2007

Introduction: Dred Scott After 150 Years: A grievous Wound Remembered

John L. Gedid

WIDENER LAW JOURNAL

VOLUME 17 2007 NUMBER 1

Symposium

DRED SCOTT AFTER 150 YEARS: A GRIEVOUS WOUND REMEMBERED

INTRODUCTION

John L. Gedid*

March of 2007 included the 150th anniversary of the Supreme Court of the United States decision in *Dred Scott v. Sandford.*[1] In this symposium, Chief Justice Taney's opinion in *Dred Scott*, reviled as a "self-inflicted wound"[2] on the judiciary, will be the subject of analyses that seek to explain how such an opinion could have been rendered by the highest court in the land and why that case—or more precisely the errors of the Supreme Court in that case—remains relevant for constitutional analysis today.

The facts of *Dred Scott* involve an attempt by a Negro slave, Dred Scott, to win freedom for himself and his family.[3] Scott was the slave of Dr. John Emerson, an army surgeon.[4] Emerson was posted to a military base in Illinois for several years, then later to a military post in Minnesota.[5] At the time Emerson and Scott were in

---

* Professor, Vice Dean, and Director, Law & Government Institute, Widener University School of Law—Harrisburg, P.A.

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

[2] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS, AND ACHIEVEMENTS: AN INTERPRETATION 50 (1928).

[3] *Dred Scott*, 60 U.S. at 400.

[4] *Id.* at 431.

[5] *Id.*

Minnesota, it was a part of the Wisconsin Territory.[6] Slavery was forbidden in Minnesota by a federal statute, the Missouri Compromise.[7] Then Emerson returned to Missouri along with Scott and his family.[8] After losing a state court suit brought in Missouri to establish his freedom, Scott brought a federal court action based on diversity of citizenship.[9] In the federal suit, he argued that his residence in Illinois and Minnesota, which banned slavery, had freed him from slavery.[10] The defendant in the suit argued that Scott, because he was a slave, was not a citizen; and since citizenship is a necessary condition for bringing a diversity action in federal court, the federal court had no choice but to dismiss the action.[11]

After losing below, Scott appealed to the Supreme Court of the United States.[12] In a seven-to-two decision, the Supreme Court held against Scott.[13] Chief Justice Taney authored an opinion with two major conclusions.[14] First, he held that Scott, as a Negro slave, was not a citizen.[15] According to normal judicial decision-making canons, that holding should have ended the case. Since citizenship is a necessary condition for the exercise of diversity jurisdiction, federal courts could not exercise jurisdiction over the merits of Scott's suit.[16] Therefore, the Court could have dismissed the case without addressing the substantive issues in the case. Instead, Chief Justice Taney addressed all of the substantive issues raised by the parties and arrived at his second major conclusion. He held that Congress did not have the power under the Federal Constitution to forbid slavery in the territories of the United

---

[6] *Dred Scott*, 60 U.S. at 431.
[7] *Id.* at 432.
[8] *Id.* at 431.
[9] *Id.* at 400.
[10] *Id.* at 432.
[11] *Id.* at 400.
[12] *Dred Scott*, 60 U.S. at 400.
[13] *Id.* at 529.
[14] *Id.* at 430. For a more complete review of the issues and conclusions in the case, see John S. Vishneski III, *What the Court Decided in* Dred Scott v. Sandford, 32 AM. J. LEGAL HIST. 373, 376 (1988).
[15] *Dred Scott*, 60 U.S. at 430.
[16] *Id.* at 430.

States.[17] Because the United States Congress in 1820 had enacted the Missouri Compromise, which banned slavery in the federal territories north and west of Missouri,[18] Chief Justice Taney thus held that the Missouri Compromise was unconstitutional.[19]

The *Dred Scott* decision intensified the debate over slavery in the United States that had been raging since the beginning of the nineteenth century so powerfully that it has been described as a major factor leading to the American Civil War:

> The decision sparked enormous political reaction, particularly in the North. It destroyed any chance of agreement between the North and the South over slavery in the territories. It would be an exaggeration to say that the *Dred Scott* decision *caused* the Civil War. But, it certainly pushed the nation far closer to that war.[20]

In the years since the *Dred Scott* decision, it has been the subject of a vast amount of commentary that examines every aspect of the decision and the Supreme Court decision-making process that produced it.[21] Much of this literature has asked the question: How could the Supreme Court have committed such an egregious error? Terms used to describe the case have included "reviled,"[22] "denounced,"[23] and "destabilizing."[24]

This symposium attempts to add some insights about *Dred Scott* after 150 years. Professor Wesley Oliver examines the

---

[17] *Dred Scott*, 60 U.S. at 452.

[18] Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 5, 6 (1997).

[19] *Dred Scott*, 60 U.S. at 452.

[20] Finkelman, *supra* note 18, at 5-6.

[21] Vishneski, *supra* note 14, at 373.

[22] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415 (1998) (referring to *Dred Scott* as "the most repugnant and reviled of Supreme Court decisions").

[23] Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1686 (2005).

[24] Mark A. Graber, Dred Scott *as a Centrist Decision*, 83 N.C. L. REV. 1229, 1231 (2005).

concept of the political question doctrine in *Dred Scott*.[25] His analysis of the Constitution is both textual and historical. Chief Justice Taney, he argues, totally misconstrued the text of the Constitution.[26] Professor Oliver also argues that Chief Justice Taney's analysis redefined the fundamental values expressed in the Constitution because it elevated the protection of the institution of slavery over other, explicitly expressed, textual values in that document.[27] For example, Professor Oliver notes that the Framers were ambiguous in expressions about slavery in the Constitution, as evidenced by permitting *limited* congressional action against slavery, such as not forbidding importation of slaves before 1808.[28] This indicated that the Founding Fathers intended slavery for resolution by the *political* branches of government, not the Supreme Court.[29] Chief Justice Taney's opinion squarely contradicted this approach of the Founding Fathers. In his *Dred Scott* opinion, he held that protection of slavery as a species of property was a fundamental value intended by the Founding Fathers to be safe from invasion by the legislature, like freedom of speech and of the press.[30] Professor Oliver argues that under this conception of the Due Process Clause in the United States Constitution—coupled with Chief Justice Taney's conclusion that property in human beings as practiced in slavery was no different than property in an inanimate object—a legislature would not have the power to zone because zoning includes permitting some uses in some territories and different ones in others.[31]

Professor Robert Mensel examines the nature of *Dred Scott* as an originalist document and explains the historical and psychoanalytical reasons for that approach to constitutional construction in the period in which the case was decided.[32] He

---

[25] Wesley M. Oliver, Dred Scott *and the Political Question Doctrine*, 17 WIDENER L.J. 13 (2007).

[26] *Id.* at 20, 24.

[27] *Id.* at 20.

[28] *Id.* at 27.

[29] *Id.* at 21.

[30] *Id.* at 20.

[31] Oliver, *supra* note 25, at 23.

[32] Robert E. Mensel, *Originalism and Ancestor Worship in the Post-Heroic Era: The* Dred Scott *Opinions*, 17 WIDENER L.J. 29 (2007).

argues that judges in the era preceding the American Civil War felt the need to refer to the constitutional context of the 1780s and to widely shared beliefs about the stature and intent of the Founding Fathers.[33] According to Professor Mensel, an examination of the historical record and the text of the Constitution clearly establishes that the Founding Fathers were ambivalent about slavery and "bequeathed" the problem to their successors.[34] Professor Mensel argues that the attitude of leaders in the Antebellum Period toward the Founding Fathers was that the Founding Fathers were "heroic";[35] Antebellum leaders conceived of themselves as "post-heroic."[36] These views in the Antebellum Period created a form of ancestor worship in which judges were unwilling to engage in constitutional analysis as the Founding Fathers had engaged in and had envisioned for the future, but instead were "clinging" to the words of the Constitution as if it were "sacred."[37] And this approach meant that, in construing the Constitution, the Supreme Court would be guided by the text and what it believed was the Founding Fathers' intent as of the time of adoption.[38]

Professor Mensel effectively argues that this originalist approach is deeply flawed for historical reasons—the Founding Fathers did not attempt to resolve the slavery question in the Constitution, but left that problem for succeeding generations.[39] Thus, when Antebellum jurists sought the original intent of the Founding Fathers, a process similar to the doctrine of *renvoi*, recognized in the area of conflicts of law, emerged: the Antebellum jurists referred to the original intent of the Founding Fathers, but the Founding Fathers had referred the resolution of the slavery question to succeeding generations such as the Antebellum jurists.[40] Thus, on the issue of slavery, an endless reference back and forth between the Constitution and the Antebellum jurists that

---

[33] Mensel, *supra* note 32, at 31-32.
[34] *Id.* at 33, 37.
[35] *Id.* at 37.
[36] *Id.*
[37] *Id.* at 44-45.
[38] *Id.*
[39] Mensel, *supra* note 32, at 33.
[40] *See id.* at 37.

was unenlightening and misleading was created.[41] In short, Professor Mensel argues persuasively that originalism on this question—and by analogy most other questions—cannot provide guidance.

Professor Mensel also illustrates another problem with originalism: the difficulty of ascertaining what was the original intent of the Founding Fathers.[42] He illustrates this problem by contrasting the opinions of Chief Justice Taney and Justice Curtis.[43] Both Supreme Court Justices used an originalist approach to resolve the issue in the case, but one upheld the constitutionality of slavery and the other did not.[44]

Professor Earl Maltz compares the *Dred Scott* decision with the decision in *Roe v. Wade*,[45] which held that the Fourteenth Amendment limits the power of the states to limit access to abortion.[46] He notes that persons who oppose the Supreme Court action in *Roe* often compare it to the decision in *Dred Scott*.[47] They argue that because the analogy between the two cases is so great and because *Dred Scott* is now perceived as being disastrously wrong and a case of overreaching by the Supreme Court, so also *Roe* is egregiously wrong, should not have held as it did, and should be reversed.[48]

Professor Maltz first examines the "purported" similarities between the two opinions. He concedes that both are examples of substantive due process analysis by the Supreme Court.[49] As he explains it:

---

[41] Mensel, *supra* note 32, at 37.

[42] *Id.* at 45.

[43] *Id.* at 49-52.

[44] *Id.* at 54. Thus the issue would seem to be who was the better historian. Professor Mensel concludes that it was Justice Curtis. However, that observation leads to a serious challenge to the proponents of originalism. How can the courts determine when originalism is used as the basis for constitutional construction who is the better historian? *Id.*

[45] 410 U.S. 113 (1973).

[46] Earl M. Maltz, Roe v. Wade *and* Dred Scott, 17 WIDENER L.J. 55, 60-61 (2007).

[47] *Id.* at 55-56.

[48] *Id.* at 61-64.

[49] *Id.*

> Taney contended that the Missouri Compromise unconstitutionally deprived immigrants from Southern states of their property rights in slaves. Similarly, Blackmun's analysis was premised on his view that the right to choose whether or not to bear a child was a fundamental aspect of the liberty protected by the Fourteenth Amendment.[50]

According to Professor Maltz, any similarity ends there.[51]

Professor Maltz points out that there are several substantial dissimilarities between *Dred Scott* and *Roe*, so that it is misleading to refer to them as similar; hence, his description of the "purported" similarities between the two cases.[52] One major difference was that Taney's approach was premised on the text of the Constitution, while Justice Blackmun's opinion in *Roe* was explicitly founded on a nontextual right to privacy.[53] Another difference was that Chief Justice Taney's vision of the federal system let the states make basic policy choices, an approach that led to his conclusion that rights protected by state law—property rights in slaves—were protected from federal incursion.[54] This was the basis for his holding that the Missouri Compromise was unconstitutional: it interfered with the property rights of Southern immigrant slaveholders who came from states where slavery was legal.[55] On the other hand, Justice Blackmun's view of the federal system, according to Professor Maltz, is "strikingly nationalistic."[56] Justice Blackmun's opinion in *Roe* requires state laws and standards to give way before a federal standard.[57] Thus, Professor Maltz concludes that, contrary to most analyses and comparisons of *Dred Scott* and *Roe*, there are substantial doctrinal differences between the two cases.[58]

---

[50] Maltz, *supra* note 46, at 62.
[51] *Id.*
[52] *See id.* at 63-64.
[53] *Id.* at 63.
[54] *Id.*
[55] *Id.* at 63-64.
[56] Maltz, *supra* note 46, at 64.
[57] *Id.*
[58] *Id.*

After examining the traditional similarity/dissimilarity analyses of the two cases, Professor Maltz moves to a more novel comparison of the two cases. He argues that the crucial significance of the two cases is that both cases addressed substantive questions that were far more important than the doctrinal issues.[59] These questions were political and were, or were about to become, central issues in national politics. For example, the electorate at the time of the *Dred Scott* decision was already deeply divided over slavery.[60] The results of the *Dred Scott* decision in the political arena were many, wholly unexpected, and may have led to the election of Abraham Lincoln.[61]

The effect of *Roe* was to elevate an issue that had not yet reached national political consciousness into a burning national question with passionate advocates on both sides.[62] He argues that *Roe* had a polarizing effect that prevented a political compromise.[63] Thus, Professor Maltz concludes that *Roe*, by establishing a new baseline before national debate and electorate positions had become fully developed, established a "new structure for debate," which the Supreme Court in *Dred Scott* was not able to do.[64] Thus, the cases are dissimilar in effect, but similar in addressing burning substantive questions. The suggestion seems to be that the Supreme Court should refrain from deciding questions that involve a deeply divided electorate and leave the resolution of such questions to the political process.[65]

An important part of this symposium is Professor Robert Burt's article entitled *Overruling* Dred Scott*: The Case for Same-Sex Marriage*.[66] In this article, Professor Burt examines the effect of overruling the *Dred Scott* decision by the Thirteenth and Fourteenth Amendments, and, in particular, whether those

---

[59] Maltz, *supra* note 46, at 64.
[60] *Id.* at 58.
[61] *Id.* at 66.
[62] *Id.* at 67.
[63] *Id.*
[64] *Id.* at 71.
[65] Maltz, *supra* note 46, at 71.
[66] Robert A. Burt, *Overruling* Dred Scott*: The Case for Same-Sex Marriage*, 17 WIDENER L. J. 73 (2007).

amendments eliminated the underlying assumptions of Chief Justice Taney.

He argues that the Thirteenth and Fourteenth Amendments were intended to eradicate the assumption of Chief Justice Taney that black persons were "beings of an inferior order, and altogether unfit to associate with the white race, . . . and so far inferior, that they had no rights which the white man was bound to respect."[67] This assumption was not only baseless, but created a constitutional doctrine that violates basic notions of human equality and dignity.[68] In the Civil War Amendments, Professor Burt argues that by explicit use of the word "persons" rather than, for example, "freed slaves" or some other label, the Framers of the Thirteenth and Fourteenth Amendments made clear their meaning that those amendments referred to all human beings.[69]

He uses the widely held view in the Antebellum years that slaves lacked any legal status as a starting point for his analysis of what the Thirteenth and Fourteenth Amendments were intended to cure.[70] Professor Burt observes that slaves could not marry, not because they were forbidden to do so, but because they were the property of the person who owned them; therefore, they could have no legally recognized relationship with another human being.[71] Prior to the abolition of slavery and the enactment of the Civil War Amendments, slavery created a status of social death in which slaves were alive but not considered part of the human species.[72] In short, in spite of the natural law guarantees of the Constitution, slave law was wholly *dehumanizing*. The Civil War Amendments were intended to end this dehumanized status.[73]

Professor Burt points out that more recently the Supreme Court in the case of *Loving v. Virginia* held that marriage is a fundamental right under the Constitution, even though that particular holding was not necessary for the decision of the *Loving*

---

[67] *Dred Scott*, 60 U.S. at 407.
[68] Burt, *supra* note 66, at 74.
[69] *Id.* at 77.
[70] *Id.* at 77-78.
[71] *Id.* at 78-79.
[72] *Id.*
[73] *Id.* at 79.

case.[74] The reason that the Supreme Court included it, Burt explains, is that the Supreme Court understood that the evil of state statutes that prohibit marriage is that they are also dehumanizing.[75] Drawing on this analysis of *Dred Scott* and the Civil War Amendments, Professor Burt presents a convincing argument in favor of the proposition that gay marriage is constitutionally protected. Current attitudes toward gay marriage are in many respects like the dehumanized, and dehumanizing, assumptions made by Chief Justice Taney and many other Americans prior to the Civil War.[76] Professor Burt persuasively argues that the Thirteenth and Fourteenth Amendments and *Loving* taken together mean that gay marriage is a fundamental right protected by the Constitution.[77]

The presentations in this symposium lead to some interesting and useful conclusions. First, Chief Justice Taney probably misconstrued the fundamental values of the United States Constitution that were plain from a careful textual reading and analysis. Second, Chief Justice Taney incorrectly construed the intent of the Founding Fathers, thus indicating the weakness and—as demonstrated by two Justices in *Dred Scott* reaching opposite conclusions as a result of using that approach—the inaccuracy and arbitrariness of originalism as a method of constitutional construction. Third, underlying assumptions were a driving force for Chief Justice Taney in construing the Constitution. Jurists must exercise care about underlying assumptions in cases involving civil, political, and human rights. If not, a case may employ perfect syllogistic logic, like *Dred Scott*, and nevertheless constitute a horrific violation of human decency, fundamental values, and natural rights. Fourth, arguably, as Professor Maltz seems to suggest, there may be some boundary beyond which the Supreme Court should not act for questions that involve strongly-held value judgments on which the electorate is deeply divided; these questions should be resolved by the political process, not the

---

[74] 388 U.S. 1, 6 n.5 (1967).
[75] Burt, *supra* note 66, at 81.
[76] *Id.* at 82.
[77] *Id.* at 83-95.

Supreme Court.[78] These are a few lessons of *Dred Scott* that we learn from this symposium. We would do well to heed them.

[78] It is hoped that, when further developed, this position will address the question for this writer—and no doubt for many others—of whether, under this apparently restrictive approach to Supreme Court jurisprudence, cases like *Brown v. Board of Education*, 347 U.S. 483 (1954), a case which is widely accepted and praised today, could have been decided.