



Garden State
CLE

presents...
presents...
presents...

“THIS MEANS WAR!”

DRED SCOTT IN THE 21ST CENTURY



Lesson Plan

Table of Contents

1. Clauses in the Constitution Dealing with Slavery
2. Slavery as population and property up to *Dred Scott* Decision.
3. Political Developments leading to *Dred Scott* Decision
4. Economic Developments leading to *Dred Scott* Decision
5. *Dred Scott* Decision – Statement of Facts
6. Cast of Characters
7. The Decision
8. Impact and Aftermath
9. Final Thoughts



1. Clauses in the Constitution Dealing with Slavery

Article 1 - Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[Notice – Slavery could not be ended until 1808, but no promise that slavery would be ended even then.]

1. Clauses in the Constitution Dealing with Slavery

Article 1 - Section. 10.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress

[South insisted upon this due to a fear of an indirect tax on slavery]

1. Clauses in the Constitution Dealing with Slavery

Article IV - Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

1. Clauses in the Constitution Dealing with Slavery

Article IV - Section. 2.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

[Fugitive slave provision, construed in Prigg v. Pennsylvania, 41 US 539 (1842). Note that the Constitution contains no similar fugitive cow clause or fugitive horse clause. Slavery only form of private property that is afforded protection under the constitution. Fifth Amendment generally protects private property. Also note that citizenship is considered a matter of state law.]

1. Clauses in the Constitution Dealing with Slavery

Article I - Section. 2.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

[Notice – this aspect of slavery becomes folded into the Electoral College, (each state’s electors = to number of representatives and senators) providing enormous political power to the South in that era.]



1. Clauses in the Constitution Dealing with Slavery

Article I - Section. 2.

According to Judge Andrew P. Napolitano, “The result was the Three-Fifths Compromise. Widely considered to be the chief pro-slavery clause in the Constitution, it epitomized the racism of the document—as it reduced each slave to three-fifths of a person, a reflection of the inferior, subhuman class blacks would come to represent in the coming decades. Inherent in this compromise is a bitter irony, as it was the Southern slaveholding states that wanted slaves counted as full persons while the North and its abolitionists wanted slaves to remain uncounted; the slaves themselves, of course, had no say whatsoever in their constitutional standing.”

(Dred Scott’s Revenge – 2009 – Thomas Nelson Co.)



1. Clauses in the Constitution Dealing with Slavery

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.



1. Clauses in the Constitution Dealing with Slavery

Article V

[Note slavery protected until at least 1808. In 1860, there were 15 slave-states, more than enough to block any amendment affecting slavery. Only Secession made the 13th Amendment possible.]

1. Clauses in the Constitution Dealing with Slavery

Article I – Section 8

Provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions

1. Clauses in the Constitution Dealing with Slavery

Article 4 – Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

[The clauses related to “Suppression of Insurrections” and “Domestic Violence” were included at the urging of the south as protection against slave revolts.]

1. Clauses in the Constitution Dealing with Slavery

Notes on the Slavery Clauses

This review provides a painful look in the mirror of our nation's founding and early history. The historical truth is:

The United States was founded as a slave-holders republic.

Slavery is deeply rooted in our constitutional history although the word does not appear in the Constitution. Between 1788 and 1857, only two presidents were anti-slavery (John Adams & John Quincy Adams)

All of the others owned slaves, except Fillmore, Pierce, Van Burden and Buchanan.



1. Clauses in the Constitution Dealing with Slavery

Notes on the Slavery Clauses

These latter four presidents were called “doughfaces”, a reference to northern men with southern sentiments and the ability of southern politicians to shape their faces in any way they desired.

The foregoing “slavery clauses” were nullified by the 13th, 14th and 15th Amendments as well as by the Civil Rights Act and the Voting Rights Act. But in the era of the founding through the Civil War, the institution of slavery with all its passions and controversy was part of American political, social and economic life.



2. Slavery as population and property up to *Dred Scott* Decision.

Census Year	# Slaves	# Free blacks	Total blacks	% Free blacks	Total US population	% Blacks of total
1790	697,681	59,527	757,208	7.9%	3,929,214	19%
1800	893,602	108,435	1,002,037	10.8%	5,308,483	19%
1810	1,191,362	186,446	1,377,808	13.5%	7,239,881	19%
1820	1,538,022	233,634	1,771,656	13.2%	9,638,453	18%
1830	2,009,043	319,599	2,328,642	13.7%	12,860,702	18%
1840	2,487,355	386,293	2,873,648	13.4%	17,063,353	17%
1850	3,204,313	434,495	3,638,808	11.9%	23,191,876	16%
1860	3,953,760	488,070	4,441,830	11.0%	31,443,321	14%
1870	0	4,880,009	4,880,009	100%	38,558,371	13%

2. Slavery as population and property up to *Dred Scott* Decision.

In terms of value, by 1857, slaves were the biggest single asset in southern United States except for real estate.

3. Political Developments leading to *Dred Scott* Decision

1803 – Louisiana Purchase – vastly increased the size of United States with territory that was largely wilderness.



3. Political Developments leading to *Dred Scott* Decision

1804 – Most northern states (not Delaware!) had taken steps to abolish slavery.



3. Political Developments leading to *Dred Scott* Decision

Example – New Jersey enacted a statute in 1804 providing that "every child born of a slave, after the fourth of July of that year, should be free, but remain the servant of the owner of the mother until he or she should arrive at a [age 25]"

See generally *State v. Post*, 20 N.J.L. 368 (1945) which construed the following language in the 1844 Constitution as not eliminating slavery: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing, and obtaining safety and happiness."

This language is repeated verbatim in the 1947 Constitution.



3. Political Developments leading to *Dred Scott* Decision

In 1810 there were 10,851 slaves in New Jersey. As a result of the statute, by 1840 there were only 674.

The Missouri Compromise of 1820 provided for the admission of Missouri as a slave state and Maine as a free state, thus keeping an even balance of power between free and slave states.

More importantly, it banned the introduction of slavery into the northern territories of the Louisiana Purchase.



3. Political Developments leading to *Dred Scott* Decision

The Missouri Compromise was the last act taken by Congress to limit slavery in any way until the middle of the Civil War.

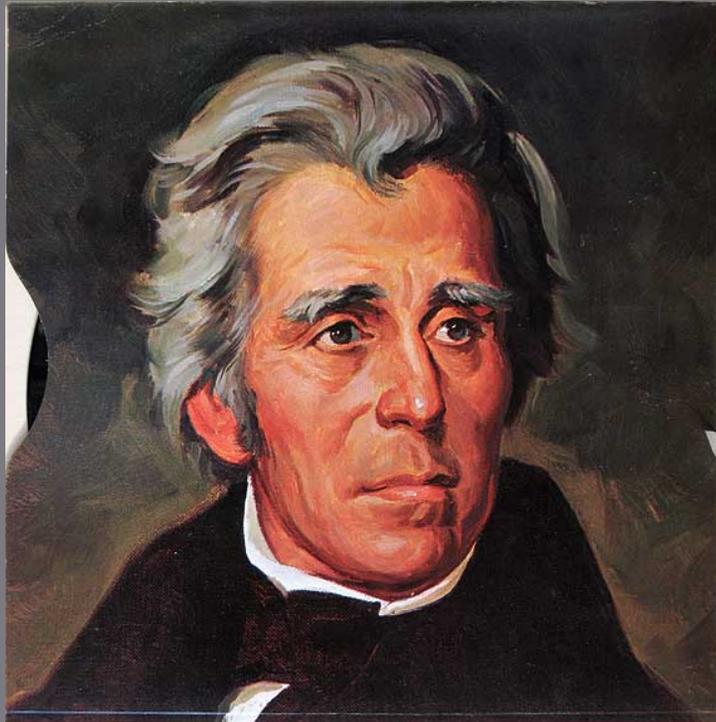
Kansas-Nebraska Act in 1854 created the territories of Kansas and Nebraska. It repealed the Missouri Compromise by leaving the question of slavery in these new territories to popular sovereignty.

The stage was now set for judicial catastrophe.....



4. Economic Developments leading to *Dred Scott Decision*

Contrast the elections of Bill Clinton in 1992 and Andrew Jackson in 1828.



4. Economic Developments leading to *Dred Scott* Decision

Invention of the Cotton Gin & the expanding market for Tobacco



4. Economic Developments leading to *Dred Scott Decision*

Primitive Roadways and Highways linking cities and towns
(like Route 206 – aka The King's Highway)



4. Economic Developments leading to *Dred Scott* Decision

Canals (Erie 1817 to 1825) (Delaware-Raritan 1830-1834)
(Morris Canal 1836)



Cut transportation costs by 95%

Opened western United States to East Coast and European markets for a wide variety of goods, produce and meats.

Spurred change to coal (and steam) as an energy source.

4. Economic Developments leading to *Dred Scott* Decision

Steam-powered vessels

Primary use in navigable rivers in the west.



4. Economic Developments leading to *Dred Scott* Decision

Rail Roads



4. Economic Developments leading to *Dred Scott* Decision

Rail Road Lines in 1860



4. Economic Developments leading to *Dred Scott* Decision

Additional territories seized as a result of the annexation of Texas in 1845 (as a slave state) and the 1846-1848 Mexican War.



4. Economic Developments leading to *Dred Scott* Decision

These economic and political events combined to unlock the enormous financial potential of the new territories in the west, creating new cities, and towns, populated by large numbers of immigrants.

The key development was that instead of declining as an institution (as was expected in 1788), the value of slavery as a means to exploit the new economy dramatically increased in the south.

Indeed, the central political question of the decade became the enforcement of the 1850 fugitive slave law.



5. *Dred Scott Decision* – Statement of Facts



Dred Scott was born into slavery between 1795 and 1800 in Virginia to a family named Blow. In 1830, the Blow family relocated to St. Louis (Missouri was a slave state), and sold Dred Scott to John Emerson, a doctor serving in the military.

Scott was taken all over the United States as his owner was transferred to various military posts. These included lengthy stays in Illinois (free-State) and Fort Snelling in present-day Minnesota (free territory). During these periods, he was often “hired out” to others as a laborer.

5. *Dred Scott* Decision – Statement of Facts

In 1836, Scott met and married another slave named Harriet. Her ownership was transferred to Emerson and the couple subsequently had two daughters.

Emerson would frequently abandon Dred Scott and travel to far-flung army posts. On one trip to Louisiana, he married a woman named Irene Sanford and sent for Dred Scott to join him. Although Scott could have remained in the free territory of Minnesota, he traveled the 1000 miles from Fort Snelling to Louisiana with his family to reunite with his master.

5. *Dred Scott* Decision – Statement of Facts

Subsequently, the Emerson family and the Scotts returned to St. Louis, where, in 1843, Emerson died.

Dred Scott then offered \$300 to the Emerson estate to buy the freedom of his family. Irene Sanford refused and Scott filed suit in Missouri State Court in 1846.

The *Scott v. Emerson* case was tried in 1847 in St. Louis. The judgment went against Scott, but the case was subsequently remanded for a retrial.

5. *Dred Scott* Decision – Statement of Facts

In 1850, a Missouri jury concluded that Scott and his wife should be granted freedom since they had been illegally held as slaves during their extended residence in the free jurisdictions of Illinois and Wisconsin.

Irene Emerson appealed. In 1852, the Missouri Supreme Court struck down the lower court ruling. As a result, the Scotts were returned to their late-master's wife.

5. *Dred Scott* Decision – Statement of Facts

Under Missouri law at the time, after Dr. Emerson died, the powers of the Emerson estate were transferred to his wife's brother, John F. A. Sanford. Because Sanford was a citizen of New York, Scott's lawyers claimed the case could now be brought before the Federal courts, on the grounds of diversity of citizenship. With the assistance of new lawyers, the Scotts filed suit in the federal court.

After losing again in federal district court, they appealed to the United States Supreme Court in *Dred Scott v. Sandford*. (The name is spelled 'Sandford' in the court decision due to a clerical error.)



6. Cast of Characters

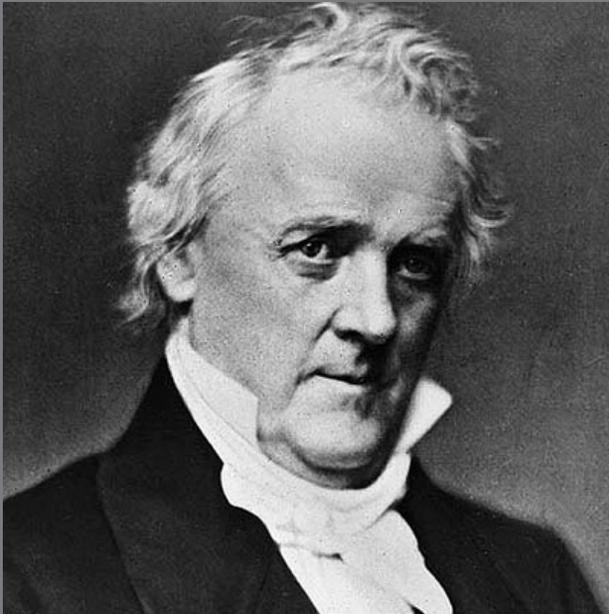


**Chief Justice Roger B. Taney
(1777-1864)**

**Appointed by Andrew
Jackson
in 1836 as the 5th Chief
Justice.**

A native of Maryland, he had personally manumitted all of his own slaves, he remained an avowed racist and believer in the efficacy of slavery as an institution guaranteed protection by both the Declaration of Independence and the Constitution.

6. Cast of Characters



President James Buchanan

(1791 – 1868)

Life-long Pennsylvania lawyer, he maintained a belief that the slavery issue could be resolved by application of the rule of law as interpreted by the United States Supreme Court.

6. Cast of Characters

In his inaugural address on March 4, 1857, besides promising not to run again, Buchanan referred to the slavery questions raised in the Dred Scott case as "happily, a matter of but little practical importance" since the Supreme Court was about to settle it "speedily and finally," and proclaimed that when the decision came he would "cheerfully submit, whatever this may be." His belief was that the Supreme Court's decision would settle the expansion of slavery controversy for all time.

The Supreme Court of that era was dominated by southern members. Shortly after his election, in an effort to bring about a resolution that the country would accept, he wrote to Justice John Catron in January 1857, inquiring about the outcome of the case and suggesting that a broader decision would be more prudent.



6. Cast of Characters

Catron, who was from Tennessee, replied on February 10 that the Supreme Court's southern majority would decide against Dred Scott, but would likely have to publish the decision on narrow grounds if there was no support from the Court's northern justices—unless Buchanan could convince his fellow Pennsylvanian, Justice Robert Cooper Grier, to join the majority. Buchanan then wrote to Grier and successfully prevailed upon him, allowing the majority leverage to issue a broad-ranging decision that transcended the specific circumstances of Scott's case

The decision was released two days after his inauguration ruling against Dred Scott by a vote of 7 – 2, with Justice Grier in the majority.



7. The Decision

The Court's intention in *Dred Scott* was to transform a pure political issue into settled law. Using the so-called "originalist" doctrine to interpret the Constitution, Chief Justice Taney wrote the majority opinion and ruled that:

African-Americans are not citizens of the United States and have no rights privileges or immunities under federal law. Accordingly, the jurisdictional claim based upon diversity fails because Scott is not a citizen of the United States. [Note: As a slave, Dred Scott was not even a citizen of Missouri, a slave State.]



7. The Decision

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. *Dred Scott v. Sandford*, 60 US 393, 407 (1956).



7. The Decision

This narrow issue should have settled the controversy for Dred Scott, but the majority went on to rule on a wide variety of extraneous issues with an eye toward resolving the issues related to the expansion of slavery, including:

The Missouri Compromise is unconstitutional in that it violates the 5th Amendment's due process clause. [Note that this statute had already been repealed by the Kansas-Nebraska Act].

It endorsed the view that slaves could be brought into new territories regardless of popular sovereignty.

8. Impact and Aftermath

Trigger the panic of 1857, resulting in a run on northern banks and the failure of all the rail road companies that had lines running east and west.

The case made any level of political compromise on this issue of the expansion of slavery impossible due to the interpretation of the 5th Amendment due process clause.

Split the Democratic Party in such a way that it guaranteed the election of the Republicans in 1860.

Elevated Lincoln to national status as a result of the Lincoln-Douglas debates on this issue.



8. Impact and Aftermath

It outraged northerners while providing encouragement and legal support for southern slave interests.

In combination, these effects hastened the beginning of the Civil War.

The opinion had the net effect of continuing the bondage of Dred Scott.

Dred Scott was subsequently repurchased by the sons of his original owner, Peter Blow, and was immediately emancipated. He died a free man in 1858.



Part 9. Final Thoughts

Dred Scott is not taught in Law School or mentioned in standard constitutional law texts and few lawyers have any knowledge of it. There is a reason for this:

The case holds up a mirror to us as Americans from which we see a historical image of which we are deeply ashamed.

The Civil War was fought over secession & slavery. While the *Dred Scott* Decision did not directly cause the Civil War, it accelerated the outbreak of hostilities by making any reasonable compromise based in law impossible.

The legal issues and judicial missteps are of critical importance to New Jersey attorneys to this very day.



Part 9. Final Thoughts

For modern-day lawyers and judges, it is a cautionary tale that demonstrates what can happen when:

The judicial branch takes on political questions;

The ethical requirements of judicial process are not followed;

The concept of judicial restraint and narrow grounds is ignored.

