role of a particular aspect or action of government, the struggles over social issues, the development of political culture and the impact of economic change in history all should be compared to what we face today. Often the mere exposure to particular concepts or institutions within an historical context will spark student interest in analogous issues in contemporary life. A unit on *Dred Scott* therefore should include some consideration of a recent Supreme Court Case that can be used as a point of comparison.

Learning Objectives

Students will identify and explain the political conflicts over slavery in the territories including:

- the effects of the Mexican Cession
- the Wilmot Proviso
- the Compromise of 1850
- the Kansas-Nebraska Act

Students will provide examples of the degree of political deadlock on the issue of slavery in the U.S. Congress.

Students will outline the essential elements of Dred Scott's life that were the basis for his claims to freedom.

Students will research, write and present arguments to support Scott's suit.

Students will research, write and present arguments to deny Scott's suit.

Students will articulate the reasoning used by Justice Taney in denying Scott's claim.

Students will critique the reasoning in Justice Taney's opinion.

Students will identify the positions taken in various newspaper editorials written in response the Scott case.

Students will identify the positions taken by Abraham Lincoln and Stephen Douglas on the Scott case in their debates.

The Dred Scott Case

What follows is a very brief synopsis of the case emphasizing the key points that are especially important and thematically related to the basic themes of a survey course in U.S. History I (to 1877). For a slightly more detailed version, I recommend *Dred Scott v. Sandford: A Brief History with Documents* by Paul Finkelman, a mercifully slim volume upon which I have based this account . The book includes excerpts of many of the primary source documents associated with the case (see bibliography).

Dred Scott was a slave who sued for his freedom in Missouri state court in 1846. He claimed that he, his wife, Harriet, and his two daughters were entitled to freedom because he (and later his family) had been taken to live by his owner first to the free state of Illinois and later to the Wisconsin Territory where slavery had been forever banned by the Missouri Compromise of 1820. After numerous delays the case went to trial in 1850 and a jury found him free. The judge had instructed the jury that Scott's status as a slave would be destroyed by his residing in a free jurisdiction which was consistent with Missouri precedents dating from 1824. In 11 other cases Missouri courts had freed slaves on similar grounds as had several other slave states including even Mississippi. Scott's owner (now the widow of the man who took him into Illinois and Wisconsin) appealed the decision to the Missouri Supreme Court.

In 1852 Missouri's highest court reversed the lower court's decision and ruled that Dred Scott was still a slave.

In an overtly political opinion, the Chief Justice stated that “times are not now as they were when the former decisions on this subject were made.” He went on to say that due to the “dark and fell spirit” of the antislavery forces in the country, Missouri had to take an unambiguous stand and not take any steps that “might gratify this spirit.”⁴ Thus the court foretold the final result of the case by ignoring precedent and legal reasoning in order to arrive at a decision driven by political necessity.

At this point Scott and his family were now controlled by John Sandford, a prosperous New York merchant and the brother of the previous owner’s widow. Now that the case had become a dispute between citizens of different states, Scott’s lawyers had the opportunity to sue in federal court, a right provided for in the Constitution (article III, section 2, paragraph 1). When, in 1854, the case came before federal district court in St. Louis the first issue to be decided was one that played a major part in the final opinion: the question of whether Dred Scott was in fact a citizen of Missouri or the United States. If, as Sandford’s lawyers argued, the fact that he was black meant that he could not be a citizen, the federal court had no jurisdiction. The presiding judge rejected this reasoning and the case went to trial, but he instructed the jury that Scott’s status was to be determined by Missouri law. As the Missouri Supreme Court had already spoken on the issue, the jury found that Scott and his family were still slaves.

It was not until February 1856 that Scott’s case was finally argued before the United States Supreme Court. In the interim, “bleeding Kansas” has served to raise the tensions over slavery in the territories to a fever pitch and in hindsight it appears inevitable that political concerns would weigh heavily on a case such as this. Sandford was able to retain as his attorney Missouri’s proslavery Senator and one of the most experienced constitutional lawyers in the country who also happened to be a good friend of Chief Justice Roger B. Taney. Scott’s supporters were able to find a free soil Democrat willing to take the case, but he was unable to find other attorney’s to assist him. It is apparent that the antislavery movement did not see this case as significant, assuming that the Court would rule on narrow grounds that Scott was still a slave. The idea that the Court would weigh in on questions relating to the power of Congress, the rights of states, the rights of individuals, and the rights of property owners -- all questions which lead back to the Constitution -- seem obvious today, but few foresaw that such action was imminent, at least not with this case.⁵

As it was, the Court did begin to give signs that it was to make a significant ruling as it called for reargument on crucial questions in December and declined to render a final decision until after the 1856 presidential election. The idea that the Court had intentionally delayed the case in order to avoid giving the Republicans ammunition and insure the election of James Buchanan was promoted by Lincoln in his “House Divided” speech and further reveals the intensely partisan nature of the case. The ruling in the case was finally announced on March 3, 1857, two days after Buchanan was inaugurated. Keeping in tune with the election of a proslavery president, the decision put the federal government in the positions of fully protecting the rights of slaveholders and releasing it from any obligation toward those of African descent.

Chief Justice Taney wrote the “opinion of the Court” in this case and, despite the fact that he did not have the support of the majority of the justices on all of his points, his opinion was and still is considered the “Dred Scott decision”. Six other Justices certainly concurred that Dred Scott and his family were still slaves, but Taney went further. He declared that people of African descent were inherently inferior, were considered to be so by the framers of the Constitution, and therefore could not be citizens of the United States or any of the individual states. He also ruled that Congress had no power exclude slavery in the territories and declared the Missouri Compromise and any other legislation that sought such an exclusion to be unconstitutional.⁶

Reaction to the opinion was understandably intense and divided. Rather than serving to keep slavery out of

national politics, the decision only served to exacerbate divisions and bring the nation one step closer to the final break. On a basic political level, the ruling had essentially removed the issue upon which the Republican Party was based: free soil. To northerners of all political stripes it appeared to be one more example of how the “slave power” had come to dominate the national government -- that it would no longer be neutral on the issue of slavery, but would now actively promote it. The variety of reactions to the decision -- newspaper editorials and speeches -- provides an excellent perspective on how people viewed not only the questions of slavery and black citizenship, but also the power and the role of the Supreme Court.

Strategies

Related Issues in the U.S. History Curriculum

Proper consideration of the issues raised by the Dred Scott case within the context of a U.S. History course must begin long before a class begins to study the events leading up to the Civil War. Although it isn't the primary focus of this unit, it makes sense to review some of the related issues that should be covered that provide direct connections to Dred Scott. The first of these issues encountered will be the establishment of race-based slavery in the early colonial era. It is important for students to consider how the institution of indentured servitude was slowly transformed into slavery as laws began to define the status of individuals based on race.

An exploration of the ideals of the American Revolution will certainly be important for a satisfactory understanding of the Dred Scott case. As the fundamental proclamation of those ideals, the Declaration of Independence is an obviously important component of the U.S. History curriculum and will serve to inform the discussion on Dred Scott by addressing one important question: who did Jefferson and his collaborators mean when they referred to “all men”? Perhaps some discussion of the concept of an ideal as compared to reality would be useful at this point. The Enlightenment thinkers certainly promoted the idea of universal god-given human rights that are retained by all men regardless of status -- racial or otherwise. (the rights of women are less clear -- if we now have expanded the ideal to include women, could it earlier have been expanded to include blacks?). The founding fathers, however, felt forced by circumstances to accept slavery as a necessary evil -- and contradiction. Most did see it as an evil nevertheless and looked forward to some vague time in the future (preferably after their deaths) when it would be abolished. Students should be asked to consider, however, how this thinking related to the racial attitudes of the time.

Thomas Jefferson himself can serve as a model for students on the thinking of many Americans of the time on this issue. A revealing comparison can be made between Jefferson's writings in which he condemns slavery and the parts of his *Notes on the State of Virginia* in which he writes of the inherent inferiority of blacks in his home state (see web address below for text). Was his belief in natural law and his optimistic faith in the power of reason able to overcome his essential racial bias? Jefferson is remarkably honest about the inherent contradictions in his thinking and he explores them in *Notes*. This double think is inherent in much of American culture right on through the antebellum period. Perhaps most white Americans at the time of Dred Scott would agree that slavery was an evil and yet could not bring themselves to consider blacks as their social equals. The only ones who had resolved this contradiction were the radical abolitionists who were calling for racial equality and southern slaveholders who argued that slavery was a positive good. Indeed, Taney's opinion was a clear attempt to resolve this contradiction once and for all.

The next related subject that arises in the U.S. History curriculum is the Constitution. The most important point to consider at this point in relation to Dred Scott is the degree to which the framers sought to avoid the issue of slavery altogether. Indeed the dreaded “S” word is never even used. It is essential for students to understand that the Constitution is a document that is largely based on compromise rather than a clear unifying vision. This concept should be familiar to students as most textbooks emphasize the importance of the Great Compromise and the Three Fifths Compromise. Of the three clauses that relate to slavery, only the three-fifths clause expressly differentiates between free and unfree persons and none of them specifically authorize or limit slavery. Even the fugitive-slave clause seeks to avoid the contradiction between humanity and property by referring to a slave as a “person held to service or labor.” Such a designation seems to imply a temporary arrangement more in line with indentured servitude than slavery.⁷ A careful reading of each of these three clauses reveals a genuine desire on the part of the framers to keep the federal government out of the slavery business. Don E. Fehrenbacher in his seminal work on the Dred Scott case put it this way:

It is as though the farmers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally -- that is, plainly visible at their feet, but disappearing when they lifted their eyes.⁸

Curriculum units on the early republic should and usually do include study of *Marbury v. Madison* and its effect on the developing role of the Supreme Court. In this case the court famously establishes the right of Judicial Review that gives it the power to strike down any action by federal or state governments that are deemed to be unconstitutional. Students should recognize that it is at this point that the Court begins to position itself as a potentially powerful arbiter on constitutional issues. There are several interesting points of comparison with Dred Scott, however, which may prove useful for students to consider later. Together the cases represent the only times before the Civil War that the Court actually struck down federal law. In both cases as well the issue of jurisdiction was side stepped so that the Chief Justices could rule on broader issues that would otherwise be moot. In the first case, however, Chief Justice John Marshal was acutely aware of the limitations of his power and the deep political divisions in the country and sought to establish principles without requiring action by the government that would be unenforceable. Taney, on the other hand, failed to make the same realization as he entered an even more divisive political minefield.

Territorial expansion and the philosophy of Manifest Destiny should play a central role in U.S. history curriculum and explores issues that are also important to the Scott case. As each new section was added to the nation, the question of the expansion of slavery was considered and debated with increasing bitterness until it became the central point of contention between the sections. Students should understand that the evolution of the debate paralleled the hardening of attitudes on race and increasing bitterness over the issue of slavery itself. The Northwest Ordinance of 1787, which banned slavery north of the Ohio River, was enacted by Congress under the Articles of Confederation and later adopted by Congress under the Constitution with little debate and strong support from southern states. When the issue was confronted again in 1819 in relation to the lands added by the Louisiana Purchase, however, sectional friction over slavery had risen considerably. The Missouri Compromise, which resolved the question for a time, was seen with great suspicion by many southerners and was actually opposed by a majority of northern members of Congress. Thomas Jefferson, who thirty years earlier had proposed a ban on slavery in all the territories, now felt that even the partial limitation included in the compromise was “the knell of the Union.”⁹ Whether Congress had the power to limit slavery in

the territories and whether future states created from territories where slavery was “forever forbidden” could make a choice were questions that many raised at the time and later disputed in the Scott Case. It would make sense to get students to look again at article 4, section 3 of the Constitution to see how Congress’ role in ruling the territories and admitting new states is described.

The Missouri Compromise nevertheless was able to hold the union together until the addition of still more territory with the annexation of Texas and the subsequent Mexican War. Soon after the declaration of war, David Wilmot, a northern Democratic member of the House of Representatives introduced his famous Proviso that sought to ban slavery in all territories acquired from Mexico. Although the Proviso was eventually defeated in the Senate, it brought the question of the expansion of slavery back to the fore and this time the intensity of feelings on the issue were not to cool until the Civil War settled the issue. One illustration of the lack of common ground that students may consider is the dearth of political support for the Compromise of 1850. Fehrenbacher includes tables of voting patterns that show that only a small minority of members of Congress actually supported the compromise. Only 61 members of Congress -- about 21 per cent -- voted for at least four of the five compromise measures.¹⁰ It was in the midst of this highly charged political atmosphere that Dred Scott took the first step in Missouri court to sue for his freedom.

The Dred Scott Opinions

The makeup of the Court that heard the Scott case is a reflection of the degree to which the slaveholding class dominated the national government in the first half of the 19th Century. It is also a valuable illustration of how the Constitution was designed to protect vested interests, limit the power of voting majority, and how the power of those interests was (still is?) manifested in the Supreme Court. The Taney Court is a good case in point. Five of the justices were from slaveholding families in southern states: James Wayne of Georgia, John Catron of Tennessee, Peter V. Daniel of Virginia, John A. Campbell of Alabama, and Chief Justice Roger B. Taney of Maryland. The four remaining justices were from northern free states, but two -- Samuel Nelson of New York and Robert Grier of Pennsylvania -- were known to be strong supporters of slavery. Benjamin Curtis of Massachusetts, who was to surprise the nation with his strong dissent from the Scott decision, was a conservative with strong ties to the textile industry and had never shown any opposition to slavery. Only John McLean of Ohio, a Republican who had rejected his previous affiliation with the Democratic Party, was an open opponent of slavery.¹¹ Thus the Court was heavily weighted to one side of an issue upon which public opinion had been increasingly leaning the other way for decades.

Students may wonder how, in a democratic society, a government institution like the Supreme Court with such broad powers could come to be so far removed from the political will of the people. To answer this question students should look back at the Constitution and note how members of the Supreme Court are selected: they are appointed by the President and confirmed by the Senate (Article 2, Section 2, Paragraph 2). Once in office they have life terms. Due to the politics of the Electoral College and the need of the two major parties to maintain a base in the South, all of the Presidents from Jackson to Buchanan were either openly supportive of slavery or neutral on the issue. The framers moreover had established the Senate as the upper house of Congress where representation was not based on population. Add to this the fact that Senators were chosen not by the voters, but by state legislatures and it becomes clear that the makeup of the court could be many steps removed from popular political pressure. Students should bear in mind that this least democratic branch of government also determined for itself in *Marbury* that it had broad power to strike down law and set legal precedent as the sole legitimate interpreter of the Constitution.

A unit on Dred Scott must include readings of excerpts of Taney’s opinion and Curtis’ dissent (the dissenting

opinion with the greatest political impact), but before students begin to read they must be asked to consider why the Court's opinions are written, published and distributed in the first place. A member of Congress or even the President may or may not explain a vote or an action, but only judges are required and expected to fully justify their decision in writing. The idea that an opinion of the Court must have a firm foundation in the Constitution and legal precedent is intricately connected to why decisions of the Court are accepted despite the fact that they are not subject to ordinary democratic processes. This is especially true in those cases that are of great interest to the broader public and therefore have wide-ranging political implications. If the opinions are convincing and based on widely accepted norms and values, they tend to be accepted especially if the Court is unanimous. If, on the other hand, a narrow majority on the Court seeks to render judgment on questions upon which public opinion is bitterly divided, public reaction and actions by the other branches of government may serve to render the decision moot, ignored, or overturned. In these types of cases the dissenting opinions can have a significant political impact because they point to an alternative that is similarly based on legal reasoning.

As is the case with primary source readings in general, reading the Scott opinions presents challenges for the high school curriculum particularly when students are at or below grade level in reading. Text rendering is a method in which students read a selection multiple times in a classroom setting and identify key words and phrases that express the main ideas of the reading (see lesson plan below). If care is taken to select excerpts that will resonate with students, the method will be effective in providing a distinctive voice to accompany the facts of the case. The excerpts I have chosen (see appendix) for the lesson plan below are relatively brief and speak directly to the three essential questions Taney decided in the case:

1. Could blacks sue in federal court? Are they citizens of the United States? Can they sue as merely state citizens?
2. Did Congress have the power to prohibit slavery in the territories? In other words, was the Missouri Compromise constitutional?
3. Was Missouri obligated to recognize Dred Scott's freedom based on his residence in either Illinois or the Wisconsin Territory?¹²

Through the process of text rendering students should be able to articulate the reasoning Taney uses to defend his answers for each of these questions. Students should also be encouraged to consider Taney's primary goal in rendering such a decision. Why did he render such a broad ruling that went to the heart of the issues that so bitterly divided the nation at the time? What other options did he have in this case? Could he have ruled that Scott was still a slave without getting into issues of slavery in the territories or the rights of African-Americans? Upon what basis did he believe that the Supreme Court had the right, the responsibility, and the power to take such an action? Could, and should, the court play such a role today? Would it be more able to do it today than it did in 1857?

As far as law is concerned, dissenting opinions have no bearing whatsoever. They set no precedent and have no influence on the ruling of the court in a particular case. In *Dred Scott*, however, the Court stepped into a political arena where opposing views in the debate over slavery did count for a great deal. Justice Benjamin Curtis' dissent provided those who opposed the decision with a case for how the Court could have, and should

have, ruled if it were acting in a “proper” unbiased way and not merely acting to support the slave holding interest. Why it was Curtis’ opinion and not Justice John McLean’s that was widely quoted and reprinted may have had to do with the fact that it was somewhat of a surprise. As a Democrat and a conservative, his views were untainted by partisanship and appeared to be based on disinterested principle. As such it became a powerful weapon in the hands of Republicans like Horace Greeley, the publisher of the New York *Tribune*, who published a pamphlet edition of Taney’s opinion and Curtis’ dissent as soon as he had the text. The dissent was also used by several northern legislatures as the basis for resolutions opposing Taney’s decision and it became an important political document in both the 1858 and 1860 elections.

The excerpts of the Curtis dissent that I have selected focus on the issue that brought it the most attention: the questions of citizenship for free blacks. Again text rendering will provide the most effective way of getting to the main ideas that are expressed. In discussing the reading, students should consider why dissenting opinions are published by the Court if they don’t represent the Court’s ruling and are not considered law. What purpose do they serve in the short term or over a longer period of time? What role can dissents play in the political arena? Do dissents add to the strength of the Court as a government institution or does it take away from its power? How is the political effect of a Court’s ruling different if it is unanimous and there is no dissent? The purpose of these questions and the discussion that they generate is not so much to come up with definitive answers, but to get students thinking about the role and power of the Court. It is the context of these types of discussions that it make sense to look at today’s Supreme Court and consider a recent decision that had an impact similar to *Dred Scott*.

A short writing assignment upon completion of the readings of the two excerpts will push students to analyze and critique the reasoning used by the two justices on the subject of citizenship for African-Americans. Students should be asked to state in a short essay which reasoning they believe is more effective and explain why. In order to avoid the tendency of students to simply defend Curtis’ dissent because it is morally correct, the teacher can play devil’s advocate. Moral questions aside, is it all that unreasonable to argue that the Constitution, as it existed in 1857, really was by and for white people? Could a document that allowed the enslavement of people on the basis of race be used in any way to defend racial equality? These are questions that students must respond to if they are to defend Curtis’ opinion as the more reasonable. On the other hand, those students who find Taney’s opinion more convincing need not feel that they are defending it as ethical, but simply one that expressed the truth as it stood at that time.

Another, more involved approach would be to set up a debate/role play in which students take on the task of presenting oral arguments before a mock Supreme Court (see lesson plan below). In order to involve as many students as possible it will be necessary to divide up the basic issues of the case and assign each one to teams of two on each side of the case. Thus, six students will divide the three basic questions of citizenship, constitutionality of the Missouri Compromise, and the right of the State of Missouri to determine Scott’s status and argue in favor of Scott, while six other students take on the same three questions and argue in favor of Sandford. Three to five students will take on the role of the Supreme Court and ask questions during the oral arguments and write opinion based on which group was most convincing. A larger court is not really necessary and will make it more difficult for the students to come to a decision on a ruling. The remaining students will represent the press and will write editorials expressing the range of public reaction to the case. A critical element of this approach will be the instructions which must be provided to each group in order to structure the lesson and insure that students will not be overwhelmed by their tasks. Those students participating in the role-play need to be provided with a script that will guide their approach and provide them with a structure that they can build on with their own reasoning.

Reaction to the Decision

A critical issue for the Supreme Court today as well as in 1857 that students should consider, is the degree to which public response to a controversial ruling can influence the impact of that ruling. Constitutionally the weakest of the three branches, the Court depends on the soundness of its reasoning and above all on its prestige to garner support for its rulings and insure that they are enforced. This was far more true before the Civil War when the Court lacked the near universal esteem it enjoys today. For the Dred Scott case there are two avenues to explore public reaction: newspaper editorials and the Lincoln-Douglas debates. Both of these sources reveal how deeply divided the nation was on the issues of the case and the degree to which these questions had in no way been resolved by the Court's ruling.

Newspaper editorials provide a quicker and more direct way to expose students to the range of public reaction to the case. An excellent resource for editorials on Dred Scott is the Secession Era Editorials Project website (see address below) which includes a wide range of opinion pieces on both sides of the issue. Students should understand that in this era newspapers were rarely politically neutral as they tend to be today. They were often affiliated with a particular political party or even a faction within a party. As they fought with their rivals for circulation they often reflected as well as shaped the diverse opinions of their readers. Upon reading each article, students should be asked to consider first whether the writer supports or opposes the ruling in Dred Scott, second what the writer considers to be the implications of the decision, and finally what is being proposed as a response or desirable outcome.

An instructive example of reaction from the North against the decision is "The Issue is Forced Upon Us" (see resources below) which was printed in the Albany, New York *Evening Journal* on March 9, 1857. In this case the writer sees the decision as further evidence that the slaveholding class now has taken complete control of the national government. His reference to the Lemmon Case is important and will need to be explained to students before they read the piece. The Lemmons were slave owners from Virginia who sought to bring their slaves through New York City in order to catch a steam ship to New Orleans. When a New York court freed their slaves, the ruling was appealed, had worked its way through the New York courts, and was generally expected to come before the Taney Court. With the Dred Scott decision as a precedent, it seemed clear to many northerners that slavery was on the verge of being nationalized. The outcome proposed by the editor in this case points up an issue that is still current with respect to the Supreme Court -- that it is anti-democratic in that it has the power to thwart the will of the people. Without the support of the people, he avows, the "conspiracy of the Oligarchy is wholly incomplete."¹³ There are numerous recent cases in which the will of the people is at issue, one of which, *Bush v. Gore*, will be considered at the end of the unit.

To get a perspective from the other side of the political spectrum, students should read "The Issue Must Be Met" from the Milledgeville, Georgia, *Federal Union*. The writer here believes, as did Taney, that the ruling in the case has put the slavery question finally to rest. Students should note the irony of the fact that southerners of this political stripe -- who would in three years agitate for secession -- saw themselves at that point as "union men" who hoped to join with "law-abiding men of the North" in supporting a Constitution that now clearly appeared to be protecting their interests.¹⁴ Another interesting point to note is the use of the term "Black Republican Party." Democrats from both sections frequently used this term in an effort to paint Republicans as supporters of racial equality -- which was an anathema to most Americans at the time -- rather than advocates of free soil, an issue that garnered much wider support. Indeed the issue of equal rights for free African-Americans was one that had the potential to split the Republican Party, leading many Republican leaders to oppose the ruling in Dred Scott far more on the basis of its voiding the Missouri Compromise rather than its assault on the Constitutional rights of blacks.cks.

A third example that illustrates the northern Democratic view is “The Question Settled -- Black Republicanism vs. the Constitution” which was printed in March of 1857 in the Concord, New Hampshire, *New Hampshire Patriot*. The editor here emphasizes the role of the Democratic Party as “the constitutional, national, Union party of the country.” From this perspective, the combination of the Scott ruling with the election of the Democrat Buchanan as President have saved the nation from the divisive dangers of sectionalism. In addition to the three essential questions outlined above, students should consider why northerners from free states such as New Hampshire would be so supportive of the Court’s opinion in *Scott*. For many a mixture of motives from opposition to racial equality to a very understandable fear of disunion and possible civil war led to support for developments which might strengthen the national government at the expense of African-American rights.

The political impact of *Dred Scott* can also be explored in a more thorough (and time consuming) manner by reading excerpts of the debates between Abraham Lincoln and Stephen Douglas as they competed in the election for the U.S. Senate in 1858. The *Scott* ruling was not an issue that either man could ignore. For Lincoln it represented an attack on the very premise of the Republican Party: that slavery must be limited to the states where it currently existed. In the debates and in previous speeches he described the decision as the product of a conspiracy that included northern Democratic leaders such as Douglas and President Buchanan, the southern members of the Supreme Court and the slave holders of the South with the goal of forcing slavery on the entire nation. For Douglas the ruling had to be somehow reconciled with his policy of popular sovereignty incorporated in his Kansas-Nebraska Bill that left the slavery question for a territory and a new state up to the people who lived there. The question, repeatedly pressed by Lincoln, was how a territory could now act to exclude slavery, if the federal government was bound by the *Scott* ruling to allow it. Douglas’ answer, which became known as the “Freeport Doctrine,” was a skillful attempt to finesse the question. Slavery could never exist, he declared, if the local populace refused to provide local regulations and police enforcement power; thus the basic tenet of popular sovereignty was maintained. Despite his best efforts to walk this fine line, however, Douglas was unable to satisfy the southern wing of his party. It was yet another example of his being insufficiently supportive of slavery and it certainly denied him any chance to get southern support for a run for President.

Lincoln’s most definitive and eloquent pronouncements on the implications of *Dred Scott* are contained in his “House Divided” speech with which he opened his campaign for the Senate and which preceded the actual debates by several weeks. The text of the speech can be found on the *Africans in America* website referred to above which is a companion to the PBS series of that name (see resources below). The entire speech is certainly too long to be used, but excerpts in which he outlines in general terms his view of the decision as part of a larger conspiracy -- he uses the term “machinery” -- can be used effectively to show how Lincoln used it for political gain. The entire texts of all the debates can be found on the National Park Service web site for the Lincoln Home National Historic Site (see resources below). *Dred Scott* was a central topic in all the debates, but the most famous exchange -- the debate in Freeport -- is perhaps the most useful to illustrate Douglas’ attempts to characterize the decision in terms that will cost him the least political damage. Another revealing source of Douglas’ positions with regard to *Dred Scott* is a speech he gave on July 9 in response to the “House Divided” speech just prior to the beginning of the formal debates. In one part of the speech he attacks Lincoln for advocating racial equality and makes it quite clear that he believes that blacks are inferior and not deserving of the rights of citizenship. It was on the question racial equality that Republicans were most likely to disagree and Douglas was doing what he could to drive a wedge into that division and appeal to the deep-seated racist attitudes that were held by most Americans at the time. That section is fairly short and certainly goes far in helping students to understand the intensity of racial feelings in that era.

After reviewing the range of responses to *Scott* it will be important for students to consider the options open to those who passionately disagreed with the ruling and those who wanted to support the ruling over such disagreement. Lincoln makes it clear that the Republican Party would continue to express outright opposition. What did that mean exactly? What options were there to fight the ruling or defend the ruling short of lawlessness and violence (“Bleeding Kansas” might be a good example to raise here)? In 1857 the Court had the firm support on this case from the executive branch, but what if this were not the case? Certainly with the inauguration of Lincoln in 1861 it was not. If the Supreme Court makes law and the executive declines to enforce that law, what is the result? From the time of John Marshall to the *Dred Scott* era the Court strained to achieve a status where its rulings would simply be accepted. What about the Supreme Court today? Does it still render judgments on equally controversial issues? Has the stature of the Court in American political culture risen to the point that its rulings are accepted without much question? It is at this point that it makes sense to consider a contemporary action by the Supreme Court that bears some resemblance to *Scott* at least in terms of its controversial and overtly political nature.

A Recent Supreme Court Case

A look at today’s Supreme Court and a recent case can take place at either the beginning or the end of this unit. If done at the beginning, it serves as an introduction to the institution and establishes the idea that the questions over the proper role of the court in American government have not changed a great deal over the past century and a half. If done at the end of the unit, it allows students to explore questions about the Court today that should come up as they study *Dred Scott*. There are of course many examples of controversial cases from recent decades that provide interesting parallels with *Scott*, but for a number of reasons *Bush v. Gore* stands out as especially instructive. Most importantly, it was argued before the members of the current Court and will therefore allow students to learn something about them. The case also illustrates in dramatic fashion the potential for the Court to enter into divisive political territory upon which there is little public agreement. The best resource on the web for material on the Supreme Court, its membership, and cases throughout its history, is *Oyez: U.S Supreme Court Multimedia* at oyez.org (see resource list below).

This portion of the unit should begin with an introduction to the Court’s membership. The *Oyez* website has short biographies of each justice. Divide the class into nine small groups of two or three to read each biography and assign each group the task of writing up a short oral presentation on each one. Several key facts should be provided for each: date of appointment, President who appointed them, political affiliations, location on the political spectrum (liberal, moderate, conservative) and age. These basic facts can be jotted down on the board as they are reported for students to retain in their notes. The identification of each justice’s political position will generate discussion on what the political spectrum means for a Court justice. It should be noted that the designation of liberal as a justice who is more likely to invoke federal authority to protect individual rights could be applied in the *Scott* case to Justices Curtis and McLean. By the same token, Taney and those who concurred with his ruling were more likely to be protective of states rights as are judicial conservatives today.

The case of *Bush v. Gore* is not overly complex and need not be considered in great depth for the purposes of this unit. A useful summary of the case can be found at civilmind.com (see complete address below) including short excerpts from the opinion, concurrences and dissents. The decision by the court in a vote of 5-4 during the election in 2000 to stop the recount of votes in Florida and essentially give the election to George W. Bush was certainly controversial and resulted in an outcry of derision and strong statements of support that is reminiscent of the response to the *Scott* ruling. Students should be asked why a majority on the Court felt justified in taking action in a matter -- the choosing of electors for the Electoral College -- that, according to

the Constitution, is a state responsibility. Referring to their biographies of the individual justices, students should consider why each justice voted the way he or she did on this case. What will emerge is a curious contradiction: the conservative justices were unconvinced by a defense of state's rights while the liberals were unmoved by concerns over equal protection of the laws. If ideology did not serve their thinking on this case what did? What is apparent is that most of the Republican appointees supported Bush's claims while all of the Democratic appointees (there are only two) supported Gore's. Just as the southern justices in *Dred Scott* wanted to settle the divisive issue of the spread of slavery in support of slave holding interests, the Republican members desired to put an end to a bitterly contested election in the way they saw fit. The simple fact was that in each case they had the votes. Unlike the *Dred Scott* Decision, however, the ruling rendered in *Bush v. Gore* was universally accepted. No groups took to the streets or sought redress from other branches of government or from state governments. President Bush's mandate has not been questioned in any fundamental sense. Such is the power wielded by the Supreme Court today.

Conclusion

Students should come away from this unit with an understanding that the Supreme Court is a powerful and vital institution that can have a great influence on their lives. They should develop an interest and a curiosity that will lead them to pay greater attention to its makeup and its actions in the future. Both *Dred Scott* and *Bush v. Gore* represent highly unusual actions for the Court, but they illustrate its potential power and the very real danger of abuse of that power. Students should consider the question of what kind of role the Court should play and decide which justices today are most likely to promote a role they would consider just and proper. The likelihood that the membership of the Court will change should promote an interest in Presidential electoral politics.

A century and a half ago, the nation was on the verge of Civil War and the Court lacked the standing necessary to impose a resolution of the issue that was tearing the nation apart. It may very well be that the impending conflict was unavoidable; that the differences between the sections had become so deep and bitter that no structure of government could have provided a peaceful solution. For the past century, however, the Court has inserted itself into disputes that were equally bitter and it has been accepted for the most part as the final arbiter. With this unit students should begin to establish a framework for thinking about the Court that they can build on as they continue with the U.S. history curriculum and as they study current events.

Classroom Activities

What follows are three lesson plans derived from the strategy section above. The first should be taught as part of a unit on the Constitution. It lays out important facts and establishes a theme that will provide an important element of the *Dred Scott* unit later in the curriculum. The other two provide students the opportunity to explore the details of the case and engage in critical analysis.

Lesson Plan: The Founding Fathers, Race, and Slavery

Objectives

Students will identify and articulate the contradictions between racial attitudes and ideals of equality among the leaders who wrote the Declaration of Independence and framed the Constitution.

Materials

1. Selection from the Declaration of Independence
2. Sections dealing with or referring to slavery in the Constitution
Excerpts from Thomas Jefferson's Notes on the State of Virginia, Query 14 "Laws" The
3. administration of justice and description of the laws? available at the Electronic Text Center of the University of Virginia Library web site.

Procedure

- Write the following quote on the board by Don E. Fehrenbacher in reference to the attitude of the framers of the Constitution toward slavery:

It is as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally -- that is, plainly visible at their feet, but disappearing when they lifted their eyes

Explain to students that the purpose of this lesson is to explore why this was so. Why was it so difficult for them to rise to their own ideals?

- Have a student read out loud the sentence in the Declaration of Independence that begins "We hold these truths..." Ask students to explain in their own words the ideal being expressed in that sentence.

- Ask students to open their textbooks to the Constitution and read the following selections: Article I, Section 2, Clause 3; Article I, Section 9, Clause 1; Article IV, Section 2, Clause 3. Discuss the following questions: What do these three clauses have in common? Do any of them actually mention slaves or slavery? Why not? What does this fact indicate about attitudes toward slavery at that time?

- Distribute excerpts from Jefferson's *Notes on the State of Virginia, Query 14*. Select and duplicate passages in which Jefferson describes the "Negro race" on pages 265-266. Tell students that this was written in 1781 only five years after the Declaration of Independence and six years before the writing of the Constitution. Have students read the excerpts out loud. Discuss the following questions: What are some of the surprising and offensive ways that Jefferson describes blacks? What is the tone of the writing? Is it emotional or intellectual? Is Jefferson expressing passion or reason? Can any assumptions be made that most Americans in that time would agree with his characterizations?

Evaluation

For homework students should write a brief reflection on the reasons for the contradictions expressed in the Fehrenbacher quote. The reflection should include references to the ideals of the Declaration of Independence, the acceptance of slavery without naming it in the Constitution and the racial attitudes expressed in Jefferson's *Notes*.

Lesson Plan: Role Play -- Oral Arguments On The Dred Scott Case Before the Supreme Court

Objectives

Students will outline the essential elements of Dred Scott's life that were the basis for his claims to freedom.

Students will research, write and present arguments in support of Scott's suit.

Students will research, write and present arguments to deny Scott's suit.

Materials

1. Handout: A summary of the facts of the case. It can be drawn from the "objectives" section above.
2. Handout: Role assignments for each of the participants.
3. Copies of the Declaration of Independence and the Constitution.

Procedure

1. Assign roles to the students in the class. Three students should play the role of Scott's lawyers, three students should play the role of Sandford's lawyers, and three to five students should play the members of the Supreme Court. The rest of the students should be divided into three groups of newspaper reporters: one group will be writers for the *New York Tribune*, a Republican paper, another will be for the *Charleston Mercury*, a southern Democratic paper and the third will be for *New Hampshire Patriot* a northern Democratic paper.
2. Hand out the summary of the facts of the case and the appropriate role instructions the students.
3. Depending on student ability and the length of the class period (block periods work best with role plays) about 40 minutes will be necessary for students to prepare. Students who are playing the lawyers should divide the three questions that they must argue (see role instructions below) and prepare a short statement in answer to each question. They should back up their arguments with facts from the case, the Constitution and, if necessary, the Declaration of Independence.
4. Students playing members of the Supreme Court should locate the sections of the Constitution that relate to the case (identified in their role instructions) and develop at least one question for each lawyer on the meaning of those sections.
5. The newspaper reporters should write a brief preview of the case outlining the basic facts and

expressing a bias -- based on the party affiliation of their newspaper -- as to what the proper outcome should be. The result should be a news story that reports on the impending oral arguments.s.

6. When the students are ready, the lawyers should rise and present their arguments on each of the questions at issue in the case. The justices should present each lawyer with at least one question to answer. The questions can come from those that they prepared or one that comes to them in the course of listening to the presentation. Each group of three lawyers can work together on their response -- or they may simply say that they have no response.

7. All reporters must take notes on the presentations in order to prepare editorials either condemning or supporting the eventual ruling.

8. When the oral arguments and questions have been completed, the justices should withdraw into a separate room -- or in the hallway if necessary -- and confer on what their ruling should be. In the event of a disagreement, the majority opinion will constitute the ruling.g.

9. While the justices are conferring, the rest of the class can begin working on the writing assignments that will provide the evaluation for the lesson.

Role Assignments

Lawyers for Dred Scott: Your task is to answer the following questions to support Scott's case-

Can blacks sue in federal court? Are they citizens of the United States? For this question you must make the case that Scott is a citizen of the United States. Use the Declaration of Independence to help establish the intent of the framers of the Constitution. Point out that the Constitution nowhere specifically denies citizenship to anyone on the basis of race. Provide some examples of

1. where the framers could have made racial distinctions, but used the term people instead: the Preamble; Article I, Section 2, Clause 1; the 9th Amendment; and the 10th Amendment. Having established that Scott is a citizen you can then make the claim that has the right to sue in federal court because the respondent (the plaintiff is the one suing and the respondent is the one being sued) lives in New York.

2. Did Congress have the power to prohibit slavery in the territories? In other words, was the Missouri Compromise constitutional? Read for the Court Article IV, Section 3, Clause 2 of the Constitution. You might point out that if the right to prohibit slavery was specifically denied, the framers could have written that right there.

Was Missouri obligated to recognize Dred Scott's freedom based on his residence in either Illinois or the Wisconsin Territory? Your argument here must rest on the fact that those to jurisdictions didn't simply lack laws *enforcing* slavery, they actually had laws *prohibiting* slavery.

3. When Scott's owner took him there to live, Scott became free and once free a person cannot be returned to slavery. You should also point out that for 20 years before Scott sued for freedom, the Missouri courts had always freed slaves who could prove that they had lived in jurisdictions that prohibited slavery.

Lawyers for John Sandford: Your task is to answer the following questions to support John Sandford's case-

1. Can blacks sue in federal court? Are they citizens of the United States? Your response to this

question needs to show that blacks cannot sue in federal court because they do not have rights of citizenship that are recognized in the Constitution. Africans were brought to America for the express purpose of providing labor as slaves. The vast majority of Americans do not accept the idea of equal status for the descendents of those slaves and equality was certainly not generally accepted at the time of the Constitution. A state can choose to give an African-American state citizenship, but that does not confer U.S. citizenship. (Granted, this is a weak and morally offensive argument to make, but we all understand that you are just playing a role)

2. Did Congress have the power to prohibit slavery in the territories? In other words, was the Missouri Compromise constitutional? Read for the Court the 5th Amendment where it refers to the right to property and due process.

3. Was Missouri obligated to recognize Dred Scott's freedom based on his residence in either Illinois or the Wisconsin Territory? Read for the Court the 10th Amendment. This is an issue for the State of Missouri to decide. That is where Scott lives and it is the laws of Missouri that he must live under. The Missouri Supreme Court has ruled that he is a slave.

Members of the Supreme Court: Your task is to listen to the arguments, ask questions to clarify those arguments or to poke holes in them if you find them weak. When the arguments are complete you will retire to confer and decide which way you want to vote. The majority wins. You must explain to the class why you voted the way you did.

Members of the Press: Your task is to listen to the arguments and the ruling, report on the result and express your opinion. Your reporting should be utterly biased. If you write for a Republican paper you must call out for black citizenship, defend the Missouri Compromise and demand that Dred Scott be made free. If you write for a southern Democratic paper, you must call for the opposite outcome for these three questions, but you especially must demand that slave owners property rights be protected all over the country. If you write for a northern Democratic paper, you will be more concerned that the rights of free blacks be limited and that the territories and new states have the right to choose whether they want to be slave or free.

Evaluation

Upon completion of the lesson each student must write up his or her position on the case in the form of a 1-2 page paper. The lawyers will write out their arguments, the justices will explain their votes in the form of written opinions and the reporters will write editorials.

Lesson Plan: The Dred Scott Opinions

Objectives

Students will articulate the reasoning used by Justice Taney in denying Scott's claim.

Students will articulate the reasoning used by Justice Curtis in dissenting from Justice Taney's opinion.

Materials

Handout: Excerpts from Justice Taney's opinion in *Scott v. Sandford* (see appendix)

Handout Excerpts from Justice Curtis' dissent in *Scott v. Sandford*

Highlighters for those students who don't have them.

Procedure

Once the copies of both opinions have been handed out, the students will begin a process called text rendering. Each text should be handled separately, so it will probably be necessary to use two class periods. In text rendering the students read the text four times:

- In the first reading students read the entire document silently. Students should be told that this first reading is simply to understand the general nature of the reading rather than fully comprehend it.
- For the second reading students will read aloud. Any student can begin and read as much as they want. When they stop any other student can jump in. It may be necessary to set a limit on how much one individual can read.
- For the third reading students again read silently, but this time use highlighters. They should be told to highlight any part that seems important, is surprising or confusing. The individual portions that students highlight should be short -- generally not more than a phrase or a sentence..
- In the fourth reading students will read out loud what they have highlighted. They can read in any order and at any time that no one else is reading. Students can also jump in and read a selection in unison if they find they have highlighted the same thing.

Evaluation

For homework students should write a short one page summary of each excerpt. The summary should explain in the students' own words the reasoning each justice uses in defending his position. An alternative assignment would be for students to explain the flaws in Taney's reasoning concerning black citizenship as explained by Curtis.

Resources

Those items marked with an asterisk will be especially useful for students.

Bibliography

Burt, Robert A., *The Constitution in Conflict*, (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1992)

Traces the history of the Supreme Court and its relationship with the Constitution and articulates how the Court can best handle politically divisive issues.

*Finkelman, Paul, *Dred Scott v. Sandford: A Brief History with Documents*, (Boston: Bedford Books, 1997)

An excellent concise book with everything a teacher will need to teach this unit: an overview of the case and excerpts of all relevant documents

Fehrenbacher, Don E., *The Dred Scott Case: Its Significance in American Law and Politics*, (New York: Oxford University Press, 1977)

The definitive history of the case and its implications. Especially useful for its detail on the historical factors leading up to *Dred Scott*.

Internet Sites

*Founders Library, *Homecoming Speech at Chicago, Stephen A. Douglas, 7/20/04*

<http://www.founding.com/library/lbody.cfm?id=340&parent=65>>

Text of the speech Douglas gave in response to the "House Divided" speech.

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A resource for editorials from a variety of newspapers on the Dred Scott Decision

*Lewis, Wendy Bay, *Civilmind.com*, "Hot Points > Bush v. Gore," 7/20/04,

<http://www.civilmind.com/bushsct.htm>>

Includes excerpts of the of the rulings and dissents on *Bush v. Gore*.

*NPR, *The Tavis Smiley Show audio*, "Supreme Court 'Bush vs. Gore' Anniversary,"

<http://www.npr.org/features/feature.php?wflid=1543944>>

An audio clip of a discussion on *Bush v. Gore* that provides competing perspectives on the case.

*PBS, *Africans in America*, 5/18/04, <http://www.pbs.org/wgbh/aia/part4/4h2934t.html>>

Companion web site to the four-part series of that name. This url will go directly to the "House Divided" speech.

*Street Law and the Supreme Court Historical Society, *Landmark Cases: Supreme Court*, 7/15/04, <http://www.landmarkcases.org>>

Excellent resource for teachers on Dred Scott and many other court cases. Includes readings and lesson plans.

*University of Virginia, *Electronic Text Center*, 6/17/04, <http://etext.lib.virginia.edu/modeng/modengj.browse.html>>

This site contains a wealth of Jefferson's writings including *Notes on the State of Virginia*.

Appendix

Chief Justice Roger Brooke Taney, Opinion of the Court in *Dred Scott, Plaintiff in Error v. John F. A. Sandford*

(excerpts)

March 6, 1857

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? . . . We think they [people of African ancestry] are not [citizens] and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for secures to citizens of the United States. . . . They had for more than a century [before the framing of the Constitution] 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. . . . And upon a full and careful consideration of the subject, the court is of opinion, that, . . . Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and consequently, that the Circuit Court had no jurisdiction of the case...

The act of Congress [the Missouri Compromise], upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. [But] . . . [was Congress] authorized to pass this law under any of the powers granted to it by the Constitution[?] . . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power . . . it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. . . . But until that time [of statehood] arrives, it is undoubtedly necessary that some Government should be established, [by Congress] in order to organize society, and to protect the inhabitants in their persons and property. . . . But the power of Congress over the person or property of a citizen . . . [is] regulated and plainly defined by the Constitution itself. . . . Thus the 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.

It is contended, on the part of the plaintiff [Scott], that he is made free by being taken to Rock Island, in the State of Illinois, . . . and being made so free, he was not again reduced to a state of slavery by being brought back to Missouri. The principle on which [our ruling] depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham* [1850]. In that case the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court

held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. . . . So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois. . . . Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error [Scott] is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States [federal court] had no jurisdiction in the case, and could give no judgment in it.

Justice Benjamin Robbins Curtis, Dissenting Opinion in Dred Scott, Plaintiff in Error v. John F. A. Sandford

(excerpts)

March 6, 1857

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States . . . at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the [Articles of] Confederation, at the time of the adoption of the Constitution. Of this there can be no doubt.

At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them had the other necessary qualifications possessed the franchise of electors [right to vote] on equal terms with other citizens . . . [In Massachusetts] . . . persons of color, descended from African slaves, were by [the 1780 state] Constitution made citizens of the State and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present . . . [similar examples are provided for other states] Did the Constitution of the United States deprive them [free African-Americans] or their descendents of citizenship?

That Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored person were among those qualified by law to act on this subject. These colored persons were not only included in the body of “the people of the United States,” by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages [right to vote], upon the question of its adoption. It would be strange, if we were to find in that instrument [the Constitution] anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established . . .

It has often been asserted that the Constitution of the United States was made exclusively by and for the white race. It has already been shown that in five of the original thirteen states, colored persons then possessed the elective franchise [right to vote], and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was

ordained and established by the people of the United States, for themselves and for their posterity. And as free colored person were then citizens of at least five states, they were among those for whom and whose posterity the Constitution was ordained and established . . .

Notes

1. Finkelman, Paul, *Dred Scott v. Sandford: A Brief History with Documents* , (Boston: Bedford Books, 1997) p.5
2. Ibid., p.7
3. Ibid., p.5
4. quoted in Finkelman, op. cit., p22
5. Ibid., p.26
6. Fehrenbacher, Don E., *The Dred Scott Case: Its Significance in American Law and Politics*, (New York: Oxford University Press, 1977) p.2
7. Ibid., p.26-27
8. Ibid., p.27
9. Ibid., p. 110-111
10. Ibid., p. 162-163
11. Finkelman, op. cit. p.29
12. Ibid., p. 33
13. Furman University, *Secession Era Editorials Project* , 7/20/04 <http://history.furman.edu/~benson/docs/nvaids57309a.htm>>
14. Ibid., <http://history.furman.edu/~benson/docs/gafuds57331a.htm>>, 7/20/04

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