

Dred Scott and the Election of Lincoln in 1860.

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Abstract

1 Introduction

It is a commonplace in positive political theory to suppose that policy disagreements between parties can be expressed in terms of a single “ideological dimension”¹. Vote maximization by parties (under plurality rule), theoretically leads inexorably to convergence at the voter median, or mean. In fact, however, there seems little evidence of such convergence. One possibility

¹Anthony Downs, *An Economic Theory of Democracy* (New York, Harper, 1957).

is that policy outcomes reside in a higher dimensional space. In economic theory, it is natural to emphasize the utilization of at least *three* economic factors, capital, labor and land . Political coalitions may form in an attempt to modify the *institutional* equilibrium in the three dimensional economic factor space. Whether or not such coalitions can form may depend on the stability of earlier compromises, so we would not in general expect all three economic factors to be relevant at all times.

Recently (Schofield (2006) explored the possibility that a factor dimension can become prominent when sections of the population feel under threat because of an attempt to modify the political equilibrium associated with that dimension.. For example, a primary cause of the American Revolution of 1776-1783 was the attempt by the British, under the Quebec Act of 1774, to close the Ohio Valley to settlement. The colonists' understanding that the political equilibrium gave them access to the Ohio Valley was denied by the British. Instead, the British perceived a need to change this institutional equilibrium because they, in turn, had to face the demands (in the form of a rebellion) of the Indian tribes of the Ohio Valley. Since the cost to the colonists of acquiescence to Britain was high, they were willing to fight a "Revolutionary War" to arrest the change of equilibrium.

Similarly, in 1787 the Spanish posed a threat to the new United States, in their effort to close the Mississippi. Hamilton, Jay and Madison all argued in the *Federalist Papers* that it was necessary to create a stronger federal structure to counter this threat. Riker (1964) in his discussion of federalism ar-

gues that Beard (1913) was incorrect to see only economic motives behind the move to federalism in 1787. In fact, Riker and Beard are both justified in their differing interpretations. The Spanish threat clearly brought the political issue of federation into prominence. Once the threat was perceived, however, the question of institutional change became important (Schofield, 2001a). As Beard observed “merchants, money lenders, security holders, manufacturers, shippers, capitalists and financiers” all preferred a dollar backed by a credible commitment to a “hard-money principle”. In contrast, “non-slaveholding farmers and debtors”² would prefer a “soft money principle”. The external threat forced, in a sense, an agreement over federation that initially favored this “hard money principle”. Once the threat faded, however, political disagreements over what was essentially a policy on the economic dimension became increasingly salient. Over time, conflict between Federalists and Jeffersonian Republicans became more pronounced on this dimension of capital, and came to be re-interpreted in political terms about the nature of states’ rights.

The equilibrium on this capital dimension was always affected by the compromise or outcome on the two other dimensions of land and labor. In attaining the federal solution of 1787, slavery had been accepted (for a period of at least twenty years). Clearly this had profound effects on the economic factor dimension of labor. Expansion of the U.S. into Florida, then the

²Charles Beard, *An Economic Interpretation of the Constitution of the United States*. (New York, Macmillan,1913) p.17.

Louisiana Purchase and finally the acquisition of the western territories, after war with Mexico, not only changed the factor availability of land, but modified the need for credit, and affected the labor equilibrium.

The question that this paper attempts to address is the manner by which the labor “equilibrium”, or slavery compromise, became profoundly important in the period from 1840 on, eventually leading to the “disequilibrium” of the 1860 election and the Civil War. In line with the earlier analyses of 1776 and 1787, we shall argue that the labor dimension became even more salient for the northern electorate after the *Dred Scott* decision of March 1857. This decision by the Supreme Court essentially denied that slaves had any rights under the Constitution. Lincoln was able to persuade a significant proportion of the electorate that this decision provided a signal that the South did indeed constitute a threat to the North, because of the probable intention to extend slavery to the free northern states.

The argument I shall give owes something to Riker’s earlier analysis of the slavery issue from 1830.³ Riker’s general point was that, until 1856 or so, the Whig and Democrat intersectional coalitions were opposed in a political space that essentially comprised a single dimension. We may view this dimension as economic, with Whigs representing an eastern hard money principle, while Democrats emphasized expansion, and easy credit. Typically, presidential elections were relatively closely fought. Martin Van Buren, for example, won the 1836 presidential election with about 57% of the popular

³William Riker, *Liberalism Against Populism* (San Francisco, Freeman, 1982)

vote. Given the plurality nature of the electoral college, this translated into 170 electoral college votes, out of 294, with 124 distributed between his three Whig challengers. Van Buren's electoral victory depended both on the North (101 electoral college votes out of 130) and the South (57 out of 94).

Congress passed the gag-rule in January 1840, to prevent discussion of the question of slavery (possibly as a consequence of the agitation over the *Amistad* affair: see Schofield, 1999a, for discussion). Van Buren, in turn, lost the 1840 presidential election to the Whig, William Harrison, because the northern Democrat support was seriously weakened. Harrison won over half the southern electoral college votes, and almost all the northern electoral college. In 1844, Van Buren expected to be nominated as the Democrat presidential candidate, but southern Democrats imposed a $\frac{2}{3}$ majority rule in the nominating convention. After eight ballots, the southerner, James Polk, of Tennessee, won the nomination. As Thomas Hart Benton said in his memoirs, "here ends the history of this long intrigue-one of the most elaborate, complex and daring ever practised in an intelligent country." ⁴. Polk won the presidential election, taking 77 out of 112 northern electoral college votes, and 60 out of 84 of the southern electoral college . However, the election was very close indeed. The Whig, Clay, took just over 48% of the popular vote, to Polk's almost 50% . As Riker noted, the Liberty candidate, James Birney, had 10,000 votes in New York. Had Clay won these voters, he would also have won New York, and thus the presidential election. Riker

⁴Thomas Hart Benton, *Thirty Years View* (New York, Appleton, 1856),p.595.

suggests this was the “beginning of the end for both Whig and Democratic intersectional alliances”⁵

Indeed, these intersectional alliances almost collapsed immediately. In December 1844, 55 northern Democrats in the House voted with 53 Whigs to rescind the gag-rule. Presumably these northern Democrats were angered (as was Thomas Hart Benton) at the betrayal by their southern Democrat allies. Nonetheless the intersectional alliances did not completely collapse. In 1848, the Democrat, Cass, gained 127 electoral college seats in the North (out of 290) and 48 (out of 91) in the South. Van Buren had his revenge on southern Democrats in this election. As a Free Soil candidate he took 10% of the popular vote and weakened Democrat support in the North, sufficient to give the Whig, Zachary Taylor, the presidency. In the election of 1852, the free-soil candidate, John Hale, took only 5% of the popular vote. This had an insignificant effect on the presidential election, since the Democrat, Franklin Pierce, won with about 51% of the popular vote, winning 92 (out of 110) of the northern electoral college and 76 (out of 88) of the southern electoral college.

By 1856, John Fremont, the candidate for the new Republican party, was able to win 33% of the popular vote, two-thirds of the electoral college vote in the North and over one half in the West (in the relatively new states of California, Iowa, Oregon and Wisconsin). It has been suggested that until 1850 (with the admission of California as a state), a convention had been

⁵William Riker, *Liberalism Against Populism* (San Francisco, Freeman, 1982),p.223.

maintained to preserve a balance rule of free and slave states in the Senate.. What is obvious, however, is that the creation of new states in the West would have an impact on the availability of land, and on the natural economic consequences over the labor and capital equilibria. Such an expansion would naturally lead to an “undersupply” of labor with respect to the availability of land

However, the interests of land, labor and capital may diverge in interesting ways. The western Democrat, Stephen Douglas clearly had a preference for ready credit (and increase in the availability of land). The position of the Whig, or Conservative Unionist, John Bell represents conservative or protectionist interests, on the capital dimension. Bell’s position could appeal to holders of capital and also industrial labor. The southern Democrat, John Breckinridge, represents slave owning, land holders. His policy would be to hold down the price of labor, by maintaining the slavery institution. Lincoln represents a policy of free mobility in labor.

There are some implicit conflicts both between Douglas and Breckinridge, and between Douglas and Lincoln. Douglas attempted to appeal to labor, seeing great opportunities in the new states of the West. However, his political position involved the attempt to form a coalition with southern Democrat land owners (implicitly incorporating the notion of states’ rights). Although he hoped this would appeal to free labor, it is clear that labor could potentially be threatened by slavery itself. It was this threat that Lincoln articulated.

In the election of 1860, Lincoln took over 1.8 million voters (out of about 4.7 million) or 40%, and won 180 electoral college seats (out of 303, or nearly 60%). Douglas with nearly 1.4 million votes (or 30%) only won 12 electoral college seats. Breckinridge, with 850,000 votes (or 18%) concentrated in the South, took 72 electors, while Bell (with 600,000, or 12%) only won 39 electors (27 in the South, and 12 in the Border states).

Riker⁶ offered this election as an example of the potential disequilibrium of politics. He suggests that in binary choice, a majority of the voters in 1860 would have preferred Douglas to Lincoln, a majority preferred Lincoln to Bell, a majority preferred Bell to Douglas, with Breckinridge least preferred. The cycle between Douglas, Lincoln, and Bell then implies that agenda manipulation could lead to any outcome. This may well be, but Riker's argument is only valid in a committee, where the three alternatives (Douglas, Lincoln, Bell) are static outcomes, and voting is interpreted using some agenda process. In fact, the election was governed by plurality rule in the electoral college. As such, Lincoln won easily.

What is less clear is why Lincoln won this plurality election. One argument is offered, in a sense, by Mackie⁷. He suggests that there was in fact no pairwise voting cycle. Instead simple majorities preferred Douglas to Lincoln to Bell to Breckinridge.

Indeed he suggests the election can be interpreted in terms of a single

⁶William Riker, *Liberalism Against Populism* (San Francisco, Freeman, 1982),p.230.

⁷Gerry Mackie, *Democracy Defended* (Cambridge, Cambridge University Press, , 2003)

dimension, where “latitude is attitude”. Thus the ‘upper North’ voted for Lincoln, the “lower North” voted Douglas, the “upper South” voted Bell, and the “lower South,” Breckinridge. By this reasoning, Riker’s inference of a cycle (based on the assumption that most Lincoln voters preferred Bell to Douglas) is implausible. However, by Mackie’s logic, the poor showing by Douglas in the electoral college must be due to his supporters being concentrated in States where Lincoln supporters were more numerous. Moreover, on a one dimensional policy space it is unlikely that an extreme candidate (on that dimension), such as Lincoln, could win a plurality. I contend that understanding the election requires consideration of at least two dimensions of policy.

It was important for Riker’s interpretation of this election that the second dimension (labor) was part of the electoral calculus. In his book on *Manipulation* ⁸Riker contended that Lincoln trapped Douglas by a “heres-
thetic” question at Freeport, on August 27, 1858, during their campaign for Illinois Senator. However, Lincoln asked Douglas if the people of a U.S. territory could exclude slavery prior to the formation of a State Constitution. Douglas answered that they could, and Riker infers that this helped Douglas win the Senate seat. However, by the same answer, Douglas alienated southern Democrats. Inevitably, this led to the split in the Democrat nomination convention in May 1860, and to the opposition of Douglas and Breckinridge.

⁸William Riker, *The Art of Manipulation* (New Haven, CT., Yale University Press, 1986)

Riker argues that “Lincoln won the Republican nomination, in no small part because of the heresthetic ability displayed in the campaign of 1858, and was elected president by a plurality. [Lincoln’s] question...should be interpreted as the capstone of the Republican strategy of splitting the Democratic majority”⁹.

I quibble with Riker’s interpretations of this maneuver. Firstly, slavery interests in the South were already disenchanted with Douglas before August, 27, 1858. The *Chicago Press and Tribune*, quoted, on August 22, 1858, from an article in the influential *Mobile Register*, that Douglas was “in a position to offer the Democrat Party the alternative of a probable success in the next presidential campaign if [the South] accepted the modified platform he has prepared for them or of certain defeat and permanent destruction as a party if they do not. There is ruin to them as a national party in either horn of the dilemma....but there is demoralization as well as disaster in one.”

Thus, even before Douglas had a chance to respond at Freeport, he must have known that his chance of winning overwhelming southern support was slim.

Prior to the 1860 election, the Democratic National Convention met in Charleston, on April 23 but adjourned, without selecting a candidate. The reason for the impasse was the $\frac{2}{3}$ rule, mentioned earlier. A majority of the delegates had, however, expressed support for Douglas. This may have had

⁹William Riker, *The Art of Manipulation* (New Haven, CT., Yale University Press, 1986), p.5.

an effect on the choice of Lincoln by the Republican convention, meeting in late May in 1860. Although the abolitionist, Seward, had an initial plurality (but not a majority) Lincoln was eventually chosen after other candidates dropped out. It is possible that Seward lost not because of the split in the Democrats, but because Bell and Everett (of Massachusetts) had been chosen in early May as the presidential and vice presidential candidates for the Conservative National Union Party (the remnant of the Whigs). Seward would not have done well against Bell and Everett in the East.

Finally, Riker considers that the split between Douglas and Breckinridge was crucial for Lincoln's victory. This is not plausible. Had Douglas and Breckinridge contested on a combined Democrat platform, Lincoln would still have won. In every state that Lincoln beat Douglas, he would also have won over a combined Douglas-Breckinridge slate. In the East, Lincoln's principal challenger was Bell, not Douglas.

Riker's account is designed to offer an "heresthetic" explanation why Lincoln was able to win 40% of the popular vote (and approximately 60% of the northern vote), while the Republican Fremont, in 1856, could only gain 33%. Clearly the labor axis and the slavery issue were relevant in 1856, but some change in perception or electoral preference occurred between the two elections.

Had the popular vote for the Conservative National Union Party been 21% in 1860 (as it was in 1856 for the Whigs), then Bell would have received over a million votes. This suggests that over 400,000 voters in the North switched

allegiance to the Republican party, and it was this that gave Lincoln the election. What provoked this electoral switch was the credibility of Lincoln's argument about the consequence and meaning of the *Dred Scott* decision.

Although the Supreme Court Decision was only made in March 1857, Lincoln had studied the decision and was ready to argue against it by June 1857. In the Illinois State House in Springfield, on June 26, 1857, Lincoln made his case. Firstly, if the decision had been made "in accordance with legal public expectation, and....on historical facts," then it would be "factious, nay, even revolutionary, to not acquiesce in it as a precedent"¹⁰

But

The *Dred Scott* decision was, in part, based on assumed historical facts which were not really true...Chief Justice Taney, in delivering the opinion of the majority of the court insists at great length that negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States.... [But] Judge Curtis in his dissenting opinion, shows that in five of the then thirteen states...free negroes were voters. ¹¹.

Moreover,

¹⁰Dan Fehrenbacher, ed, *Lincoln: Speeches and Writings 1832-1858*. (New York, Library of America, 1980), p.393.

¹¹Dan Fehrenbacher, ed, *Lincoln: Speeches and Writings 1832-1858*. (New York, Library of America., 1980), p.395.

[i]f resistance to the decisions of the Supreme Court in [the matter of] the *Dred Scott* case...be forced upon the country as a political issue, it will become a distinct and naked issue between the friends and the enemies of the Constitution – the friends and enemies of the supremacy of the laws ¹².

In his speech of acceptance as Republican candidate for Senator from Illinois on June 16, 1858, Lincoln said

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 threat of it ... 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* ¹³.

Finally, as argued in Schofield ¹⁴, it was not Lincoln's second question to Douglas at Freeport on August 27, 1858, that was important. Lincoln's third question was:

¹²Dan Fehrenbacher, ed, *Lincoln: Speeches and Writings 1832-1858*. (New York, Library of America, 1980), p.393.

¹³Dan Fehrenbacher, ed, *Lincoln: Speeches and Writings 1832-1858*. (Library of America. New York, 1980), p.426.

¹⁴Norman Schofield, *Architects of Political Change* (Cambridge University Press, Cambridge, 2006), Ch.5.

If the Supreme Court of the United States shall decree that states cannot exclude slavery from their limits, are you in favor of acquiescing in adopting, and following such a rule of political action?

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Lincoln obviously implied by this question that, while the *Dred Scott* decision only extended slavery to the Territories, the next step would be to extend it to the States.

Clearly Lincoln believed that the *Dred Scott* decision signaled a profound threat to free labor in the North. To see why this belief was credible, the next sections of the paper will discuss in detail why this case came before the Supreme Court and will attempt to make clear what it signified.

2 The Background to the Dred Scott Decision

Sometime around the year 1800, Dred Scott was born in Virginia. He became the property of Peter Blow, although when and how is unknown. Peter Blow was born in 1771 in southeastern Virginia and married Elizabeth Taylor in 1800. They eventually had 11 children. In 1818, the Blow family moved to

¹⁵Dan Fehrenbacher, ed, *Lincoln: Speeches and Writings 1832-1858*. (Library of America. New York, 1980), p.542..The version in the *Chicago Press and Tribune*, August 30, 1858, has capitalized States.)



Figure 1: Portrait of Dred Scott by Louis Schultze, Missouri Historical Society

Alabama, living in two different areas before eventually moving to St. Louis in 1830. With them was their slave, Dred Scott.

The need for a slave was much more limited in the thriving and bustling urban setting of St. Louis, already being referred to in 1830 as the “gateway to the West”. It was not clear in what capacity Dred Scott was working for the Blows, as they had opened up a boarding house called the Jefferson Hotel. He could have been hired out, with his income helping to support family members.¹⁶ Scott did not stay with the family long in St. Louis. Elizabeth Blow died in the summer of 1831 from a lingering disease, with Peter Blow following shortly after on June 23, 1832. While there is much debate on when precisely Dred Scott was sold by the Blow family, either before or after

¹⁶Walter Ehrlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (Westport, Conn.: Greenwood Press), p. 11.

Peter Blow's death, there is no question that as of December 1, 1833, he was owned by Dr. John Emerson.¹⁷

Emerson had been appointed assistant surgeon in the Army of the United States, to take effect December 1, 1833, the same day he reported for duty at Fort Armstrong in the State of Illinois. He was accompanied by his slave Dred Scott.¹⁸ After about two and one-half apparently miserable years,¹⁹ Emerson was transferred to Fort Snelling, which was located in the newly created Wisconsin Territory. While at Fort Snelling in 1836, Dred Scott met and married in 1836 a young girl, Harriet Robinson, the slave of Major Lawrence Taliaferro.²⁰

The marriage is of significant note because there was an actual civil ceremony, "an event not often accorded to unfortunates held in bondage," which was, in fact, officiated over by Taliaferro acting as justice of the peace.²¹ At the time, slave states did not recognize slave marriages, because it would have undermined the property interests of the owner, because no American states allowed slaves to make contracts, such as a civil marriage contract, and because recognition of slave marriages might have caused slaves to claim other rights.²²

¹⁷See Ehrlich, p. 11-15. See also Don E. Fehrenbacher, *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981), p. 121-123, and Vincent C. Hopkins, S. J., *Dred Scott's Case* (New York: Fordham University Press, 1951), p. 3-5.

¹⁸See Ehrlich, p. 18; Hopkins, p. 5; and Fehrenbacher, p. 123-124.

¹⁹Ehrlich, p. 11

²⁰Ehrlich, p. 21

²¹Ehrlich, p. 20.

²²Paul Findelman, *Dred Scott v. Sandford: A Brief History with Documents* (*Boston:

There are different theories as to how Harriet left Taliaferro and went to marry Dred Scott. It was possible that Taliaferro gave Harriet her freedom, as he wrote in 1864 biography that he *gave* her to him, and in a newspaper interview around the same time he referred to his “marrying the two and *giving the girl her freedom.*”²³ However, it was also claimed that Emerson bought Harriet from Taliaferro and gave the couple permission to marry.²⁴ While the lawyers for Dred Scott may have later argued that his marriage before a justice of the peace was proof that both Emerson and Taliaferro thought the slaves were free persons, the lawyers’ arguments were invalidated by the fact that Emerson continued to treat Dred Scott and his wife as slaves,²⁵ often hiring them out to others.

Emerson was to again be transferred, this time to Fort Jesup, Louisiana, where he reported on November 22, 1837. He initially did not take the Scotts with him, leaving them at Fort Snelling where he rented them to other people. While at Fort Jessup, Emerson met, courted, and married Eliza Irene Sanford on February 6, 1838. Shortly after his marriage to Mrs. Emerson, who was known as Irene, he sent for Dred and Harriet Scott, who joined him in April 1838. After only five months, Emerson was transferred back to Fort Snelling, making the trip upriver in September 1838 with his wife and two slaves. Along the way, Harriet gave birth to a daughter, Eliza,

Bedford Books, 1997), p. 16.

²³Ehrlich, p. 21.

²⁴Hopkins, p. 5.

²⁵Finkelman, p. 16.

while the steamboat *Gipseey* was north of the state of Missouri along the Mississippi River.

Less than two years later, Emerson was transferred to Florida to the zone of military operations of the Seminole War. He traveled downriver with his wife, Dred, Harriet and Eliza Scott, leaving them in St. Louis while he continued on to Florida. Mrs. Emerson lived with her father, Alexander Sanford, in St. Louis, while it appears that Dred and Harriet Scott may have spent the time either working for Sanford or hired out to different people.²⁶ Emerson returned to St. Louis in 1842 upon his discharge from the Army. Apparently discouraged from beginning a private practice in St. Louis, he moved, with his wife, to Davenport, Iowa in the spring of 1843. It is thought they did not take Dred and Harriet Scott with them, instead leaving them in St. Louis to continue to be hired out.

On December 29 of that year, Emerson died in Davenport. Apparently sensing death was imminent, he had prepared a will only a few hours earlier. He bequeathed most of his property to his wife for the term of her natural life, with the proviso that she could sell all or part for support and maintenance, with the remainder to go to his month-old daughter, Henrietta. The will named John F. A. Sanford (Mrs. Emerson's brother) and George L. Davenport (friend) executors of the estate in Iowa. Iowa law required the nominees to appear before the probate court within 20 days after the will had been probated. Davenport appeared and was duly appointed. Sanford

²⁶Ehrlich, p. 26.

never appeared and was never appointed as executor.

Since legal action also was required in Missouri, the court named Alexander Sanford (Mrs. Emerson's father) administrator of the estate in Missouri. Alexander Sanford "dawdled over his responsibilities in Missouri and had not yet filed a final report when he died in 1848," leaving Mrs. Emerson full control of her husband's property.²⁷ There is no evidence John Sanford (brother) ever participated in the process of executing his brother-in-law's will.²⁸

Mrs. Emerson returned to St. Louis after her husband's death. At some point until 1846, Dred and Harriet Scott were loaned to Captain Henry Bainbridge, Mrs. Emerson's brother-in-law, who had transferred to St. Louis in 1843.²⁹ One account states that Dred Scott tried to buy his and his family's freedom from Mrs. Emerson in February 1846.³⁰ She refused. In March of 1846, Mrs. Emerson hired out the Scotts to Samuel Russell. One month later, in April 1846, Dred and Harriet Scott sued for their freedom.

²⁷Fehrenbacher, p. 127.

²⁸Ibid.

²⁹See Fehrenbacher, p. 128 and Hopkins, p. 7.

³⁰Finkelman, p. 10.

3 The Beginning of the Political Life in the States and Territories

The thirteen states in existence as the U. S. Constitution was signed in 1776 was only a beginning for the United States. It had only just begun to grow. And with that growth came the question of what to do about slaves. By the early 1800's, the several states had declared their intentions regarding slaveholding status within its boundaries.³¹ As new territories and states were added to the Union, the slaveholding status of those new territories and states were considered. Thus, political action was taken as property increased the size of the United States.

In July 1787, a plan of government for the new West won approval in Congress. This measure explicitly applied only to “the territory of the United States North West of the river Ohio.”³² The sixth article, which was introduced by the only state, Massachusetts, which had at the time abolished slavery, read:

There shall be neither slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided always that

³¹The states abolished slavery in the following years: Vermont, 1777; Massachusetts (including Maine), 1780; New Hampshire, 1783. Gradual abolition was won in Pennsylvania, 1780; Rhode Island and Connecticut, 1784; New York, 1799, and New Jersey, 1804. See Louis Filler, *Crusade Against Slavery: Friends, Foes and Reforms 1820-1860* (Algonac, MI: Reference Publications, Inc., 1986), p. 26.

³²Fehrenbacher, p. 41.

any person escaping into the same, from whom labor or services is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.³³

This ordinance won approval by a unanimous vote of the eight states present, even though only three were northern. This seemed to be an indication the slave holding south was not yet concerned with its political strength.³⁴

At about the same time, the Constitutional Convention was meeting in Philadelphia where it addressed congressional power over new territories. It eventually encompassed that power in the phrase: “The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”³⁵ This vague phrase would later be interpreted by the U. S. Supreme Court in the *Dred Scott Case*. It was thought this expansion of congressional power took into account the five-week old Northwest Ordinance of 1787.³⁶

The Northwest Ordinance, which was renewed by the new United States government under the Constitution in 1789, was important to Dred Scott because the state of Illinois was carved out of the Northwest Territory. When

³³Ibid, p. 42.

³⁴Fehrenbacher, p. 42.

³⁵Fehrenbacher, p. 42.

³⁶Douglas North and Andrew Rutten, “The Northwest Ordinance in Historical Perspective,” in *Essays on the Economy of the Old Northwest*, ed., D. Klingamen and R. Vedder (Ohio University Press, Athens, 1987), 19-35.

it was admitted into the Union in 1818, its constitution prohibited slavery. That prohibition was still in effect when Dred Scott lived there from 1833 to 1836.

The Louisiana Purchase in 1803 again brought the issue of slaveholding in the territories to the forefront. Although there were several measures offered or introduced into Congress, both for and against slaveholding in the area, the final legislation converting the district of Louisiana into a full-fledged territory neither authorized nor prohibited slavery. Presumably, then, slaveholding was still legal under previous French or Spanish law. In 1812, having admitted Orleans Territory as the state of Louisiana, Congress changed the name of the remaining Louisiana Territory to Missouri Territory, again with no reference to the Northwest Ordinance or its anti-slavery article “Missouri remained slaveholding territory by virtue of congressional default.”³⁷

This “non-intervention”³⁸ policy held for several years, until sometime after the War of 1812, when some northern members of Congress opposed the admission of Missouri as a slaveholding state. This protest in 1819 was an attempt to recover some ground which had been passively yielded by the northern members during the preceding 15 years.³⁹ The House passed Missouri enabling legislation with an amendment prohibiting the further in-

³⁷Fehrenbacher, p. 48.

³⁸While all other territories at the time were expressly assimilated to the Northwest Ordinance, either affirming or excluding the anti-slavery clause found in the Ordinance, the acts that created the Louisiana-Missouri Territory omitted all reference to it. Fehrenbacher describes the effect it created as establishing the purest form of a “non-intervention” policy. Fehrenbacher, p. 49.

³⁹Fehrenbacher, p. 49.

roduction of slavery to Missouri and freeing slave children born after the date of the state's admission. The Senate refused to accept the House bill unless the amendment was deleted.

In 1820, the state of Maine applied for admission to the Union. Its enabling legislation became tied up with the still languishing Missouri enabling legislation, with neither bill being passed through both the House and the Senate. The House had passed the Maine bill and sent it to the Senate, however, the Senate amended it by adding a Missouri enabling act with no restrictions on slavery. Eventually, the Senate added an amendment to the package that "declared slavery to be 'forever prohibited' in the remainder of the Louisiana cession lying north of 36 (degrees) 30 (minutes)."⁴⁰ The House initially refused to accept the Senate's package, but eventually approved what would become known as the Missouri Compromise.

The territory where Fort Snelling was formed would be governed by the Missouri Compromise. The Fort, established in 1819 as Fort St. Anthony, was located on the north bank of the now Minnesota River, where it flowed eastward into the Mississippi River. Part of the newly created Wisconsin Territory, the Fort was located on the west bank of the Mississippi River, "in that portion of the Louisiana Purchase territory where slavery had been prohibited by the Missouri Compromise of 1820."⁴¹ Dred Scott once again lived in free territory during his two years at Fort Snelling.

⁴⁰Fehrenbacher, p. 52.

⁴¹Ehrlich, p. 19.

4 The Beginning of the Sentiments of Slavery in the United States

“Throughout the colonial period and after the American Revolution, slavery was accepted by most Americans as a normal and inevitable aspect of their affairs.”⁴² The Revolutionary War did aid the cause of some slaves whose owners saw fit to manumit them as a reward for serving in the Revolution.⁴³ However, the invention of the cotton gin by Eli Whitney in 1793 made the use of slaves in the cultivation of cotton a more profitable venture; “thereafter, the southern leadership became more assertive in defense of its rights.”⁴⁴ The Industrial North did not have as strong a financial interest in slave labor as did the South.

As time went on, though, people’s sentiments became less about economics and more about personal philosophies, with less of a sectional division. “By 1825, North and South were clearly distinguishable in their attitude toward slavery, but not in the attitude toward the Negro.”⁴⁵ When the Marquis de Lafayette visited the country in that year, he was “dismayed by the amount of anti-Negro prejudice he observed everywhere, and recalled that during the Revolution, “black and white soldiers messed together without

⁴²Louis Filler, *Crusade Against Slavery*, p. 16.

⁴³In 1782, Virginia repealed a law restraining manumissions, and within nine years 10,000 slaves had been freed. William Jay, *Inquiry into the Character and Tendency of the American Colonization and American Anti-Slavery Societies* (New York, 1835), pp. 27-28, as cited in Filler, p. 18, note 6. See also Fehrenbacher, p. 25.

⁴⁴Filler, p. 18.

⁴⁵Filler, p. 20

hesitation.”⁴⁶

Even if support for slavery in the South came mostly from an economic perspective, the South’s poor whites and non-slaveholders, who would have had no vested interest in the perpetuation of slavery, “chose to despise the Negro and adopt in exaggerated form the view point of the patricians.”⁴⁷ As abolitionists grew in power, Southerners came together and adopted “a stern uniformity in outlook and a program of repressing liberal thought.”⁴⁸

While Northern states were the first to abolish slavery,⁴⁹ this did not necessarily mark the beginning of an abolitionist movement. The first group to take a stand on the abolition of slavery was the Quakers, perhaps with the publication of Ralph Sandiford’s *A Brief Examination of the Practice of the Times* in 1729.⁵⁰ There were several free, and wealthy, black Americans who contributed to the abolition movement, but for the most part, “(a)ntislavery forces North and South failed signally to utilize the free Negro, despite the fact that his own efforts in behalf of slaves probably exceeded those of all others.”⁵¹ John Rankin developed the best-known “underground railroad” station in Ripley, Ohio.⁵²

One movement that received much support, including a \$100,000 federal appropriation, was The American Society for Colonizing the Free People of

⁴⁶Filler, p. 20.

⁴⁷Filler, p. 23.

⁴⁸Filler, p. 23.

⁴⁹See note 16.

⁵⁰Filler, p. 29.

⁵¹Filler, p. 32.

⁵²Filler, p. 31.

Colour of the United States developed in the early 1800's, a Society whose goal was to obtain a territory on the coast of Africa, or somewhere not the United States, to receive free or emancipated blacks. The support this movement garnered gave great strength to the idea that "the presence of free Negroes troubled white people North as well as South."⁵³

Abolition efforts seemed to be coming to the forefront as the 1820's wore on.

Numerous events contributed to the growth of a crisis psychology in both the North and the South. There was the Andrew Jackson 'revolution' of 1828, his election to the Presidency, which overturned established political alliances. The year 1829 teemed with incidents, including the official ending of slavery in Mexico, which caused the Yankee settlers of Texas to be concerned for their slave property. That same year saw a cruel riot against the free Negroes of Cincinnati which caused many of them to flee the city and state, clouded as it was by a Black Code. In 1829, too, there was a debate on the slave trade in the District of Columbia, which resulted in resolutions condemning the trade and even looking to the gradual abolition of slavery.⁵⁴

In August 1831, Nat Turner, a slave and religious fanatic, led a revolt of about 70 slaves in southeast Virginia. In one day, 57 men, women and

⁵³Filler, p. 37.

⁵⁴Filler, p. 71.

children were killed by the revolting slaves. In turn, many of the slaves were massacred, without trial, by white troops and militia. “This latest of major slave plots evoked memories, North and South, of the gruesome violence which had been reported during the struggles in Santo Domingo several decades before.”⁵⁵ It alerted Virginians to the dangers among which they lived, and to their need for guarantees against further insurrections.”⁵⁶

Despite any personal feelings of the individual white Americans toward free or enslaved blacks, a legal question arose regarding what to do about slaves who were moved from a slaveholding to a non-slaveholding state or territory, in violation of the law. Even more difficult to answer was what happened to a slave who was moved back to a slaveholding state, after residing in a free area.

To the substantive question there were three basic answers: (1) The law of slavery remained attached to a slave when he entered a free state; his status did not change. (2) The slave taken by his master into a free state became a free man and remained so permanently, wherever he might go thereafter. (3) The slave taken into a free state became free in the sense that his master lost the power to control him, but upon his returning to a slaveholding state, the status of slave was reattached to him.⁵⁷

Early on, there was some tacit agreement to this question. Based on

⁵⁵Feherenbacher, p. 25.

⁵⁶Filler, p. 72.

⁵⁷Fehrenbacher, p. 27.

Somerset v. Stewart (1772), an English case which stood for the idea that without positive law legalizing slavery, any slave brought into England became free, early abolitionists argued “slavery was contrary to natural law and without legal status beyond the boundaries of the jurisdiction establishing it by positive law.”⁵⁸ Both southerners and northerners were willing to accept the doctrine, with the southerners agreeing it applied to slaves domiciled by their masters on free soil and with the northerners generally agreeing it should not apply to instances of transit, sojourn, or temporary residence.⁵⁹ Many courts, including southern courts, consistently ruled that a slave taken to a free state to live by his masters was freed. The Missouri Supreme Court, in fact, in 1824 in *Winney v. Whitesides*,⁶⁰ freed a slave who had been taken to Illinois. Over the next 13 years, the Missouri court heard another 10 cases, “always deciding that slaves gained their freedom by either working in a free jurisdiction⁶¹ or living there long enough to be considered a resident,”⁶² even if the slave afterwards returned to Missouri.⁶³

One of the most liberal states on this question, but not alone, Missouri

⁵⁸Fehrenbacher, p. 28.

⁵⁹Fehrenbacher, p. 29.

⁶⁰1 Missouri Reports 476 (1824).

⁶¹As held in *John Merry v. Tiffin and Menard* 1 Missouri Reports 725 (1827), this included slaves living in any territory where slavery was prohibited by the Ordinance of 1787. See also *Francois La Grange v. Pierre Chouteau, Jun* 2 Missouri Reports 20 (1828) and *Theoteste alias Catiche v. Pierre Courteau* 2 Missouri Reports 145 (1829). As cited in Ehrlich, p. 41.

⁶²Findelman, p. 20.

⁶³As held in *Philip Tramel v. Adam* 2 Missouri Reports 157 (1829). See also *Vincent v. James Duncan* 2 Missouri Reports 214 (1830), *Ralph v. Coleman Duncan* 3 Missouri Reports 195 (1833), and *Julia v. Samuel McKinney* 3 Missouri Reports 275 (1833). As cited in Ehrlich, p. 41.

was joined by Kentucky, Louisiana, and Mississippi as slave states whose courts upheld the freedom of slaves who lived in a free state or territory. As late as 1837, the Missouri Supreme Court reaffirmed this principle and it had made no further decisions on this principle before Dred Scott brought his suit in 1846.⁶⁴

5 The Dred Scott Case

The Missouri Courts: *Dred Scott v. Irene Emerson*.

What is commonly thought of as “The Dred Scott Case” was actually the culmination in the U. S. Supreme Court of several trials and appellate hearings held over the course of 11 years. Why Dred Scott brought the case in 1846, or at all, after it had been more than six years since their residency in a free state, has been a matter of much speculation. “How did an illiterate slave who could not even sign his name know that he had a legal basis for freedom?”⁶⁵

One thought was that it was only in 1846 that Dred Scott discovered he had a strong legal claim to freedom.⁶⁶ He may have learned this from his former masters, the Blows, after returning from service with Captain Bainbridge.⁶⁷ He apparently renewed his acquaintance with the Blows, who

⁶⁴ *Daniel Wilson v. Edmund* 4 Missouri Reports 597 (1837). As cited in Ehrlich, p. 42.

⁶⁵ Ehrlich, p. 35.

⁶⁶ Finkelman, p. 19.

⁶⁷ See note 14.

then provided him financial support for his litigation. While their motive is unknown, it is considered without a political agenda as it is thought the Blow's benevolence, particularly that of the son Taylor Blow, had "sprung wholly from a personal affection extending back to his boyhood."⁶⁸

Another possible way Dred Scott learned of his right to freedom was through his wife Harriet. She joined Rev. John R. Anderson's Second African Baptist Church in the early 1840's. Anderson had been a former slave who worked as a typesetter for Elijah P. Lovejoy, an antislavery editor in Alton, Illinois.⁶⁹ It was possible Anderson or someone else in the church told Harriet the Scotts were entitled to their freedom.⁷⁰

There was another "friend" who appeared early in the Dred Scott case, a mysterious friend who was not only a benefactor to Dred Scott, but who may have had something to do with the initiation of the case. Attorney Francis B. Murdoch filed the initial documents charging Mrs. Emerson and also signed a bond accepting responsibility for the costs that might accrue in the case.⁷¹ The mystery surrounding Murdoch has to do with his motive for stepping into Dred Scott's life. He had previously practiced law and was elected prosecuting attorney in Alton, Ill., the location where Alton abolitionist minister and pamphleteer Elijah P. Lovejoy was killed. "As Alton's

⁶⁸Feherenbacher, p. 122.

⁶⁹Finkelman, p. 19, note 22.

⁷⁰Finkelman, p. 19-20.

⁷¹Before a slave could sue for freedom, the slave had to represent "security, satisfactorily, to the clerk for all costs that may be adjudged against him or her." Ehrlich, p. 42. In the *Dred Scott Case*, the attorneys representing the Scotts typically posted this security throughout the course of the litigation.

city attorney, Murdoch prosecuted both antislavery and proslavery zealots charged with capital offenses tied to slavery, however his sympathies were with those opposed to slavery.”⁷² After the Lovejoy killing, Murdoch moved to St. Louis, where he may or may not have known Harriet Scott’s pastor, Reverend Anderson.⁷³

Contemporary writers of Dred Scott’s time suggested the case originated as a test case, initiated by one or the other of proslavery or antislavery supporters, in order to substantiate their point of view.⁷⁴ In 1907, one lawyer argued the theory that the reason for the case was financial; that a freedom suit would pave the way for a second suit for back wages once the court found the Scotts had been held illegally.⁷⁵ These theories were dismissed by one researcher who located missing court documents which indicated the points of law and arguments raised by the counsel. Ehrlich details his search for the missing court records of the *Dred Scott* case. Around 1900, the original records were removed from the Circuit Court in St. Louis by George W. Taussig, a St. Louis lawyer and one of Henry Blow’s close friends. He died before writing anything about the case. His nephew had been storing his dead uncle’s papers, and went to burn them. As he was throwing papers into the furnace, one bundle got caught on the lip of the furnace, with the words “Dred Scott, a man of color, vs. Irene Emerson.” He pulled the papers from

⁷²Ehrlich, p. 37.

⁷³Ehrlich, p. 37.

⁷⁴Ehrlich, p. 33.

⁷⁵Ehrlich, p. 33.

the furnace and returned them to the Circuit Court. It is unknown, though, how many documents were lost to the furnace before he pulled them from the fire. There were also copies of some of the original documents filed with the Missouri Supreme Court. Ehrlich went to the Court in 1947 and located copies of the documents, only to be told by the clerk of the court that the files had been missing for decades. Ehrlich volunteered to search for the records himself, feeling the integrity of his doctoral dissertation was at stake. Five years later in 1956, after a file-by-file and drawer-by-drawer search, he found the papers a “scant few feet from where they should have been in the first place.”⁷⁶ These documents seem to indicate the only issue at hand for Dred Scott and his family was to gain their freedom from slavery.

“At no time were the politics of slavery, the morality of slavery, the views of any political or civic leader, financial considerations, or any other issues raised. The case purely and simply involved a Negro slave who sued for one thing and one thing only — to obtain his freedom.”⁷⁷ This was not even an unusual suit. “Besides, the central question raised in the suit — whether extended residence on free soil liberated a slave — was not an issue in American politics and had already been tested many times in the Missouri courts, with consistent results.”⁷⁸ There was no reason to think this case would be decided otherwise.

The case began on April 6, 1846, when Dred and Harriet Scott filed pe-

⁷⁶Ehrlich, p. 188.

⁷⁷Ehrlich, p. 34.

⁷⁸Fehrenbacher, p. 129.

titions in the Missouri Circuit Court in St. Louis requesting permission to bring suit against Ireme Emerson to establish their right to freedom based on their residence on free soil. Before a slave could actually sue for freedom, he first had to petition the circuit court of Missouri, or its judge, for permission to sue. The judge, if he believed the grounds for suit set forth in the petition, set four conditions for that permission. First, the slave had to present security (*see* note 56); second, that he have liberty to attend his counsel and the court; third, that he not be subject to severity on account of his application; and fourth, that he not be removed out of the jurisdiction of the court.⁷⁹ The judge granted their petitions, and on the same day, the Scotts initiated actions of trespass for assault and false imprisonment against Mrs. Emerson, complaining that she had “beat, bruised and ill-treated him” and then imprisoned him.⁸⁰ The action also averred that Dred was a “free person” held in slavery and claimed damages of ten dollars. A suit for freedom took the conventional form of a suit for damages in which it was understood that the alleged acts of the defendant were lawful chastisement of a slave by his master, but constituted assault and false imprisonment if the plaintiff were indeed a free person.⁸¹

Although the suit was brought in April 1846, the case was not tried until June 30, 1847, with Samuel Bay now representing Dred Scott. The witnesses for Dred Scott testified Dr. Emerson had held him as a slave in Missouri and

⁷⁹Ehrlich, p. 42

⁸⁰Fehrenbacher, p. 129.

⁸¹Fehrenbacher, p. 129.

in free territory, with Samuel Russell testifying he had hired Scott from Mrs. Emerson and paid for the hire to her and her father. This was to establish Mrs. Emerson still claimed Scott as her slave in Missouri. However, under cross-examination, Russell testified his wife had done the actual hiring and he actually did not know if the money for the hire went to Mrs. Emerson. The defense thus argued “the technicality that Dred Scott had not legally proved that it was specifically Mrs. Emerson who was holding him as a slave in Missouri.”⁸²

Agreeing with the defense, the judge instructed the jury that Russell’s testimony was not legal evidence to prove what the law required. Thus instructed, the jury returned a verdict in favor of Mrs. Emerson. Dred Scott had not gained his freedom that day.

Immediately after the verdict, attorney Bay moved for a new trial, contending this technicality could be resolved by calling Mrs. Russell. Judge Hamilton did not render a decision until December 2, 1847, when he did order a new trial. Meanwhile, on July 1, 1847, Alexander P. Field and David N. Hall initiated a new case on behalf of Dred Scott, naming Alexander Sanford, Irene Emerson, and Samuel Russell defendants. It was not precisely known why this suit was instituted, unless it was to ensure at least one master would be found guilty of the offenses alleged.⁸³ When the court noted on July 31 there were two cases charging Mrs. Emerson with the same offense,

⁸²Ehrlich, p. 46.

⁸³Ehrlich, p. 48

it ordered one be dropped. The attorneys dropped the new case, continuing with the original one.

After Judge Hamilton ordered the new trial, the attorney for Mrs. Sanford filed a bill of exceptions for an appeal to the Supreme Court of Missouri. Before the court convened, Mrs. Emerson relinquished direct control over Dred Scott. On March 17, 1848, the sheriff of St. Louis County assumed direct custody of Dred Scott with the order to hire him out “to the best advantage during the pendency of this suit,”⁸⁴ with all payments made to the sheriff, who would account for the wages to the party that won the suit at the termination of the litigation.

The Supreme Court of Missouri convened on March 20, 1848, with Dred Scott’s case being heard April 3, 1848. The issue was the decision by the lower court to grant a new trial, not whether or not Dred Scott was entitled to his freedom. Exactly one year after the first trial, June 30, 1848, the Missouri Supreme Court handed down its decision dismissing the writ of error. Dred Scott would receive his new trial.

It is noteworthy to mention that Dred Scott’s case had yet to stir up any particular interest or public reaction. The only notice it did receive was a routine listing in the newspapers recounting Missouri Supreme Court cases.⁸⁵ This tends to support the theory that the case was not initially brought to support any political agenda but merely to gain the freedom of a slave and

⁸⁴Ehrlich, p. 49

⁸⁵Ehrlich, p. 50.

his family.

The case was not called until January 12, 1850, about a year and a half after the Missouri Supreme Court upheld Dred Scott's right to a new trial. An overloaded court docket, influential St. Louisans persuading the court to take up other litigations, a fire that ravaged a large part of the city, and cholera all contributed to the delay.⁸⁶ The faces of the attorneys had changed, but the issues were the same as from the first trial. This time, a deposition from Mrs. Russell was read into the record which stated she had hired out the Scotts from Mrs. Emerson. This time, the jury returned a verdict stating "the defendant is guilty of manner and form as in the plaintiff's declaration alleged."⁸⁷ Judge Hamilton ordered Dred Scott recover his freedom against the defendant. He was a free man, and in the law of Missouri he had been since 1833 when he first went to Fort Armstrong, as was his wife and their two daughters. And this freedom had yet to cause a stir outside of the Scott household. "So unimportant and insignificant was this case that when its title was inadvertently omitted from routine newspaper listings of St. Louis court proceedings no one thought it worth the trouble even to print a correction."⁸⁸

From all indications, it seems the *Dred Scott Case* should have ended there. It was, for the time period, a routine case of a slave seeking freedom from his owner. The owner had even ceased to have an interest in the slave, as Dred Scott had been working for hire under the sheriff's supervision since

⁸⁶Ehrlich, p. 51.

⁸⁷Ehrlich, p. 53.

⁸⁸Ehrlich, p. 54.

1848 and Mrs. Emerson had even moved from St. Louis sometime in 1849 or 1850. So why would her attorneys⁸⁹ first move for a new trial, and then file a bill of exceptions, thus setting the appeal procedure to the Missouri Supreme Court in motion?

One thought is that Mrs. Emerson's brother, John F. A. Sanford, who had been looking after the affairs of her deceased husband's estate, was a "shrewd and prosperous" businessman who was not going to lose property and money⁹⁰ when there was a chance to retain it.⁹¹ The attorneys could also have noted the composition of the Missouri Supreme Court had changed, with two pro-slavery justices on the bench.⁹² It should be noted, though, the briefs of the lawyers still did not argue the politics of slavery, even though the issue of slavery had found its way into Missouri politics.

There was an attempt by the Missouri legislature to unseat U.S. Senator Thomas Hart Benton, a free-soil democrat who opposed proslavery resolutions introduced in the U.S. Senate by John C. Calhoun on February 19, 1847. The Missouri Legislature passed the "Jackson Resolutions" on March 6, 1849, which reaffirmed Calhoun's proslavery principles and instructed Missouri senators conform with them. On May 26, 1849, Benton declared his

⁸⁹Hugh A. Garland and Lyman D. Norris

⁹⁰All the income earned by Dred Scott since he had been in the care of the sheriff would be turned over to the winner of the case. It was likely not an insubstantial sum two years later.

⁹¹Ehrlich, p. 56.

⁹²William B. Napton and James H. Birch were political enemies of Senator Thomas Hart Benton, and thus held proslavery views, while John R. Fyland was pro-Benton. Ehrlich, p. 55.

position for the electorate of Missouri, appealing to the people of Missouri to stand by him to maintain the Union. As noted above, two of the three Missouri Supreme Court justices were bitter political, and personal, enemies of Benton.⁹³

The briefs were filed on March 8, 1850, for the regular March term of the Supreme Court. Due to an unusually heavy docket, the court was unable to take up the case during that term, however it had reached a decision by the time it convened its next term in October 1850. “Napton and Birch, both resolute anti-Benton Democrats, favored a proslavery decision overturning the previous decisions upholding the validity of the Ordinance of 1787; Ryland, on the other hand, wanted to retain the old precedents as they existed, and he was prepared to write a dissenting opinion expressing this view.”⁹⁴ Despite this view, Ryland changed his mind after the court convened and agreed to concur so a unanimous decision could be delivered.

Napton was to write the decision, but he was never to do so. He sent away for Lord Stowell’s *Slave Grace* case opinion, but it had not arrived when he lost his seat in the August, 1851 election of judges for Missouri courts. The newly-elected Missouri Supreme Court, again with two members committed to overthrowing precedents based on the Ordinance of 1787, finally considered the *Dred Scott Case* November 29, 1851, on the original written briefs resubmitted by Dred Scott’s attorney. But, before the court’s opinion was

⁹³Ehrlich, p. 58-59.

⁹⁴Ehrlich, p. 60.

prepared, Mrs. Emerson's counsel obtained permission to file a new brief. This is significant because in his revised brief, attorney Norris raised doubts for the first time about the applicability of the Ordinance of 1787 and the Missouri Compromise. He also introduced racial overtones in the *Dred Scott Case*.

Neither sound policy nor enlightened philanthropy should encourage in a Slaveholding State, the multiplication of a race whose condition could be neither that of freemen or slave [and] whose existence [and] increase in this anomalous character, without promoting their individual comforts [and] happiness[,] tends only to dissatisfy and corrupt those of their own race [and] color remaining in a State of Servitude.⁹⁵

With Norris' new brief added to the record, the Missouri Supreme court considered the briefs and announced its decision March 22, 1852. In a two-to-one decision, the Missouri Supreme Court overturned all precedents by deciding the courts of Missouri were under no obligation to recognize the laws of any other state if they conflicted with the laws of Missouri. While the court did not deny a slave could obtain freedom by going into free territory, but once he returned to Missouri, he reverted to slavery under Missouri law. The opinion of the court also seemed to succumb to the racial overtones found in Norris' brief.

⁹⁵Ehrlich, p. 63.

Times now are not as they were, when the former decisions on the subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances, it does not behoove the State of Missouri, to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may for our own sake regret that the avarice and hardheartedness of the progenitors of those who are now so sensitive on the subject, ever introduced the institution among us, yet we will not go to them to learn law, morality or religion on the subject.⁹⁶

Thus, the court declared the judgement of the lower court be reversed and the case be remanded for a new judgment, consistent with the proceedings. While the decision was recognized as important by some newspapers in Missouri,⁹⁷ others made no mention of it whatsoever. A Washington, D. C. paper⁹⁸ noted the decision giving bare details of the decision, but made no editorial comment regarding the case. The case had yet to become a rallying point in the controversy over slavery.

⁹⁶ *Scott v. Emerson* 15 Missouri Reports 582, 586-587 (1852).

⁹⁷ Among them the St. Louis *Daily Missouri Republican*.

⁹⁸ *Daily National Intelligencer*

Back in St. Louis, the Circuit Court of St. Louis County received the Supreme Court decision April 10, 1852. A routine motion to turn over the proceeds of the Scotts' hire since 1848 surprisingly was overruled, on June 29 of that year. The records are silent as to why the motion was overruled until January 25, 1854, when the case was "(c)ontinued by consent, awaiting decision of the Supreme Court of the United States."⁹⁹ A new case had been instituted in the U. S. Federal courts November 2, 1853. The sheriff kept the money and the Scotts remained slaves.

The Federal Courts: *Dred Scott v. John F. A. Sanford*

Another of the Dred Scott mysteries is how and why the case was transferred to a federal action, with no one questioning John Sanford's right to act on behalf of Mrs. Emerson. While he may have acted in good faith, it appears he was never legally authorized to act on behalf of Dr. Emerson's estate.¹⁰⁰ However, Sanford had moved to New York and could be brought into federal court in a diversity suit. It does appear Dred Scott's new lawyer, Roswell M. Field, had been mistakenly informed that Scott and his family had been sold to Sanford, with an agreed statement of facts averring that "shortly before the commencement of the suit Scott and his family had been 'sold [and] conveyed' to Sanford."

⁹⁹Ehrlich, p. 70.

¹⁰⁰See Footnote 12.

But this statement was inaccurate and erroneous. The evidence is unmistakable. In the first place, the agreed statement asserted that it was Dr. Emerson who had ‘sold [and] conveyed Scott to Sanford; yet Emerson had died some ten years earlier. Even more conclusive are the circumstances surrounding Scott’s eventual emancipation. On May 26, 1857, two and one-half months after the Supreme Court declared him still a slave, Scott was granted his freedom by Taylor Blow, to whom the slave in the meantime had been sold — not by Sanford, but by Dr. and Mrs. Chafee. Sanford had died in New York only three weeks earlier, on May 5, 1857; but probate records of his estate in both New York and St. Louis indicate that Scott never was a part of that estate.¹⁰¹

The person who did the informing was Charles Edmund La Beaume, a brother-in-law of the Blows, and a benefactor of Dred Scott’s from the beginning of the litigation in 1846. It is speculated that he perhaps declared this falsity either in an altruistic effort to gain a new trial for Dred Scott, as the state courts had already disappointed him, or in an attempt to test certain slavery principles, with Dred Scott merely being on hand to benefit possibly from the trial. The answer is not known.

Even more interesting, though, is why Sanford admitted to ownership when he could have terminated the litigation at its inception by showing he

¹⁰¹Ehrlich, p. 75.

did not own the slave as alleged. It is suggested his failure to do so “almost *prima facie* suggests collusion.”¹⁰² Even if he allowed the case to continue to support the political interests of proslavery Democrats, of whose party he was actively involved, there was never any proof who did the “importuning” or the “badgering”.¹⁰³ Thus, the case went forward.

The circuit court convened in St. Louis on April 3, 1854. In response to the charges filed against him, Sanford filed a plea in abatement denying the jurisdiction of the court. He argued Scott was not a citizen of Missouri, on account of his being a black of African descent whose ancestors were brought into the country and sold as slaves, thus there was not true diversity as the case did not involve legitimate citizens of different states. This was the first time the right of a black person to be a citizen of the United States was questioned in the *Dred Scott* case. These legal issues had to be argued before the case could proceed to a trial on the facts.

The decision by the court on April 25 recognized that while slave states disagreed with the policy of giving a free black the right to sue, it also meant that neither could he *be* sued, and thus obtained “a very substantial privilege and immunity that free white citizens did not possess.” Thus, the Court held “every person born in the United States and capable of holding property was a citizen having the right to sue in the United States courts.’ If Scott was free, he had the right to sue.”¹⁰⁴ The trial had to go forward on the facts to

¹⁰²Ehrlich, p. 77.

¹⁰³Ehrlich, p. 77.

¹⁰⁴Ehrlich, p. 84.

determine if Scott were free or slave, based on his residence in free territory.

If Sanford and his attorney truly meant for the *Dred Scott* case to be a test case on the merits of the Ordinance of 1787, they would not have attempted to have the case thrown out of court for a different reason, the citizenship question. This argument “has every semblance of a genuine attempt by the defendant to avoid being sued.”¹⁰⁵

The case was heard on May 15, 1854, interestingly enough, *not* in the Old Courthouse, as is in St. Louis. It was instead held in a private building, the Papin Building, down the street because state courts had occupied all the courtrooms. Scott’s lawyer, Field, requested the court to instruct the jury Scott was free by virtue of the Ordinance of 1787, the Constitution of Illinois and the Missouri Compromise. The judge refused to give such instructions, instead instructing the jury that “the law covering the facts of the case did not operate to grant the slave his freedom.”¹⁰⁶ The judge explained to the jury that removal of the slave into Illinois only suspended slavery temporarily, and upon their returning to Missouri, the master’s right to the slave was revived. He also explained the provisions in the Illinois Constitution that emancipated slaves were penal in nature against slaveholders and therefore other states, such as Missouri, did not have to enforce them. Essentially, as a U.S. court, he was following the State courts’ interpretation of their own law, since the above were the reasons given by the majority in the Missouri

¹⁰⁵Ehrlich, p. 85.

¹⁰⁶Ehrlich, p. 86.

Supreme Court.

On the basis of these instructions, the jury found in favor of defendant Sanford. After losing a motion to set aside the verdict and grant a new trial, Scott's attorney began an appeal to the Supreme Court of the United States. And still, the case merited no more mention than a brief summary in the antislavery *St. Louis Daily Morning Herald*.

The U. S. Supreme Court: First Arguments

Even while Dred Scott's case was not garnering much media attention, the opposing viewpoints on the slavery issue seemed to be growing in voice. Two weeks after the *Dred Scott* decision in St. Louis, President Franklin Pierce signed the Kansas-Nebraska Act into law, thereby repealing the slavery prohibition of the Missouri Compromise. "The sleeping tiger of sectionalism was now awake and seething with fury. The press, the pulpit, and the public forum, both North and South, raged with denunciation and defiance."¹⁰⁷

The case was filed December 30, 1854, but was not heard until February of 1856 due to a crowded docket. Montgomery Blair, attorney for Dred Scott, filed a brief arguing Scott was free because Missouri precedent had previously upheld a slave's freedom based upon his residence in a free state and that the Missouri court injected then-current political views into its decision. He also addressed the jurisdictional question of whether a Negro

¹⁰⁷Ehrlich, p. 89.

of African descent could be a citizen of the U.S., noting the numerous suits that had been brought in federal court by and against free blacks with their status as citizens having the right to sue not being questioned. The written brief by Missouri Senator Henry S. Geyer, attorney for John Sanford, was filed, no copy is currently in existence, therefore its contents are unknown. There was also a second brief, filed by [Re] Johnson, the second attorney for Sanford.

The oral arguments, with the attorneys allotted three hours each instead of the usual two, as per the request of Johnson, began February 11, 1856. There is also no detailed record of the oral arguments, but it is assumed Blair argued the points he raised in his brief. Again, not much was written about the arguments of Geyer and Johnson, but “*(f)or the first time the Dred Scott case was referred to as involving the constitutionality of the Missouri Compromise,*”¹⁰⁸ with the attorneys arguing Dred Scott had *never* been free because Congress did not have that authority. They did acknowledge Scott’s residence in the state of Illinois, arguing he could have been free in Illinois, but his slave status resumed when he returned voluntarily to Missouri.

Even with the introduction of this new argument, there was still little attention paid to the case in the Supreme Court. Major Washington papers briefly described the attorneys’ arguments, with assorted papers in other states, including New York, Baltimore, and Boston, being the first newspapers outside Washington to mention the case. “All these reports were very

¹⁰⁸Ehrlich, p. 95.

short, mentioning only that a litigation was before the Supreme Court involving the constitutionality of the Missouri Compromise, the citizenship of blacks, and the rights of slaveholders to take their slaves into free states. There were neither details nor editorial comment.”¹⁰⁹

The Court consulted on the case for the first time on February 22. This was the first of several consultations over the next three months, until the Court announced it had ordered the case to be reargued by counsel at the next term. While these consultations were traditionally confidential, the issues discussed seemed to make their way to the press. It appeared the main discussion centered around whether the Court should discuss the plea in abatement raised in the earlier Court. If the plea should have been sustained, the Court would not even have jurisdiction to hear the merits of the case.

There were several reasons raised as to why the Court ordered the case to be reargued. One accusation was that the judgment was being postponed for political reasons until after the 1856 presidential election. It was suggested this was part of a conspiracy to repeal the Missouri Compromise, paving the way for legalization of slavery throughout the country.¹¹⁰ Another reason, the most widely accepted, is that rearguing the case would prevent Justice McLean from “delivering a dissent that might either propel him into the Republican presidential nomination or at the very least make available authoritative judicial doctrine for the Republican campaign.”¹¹¹ The final reason for

¹⁰⁹Ehrlich, p. 97.

¹¹⁰Ehrlich, p., 104.

¹¹¹Ehrlich, p. 104.

the delay could simply have been a genuine desire on the part of the justices to undertake a more thorough review of the issues. The motion to reargue was approved unanimously. If McLean wished to deliver his opinion before the election, he would not have voted to delay the decision.

The decision to reargue the case still raised very little hubbub. Some newspapers mentioned it briefly in their routine summaries of action taken by the Supreme Court. Even “(the strongly antislavery Washington, D.C., *National Era* printed a small article noting the adjournment of the Supreme Court, but it made no mention of the *Dred Scott* case — and its own editor, Gamaliel Bailey, had assumed financial responsibility for the case while it was in the Supreme court.”¹¹² The curtain had yet to fall on the final act of the *Dred Scott* case, though.

The U. S. Supreme Court: Second Arguments

Before December 1856 came to pass, and with it the rearguing of the *Dred Scott* case, the sectional breach between North and South grew.

On May 21, 1856, a band of proslavery ‘border ruffians’ virtually destroyed the city of Lawrence, center of the free-state population of Kansas Territory. The next day Representative Preston S. Brooks of South Carolina brutally assaulted Senator Charles Sumner at his seat in the United States Senate shortly after the Massachusetts abolitionist’s delivery of a vir-

¹¹²Ehrlich, p. 108.

ulent attack on slavery. Two days later came John Brown's blood bath at Pottawotomie Creek.¹¹³

A presidential election also took place, with the Democrat James Buchanan carrying the day. Sectionalism had quieted in the intervening period, but in his last State of the Union address on December 2, President Pierce rekindled the controversy by stating "Congress does not possess constitutional power to impose restrictions of this character [referring to the recent Kansas-Nebraska Act] upon any present or future State of the Union."¹¹⁴

On that same day, December 2, Geyer filed his brief on behalf of Sanford, devoting a considerable portion to the citizenship issue. He distinguished a slave's temporary residence in a state from a permanent one, arguing Scott was only in the free state temporarily. Geyer also argued the Missouri Compromise was unconstitutional and Dred Scott was therefore never free in the first place.

Blair, the attorney for Scott, pointed out in his supplementary brief, filed December 15, that citizenship should not even be an issue in this case, because Sanford had not appealed the action taken on the plea in abatement, instead going forward to argue the merits. Most of his brief, though, dealt with the constitutionality of the Missouri Compromise. He listed 13 acts of Congress legislating over slavery in various territories, and referenced 14 judicial decisions which recognized the constitutional right of Congress to

¹¹³Ehrlich, p. 109.

¹¹⁴Ehrlich, p. 112.

legislate over slavery. Blair argued that the defendant's brief challenged the legality of the Missouri Compromise based on the fact that "the 1820 statute conflicted with a *state* law as interpreted by a *state* supreme court, that 'a species of property recognized in the laws of the states cannot be held in the territories.'" ¹¹⁵ If this argument prevailed, it would allow state authority to supercede federal authority, subjecting Congress to the state legislatures.

The oral arguments were heard over four days, beginning December 15, 1856. In the end, Blair spent nearly five hours justifying the power in Congress to legislate the abolishment of slavery. He also argued the citizenship issue, stating it was not an issue in the appeal and not properly subject to review by the Court. Turning to the merits, he argued a state could, in fact, prohibit slavery and Dred Scott's residence in Illinois made him free.

George Tickner Curtis, who had joined Blair in arguing for Scott, examined the Constitution, concluding the "clear intent of the framers of the constitution was that Congress should have absolute authority over a territory while it remained in that status." ¹¹⁶ When the territory became a state, the state could then decide upon its local institutions, such as slavery.

Geyer, in his oral argument for Sanford, discussed the citizenship issue, arguing the court must review the plea in abatement in order to determine if it had jurisdiction. On the merits of the case, he argued the state of Illinois

¹¹⁵Ehrlich, p. 115.

¹¹⁶Ehrlich, p. 121.

could legislate slavery within the state, but it had no effect on someone brought into the state who was already a slave. With regard to the Missouri Compromise, he argued Congress only had the power to institute municipal governments in a territory, preparing it for eventual statehood. There was no express grant of power in the Constitution.

Johnson, in his argument for Sanford, noted the Union's Fifth Amendment requirement to protect property rights, even if that property were a man. His argument against the Missouri Compromise noted that in making rules and regulations for the territories, "Congress could do nothing that was detrimental either to the United States or to any one state."¹¹⁷ In legislating on slavery in the territories, it could harm either the interests of the free states or of the slave states, depending on its position; thus, it was unconstitutional for Congress to legislate at all on this issue.

With the arguments completed, the court consulted. There was a marked difference in public reaction this time. "In contrast with the sparse publicity before, news of the oral arguments now was disseminated in the press throughout the country."¹¹⁸ The case was taken up by the court on February 14, with several discussions occurring before the court came to a conclusion. Justice Nelson was to prepare the Opinion of the Court, working under the instructions that he was "not to touch upon either the citizenship of Negroes or the constitutionality of the Missouri Compromise, to limit his statement

¹¹⁷Ehrlich, p. 120.

¹¹⁸Ehrlich, p. 122.

very carefully to the particular circumstances of Dred Scott, and not to make any generalizations that might associate the decision with any partisan political doctrines.”¹¹⁹ That decision was never finished. Three justices, McLean, Curtis and Wayne, have been accused of causing the majority to change its attitude and discuss citizenship and the Missouri Compromise. Another thought is that it was Wayne himself, a proslavery Georgia Democrat, who was responsible for the reverse. There is also evidence of outsiders exerting influence on the court to invalidate congressional prohibition of slavery in the territories. The president-elect himself corresponded with several justices, trying to determine the outcome before his inauguration.¹²⁰ While there is no definitive answer as to what happened, what is known is that after Nelson began to write his opinion, “*Wayne proposed that the decision should include the two vital questions Nelson was omitting.*”¹²¹ After a brief discussion, five justices from slave states, “now decided [they] could peacefully settle the slavery issue by declaring the Missouri Compromise unconstitutional,”¹²² with Chief Justice Taney writing the opinion.

Before the decision of the Court was handed down, James Buchanan was inaugurated as president. As he pointed out in his inaugural address, the principle of popular sovereignty, the will of the majority, had been the basis for his party’s victory and his election. Then he came to that critical point,

¹¹⁹Ehrlich, p. 127.

¹²⁰Ehrlich, p. 128-129.

¹²¹Ehrlich, p. 129.

¹²²Ehrlich, p. 129.

the differences between northern and southern views over the interpretation of that principle:

A difference of opinion has arisen in regard to the point of time when the people of a Territory shall decide this question for themselves.

This is, happily, of matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be.¹²³

Two days later, March 6, 1857, Chief Justice Taney took his seat on the bench, made a routine announcement, and then began to read the Opinion of the Court in the case of *Dred Scott v. John F. A. Sanford*. Two and one-half hours later, he was done. But did he truly speak for the majority? “Whether Roger Brooke Taney’s opinion was in fact the Court’s opinion has been for a long time a matter of controversy....Undoubtedly a majority concurred in the basic judgment that Dred Scott did not have the right to sue, and in that respect Taney did indeed speak for the court. But beyond that, Taney’s colleagues differed markedly in the reasons *why* Scott could not sue, and for none of those reasons was there an indisputable concurring majority.”¹²⁴

¹²³Ehrlich, p. 133.

¹²⁴Ehrlich, p. 137.

While the Court could have avoided conflict by staying with the original Nelson opinion, once it chose to decide the matter, the outcome was likely not a great surprise to anyone at the time.¹²⁵ The court had a seven to two majority of southerners and moderate northerners. Apparently, abolitionists and the press launched their assaults before the decision was announced, anticipating the outcome. Taney's opinion, despite extensive revisions he is supposed to have made to the original oral opinion read in the Court, was blantly racist, calling black men "beings of an inferior order" with "no rights which white men were bound to respect."

The Opinion of the Court essentially turned on the question of jurisdiction. Taney found that the African race were not intended to be granted rights and benefits in the Constitution, and thus Dred Scott was not a citizen of Missouri, and not entitled to sue in federal court. Interestingly, though, having declared the Court lacked jurisdiction, Taney proceeded to evaluate the case on its merits. While there is continuing argument over whether this evaluation was *obiter dictum*, in other words not finding on future courts, Taney stated that while the Supreme Court corrected one error of the lower court, there was nothing depriving the appellate court from further reviewing the record and correcting any material errors. Thus, the main body of his opinion dealt with the right of Congress to legislate over slavery, concluding Congress could not prohibit slavery nor pass any law depriving a citizen of the United States of his property. Therefore, Dred Scott was not a citizen

¹²⁵Ehrlich, p. 140.

both because he was black and a slave and did not have the right to sue in federal courts.

The Supreme Court and the President truly seemed to hope this decision would put a peaceable end to the slavery conflict in the United States. While it is true that sometimes authority putting the proverbial “foot down” on one side of an issue will at least cease the argument, the slow burn of the slavery issue through the years led to an emotionally-charged atmosphere in the United States in 1857 that was not going to be placated with dictates from on-high.

Both southerners and Republicans used the opinion for their own ends; the southerners as a campaign document, and the Republicans picked out the less defensible passages for their use.¹²⁶ Though the South received the legal sanction it desired, enforcement was not so easy. It is stated many opposed war and desired compromise, “but as the free-soil North refused to accept the dictates of the Supreme Court, so the South would refuse to accept the results of a popular election. Defiance of law was no longer the trademark of dissidents.”¹²⁷

Although not immediately leading to war, the *Dred Scott* decision brought the issue of slavery to center stage in the election of 1860. One man’s search for freedom for his family became the search for freedom for thousands of men and their families. And in the end, he lost. The Supreme Court instructed

¹²⁶Louis Filler, *Crusade Against Slavery: Friends, Foes and Reforms, 1820-1860* (Algonac, MI: Reference Publications, Inc., 1986), p. 299.

¹²⁷Filler, p. 299.

the lower court to rule against jurisdiction, thus denying Dred Scott and his family access to the courts which could set them free. Why their owner had not set them free ten years before when she appeared to have no interest in owning slaves is still a mystery. The footnote to the story is that after the litigation, Taylor Blow, the son of Scott's original owner, obtained ownership of the Scott family from their owners. He then "appeared before the Circuit Court, and formally entered the emancipation of Dred Scott, his wife, Harriet, and the children, Eliza and Lizzie."¹²⁸ About a year after gaining his freedom, Dred Scott died on September 17, 1858. His headstone at the St. Louis Calvary Cemetery was erected almost one hundred years later in 1957 by the descendants of Taylor Blow.¹²⁹

¹²⁸ *Frank Leslie's Illustrated Newspaper*, New York, June 27, 1857.

¹²⁹ *Westward*, published by the Jefferson National Expansion Memorial Historical Association, Vol. 1, No. 1, p. 10.