Seymour had done. Davidson also served on the board of the Community Law Offices, was founding chair of the Federal Defenders of New York, active in the International Bar Association and the American Bar Association, a Fellow of the American College of Trial Lawyers, a life member of the American Law Institute and chair of Greenwich House. Hayes said she remembers him encouraging associates to perform *pro bono* legal work at Hughes Hubbard and acting as a mentor to all involved in *pro bono* work.

Davidson talked about four reasons he was delighted to receive the award. First, he said that Whitney North Seymour was a personal role model. He first saw him at a program for college seniors who had been accepted by Columbia Law School, where Seymour spoke about the role and responsibility of the lawyer in the profession. Second, Davidson talked about Seymour as a person and his commitment to values, including freedom of thought and expression, advancement according to merit, a just and fair court system, and a commitment to procedural fairness. Third, Davidson said he was happy to join the company of the other recipients of the Award. Finally, he was thrilled that he was receiving the award at a time when his old friend Justice Sotomayor was the guest of honor, his long-time colleague Vilia Hayes was president of the Council, and former colleague Joan Salzman was executive director.

Legal History

The *Worst* Supreme Court Decision, Ever!

By C. Evan Stewart

There are, perhaps, many candidates for the *worst* decision by the U.S. Supreme Court, ever: *Plessy v. Ferguson*, 163 U.S. 537 (1896), for example, or perhaps, *Korematsu v. U.S.*, 323 U.S. 214 (1944). But there really can only be one that ranks at the very bottom: *Dred Scott v. John F. A. Sandford*, 60 U.S. (19 How.) 393 (1856). And it fully deserves that ranking.

Who Was Dred Scott?

Dred Scott was a slave. Born in America, circa 1800, he was owned by several owners. Importantly, in (or about) 1833, Scott was purchased by U.S. Army surgeon John Emerson in Missouri. Transferred to Fort Armstrong in Illinois, Emerson took Scott with him; Emerson also took Scott with him when he was subsequently transferred to Fort Snelling in the northern section of the Louisiana Purchase (now Minnesota). While at Fort Snelling, Scott married another slave also owned by Emerson (this was a legally recognized marriage because it took place in free territory). Scott's wife later gave birth to a daughter in free territory. Ultimately, Emerson moved his family and slaves back to St. Louis, Missouri.

In 1843, Emerson died and his wife inherited Scott and his family. In February 1846, Scott attempted to buy his freedom from Mrs. Emerson, but she refused. Scott, with the encouragement of some white friends in St. Louis, then decided to sue for his freedom, based upon his prolonged residence in a free state and a free territory. That began a lengthy legal odyssey that ultimately resulted in the *worst* decision by the U.S. Supreme Court, ever.

The Lower Courts

Suing in St. Louis county court in April 1846, Scott initially lost because he was unable to prove that he was in fact owned by Emerson and his widow. But a second trial was ordered, a decision that Mrs. Emerson appealed to the Missouri Supreme Court. She lost that appeal, and in 1850 a jury sided with Scott. That outcome was then appealed to the Missouri Supreme Court, which in 1852 rejected prior precedents and overturned the lower court's outcome, ruling that Missouri law governed Scott's status, not the fact that he had resided for a number of years in a free state and a free territory.

With a different set of lawyers, Scott then filed a new suit, this time in federal court. Because Scott's new owner was John F. A. Sandford (Mrs. Emerson's brother – she had transferred legal ownership of Scott and his family over to Sandford), and he was a legal resident of New York, the jurisdictional basis for the federal lawsuit was diversity of citizenship (Scott claimed Missouri citizenship). Scott sued Sandford for battery and wrongful imprisonment and sought $9,000 in money damages. The federal district judge, Robert W. Wells, rejecting Sandford's pre-trial argument that Scott could not be a citizen of Missouri because he was a slave, allowed the case to go to trial in May 1854. Although Sandford conceded he had "gently laid his hands" on Scott, he nonetheless won the case (based upon the prior ruling of the Missouri Supreme Court).

Determined to get his freedom, Scott pressed on, and with two new prominent lawyers (Montgomery Blair and George T. Curtis) leading the charge, he appealed to the U.S. Supreme Court in December 1854. The Court agreed to take the case, first hearing oral argument in February 1856. When the Justices met to discuss the case in April 1856, they were deadlocked four to four on the issue of the Court's jurisdiction, with Justice Samuel Nelson (New York) undecided. The Court then agreed to have four days of re-argument in December 1856.

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Politics Affecting the Court?

Many historians believe that the Court took its time deciding the case in order to push the decision beyond the 1856 presidential election. Once the election had been decided, president-elect James Buchanan wrote one of the sitting Justices (his friend, John Catron – from Tennessee), asking whether the decision was going to be handed down before his inauguration on March 4, 1857 (he hoped it would be, thereby putting to "rest" the slavery issue for the entirety of his presidential term). Buchanan later even went further, pressuring Justice Robert Grier (both men were Pennsylvanians) to join the Southern majority on the Court; the president-elect wanted the Court's decision not to be perceived as a sectional one. And it was not just the president-elect. Alexander Stephens, a prominent Georgia Congressman (and later the vice president of the Confederacy) wrote to a friend on December 15, 1856: "I have been urging all the influence I could bring to bear upon the Sup. Ct. to get them no longer to postpone the case on the Mo. Restriction [the Compromise of 1820].... I have reason to believe they will [decide] that the restriction was unconstitutional." Then, on January 1, 1857, Stephens penned another letter, stating, "[F]rom what I hear *sub rosa* [the decision] will be according to my own opinions upon every point.... The restriction of 1820 will be held to be unconstitutional."

The Supreme Court "First" Decides

In 1851, the Supreme Court had decided *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851). In that case, the Court had refused to take an appeal from a decision by the Kentucky Supreme Court, which had ruled that Kentucky slaves taken temporarily to Ohio nonetheless remained slaves under Kentucky law. On February 14, 1857, a majority of the Court actually voted to re-affirm that precedent without elaboration; and Justice Nelson was tasked to write the majority opinion. (Justice Benjamin Curtis (Massachusetts) had earlier predicted this outcome to his uncle. And Horace Greeley, editor of the *New York Tribune*, had publicly denounced the Court for its likely "convenient evasion": "The black gowns have come to be artful dodgers." At the same time, Greeley understood the problem

of the Court going the other way and embracing slavery; he also warned of "[j]udicial tyranny."

Days later, the majority of Justices reversed themselves and decided to go in a very different direction. What had changed? It would appear that two dissents coming from Justices Curtis and John McClean (Ohio) – in which they planned to opine that Scott was free under the terms of the Missouri Compromise (a law they were also going to opine *was* constitutional) – shook up the Southern Justices. Justice James Wayne (Georgia) asked that the Chief Justice reconsider and issue a broad decision; that petition carried the day. At the same time this was playing out, the Catron-Buchanan-Grier correspondence was going on behind the scenes. (Buchanan's letter to Justice Grier had in fact been encouraged by Justice Catron: "[D]rop Grier a line, saying how necessary it is, and how good the opportunity is to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other.")

Chief Justice Taney. Photo courtesy Steve Petteway, Collection of the Supreme Court of the United States.

On March 4, 1857, Buchanan was sworn in as President at the Capitol by Chief Justice Taney. In his inaugural address, Buchanan (having been prompted by Justice Catron) told the nation that the vexing question of slavery's status in the territories was "a judicial question which legitimately belongs to the Supreme Court of the United States, before whom it is now and will, it is understood, be speedily and finally settled."

Two days later, *Dred Scott v. John F. A. Sandford* was handed down.

The Supreme Court's Real Decision

Chief Justice Roger Taney (Maryland) delivered the opinion of the Court; it was separately agreed to by six other Justices (four Southerners, two Northerners – Grier and Nelson; the latter only concurred based upon *Strader v. Graham*). The Chief Justice's first task was to decide whether the Court had jurisdiction: Was Scott a "citizen" of Missouri? As Taney articulated the issue: "It becomes necessary … to determine who were citizens of the several States when the Constitution was adopted." In page after page of hard to read racism, the Chief Justice listed "evidence" that the Founding Fathers viewed all African-Americans as "being 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." According to Taney, African-Americans were certainly not included in the "all men" "created equal" language of the Declaration of Independence, and they also had not been part of the "sovereign people" who were part of the country created by the Constitution. Thus, having ascertained that African-Americans were not citizens at the time of the country's founding ("it cannot be believed that the large slaveholding States regarded them as included in the word citizen, or would have consented to a Constitution which might compel them to receive them in that character from another State"), Taney concluded that Dred Scott "was not a citizen of Missouri within the meaning of the Constitution …, and not entitled as such to sue in its courts." With no jurisdiction, the Chief Justice could have stopped there; but he had even bigger fish to fry: Stephens' *sub rosa* source(s) were right – Taney was bent on invalidating the Compromise of 1820, an act of Congress that had barred slavery north of 36 degrees 30 minutes north latitude for the land bought from France in the Louisiana Purchase.

According to Taney, African-Americans were certainly not included in the "all men" "created equal" language of the Declaration of Independence, and they also had not been part of the "sovereign people" who were part of the country created by the Constitution.

Although the Constitution gave Congress the power to "make all needful rules and regulations" for the territories (Article IV, Section 3), Taney wrote that that power was limited to merely "rules and regulations" and did *not* cover basic, fundamental rights bestowed under the Constitution (e.g., right to bear arms, freedom of the press, etc.). And one of those basic, fundamental rights was the "rights of private property":

"[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."

By those words, the Compromise of 1820 was ruled unconstitutional: all of the territories were now open to slavery and its expansion – without congressional interference; and, *beyond that*, the doctrine of substantive due process had been created – a doctrine that continues to vex legal and political debate over the Court's proper role today. And if that were not enough, Taney then went on to dust up the political doctrine that Stephen Douglas hoped would solve the contentious public debate over the expansion of slavery – popular sovereignty:

"And if Congress itself cannot do this – if is beyond the powers conferred on the Federal Government – it will be admitted, we presume, that it could not authorize a Territorial Government

to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions to the Constitution."

The dissents of Justices Curtis and McClean vivisected Taney's historical "evidence," as well as his constitutional limitations on Congress' powers vis-à-vis the territories. Curtis, for example, proved beyond a shadow of doubt that there were many free African-American "citizens" of New Hampshire, New Jersey, New York, North Carolina, and Massachusetts at the time of the Constitution and that they had in fact *voted for its ratification*!

Beyond the obvious point that the Court's invalidation of the Compromise of 1820 was unnecessary (Curtis attacked it as obiter dicta), both Justices argued that the statutory invalidation was based upon sophistry and an explicit repudiation of American history. First of all, "[a]ll needful rules and regulations" obviously meant legislation just like the Compromise of 1820. Furthermore, there were numerous other acts of Congress limiting/banning slavery prior to 1820 that many Founding Fathers *voted for* while in Congress (or *signed* into law as President), and none had ever expressed any public view that any of those laws were unconstitutional. Furthermore, as posited by Curtis, if this law violated due process, did not the 1807 law banning the importation of slavery from Africa also run afoul of that same property right? And what about the laws in the Northern States that banned slavery? Finally, preventing a slave owner from taking a slave into a territory did not *deprive* the slave owner of that property, it only limited as to where the slave owner could take his "property."

Of course, the dissents only garnered two votes. Nonetheless, the *Dred Scott* opinion ignited a volatile firestorm, and Buchanan's hoped-for peaceful presidential term went the other way in a hurry. It is clear that Taney's decision helped precipitate the Civil War. And, of course, we are still debating the application of substantive due process today (*e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), etc.). The *worst* decision by the Supreme Court, ever? It is not even close.

Postscripts

The Compromise of 1820, the legislation ruled unconstitutional by the Court in 1857, had already been repealed by Congress when it enacted the Kansas-Nebraska Act of 1854.

After years of wrangling (*e.g.*, the Wilmot Proviso), Congress had tried to legislatively kick the irresolvable political issue of the enforcement of slavery in the territories over to the courts under the terms of the Kansas-Nebraska Act of 1854: "all cases involving title to slaves and 'questions of personal freedom' are referred to the adjudication of local tribunals, with the right of appeal to the Supreme Court of the United States." Ironically, none of the territorial areas that had been the focus of Congress' hand-to-hand combat over the years – New Mexico, Utah, Kansas, and Nebraska – were areas directly at issue in *Dred Scott*.

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The political blowback to *Dred Scott* was instantaneous and fierce, and it severely damaged the Court's status as the nonpartisan wing of the federal government. Republicans publicly refused to recognize the legitimacy of the ruling and pledged to "reconstitute" the Court after the election of 1860 to ensure that *Dred Scott* was reversed. Leading Republicans William Henry Seward and Abraham Lincoln deftly turned the decision into a symbol of a slave-power conspiracy that was running/ruining the nation. In 1858, Seward cited the "whisperings" between Taney and Buchanan at the latter's inaugural, followed up by the "salutations" the Justices had paid to the President "in the Executive Palace" on March 5, where Buchanan had "received them as graciously as Charles the First did the judges who had, at his insistence, subverted the sta-

tus of English Liberty." (Taney was so outraged by Seward's attacks that he vowed not to administer the oath of office in 1861, if Seward were to win the presidency.) Lincoln (who Taney did swear in) publicly spoke about the four "conspiring carpenters" who created the *Dred Scott* monstrosity: "Stephen [Douglas], Franklin [Pierce], Roger [Taney], and James [Buchanan]." Lincoln prophesied the conspirators behind *Dred Scott* were planning a sequel: "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 ... neither Congress nor the Territorial Legislature can do it.... [W]e shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their state *free*; and we shall awake to the reality, instead, that the Supreme Court has made Illinois a *slave State*."

Lincoln built upon these notions, as well as the dissents in *Dred Scott*, and made them the central tenet of his Cooper Union speech in 1860, a speech which was critical to his getting the Republican presidential nomination (*see Federal Bar Council Quarterly* (Sept./Oct./Nov. 2011, at 20)).

The ruling also led to important fissures in the Democratic Party, which ultimately caused it to split into Northern and Southern wings with different candidates for the presidency in 1860 – Stephen Douglas (for the Northern wing) and John Breckenridge (for the Southern wing). After Douglas conceded in his 1858 debates with Lincoln that slavery could in fact be kept out of the territories by the "will and the wishes of the people" of said territories (the Freeport Doctrine), Southern Democrats saw that *Dred Scott* might have given slaveholders an unenforceable property right; as such, a slave code was necessary to govern the territories, to be enforced (as required) by the U.S. Army. Senator Albert Brown (Mississippi): "[If the North] den[ies] to us rights guaranteed by the Constitution ... then, ... the Union is a despotism [and] I am prepared to retire from the concern."

After the decision was handed down, it was revealed that Dred Scott was still in fact owned by Emerson's widow, who was now married to an anti-slavery Congressman from Massachusetts. The Congressman's wife quickly transferred ownership of Scott and his family over to the son of Scott's original owner on May 26, 1857. The new owner thereafter manumitted the entire family. Scott, now free, lived one more year.

Of Scott's advocates before the Supreme Court, George Curtis was the brother of Justice Curtis, but no one seemed to care. Montgomery Blair was the scion of a very powerful Democratic Party family, who had shifted over to the Republican Party because of slavery. He later became a member of Lincoln's cabinet as Postmaster General, resigning in 1864 as part of a deal to ensure that John C. Frémont (the Republican's 1856 standard-bearer) would drop his third party challenge to Lincoln's re-election.

Ironically, as a young Maryland lawyer in private practice Taney had taken a very different position on slavery when he defended Rev. Jacob Gruber. In 1819, Gruber had been indicted for a sermon he gave in which he attacked slavery and thus was accused of fomenting a social revolution. Arguing to the jury in defense of his client, Taney said that slavery was "a blot on our national character, and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away." *See* Timothy Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond – and before *Dred Scott*," *The Journal of American History* (June 2010). *See also* Michael Schoeppner, "Status across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision," *The Journal of American History* (Jan 2013).

The leading treatise on the *Dred Scott* decision is Don E. Fehrenbacher's *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford University Press, 1978). *See also* David Konig, Paul Finkelman & Christopher Bracey, *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law* (Ohio Press, 2010); Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Bedford Books, 1997).