From Lincoln the Trial Lawyer to Lincoln the President: *Dred Scott* and the Lincoln-Douglas Elections[*]

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Abraham Lincoln argued 243 cases before the Illinois Supreme Court and two cases before the United States Supreme Court. Most significantly, he spent more than 20 years riding the circuit as a lawyer in downstate Illinois, trying thousands of cases. You *know* what this means:

Abraham Lincoln was … (whispered) a "Trial Lawyer."

Yes, and more. He was a lawyer's lawyer. I want to spend a few minutes with you talking about his life in the law and what it meant for the fate of our

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[*] Copyright 2009. The *Dred Scott* case and its historical significance are explored in The Dred Scott Case: Historical and Contemporary Perpectives on Race and Law, ed. David T. Konig, Christopher A. Bracey, and Paul Finkelman (Athens, Ohio: Ohio University Press, 2009, forthcoming), a collection of papers from a 2007 Washington University symposium on the *Dred Scott* decision, including the symposium's keynote address: Michael A. Wolff, *Race, Law and the Struggle for Equality: Missouri Law, Politics and the Dred Scott Case*, available at http://www.courts.mo.gov/page.asp?id=8827. Further references for this piece: Benjamin Thomas, *Abe Lincoln, Country Lawyer*, www.theatlantic.com/issues/95nov/lincoln/thomabel.htm; Anton-Hermann Chroust, *Lincoln's Ability As a Lawyer*, 53 Illinois Bar Journal 512 (February 1965), Dennis K. Boman, Lincoln's Resolute Unionist – Hamilton Gamble, Dred Scott Dissenter and Missouri's Civil War Governor (Louisiana State University Press 2006), and Albert K. Woldman, Lawyer Lincoln (Carroll & Graf 1936).

Republic and for this state. There are many of aspects of the Lincoln story, but I would like to focus just a bit on the Missouri piece – specifically the *Dred Scott* case and its role in making Lincoln the trial lawyer into Lincoln the President.

Lincoln's legal career was infused off and on with political life. He served in the Illinois legislature and was elected to Congress for one term. His expressed opinion that the War with Mexico was unconstitutional cost him his congressional seat – the voters of his district turned him out as not being sufficiently patriotic. It was his return to the practice of law after political defeat that deepened his fluency in law and life and helped prepare him for the essential role he was to play.

His return to public life was spurred, initially, by his reaction to a bill sponsored by Senator Stephen A. Douglas of Illinois in 1854 to allow expansion of slavery in territories not yet states. Later, Lincoln's trenchant legal analysis of the *Dred Scott* decision in his famous "House Divided" speech in 1858 enhanced his national stature.

Douglas' 1854 bill – which would allow the citizens of the territory of Nebraska to vote on whether slavery should be allowed when Nebraska applied for statehood -- spurred Lincoln to run for office again. He was elected handily to the Illinois legislature in 1854, then resigned immediately to seek election by the legislature to the U.S. Senate. His candidacy failed.

So he was back in law practice again until 1858, when he ran seeking to dislodge Senator Douglas. That was the year of the U.S. Supreme Court's decision in *Dred Scott*.

Because the *Dred Scott* case came from Missouri, it may be well to explore a bit of the background of the case, and the contrasting positions that these two great lawyers and political opponents, Lincoln and Douglas, adopted in their famous Lincoln-Douglas debates in the race for the U.S. Senate in 1858, which set the stage for their contest for the Presidency in 1860.

Who was Dred Scott? A slave, originally owned by the Peter Blow family of St. Louis, he was purchased by Dr. John Emerson before the doctor's 1834 assignment as an Army surgeon to a military outpost in Rock Island, Illinois, and later to Fort Snelling, in the portion of the Louisiana Purchase Territory that is now in the state of Minnesota. Both were free territories.

While at Fort Snelling, Dred Scott married Harriet Robinson, a descendent of African slaves, who was either the servant or a slave of the Indian agent stationed at Fort Snelling. In the early years of this marriage, four children were born.

After Harriet and Dred Scott and their two living daughters returned to St. Louis with Dr. Emerson, they sued for their freedom in 1846 in St. Louis Circuit Court, and their case was tried to a jury. In the first trial, the jury found for the

defendant, Irene Emerson, the widow of Dr. Emerson. The judge in the case, Alexander Hamilton, did something rather unusual: he granted a new trial, apparently believing that the jury's verdict was wrong. In the second trial – with the jury instructed that, if Dred Scott were living in free territory, he should be considered free – the jury found for the Scotts. Emerson appealed to the Supreme Court of Missouri, which rendered its decision in 1852.

Prior to the Scotts' appeal the Supreme Court of Missouri had decided 11 such freedom suits, each time upholding the principle that a slave who spent time in free territory was entitled to freedom. But by the time of the *Dred Scott* appeal, the court's "pro-freedom" jurists had been replaced by three seemingly pro-slavery judges after Missouri had changed its judicial selection from appointment to popular election in 1848. It would be easy to say that the switch in doctrine that occurred with the Missouri Supreme Court's decision in the Scott case is traceable to this change to an elected judiciary, but unfortunately that is too easy.

By the time the Scott case came to the court, slavery had become an extremely divisive issue in Missouri. The Scotts' case was indistinguishable from some of the freedom suits that previously had gone before the Supreme Court of Missouri. But because of the changing times, the Court's majority in the Scott opinion declined to follow the long line of earlier precedent holding that a slave who resided in free territory was no longer a slave. The Court switched – and the

Scotts remained in slavery. Interestingly enough, the Court based its decision only on conflict of laws principles – that Missouri did not have to respect the law against slavery in Illinois or in the upper Louisiana territory. The decision was a matter of state law that was the prerogative of the Supreme Court of Missouri to decide. The Court did not invoke federal constitutional principles; specifically, the Court did not rule, as many had urged, that Congress had no power to restrict slavery in the territories which would have amounted to striking down the pair of federal statutes known as the Missouri Compromise. As I am sure we all remember from high school history class, under the Missouri Compromise, Missouri was admitted to the Union as a slave state, and Maine came into the Union as a free state.

To Dred Scott, Harriet Scott and their children, however, the result – whether based on Missouri law or the United States Constitution – was the same. They lost.

The dissenting judge, Hamilton Gamble, who was a slaveholder, nonetheless said the Court should adhere to precedent. Addressing the "temporary public excitement" over the issue of slavery that undoubtedly would cloud the people's judgment, Gamble said: "Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there

can be no safe basis for judicial decision, but in those principles which are immutable."

Because the Missouri decision was based on state law, there was no avenue of appeal to the United States Supreme Court. When the case returned to the St. Louis Circuit Court, the Scotts had a new strategy and new lawyers. The Scotts' new lawyers filed a new lawsuit in the federal court in St. Louis.

In their federal court case, the Scotts sued New York resident John Sanford, who succeeded Irene Emerson as owner of the Scott family. The Scotts claimed that they were citizens of Missouri, that Sanford was a citizen of New York, and therefore, that the federal court had jurisdiction over the case under the federal diversity of citizenship statute. The Scotts' case was tried on the merits in the federal court in St. Louis. The Scotts lost. Then they appealed to the United States Supreme Court.

Maybe I shouldn't sound like a civil procedure professor (but actually I am one) but remember that the jurisdiction of the federal courts depended on the fact that the Scotts and Sanford were *citizens* of different states. The first part of the U.S. Supreme Court's majority opinion is premised on the notion that the Scotts, of African descent, were not and never could be considered *citizens* of the United States or of the state of Missouri, whether they were freed or enslaved. Chief Justice Roger Taney's majority opinion directly addresses the contradiction

between the Court's holding and the language of the Declaration of Independence which states, of course, "that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them there is life, liberty, and the pursuit of happiness; …." The Court's opinion said that it is "too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; …."

As an aside, today we hear echoes of the notion that we ought to look at what the Founding Fathers intended in the words they used. The language I just quoted from the Dred Scott opinion, however, is a stunningly stark warning that we should be careful how we use and discern the meaning of the original words of the Founding Fathers in the various documents that frame our governmental system.

It was clear from the language of the Constitution, the Court said, that Congress had no power to "raise to the rank of a citizen anyone born in the United States who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class."

Chief Justice Taney went on to say that a state "may give the right to free Negroes and mulattoes, but that does not make them citizens of the States, and still

less of the United States. And the provision in the Constitution giving privileges and immunities in other states, does not apply to them." [†] So the Court concluded that blacks never could become state citizens allowed to sue in the federal courts under the diversity of citizenship statute.

As startling as the Court's decision about jurisdiction was, one would think that the decision should stop there, for if the court had no jurisdiction due to a lack of diversity of citizenship, then any other pronouncements in the opinion are what we lawyers call *obiter dicta*, that is, words that are not necessary to the holding in the case. *Dicta*: That's just the court talking. It is not law. But of course, lawyers can discuss at some length whether particular phrases in judicial opinions are *dicta* or part of the holding that expresses the law of the case.

Despite its professed lack of jurisdiction, the Supreme Court plunged forward, justifying its further "opinion" as being necessary to correct all errors in the lower court's judgment so that other courts might not be led to "serious mischief and injustice in some future suit." The Court wrote that slaves are

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[†] By the way, for those who adhere to the belief that the Second Amendment to the United States Constitution protects the right of individuals to keep and bear arms, that view is supported by the Court's reasoning as well, because the majority would not impute to the Founding Fathers the intent that blacks should be given "full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." (This rationale in *Dred Scott* was not the kind of precedent the current Supreme Court justices saw fit to rely on in last year's Second Amendment case, *District of Columbia v. Heller,* 128 S.Ct. 2783 (2008).)

property, the same as any other property, and that Congress, therefore, has no power to interfere with the rights of property owners. It then held that the Missouri Compromise, which outlawed slavery in some of the territories, was unconstitutional. Moreover, said the Court, states that had outlawed slavery could not interfere with the property rights of slaveholders.

The Court's pronouncement was as deeply political as any in our history. Edward Bates, a leading Missouri lawyer, scorned President James Buchanan for urging the Court in an 1857 speech -- while the Court was deliberating on the Dred Scott case -- to strike down the Missouri Compromise. Bates, who would later compete with Lincoln for the Republican nomination and would serve as Attorney General in the Lincoln cabinet, concluded that President Buchanan -- by asserting that the Missouri Compromise unconstitutionally prohibited slavery in the territories -- had reversed his narrow Jacksonian concept of the Supreme Court's role. President Buchanan had exercised a corruptive influence on the justices, Bates said, to win a decision for the slaveholders in his party for his own political gain. The greatest danger to the Union, Bates declared, was that "corrupt and dangerous party" – the Democratic Party – because of its "insistence on keeping the slavery issue in public view."

Now let's go back across the river to Illinois, where that state's great lawyer, Abraham Lincoln, delivered his "House Divided" speech in June 1858 and, later

that year, engaged its great political orator, Senator Stephen A. Douglas in debates whose context was set by the Dred *Scott* decision. After Lincoln's famous opening lines that "a house divided against itself cannot stand" and that "this government cannot endure permanently half slave and half free," Lincoln launched into a history, discussion and analysis of the Dred Scott decision. His single-sentence summary of the entire decision shows his lawyerly gifts; his "brief" of the case was: "If any man choose to enslave another, no third man shall be allowed to object."

Senator Douglas -- Lincoln's opponent for the United States Senate race that year -- was undercut in his fundamental position on the slavery issue. Douglas argued for "popular sovereignty," which meant that each state could decide for itself whether to allow slavery. His position was the same as the Nebraska bill that spurred Lincoln back into politics four years earlier.

But the *Dred Scott* decision put Douglas in a most awkward position. Douglas believed that the Supreme Court had decided only the question of jurisdiction in the *Dred Scott* case and that all else was mere *dicta*. Douglas refused to admit that the *Dred Scott* majority opinion decided that slavery would go into a territory against the wishes of that territory's inhabitants.

Dicta or not, Lincoln stuck it to Douglas on this issue. He used the Court's language to show that Douglas' "popular sovereignty" idea would be

unconstitutional. Douglas' position of "popular sovereignty," however, won the day in Illinois and Douglas stayed in the U.S. Senate.

But Lincoln, the superb trial strategist, was playing a longer range game. Lincoln's debating points framed the question for Douglas -- Is *Dred Scott* good law? – and set a trap for him. When Douglas said that the Court's teaching on the subject of slavery was not law – and that a state could decide for itself whether to allow slavery -- he gained the support of Illinois voters. But in rejecting the teaching of Chief Justice Taney's majority that Congress and the states had no power to outlaw slavery, he lost the support of the South and tore his Democratic Party apart. What gained Douglas a Senate victory in 1858, then, assured that he could not win the Presidency in 1860.

Lincoln's homey figure of speech that "a house divided against itself cannot stand" struck a cord nationally. The power of the idea that "this government cannot endure permanently half salve and half free" positioned Lincoln as the leader whose vision captured the imagination and the votes of a majority in the Presidential election of 1860.

Southern states went into rebellion with the election of Lincoln.

And what of Missouri, the crucible of the *Dred Scott* case? Gov. Claiborne Fox called a convention to have our state secede from the Union. When he failed to achieve secession, he and other confederates fled. The convention selected

Hamilton Gamble, the judge who dissented in the Missouri court's *Dred Scott* decision, as Missouri's provisional governor under the protection of the Union army. Gamble, a strong Unionist as well as a slaveholder, served as governor until his death in 1864. He traveled to Washington on a few occasions trying to sell Lincoln on his plan for gradually ending slavery in this state. (Because Missouri was not in rebellion, its slaves were not freed by the Emancipation Proclamation.)

Missouri, however, was deeply divided. In the struggle between unionists and secessionists, there was true civil war, oftentimes neighbors killing neighbors. And there were deep divisions between political factions: those who demanded an immediate end to slavery, those who favored gradual emancipation, and, of course, the confederate secessionists.

The bitter divisions in Missouri exasperated Lincoln, who wrote to Governor Gamble in 1863: "It is very painful to me that you in Missouri cannot, or will not, settle your factional quarrel among yourselves. I have been tormented with it beyond endurance for months, by both sides. Neither side pays the least respect to my appeals to your reason."

President Lincoln, unfortunately, would not live long enough to understand Missouri politics. And, I suppose, neither will we.