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## ***DRED SCOTT CASE WITH PAUL FINKELMAN***

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**With**

**Paul Finkelman  
Albany Law School  
Law Professor**

### **Program description**

Professor Paul Finkelman lectured on the 1857 *Dred Scott* case, in which the U.S. Supreme Court decided that slaves were not protected by the Constitution and were no American citizens. This lecture was a session of Professor Finkelman's Albany Law School course "Greatest Hits of Constitutional Law" on historically significant Supreme Court cases.

## **I. Dred Scott case**

- **One of the great landmarks of Constitutional Law**
- **Is this case called a “greatest hit” or catastrophic decision?**
- **Central to understanding American law**
- **Part of the response to this decision is the 13<sup>th</sup>-15<sup>th</sup> amendments – ending slavery, giving citizenship to those born as slaves**
- **1<sup>st</sup> sentence to 14<sup>th</sup> Amendment – “All persons born or naturalized in the US and subject to the jurisdiction of are citizens of the US”**
  - **Dred Scott could not be a citizen of the US**
- **Debate today to revise the 14<sup>th</sup> amendment – no birth rights citizenship for citizens of undocumented aliens**
  - **Different from reason for the 14<sup>th</sup> Amendment**

## **II. Dred Scott is the cause of the Civil War**

- **Exaggerates importance of case**
- **Without Dred Scott likely that civil war would have happened because freedom and slavery in US could not have been resolved otherwise**
- **Amendment process requires  $\frac{3}{4}$  of states agree to amend constitution – 15 slaves states at the time – if those states stay in the states then impossible to amend constitution**
- **Some things are not changeable by constitutional amendment – slavery being one of them**
- **Difficult process of amending constitution**
- **9 Justices issue opinions in this case – only 2<sup>nd</sup> time in history (other case was the “Passenger” cases dealing with immigration – whether slave states can restrict free blacks from moving into their states)**

## **III. Brief Summary of the Case**

- **Dred Scott is a slave who in 1846 files suit in Missouri to gain his freedom**
- **Argued that since he lived in free states and therefore is entitled to his freedom**
- **He wins in Missouri courts but then loses at the Missouri Supreme Court**
- **Files a diversity suit in federal court – he is in Missouri and owner is in NY – diversity of parties**
- **Loses before the US Supreme Court**

- **Chief Justice Taney reaches 3 conclusions**
  - **Blacks can never be citizens of the US even if they live in a free state and can vote even if they hold public office in a free state – possible for someone to vote for a presidential election because voting based on state rules, but could not be considered a citizen of the US**
  - **Congress has no power to regulate federal territories beyond setting up the minimal form of government – Congress had been regulating federal territories, creating different territories, passing legislation for the territories**
    - **In a concurrence by Justice Catron (TN – pro slavery), as a Circuit Justice sentenced people to death under federal law and in federal territories and now saying that those sentences were illegal – Catron dissented on this part of the opinion**
  - **Bill of Rights – Taney argues that Bill of Rights extends to federal territories and therefore since Dred Scott was not free in federal territory because 5<sup>th</sup> amendment prohibits slaves being freed there in violation of due process – don't lose property rights by bringing slaves into a federal territory**
    - **The flag follows our constitutional rights??**

#### **IV. Dred Scott**

- **Born Southhampton County VA between 1775 and 1800**
- **If born in 1800 – also born at that time Nat Turner (in 1831 would lead bloodiest slave rebellion in US)**
- **Owned by Peter Blow – abandons VA for better land/opportunities, moves west, to Alabama then to St. Louis (one of a few cities part of the slave south)**
- **2 years later – Blow dies (worst day of a slave's life)**
- **Scott sold as part of settlement of the estate – to John Emerson**
- **Scott grew up with Blow's sons – cut off from these people who he knew his whole life**
- **Emerson is physician and Army surgeon – expected to provide own servants – thus purchase of Scott**
- **Emerson transferred to Fort Armstrong in Western Illinois – far edge of western settlement – remains there from 1833-36**

- **Fort Armstrong in Illinois – free state – slavery illegal under law of Illinois – if you live in the state with that slave for a sufficient time the slave is free**
- **Scott also lives outside military fort because Emerson builds a cabin off base using Scott as a laborer to build – under state law – this would have made Scott free**
- **Missouri court says that if you bring slave laborers from Illinois to Missouri – slaves are free – can pass through Illinois but cannot stop and bring slavery into Illinois**
- **Under Missouri law – Scott gains his freedom**
  - **Emerson would have argued exempt from regular state law because in a federal zone in a military base and required to have a servant**
  - **1937 Missouri Supreme Court hears similar case to Scott case and court says slave is free because Army officers are not exempt from state law – Army officer freed his slave**
- **These cases are based on old English case – Somerset v. Stuart – decided in 1772 before American Revolution – Court of Kings declares that if you voluntarily bring a slave to England then slave is free – Somerset is slave in VA owned by British officer, returns to England, escapes and is captured – Somerset gains his freedom**
- **If a slave is brought to a jurisdiction where there is no slavery then the slave is free and can only establish slavery by statutory law and not some common law practice**
- **If Scott had sued in Illinois then Scott would have been freed – but that area of the state is very desolate and unlikely that someone is telling him that he has the ability to sue – Scott’s job with Emerson is not such a bad job so maybe not wanting to leave and where would he go**
- **1836 Army closes Ft. Armstrong – Emerson and Scott to Ft. Snelling in St. Paul, Minnesota – part of Wisconsin territory – slavery is banned**
- **Other slaves in Ft. Snelling – Harriet Robinson is there as a slave as an Indian agent working at the fort and Scott marries her at Ft. Snelling**
- **Wedding ceremony for the marriage – argument that at this point Scott is freed – marriage is a contract between the parties and the state – slaves cannot enter contracts but there is this marriage contract and therefore Scott is arguably free – BUT does not make sense in institution of slavery itself – marriage ceremonies**

- were performed throughout the country in slave states but owner can dissolve the marriage**
- **October 1837 Emerson to Missouri – weather too dangerous to travel for Scott and Harriet – they stay behind and he rents them out (they are in Minnesota) – they have no master but they remain**
- **November 1837 – Emerson transferred to Louisiana – Dred and Harriet still in Minnesota**
- **February 1838 – Emerson marries Irene Sanford (a VA born white woman who comes from a slave holding family) – eventually her brother will be the formal defendant in the Dred Scott decision (Dred Scott v. Sandford) – now his slaves are needed to set up home with Sanford – calls for Harriett and Scott and they go by themselves**
- **Why did they travel alone that distance? They could have gotten off in another territory and been freed and received protection**
  - **Illiteracy?**
  - **Unaware of money/finances?**
  - **Working for Dr. Emerson is not bad**
  - **Maybe promises by Emerson that he would free Scott after his military service**
- **October 1838 – back to Ft. Snelling – Harriet is pregnant and gives birth in the area of Iowa/Illinois (free states)**
- **May 1840 – Emerson transferred to Florida – Seminole War – Harriet and Scott with Emerson’s wife stay in Ft. Snelling (Missouri)**
- **Emerson leaves Army and returns north – moves to Iowa**
- **1843 Emerson dies – Irene hires out Scott (not Harriet) to another Army officer who takes Scott to Texas**
- **Scott stays until eve of Mexican War and returned to Missouri**
- **1846 attempts to purchase his freedom and his family’s freedom – Peter Blow’s sons and son-in-law get together and offer Dred Scott enough \$\$ to buy his freedom**
- **Irene refuses to allow them to buy their freedom – she says that she needs them because she needs help running the house – everything done with labor, need help dressing, etc.**
- **1846 Scott sues for his freedom – suit based on Somerset decision and on large number of decisions by Missouri Supreme Court that say that if you bring slaves to Missouri then slaves are free**
- **Case begins in 1846 but is delayed because he sues Irene and Irene says she does not own Scott and there is no witness to prove that**

- she owns him – he loses his case and is returned to the person who says that she does not own him**
- **Missouri Supreme Court gives him a new trial in 1850 (delay because of cholera epidemic and fire in St. Louis)**
- **1850 jury determines that Dred Scott, Harriet and children are free**
- **In 1850 a new Constitution going into effect and there is an elected Supreme Court – seat change on Supreme Court – to include 2 pro slavery justices**
- **1852 Missouri Supreme Court reverses his freedom – court is openly political with the outcome**
  - **Telling Missouri to change its laws because it is causing this problem with slavery**
- **Case should have ended because no way to appeal – no federal question at this time – except while the case is being heard in Missouri, before it goes to the Missouri Supreme Court, Irene moves to Massachusetts and marries an anti-slavery man – now she has slaves!??!**
- **Irene does not tell her new husband about the slaves – sells them to her brother John Sanford who is living in NY – he now owns Scott**
- **Scott has new lawyer – Rosewell Field (from Vermont) – attorney argues diversity of citizenship in order to get federal jurisdiction**
- **Field sues for \$10000 – assault, battery and false imprisonment - \$10000 is above jurisdictional amount to appeal to Supreme Court**
- **Sanford responds with a plea and abatement – to stop the case – like a summary judgment motion – argues Scott is not a citizen of Missouri because his parents were from Africa and he is African American – because he is black**
  - **Sanford could have won case at that time because under Missouri law black persons are not citizens of MO even though no longer slaves – free blacks cannot vote, cannot be part of militia, if move into the state need to register, pay special taxes, cannot go to school, cannot be taught to read or write, cannot have certain jobs – argument would be that totality of MO law concludes that free black is not a citizen**
  - **14<sup>th</sup> amendment is first time citizen is defined in Constitution – before that citizenship is defined by the states – Constitution talks about citizenship but always in the**

- context of state citizenship – right to vote is only for members of Congress – if you can vote for the state house of representatives, then you are entitled to vote for the US house of representatives – that is the only voting requirement in the Constitution – the rest is left to the states**
- **What is a citizen is not entirely clear – aliens have been allowed to vote, i.e. if declared that you desire to be a citizen soon enough then can vote even if not a citizen**
  - **Citizenship is not very certain – no definition – so how to determine whether Scott is a citizen in MO?**
    - **Look at totality of rights that a person would have and when you look at the totality of rights for a black in MO you can conclude that they are not citizens**
    - **Judge Wells (Federal District) – looks at the world and decides that essentially there are 4 categories of people in US: citizens, aliens, slaves, and Indians - every one had to fit into one of these categories**
      - **Dred Scott is not an alien or an Indian**
      - **So he is either a citizen or a slave – no other category**
      - **Wells decides that the case must determine what category**
  - **Having lost the plea and abatement, Sanford says it is true that Scott is alleging that he was held against his will and assaulted – Sanford admits that he chastised him but he has a right to do that because he is his slave**
  - **Yes, I held him against his will, yes, I beat him, but I have a right to do so therefore this case cannot go forward**
  - **Scott then says that Sanford has no right because he is free because he lived in Wisconsin which is free under federal law and therefore he is free**
  - **If Scott wins on the freedom issue, then Sanford pays damages and the slave goes free**
  - **Here, Scott loses – Federal District Court rules that federal courts must still follow state law – this follows the ruling based on Swift v. Tyson/Eric Doctrine – federal courts have to follow state law?? – unless there is a federal common law or statute that says otherwise**
  - **Judge may have made a mistake here – could have said we can follow MO law except the MO court got it wrong because Scott went to a federal jurisdiction – when Scott was in Illinois he**



- becomes free when he comes back to MO, unless MO decides he is free because Illinois and MO are equals – MO can tell Illinois that it is not following its rule – full faith and credit clause does not work here because never received a judicial ruling**
  - **Scott can also argue that he received his freedom while in the Wisconsin federal territory – and federal judge may have said MO is free to ignore Illinois but not free to ignore federal rules because of supremacy laws – Scott wins because became free in Minnesota territory**
- **Appeal to the US Supreme Court – has diversity**
- **Case is argued in Spring of 1856 and at the end of the term the Court decides not to issue an opinion and holds the case over for a re-argument**
- **1856 is presidential election year – arguably Court does not want decision to affect the election**
- **Court asked for reargument on very specific issues, including whether MO Compromise is constitutional**

#### **V. Regulation of the Territories and the MO Compromise**

- **After American Revolution, US ended at Mississippi River**
- **1787 North West Ordinance – some areas are free and the rest can allow slavery**
- **1803 Purchase LA – MO, AR, and LA – becomes part of US**
- **NW Ordinance – freedom North and West of Ohio River**
- **LA comes in as a slave state – expected**
- **1819 objection for MO to come in as a slave state – west of Ohio River and South of Ohio River – this does not make sense because Ohio River dumps into Mississippi**
- **House of Reps passes MO with no slavery; Senate rejects this – stalemate through 1819-1820**
- **Henry Clay – MO Compromise – MO will come in as a slave state but all the land north of the southern boundary of MO will all be free**
- **ME enters as a free state**
- **Arkansas and FL still open for slave states**
- **Political power issues**
- **1845 we annexed TX – get this huge state for slavery – northerners are upset because now the south has more political power with potential for 1000s more senators coming in**

- **Texas annexation leads to war with Mexico – we aggressively insist that boundary at Rio Grande – both sides aggressive – Mexico loses dramatically**
- **Result of victory – Idaho, Utah, Colorado, Wyoming, California**
- **1847-1850 stalemate in Congress**
- **1846 Wilmont Proviso proposed- slavery not allowed in any territory gained by Mexican War**
- **1850 Compromise of 1850 is passed – admits CA as a free state, giving the north 16 free states v. 15 slave states, opens up all New Mexico territory and all Utah territory to slavery – long term prospect New Mexico, Arizona, Utah, Wyoming open to slavery**
- **1850 every territory where slavery was allowed was a slave state – if you let slavery in you cannot get it out**
- **Fugitive slave law of 1850 – unfair, denies alleged fugitive slaves due process, prohibited from testifying in own defense – result is that riots in the north rescuing slaves from federal custody**
- **1854 Steven A Douglas sponsor building railroad from Chicago to San Francisco – transcontinental RR – would make Chicago the hub of America – to get it built – need MO senator approval**
- **Agree to RR if Douglas would support opening Nebraska territory to slavery – Kansas/Nebraska Act 1854**
- **Utah territory should have been free under MO Compromise but now that changed with Kansas/Nebraska Act**
- **Most dramatic political revolution in US – Whig party collapses and join “Anti Nebraska” party – turns its name into the Republican party – Republican party did not exist until Spring of 1854 and then suddenly has enormous clout**
- **by 1855 – a number of governors become Republicans – 1856 republicans team up with anti immigrant party and have a majority in the House of Reps**
- **Republican candidate for president – Fremont – campaigns on free soil, free labor, free men – carries 11 states in the election (only 15 slave states and 16 free states) – enormous success for new political party**
- **1850 Congress voted to open up to slavery**

## **VI. The Court gets the case for the second time in 1856**

- **1856 presidential election – single issue is slavery in the territories – guy who supported slavery won the election – Taney’s way of thinking – as of 1856 the only places where slavery is not allowed**

- is Oregon Territory and Minnesota Territory – everywhere else slavery is legal – country voted on this**
- **Issue of slavery is settled according to Taney based on political changes**
- **After election – Buchanan wins election – pro slavery**
- **Case reargued in December 1856 after election**
- **No decision is announced**
- **March 4, 1857 new President inaugurated – Buchanan shakes hands with Taney at inauguration and they talk for a minute – Republicans will later talk about the whispering between them (they were old friends)**
- **Buchanan gives his speech and says that the major issue before the country is the issue of slavery in the territories and that is the judicial question – since 1787 Congress has passed laws regulating the territories – never before did anyone think that regulation of the territories was a judicial question – only a political or legislative question**
- **Buchanan says I am sure we will agree by whatever the court decides**
- **Later Republicans will make the claim that there was a conspiracy between Buchanan and Taney and that when Buchanan got up and spoke with Taney he knew what the decision was going to be**
- **Evidence that Buchanan knew what the decision was going to be based on letters that were sent**
- **Buchanan interfered with the court, at least 2 justices told him before the decision came down**

## **VII. Court decision**

- **Jurisdictional issue – does the Justice have a right to determine whether it has a right to hear the case?**
  - **Must revisit plea and abatement**
  - **Can a negro's ancestors who were brought here as slaves become a citizen**
  - **Citizen of state? Citizen of US? – can be citizen of the State but not the US**
  - **Blacks are not included and intended to be included as citizens under the Constitution – in 1787 were subordinate – whether emancipated or not – no right to privileges**

- **Clearest examples of jurisprudence of original intent – what was the intent of the framers?**
- **Dissent – Justice Curtis – points out that free blacks can vote in some of the states and participate in politics and free blacks had held public office in NH and other states**
  - **Original intent that blacks were included**
- **Problem using original intent without specific discussion in the Constitution for interpreting Constitution**
- **Taney says no jurisdiction because blacks are not citizens – case should be over for lack of jurisdiction – if he finds that he does not have jurisdiction then no more case!**
- **Taney looked at US politics – everyone agrees with me because we have won on all these other points**
- **Taney turns to territories clause – Congress shall have power to regulate “the” territory – only applies to what was owned by US in 1787 and does not apply to anything that was obtained after**
- **Taney writes that the clause was intended to be very narrow and what was within the boundaries of the writing at the time – originalism argument**
- **Taney then argues about the 5<sup>th</sup> amendment – constitution applies to all the territories and no one may contend that congress may like any law in a territory regarding the establishment of religion or free exercise thereof or abridging freedom of speech or the press or of the right of the people in the territory to peaceably assemble and petition government – people cannot be deprived of property without due process of law – Congress cannot take a man’s property merely because he brought his property to a territory and did not violate the law – cannot pass a law that takes your property without more**
- **MO Compromise does not say that slaves will be free only says there will be no slavery – if you bring your slave in, then you have to bring him out – the government cannot just take him – or statute must provide that the slave would be taken if brought into the state – without this it is not due process**
- **Taney then says that slaves are property and that there is no less protection of this property – Constitution protects slave property – fugitive slave law in Constitution – only slavery gets specific Constitutional protection**
- **Taney shows how Constitution protects slavery – his strongest argument**

- **1787 Constitution – protective of slavery**

### **VIII. What happens next**

- **Enormous political response**
- **Nation is shocked by Scott opinion**
- **Leading critic is Abraham Lincoln**
- **Kansas/Nebraska Act and Lincoln becomes a leader in the Republican party**
- **Lincoln then travels throughout the North criticizing Dred Scott opinion**
- **Republican platform is no slavery in the territories but Scott opinion says it is illegal for Congress to ban slavery in the territories**
- **Lincoln says that since there was no jurisdiction the rest of the opinion is dicta**
- **Lincoln nominated for Senate against Douglas – in his acceptance speech “House Divided Speech” – either the nation will become all free or all slavery – have we no tendency to the later condition (all slavery) – we shall lie down dreaming that the people of MO are trying to make their State free but the Supreme Court has made Illinois a slave state – predicts a second Scott decision will come along and will end up nationalizing slavery – great fear of Republicans**
- **Future decision would be support of American slave trade**
- **Justice Nelson’s concurring opinion – narrowly crafted legally correct opinion – the status of all people is determined by the state where the person lives and this is not reviewable by a federal court – if this was the majority opinion then this case would never have been so important**
- **Federal law v. MO law – state law v. state law v. federal law**
- **Taney’s goal is to settle all the issues of slavery**
- **Nelson states that the opinion is not about someone discharging of federal duty who brings his slaves with him across state lines, like Emerson, but deals with rights of the common citizens of the republic – “when that question arises we shall be prepared to answer it” – is he saying: we will say that you have right to bring your slave anywhere in the country**

### **IX. End of the case**

- **Northerners very upset by this**

- **Lincoln then becomes President**
- **Civil war would have still happened without Dred Scott**
- **14<sup>th</sup> Amendment without Dred Scott – who knows?**
- **For a long time this case was seen as a conspiracy of anti-slavery activist to embarrass the Supreme Court**
- **Some researchers have shown that this is merely Dred Scott and the Blow brothers trying to get his freedom – family friend – case becomes bigger than Dred Scott**