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A Judge's View

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old federal statutes suggested that freed slaves were not "citizens," the language of other old federal statutes suggested the precise opposite. Nor was its "privileges and immunities" argument convincing once one learned that that constitutional provision simply repeated an older guarantee in the Articles of Confederation that entitled "free inhabitants of each of these States . . . to all privileges and immunities of free citizens in the several States." This language did not suggest that a freed slave was not a citizen. To the contrary, the drafters of the articles explicitly rejected by a vote of eight states to two (with one state divided) a South Carolina amendment that would have inserted the word "white" between the words "free" and "inhabitants." This strongly suggested that the privileges and immunities clause protected *all* free citizens, not just white citizens.[15]

The Court, however, rejecting Curtis's views, held that it had no power to hear the case or decide the merits of Scott's claim (because Scott was not a citizen). Nonetheless, it went on to do just that. The Court majority held that Dred Scott's three-year sojourn in the free territory of Wisconsin and in the free state of Illinois did not emancipate him. The majority might have reached this conclusion by simply relying on the fact that Missouri state courts had reached it and that federal courts should follow state courts on matters of state law. But in the 1850s that was not always so; federal courts often second-guessed state courts on state law matters, particularly where the matter concerned judge-made common law, not statutory law.[16]

In respect to slavery, both the common law and foreign law were uniform and clear. As Curtis pointed out in his dissent, when a master took a slave into free territory and lived there indefinitely, participating in the territory's "civil or military affairs," the slave became free. This was certainly the case when the slave married and had children in a free territory. Indeed, important federal statutes—the Missouri Compromise, for example—made this clear, by insisting that the law of the Wisconsin Territory, the jurisdiction in which Fort Snelling was located, did not permit slavery. It therefore gave Dred Scott his freedom.[17]

The Court majority countered that the laws of Congress, such as the Missouri Compromise, did not apply because, in its view, Congress lacked the power to make those laws. The Court had to concede that

the Constitution's territories clause says that Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." But, the majority said, the language, history, and structure of the Constitution made clear that this clause applied only to those territories that existed as territories in 1789, namely, certain land belonging then to Virginia, North Carolina, and a few other states, which those states intended to cede to the federal government. Congress, the majority conceded, had an implied power to hold territory for the sole purpose of turning it into new states. But it could not interfere with the rights of citizens entering or living within that territory—any more than if they were citizens of states. And were they such citizens, the Constitution would forbid the federal government to interfere with their rights to own slaves. This (and here lies the heart of the majority's pro-slavery position) is because the Constitution forbids Congress to deprive a person of property without due process of law. The Constitution, wrote the majority, recognizes the "right of property of the master in a slave." And nothing gives Congress "a greater power over slave property . . . than property of any other description." The opposite is true: The fugitive-slave clause requires that slaves who escape into other states be returned to their owners. This clause, read together with the due process clause's prohibition on the deprivation of property without due process of law, the majority reasoned, meant that the Constitution insisted that the federal government "guard" and "protect" the "[slave] owner in his rights."[18]

Thus, the Court's conclusion: "The act of Congress which prohibited a citizen from holding and owning property of this kind . . . is not warranted by the Constitution and is therefore void; and . . . neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident."[19]

Curtis replied to the majority's argument as follows: First, the territories clause certainly gave Congress the authority to hold territory acquired from a foreign nation, to make all necessary rules for governing that territory, and to include among those rules a prohibition against slavery. Congress had acted on that assumption since the nation was founded, enacting ordinances and laws excluding slavery

from various of the territories (for example, the Missouri Compromise). Curtis counted eight distinct instances, "beginning with the first Congress, and coming down to the year 1848," where Congress had explicitly excluded slavery from the territory of the United States. The acts by which Congress had regulated slavery in the territories "were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted." And when one interprets the Constitution, Curtis wrote, a "practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind."[20]

Curtis replied to the Fifth Amendment due process argument by pointing out that a slave is not ordinary "property." Rather, slavery is a "right existing by [virtue of] positive law [for example, statutes]." It is "without foundation in the law of nature or the unwritten common law." Nor could "due process of law" mean that a slave remained a slave when his master moves from, say, slave state A to live permanently in free state B. What law would then govern the slave, the slave's wife, his house, his children, his grandchildren? State B has no laws governing slavery. Its judges could not manage a proliferating legal system under which each slave, coming into free state B, brought with him his own law, whether from A or from C or from whatever other slave state he happened to be from.[21]

More important, said Curtis, the phrase "due process of law" comes from the Magna Carta. When Congress passed the Northwest Ordinance in 1787, it did not think that law violated the Magna Carta. Moreover, numerous states, including Virginia, had passed laws prohibiting the importation of new slaves. Under these laws, any slaves imported in violation of the prohibition would be set free. And, Curtis wrote, "I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of Magna Charta incorporated into the State Constitutions." If those laws did not violate the Magna Carta, then Congress's prohibition of slavery in territories could hardly violate the due process clause of the federal Constitution.[22]

Despite the strength of Curtis's arguments, however, the majority still held: (1) Scott could not bring his case in federal court because freed slaves are not citizens of the United States; (2) many congressional anti-slavery-spreading statutes, including the Missouri Compromise, were unconstitutional; and (3) the Fifth Amendment's due process clause protected the ownership rights of slaveholders even when they took their slaves into free territories and free states to live for extended periods.

The Aftermath

The Court issued its decision in early March 1857, and the chief justice issued his written opinion later in the spring. The South and southern sympathizers reacted favorably. President Buchanan (perhaps forewarned) favorably referred to the opinion in his March inaugural address and again in his December State of the Union address. But the northern reaction was vehemently negative. Horace Greeley's *New York Tribune* described the holding as "wicked" and "atrocious." "If epithets and denunciation could sink a judicial body," another observer wrote, "the Supreme Court . . . would never be heard of again."[23]

A joint committee of the New York legislature reported that the decision had "destroyed the confidence of the people in the Court," predicted that it would be overruled, and described Taney's statement that people of African descent had no rights as "*inhuman, unchristian, atrocious,*—disgraceful to the judge who uttered it and to the tribunal which sanctioned it." The committee said the opinion paved the way for slavery's spread to free states. If "a master may take his slave into a Free State without dissolving the relation of master and slave," then "some future decision of the Pro-Slavery majority of the Supreme Court will authorize a slave-driver . . . to call the roll of his manacled gang at the foot of the monument on Bunker Hill, reared and consecrated to freedom."[24]

The case had increasing reverberation. The abolitionist Frederick Douglass offered a slightly different analysis. In a New York lecture he remarked that despite this "devilish decision" produced by "the slaveholding wing of the Supreme Court," the Court could not make "evil

good" or "good evil." The decision, he concluded, "is a means of keeping the nation awake on the subject. . . . [M]y hopes were never brighter than now."[25]

Indeed, the decision did keep the nation awake. Northern supporters widely circulated the Curtis dissent in pamphlet form. Abraham Lincoln, then a Republican candidate for Senate, spoke often about the decision, describing it as an "astonisher in legal history" while arguing that Taney's "whites only" views had turned "our once glorious Declaration" of Independence into a "wreck" and "mangled ruin." In February 1860, Lincoln based his Cooper Union speech—a speech that helped make him a national political figure—on Curtis's dissent. Lincoln fed the North's fear of spreading slavery by asking, what "is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision. It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial legislature can do it."[26]

Although historians debate the precise role of *Dred Scott* in bringing on the Civil War, the decision at least energized the anti-slavery North. It became the Republican Party's rallying cry and contributed to Lincoln's nomination and election as president. These circumstances together with others helped bring about that most fierce War Between the States. After the war, the nation added the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution, ending slavery while guaranteeing equal treatment, voting rights, and basic civil rights for the newly freed slaves.

On a more personal level: Benjamin Curtis resigned from the Court immediately after the *Dred Scott* decision. Chief Justice Taney remained on the bench until his death. Dred Scott and his family were bought by a son of his original owner, Peter Blow, who set them all free. Within little more than a year, however, Scott died of tuberculosis.[27]

Lessons

Modern critics describe the *Dred Scott* case as "infamous," "notorious," "an abomination," "odious," a "ghastly error," and "judicial

review at its worst." Chief Justice Charles Evans Hughes said the decision was a "self-inflicted wound" that almost destroyed the Supreme Court. *The Oxford Companion to the Supreme Court of the United States* says that "American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court." These judgments reflect the immorality of the decision. What can people today learn from it? By reading with care, we can draw certain lessons about the Court that remain relevant. I suggest five.[28]

The first lesson concerns judicial rhetoric. Today, as in 1857, the language a judge uses to set forth his or her reasoning matters. Taney's words about Americans of African descent having "no rights which the white man was bound to respect" are lurid and offensive, more so than can be found in other Supreme Court opinions, including other opinions that Taney wrote. An experienced Supreme Court justice would not write such a phrase without being aware of the fact that others will repeat it and emphasize its judicial origin in order to make the sentiment appear legitimate. Taney's effort to attribute his words to others, such as political officials or citizens, does not help. The public simply ignores the attempt to put moral distance between the sentiment and the author. Taney could not have thought otherwise, for the language was morally repugnant even then, as Curtis seemed to acknowledge when he refused to "enter into an examination of the existing opinions of that period respecting the African race," calling instead for a "calm comparison."[29]

The second lesson reinforces the optimistic judicial view that when a judge writes an opinion, even in a highly visible, politically controversial case with public feeling running high, the opinion's reasoning—not simply the author's conclusion—can make all the difference. A strong opinion is principled, reasoned, transparent, and informative. And a strong opinion should prove persuasive, make a lasting impression on the minds of those who read it, and (if a dissent) eventually influence the law to move in the direction it proposes.

Curtis's opinion was one of two dissents. Its language is not the most colorful, but its reasoning is by far the strongest. Indeed, it paints the Taney majority into a logical corner from which it has never emerged. For example, what is the answer to Curtis's claim that five states treated slaves as citizens (hence they were American citizens) at

Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality,* 21 Stan. L. Rev. 500, 508 (1969) (describing Wirt as an advocate).

8. Kennedy, *supra* note 1, at 256 (quoting letter from Wirt); Norgren, *supra* note 1, at 61–62, 97–98; Phillips, *supra* note 1, at 75–77.

9. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); U.S. Const. art. III, § 2, cl. 2; Kennedy, *supra* note 1, at 293.

10. *Cherokee Nation,* 30 U.S. at 15–20; George Gilmer to S. S. Hamilton (June 20, 1831), in 2 Indian Removal Records, S. Doc. No. 23–512, at 22, 25.

11. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 537, 542 (1832); Phillips, *supra* note 1, at 78–81 (describing Worcester's arrest and trial); Abel, *supra* note 1, at 396–403 (same); Samuel A. Worcester to George R. Gilmer (June 10, 1831), in 27 Missionary Herald 250, 251 (1831) ("I have the pleasure of sending to your excellency a copy of the Gospel of Matthew, of a hymn-book, and of a small tract . . . of excerpts from scripture" all translated into Cherokee).

12. *Worcester,* 31 U.S. at 541.

13. *Id.* at 548–54; *id.* at 575; *id.* at 557.

14. *Id.* at 561–62.

15. *Id.* at 562 (emphasis added).

16. 2 Charles Warren, *The Supreme Court in United States History* 216–17 (1922).

17. *Id.* at 215–16; *id.* at 228; Lumpkin, *supra* note 1, at 104.

18. Lewis Cass to William Reed (Nov. 14, 1831), in Robert Sparks Walker, *Torchlights to the Cherokees* 285, 285–86 (1931); Andrew Jackson, Veto Message—Bank of the United States (July 10, 1832), reprinted in *The Statesmanship of Andrew Jackson* 154, 163–64 (Francis Newton Thorpe ed., 1909); Warren, *supra* note 16, at 217; *cf. id.* at 219 (characterizing it as "a matter of extreme doubt" whether Jackson ever uttered his famous dictum); *id.* at 229.

19. An ordinance to nullify certain acts of the Congress of the United States, purporting to be laws and imposts on the importation of foreign commodities, South Carolina (Nov. 24, 1832); Warren, *supra* note 16, at 234.

20. Andrew Jackson, Anti-nullification Proclamation (Dec. 10, 1832), in *The Statesmanship of Andrew Jackson, supra* note 18, at 232, 238 (emphasis removed); Warren, *supra* note 16, at 234–38.

21. Warren, *supra* note 16, at 235–37; Norgren, *supra* note 1, at 127–28.

22. Norgren, *supra* note 1, at 136–37.

23. Woodward, *supra* note 1, at 193–94; Norgren, *supra* note 1, at 134–36; *id.* at 143; Charles C. Royce, *The Cherokee Nation* 164 (1975).

24. Royce, *supra* note 23, at 162.

25. Woodward, *supra* note 1, at 193–94.

Chapter Four / Dred Scott

1. *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

2. *Id.* at 397–98. For a more comprehensive account of the facts of *Dred Scott,* see Don E. Fehrenbacher, *The* Dred Scott *Case* (1978), especially 240–49.

3. James F. Simon, *Lincoln and Chief Justice Taney* 13 (2007) (quoting Wirt); *id.* at

9; *id.* at 11 (quoting Taney's opposition to slavery as expressed in oral argument at the trial of an abolitionist); *id.* at 16–17 (quoting Taney's views on citizenship rights of the "African race" as expressed in a legal opinion to Secretary of State Edward Livingston).

4. 1 Benjamin R. Curtis, *A Memoir of Benjamin R. Curtis, LL.D.* 249–51 (Benjamin R. Curtis ed., 1879).

5. U.S. Const. art. I, § 9, cl. 1; *id.* art. V; *id.* art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

6. See Mark A. Graber, Dred Scott *and the Problem of Constitutional Evil* 124–27 (2006) (describing how, despite expectations, population growth in the Northwest greatly surpassed that in the Southwest).

7. See generally Fehrenbacher, *supra* note 2, at 250–83 (describing Dred Scott's litigation in the Missouri courts and the federal circuit court); *id.* at 264 (quoting the Missouri Supreme Court opinion).

8. *Id.* at 281–82; *id.* at 293; Austin Allen, *Origins of the* Dred Scott *Case* 148–49 (2006).

9. Fehrenbacher, *supra* note 2, at 288–90; Simon, *supra* note 3, at 117–19; Fehrenbacher, *supra* note 2, at 314–21.

10. *Scott,* 60 U.S. at 403; *id.* at 427.

11. U.S. Const. art. III, § 2; *Scott,* 60 U.S. at 407; *id.* at 413–17; *id.* at 419–21.

12. U.S. Const. art. IV, § 2, cl. 1; *Scott,* 60 U.S. at 423–25; *id.* at 426.

13. *Scott,* 60 U.S. at 572–76 (Curtis, J., dissenting); *id.* at 582; *id.* at 580.

14. *Id.* at 574–75.

15. *Id.* at 580.

16. For an account of the complex interaction between state and federal law in *Dred Scott,* see Allen, *supra* note 8, especially 52–67, 139–59.

17. *Scott,* 60 U.S. at 598–600 (Curtis, J., dissenting).

18. *Id.* at 432 (majority opinion); U.S. Const. art. IV, § 3, cl. 2; *Scott,* 60 U.S. at 451–52; U.S. Const. art. IV, § 2, cl. 3, amended by U.S. Const. amend. XIII.

19. *Scott,* 60 U.S. at 452.

20. *Id.* at 611–19 (Curtis, J., dissenting); *id.* at 616.

21. *Id.* at 624–26.

22. *Id.* at 626–27.

23. Fehrenbacher, *supra* note 2, at 312–13; *id.* at 417 (quoting *New York Tribune*); 3 Charles Warren, *The Supreme Court in United States History* 27 (1922).

24. Report of the Joint Committee on *Dred Scott* (Apr. 9, 1857), reprinted in 3 *Southern Slaves in Free State Courts* 279, 280–81 (Paul Finkelman ed., 2007).

25. Frederick Douglass, The *Dred Scott* Decision: Speech Delivered Before the American Anti-slavery Society (May 11, 1857), in 2 *The Life and Writings of Frederick Douglass* 407, 411–12 (Philip S. Foner ed., 1950).

26. Abraham Lincoln, Speech in Reply to Douglas, Chicago, Ill. (July 17, 1858), in *Abraham Lincoln: His Speeches and Writings* 385, 397 (Roy P. Basler ed., 2d ed. 2001); Abraham Lincoln, The *Dred Scott* Decision, Speech at Springfield, Ill. (June 26, 1857), in *id.* at 352, 362; Abraham Lincoln, First Debate with Stephen Douglas, Ottawa, Ill. (Aug. 21, 1858), in *id.* at 428, 458.

27. Fehrenbacher, *supra* note 2, at 574–75; *id.* at 568.