1953

Dred Scott's Case--Reconsidered

Wallace Mendelson

DRED SCOTT'S CASE — RECONSIDERED

WALLACE MENDELSON*

The *Dred Scott* decision[1] is not, as our folklore would have it, the classically worst, or even a typical, assertion of judicial supremacy. To be sure, earlier abolitionist-inspired interpretations have given way to a rather general acceptance of it as a "sincere" judicial effort to solve a nation-wrecking problem.[2] But even this latter view obscures the fact that the most criticized decision in American jurisprudence was undertaken only upon explicit invitation of Congress and did no more than give constitutional sanction to a position held long and persistently by most contemporary voters. This view —the present thesis—obviates an otherwise tantalizing paradox: that Chief Justice Taney should suddenly in 1857 abandon that Jacksonian respect for popular sovereignty and the democratic processes which for twenty years had been the hallmark of his philosophy upon the bench.[3]

Acquisition of the Mexican and Oregon territories during the administration of President Polk (1845-1849) revived the old problem of the extension of slavery—the problem which in the case of the Louisiana Purchase had been settled by the Missouri Compromise of 1820. After full discussion, President Polk and the members of his Cabinet unanimously agreed tha tthe principle of the old compromise should be adapted to current needs.[4] That is, the 36° 30′ parallel should be recognized as the boundary between freedom and slavery from the Louisiana territory to the Pacific. But that simple solution was no longer acceptable in the North. The Wilmot Proviso, supported by resolutions of all but one of the Northern state legislatures, would have prohibited by act of Congress the introduction of slavery into any of the newly acquired domain.[5] After its adoption by the House of Representatives in February, 1847, Southern leaders abandoned their willingness to compromise on the old Missouri basis and took the line that Con-

*Professor of Political Science, University of Tennessee.

1. Scott v. Sandford, 19 How. 393 (U.S. 1857), holding the Missouri Compromise unconstitutional on the ground, *inter alia,* that the Fifth Amendment prohibited Congress from interfering with slavery in the territories.

2. See, for example, Charles Evans Hughes, *Roger Brooke Taney,* 17 A. B. A. J. 785, 787 (1931).

3. See Mendelson, *Chief Justice Taney—Jacksonian Judge,* 12 U. of Pitt. L. Rev. 381 (1951).

4. The Diary of James K. Polk, entries for Jan. 5, 16, 1847 (Quaife ed. 1910).

5. 1 Morrison and Commager, The Growth of the American Republic 598 (1942).

gress had no power to proscribe slavery anywhere.[6] Thus in typical American fashion a vexing problem of social policy was translated into constitutional jargon and became a "legal question." Supporters of Wilmot's Proviso, of course, assumed Congressional power to outlaw slavery in the territories, while the Northern ultras held that the Constitution itself prohibited slavery in the territories. Southerners found constitutional denial of national power to interfere with their peculiar proprietary interests.[7] Upon the issue so joined Congress was unable to make a decision, for while the Northern view prevailed in the House, it was blocked in the Senate. Accordingly settlers in the new territory had to do without government because Congress could not decide whether they must do without slaves.[8]

This impasse is the background of the attempted Clayton Compromise[9] of mid-1848 whereby Congress in organizing the California and New Mexico territories was to remain silent on the subject of slavery, leaving its introduction or prohibition to rest

> ". . . on the Constitution, as the same should be expounded by the [territorial] judges, with a right to appeal to the Supreme Court of the United States."[10]

In this manner, according to Senator Clayton of Maine, Congress would "avoid the decision of this distracting question, leaving it to be settled by the silent operation of the Constitution itself. . . ."[11] After elaborate debate the Clayton Compromise was passed in the Senate and defeated in the House (the latter still intent upon the Wilmot Proviso). But the essence of Clayton's proposal lived on to be incorporated in the great Compromise of 1850[12] and the Kansas-Nebraska Act of 1854[13] and to reach fruition in the *Dred Scott* decision.

In January, 1850, Henry Clay of Kentucky introduced in the Senate the famous resolutions which were the foundation of the Compromise of 1850. His second resolution, recognizing the in-

6. Id. at 599-600; McLaughlin, A Constitutional History of the United States 512-513 (1936).
7. For a review of the opposing constitutional theories, see *id.* at 514 *et seq.*
8. 1 Morrison and Commager, *op. cit. supra* note 5, at 599.
9. Cong. Globe, 30th Cong., 1st Sess. 950, 1002 (1848).
10. *Ibid.*
11. *Ibid.*
12. Embodied in four separate measures as follows: The Texas and New Mexico Act, 9 Stat. 446 (1850); The Utah Act, 9 Stat. 453 (1850); The Fugitive Slave Act, 9 Stat. 462 (1850); Act Abolishing the Slave Trade in the District of Columbia, 9 Stat. 467 (1850).
13. 10 Stat. 277 (1854).

compatibility of the Northern and Southern views as to the power of Congress, proposed that

> ". . . it is inexpedient for Congress to provide by law either for its [slavery's] introduction into, or exclusion from, any part of the said territory; and that appropriate territorial governments ought to be established by Congress in all of the said territory . . . without the adoption of any restriction or condition on the subject of slavery."[14]

This was the doctrine of Congressioal non-intervention with slavery in the territories which Lewis Cass, presidential candidate of the Democratic Party, had sponsored in his famous Nicholson Letter[15] of December, 1847—and which Stephen Douglas was later to adopt and make famous under the banner of "popular [read territorial] sovereignty." But it was perfectly clear that Congressional silence would leave uncertain the legal status of slavery in the new domain. To obviate this, amendments to Clay's non-intervention provisions (in the bills embodying his resolutions) were offered by both Northern and Southern ultras to embody their respective constitutional views. Thus, for example, Senator Baldwin of Connecticut, offering one such amendment, observed:

> "I agree entirely in the sentiment which was advanced the other day by the Senator from Louisiana [Mr. Soule] that we ought not to pass a law which shall be understood in a different sense by those who cooperate in its passage. . . . The people demand a law, a rule for their conduct clear and intelligible. They do not ask us to give them a Delphic response, which may be interpreted in one way or another, according to the wishes of every inquirer. . . . The object of my amendment is simply to declare what we mean."[16]

But Senator Clay knew the futility of such "clarifying" amendments. It was in exactly those rapids that settlement of the territorial problem had been floundering since 1846. Congressional avoidance of the disputed issue and reference of it, as a constitutional question, to the judiciary, was precisely the essence of his compromise. As Clay put it, in answer to Baldwin:

> "The bill leaves in full force the paramount authority of the Constitution. . . . Now what ought to be done more satisfactory to both sides of the question, to the free States and to the slaveholding States, than to apply the principle of [Congressional] non-intervention to the state of the law in New Mexico, and to

14. Sen. J., 31st Cong., 1st Sess. 118 (1850); Cong. Globe, 31st Cong., 1st Sess. 245 (1850).
15. McLaughlin, *op. cit. supra* note 6, at 512-513.
16. Cong. Globe, 31st Cong., 1st Sess. 1146 (1850).

leave the question of slavery or no slavery to be decided by the only competent authority that can definitely settle it forever, the authority of the Supreme Court of the United States.

"The honorable Senator from Connecticut [Mr. Baldwin] on yesterday wanted the law settled. Suppe, then, we were to make a declaration of the law pleasing to the learned Senator . . . how if we were to attempt to settle this question could it be settled? In the first place we can not settle it, because of the great diversity of opinion which exists; and yet the Senator will ask those who differ with him in opinion to surrender their opinion, and, after they have made this sacrifice of opinion, can they declare what the law is? When the question comes up before the Supreme Court of the United States, that tribunal will declare what the law is."[17]

On this basis the slavery extension aspects of the Compromise of 1850 were settled. Congress simply delegated to the territorial legislatures of Utah and New Mexico all power over slavery which Congress itself might have, the extent of that power being the subject of vigorous dispute:

". . . the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States [with certain exceptions not here relevant]."[18]

Then to facilitate settlement of the constitutional question, special liberalizing provisions were made in regard to federal court jurisdiction in slavery litigation. Thus after providing that "writs of error and appeals [to the Supreme Court of the United States] from the final decisions of said [territorial] supreme court shall be allowed, and may be taken in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or amount in controversy . . . shall exceed one thousand dollars . . . ," special exception was made "in all cases involving title to slaves" where it was provided, "the said writs of error or appeals shall be allowed . . . without regard to the value of the matter, property, or title in controversy. . . ." Similarly "a writ of error or appeal shall be allowed to the Supreme Court of the United States . . . upon any writ of habeas corpus involving the question of personal freedom. . . ."[19]

17. *Id.* at 1155. See the following for typical expressions of willingness to accept judicial settlement of the slavery extension problem: Yulee of Florida, Cong. Globe, 31st Cong., 1st Sess., appendix, 95-96 (1850); Phelps of Vermont, *id.* at 95; Clay of Kentucky, *id.* at 916; Davis of Mississippi, *id.* at 154; Turney of Tennessee, *id.* at 297.

18. The Texas and New Mexico Act, 9 Stat. 446 (1850); The Utah Act, 9 Stat. 453 (1850).

19. *Ibid.*

These provisions are a verbatim copy of parts of the Clayton Compromise which had been added to Senator Clayton's original bill after Senators Hamlin and Corwin had raised the point that the normal federal jurisdictional amount of one thousand dollars would prevent effective operation of Clayton's proposal to shunt the slavery extension issue over to the courts.[20] It is, of course, significant that both provisions liberalizing the right of appeal to the Supreme Court (that relating to habeas corpus as well as the eliminating the "jurisdictional amount") were new in federal law. Senator Corwin's comment on the scheme is apposite—Congress had enacted a law suit, not a law.[21]

This interpretation was adopted by Senator Stephen A. Douglas' Committee on Territories which reported out on January 4, 1854, the Dodge Bill for the organization of the Nebraska Territory:

> "In the judgment of your committee, those measures [the acts constituting the Compromise of 1850] were intended to have a far more comprehensive and enduring effect than the mere adjustment of the difficulties arising out of the recent acquisition of Mexican territory. They were designed to establish certain great principles, which would . . . in all time to come, avoid the perils of a similar agitation, by withdrawing the question of slavery from the halls of Congress and the political arena, and committing it to the arbitrament of those who were immediately interested in, and alone responsible for its consequences. [There follows recital of some of the arguments as to the constitutionality of slavery in the territories and of the power of Congress with respect to slavery.] Your committee do not feel themselves called upon to enter into the discussion of these controverted questions. They involve the same grave issues which produced the agitation, the sectional strife, and the fearful struggle of 1850. As Congress deemed it wise and prudent to refrain from deciding the matters in controversy then . . . by any act declartory of the true intent of the Constitution . . . so your committee are not now prepared to recommend a departure from the course pursued on that memorable occasion . . . by any act declaratory of the meaning of the Constitution in respect to the legal points in dispute . . . it it apparent that the compromise measures of 1850 affirm and rest upon the following propositions—First: That all questions pertaining to slavery in the territories, and in the new States to be formed therefrom, are to be left to the decision of the people residing therein. . . .

20. Cong. Globe, 30th Cong., 1st Sess. 988, 989, 1002-1005 (1848). Senator Johnson of Maryland introduced the amendment (p. 1002). It will be noted that his amendment is erroneously reported to read "title to lands" instead of "title to slaves." The matter is corrected in sections 24 and 31 of the Bill as passed by the Senate (pp. 1004, 1005).

21. McLaughlin, *op. cit. supra* note 6, at 514.

"Second: That all cases involving title to slaves, and "questions of personal freedom" are referred to the adjudication of the local tribunals, with the right of appeal to the Supreme Court of the United States."[22]

The resulting legislation was the fateful Kansas-Nebraska Act of 1854.[23] In course of the Congressional debates on this Act, the familiar arguments were made in favor of the familiar "clarifying" amendments. This time we know on the authority of Senator Judah K. Benjamin of Louisiana, the problem was settled in caucus where:

"Morning after morning we met for the purpose of coming to some understanding upon that very point [slavery in the territories]; and it was finally understood by all, agreed to by all, made the basis of compromise by all the supporters of that bill, that the territories should be organized with a delegation by Congress of all the power of Congress in the Territories, and that the extent of the power of Congress should be determined by the Courts."[24]

In the course of debate on the Kansas-Nebraska Bill, Senator Brown gives what Allen Johnson calls the Southern viewpoint:

"If I thought that, in voting for the bill as it now stands, I was conceding the right of the people in the territory, during their territorial existence, to exclude slavery, I would withhold my vote. . . . It [the bill] leaves the question where I am quite willing it should be left—to the ultimate decision of the courts. It is purely a judicial question, and if Congress well refrain from intimating an opinion, I am willing that the Supreme Court shall decide it. But, Sir, I have too often seen that Court sustaining the intentions of Congress, to risk a decision in my favor, after Congress has decided against me. The alien and sedition laws, the blank law, the tariff law have all been decided constitutional. Any why? Not, in my opinion, because they were so, but because the Supreme Court, as a coordinate Department of Government, was disinclined to clash with the other Departments. If this question is allowed to go before the Supreme Court, free from the influence of a Congressional pre-judgment, I will abide the result though it be against me."[25]

22. Sen. Rep. No. 15, 33d Cong., 1st Sess. (1854).
23. 10 Stat. 277 (1854).
24. Cong. Globe, 36th Cong., 1st Sess. 1966 (1860). Senator Benjamin said the same thing in greater detail prior to the *Dred Scott* decision. Cong. Globe, 34th Cong., 1st Sess. 1093 (1856). For corroboration by Douglas and Hunter, see Cong. Globe, 35th Cong., 2d Sess. 1258 (1859); 33d Cong., 1st Sess., appendix, 224 (1854). See also letter of Congressman A. H. Stephens, May 9, 1860, in Cong. Globe, 36th Cong., 1st Sess., appendix, 315-316 (1860). As to the "clarifying" amendments see, for example, the efforts of Senator Chase, Cong. Globe, 33d Cong., 1st Sess. 421-423 (1854).
25. Cong. Globe, 33d Cong., 1st Sess., appendix, 232 (1854); Johnson, Stephen A. Douglas 247 (1908).

These remarks by Senator Brown may not be crucial in themselves, though Brown was one of the congressional leaders of his day. But they become highly significant through endorsement by the Chairman of the Senate Committee on the Judiciary, Mr. Butler, who joined in and then supplemented Brown's remarks as follows:

> "I am willing . . . to trust judges upon the bench who are sworn to administer the law and observe the Constitution. I am therefore perfectly willing to trust this bill to fortune under the impulse of justice."[26]

Accordingly what the Douglas Committee on Territories called the "great principles" of the Compromise of 1850 were embodied in the Kansas-Nebraska Act. After declaring the Missouri Compromise "inoperative and void" the measure in Section 14 provided that:

> "[It is] the true intent and meaning of this act not to legislate slavery into any territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, *subject only to the Constitution of the United States*. . . . [italics added]."[27]

The second great principle of the 1850 settlement relating to appeals to the Supreme Court on slavery questions was reproduced verbatim in the Kansas-Nebraska Act's Section 9.

Two years later, in July, 1856, only eight months prior to the *Dred Scott* decision, Senator Lyman Trumbull of Illinois, in the course of a debate on the admission of Kansas as a state, offered what was probably the last "clarifying" amendment. Trumbull wanted the above quoted "true intent and meaning" clause of the Kansas-Nebraska Act glossed with the assertion that the latter

> ". . . was intended to, and does confer, upon, or leave to the people of the Territory of Kansas full power at any time, through its Territorial Legislature, to exclude slavery from said Territory, or to recognize and regulate it therein."[28]

This, of course, was simply the Northern view, repudiated by the South, that Congress and hence by derivation the Territories, had power under the Constitution to regulate territorial slavery.

Senator Cass of Michigan answered Trumbull in the following terms:

> "It is said there is a difference of construction between the North and the South on the Kansas-Nebraska Act. . . . The difference does not result from the words of that bill, but from the nature

26. *Id.* at 240.
27. 10 Stat. 227 (1854).
28. Cong. Globe, 34th Cong., 1st Sess., appendix, 796 (1856).

> of things. The North and the South construe the Constitution differently. . . . The different constructions of . . . [the Kansas-Nebraska Act] result from no equivocations of it, but from the fact that here is an important constitutional question undetermined by the supreme judicial authority; and in the meantime individuals in different sections of the Union put their own constructions on it. . . . There is no power which the Senator from Illinois can use—no words which he can put into an Act of Congress, that will remove this constitutional doubt until it is finally settled by the proper tribunal."[29]

Senator Douglas whose genius got the Compromise of 1850 and the Kansas-Nebraska Act through Congress, suspecting that his colleague from Illinois was attempting to get commitments that would destroy Douglas at home, answered Trumbull as follows:

> "My opinion [on slavery in the territories] . . . has been well known in the Senate for years. . . . I told them [in the Kansas-Nebraska debates] it was a judicial question. . . . My answer then was and now is, that if the Constitution carries slavery there [into the territories] let it go . . . but, if the Constitution does not carry it there, no power but the people can carry it there. . . . I stated I would not discuss this legal question, for by the bill we referred it to the Courts."[30]

Thereupon the Trumbull amendment was voted down.

Was reference of the slavery extension issue to the judiciary understood and acceptable outside of Congress? One month after the Trumbull amendment debate, and some seven months before the *Dred Scott* decision, which he was to condemn so bitterly, Abraham Lincoln said in a public speech at Galena, Illinois:

> "Do you [Democrats] say that such restrictions of slavery [in the territories] would be unconstitutional and that some of the States would not submit to its enforcement? I grant you that an unconstitutional act is not a law; but I do not ask, and will not take your construction of the Constitution. The Supreme Court of the United States is the tribunal to decide such questions, and we [Republicans] will submit to its decisions. . . ."[31]

There had been some doubt as to whether President Pierce would sign the Kansas-Nebraska Act for he had been suspected of free-soilism. To resolve any such doubts Secretary of War Jefferson Davis arranged a conference between the President and a number of leading Senators and Congressmen where administration support

29. *Id.* at 797-798.

30. *Id.* at 797.

31. Speech at Galena, Illinois, July 26, 1856, II Collected Works of Abraham Lincoln 354-355 (Basler ed. 1953).

for the measure was secured.[32] Indeed as it turned out the President personally believed the Missouri Compromise unconstitutional, but rather than repeal by the Kansas-Nebraska Act he favored a "guarantee of rights of persons and property in accordance with the Constitution, and would leave it to the Supreme Court to decide what those rights were."[33] In his last message to Congress on December 22, 1856, President Pierce in effect endorsed the *Dred Scott* decision in advance:

> "All that the repeal [of the Missouri Compromise by the Kansas-Nebraska Act] did was to relieve the statute book of an objectionable enactment, unconstitutional in effect and injurious in terms to a large portion of the states."[34]

Pierce had nothing but the highest praise for the Kansas-Nebraska Act. In a historical review of the slavery controversy he condemned the Missouri settlement as conducive to sectional strife and attributed Buchanan's victory in the presidential election of the preceeding month to the desire of the people to have a termination of that difficulty.[35]

In his inaugural address two days before the *Dred Scott* decision President-elect Buchanan, referring to the problem of slavery in the territories, said:

> "[I]t is a judicial question, which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be speedily and finally settled. . . . The whole Territorial question being thus settled upon the principle of popular sovereignty—a principle as ancient as free government itself—everything of a practical nature has been decided."[36]

Clearly the treatment of slavery in the territories as a judicial question by important political figures on such occasions indicates a rather general public acceptance of that mode of settlement. Similarly in his first public mention of the matter after the *Dred Scott* decision Douglas explained that by the Kansas-Nebraska Act Congressional

32. Simms, A Decade of Sectional Controversy 59-60 (1942).
33. *Ibid.*
34. 5 Richardson, *A Compilation of the Messages and Papers of the Presidents* 403 (1903).
35. *Ibid.*
36. *Id.* at 431. These remarks are famous in connection with evidence now available which indicates that Buchanan had advance notice of what the *Dred Scott* decision was to be. On this aspect of the matter see Swisher, Roger B. Taney, c. 24 (1935). Whether he had advance notice or not, the thoughts expressed in that public utterance make it quite plain that on the eve of the *Dred Scott* decision there was nothing unusual in the proposition that slavery in the territories was a constitutional question for the judiciary to settle.

power over slavery in the territories had been referred to the Supreme Court.[37] The latter having spoken, it was the duty of all good citizens to accept the decision. Indeed, Douglas praised the Court for having passed over mere technicalities and turned its decision upon the true merits of the issue.[38]

We must now go back to trace the history of Dred Scott's litigation.[39] Having lost a decision in the Supreme Court of Missouri,[40] Scott in late 1853 began a new action in trespass in the federal court at St. Louis against a resident of New York who claimed to be his master. Admitting that he had been a slave, the plaintiff claimed that when he was taken into territory made free by the Missouri Compromise he became free; that he had since acquired Missouri citizenship and was thus properly in a federal court on diversity grounds. Scott won on a plea in abatement which questioned his citizenship, but lost on the merits.[41] The case was argued on appeal in the Supreme Court of the United States in February, 1856.[42] At that time Mr. Greeley's New York Tribune reported that the case would probably be decided against Scott on "the pretext" that his voluntary return from free to slave territory (*i.e.*, the state of Missouri) restored his status as a slave; that the Supreme Court would thus "evade" the real issue (*i.e.*, the constitutionality of the Missouri Compromise), but that "an effort will be made to get a positive decree of some sort. . . ."[43] In April Justice Curtis wrote to a friend that the Court would "not decide the question of the Missouri Compromise line—a majority of the

37. Speech to the Grand Jury, Springfield, Illinois, June 12, 1857. See Milton, The Eve of Conflict 260 (1934). It will be noted, of course, that it was Douglas who won the Lincoln-Douglas debates, in the sense that it was he who won the prize at stake, a seat in the United States Senate. In that campaign the meaning and implications of the *Dred Scott* case were thoroughly canvassed by its leading critic and its leading apologist.

Of course the *Dred Scott* case did not arrive at the Supreme Court via the procedural (*i.e.*, jurisdiction-liberalizing) route provided in either the Compromise of 1850 or the Kansas-Nebraska Act, but, as Douglas recognized in the Grand Jury Speech, it did dispose of the substantive issue contemplated by that legislation. Lincoln's recognition of the latter point is implicit in his "House-divided" speech (Springfield, Illinois, June 17, 1858) where he sees a conspiracy between "Stephen [Douglas], Franklin [Pierce], Roger [Taney], and James [Buchanan]"—the main elements of their "plot" being the language of the Kansas-Nebraska Act, the *Dred Scott* decision and the *a priori* endorsements thereof by both Presidents.

38. *Id.* at 260.

39. See 2 Beveridge, Abraham Lincoln c. 7 (1928); Swisher, *op. cit. supra* note 36, c. 24; and 3 Warren, The Supreme Court in United States History c. 26, 27 (1923).

40. Scott v. Emerson, 15 Mo. 413 (1852).

41. Dred Scott Collection, Missouri Historical Society, St. Louis, Mo.

42. 3 Warren, *op. cit. supra* note 39, at 5.

43. New York Tribune, Feb. 28, 1856.

judges being of opinion that it is not necessary to do so. (This is confidential)."[44] On May 12 on the motion of Justice Nelson the case was put down for reargument. Mr. Greeley thereupon assailed the "black gowns" as "artful dodgers. The minority were prepared to meet the issue boldly and distinctly; but the controlling members were not quite ready for such an encounter of authority as could be produced; or perhaps not inclined to open the opportunity for a demolition of the fraudulent pretenses that have been set up in Congress on this question."[45]

Greeley, of course, was fishing in troubled waters and wanted at the very least what he had every reason to believe would be a strongly, pro-Republican opinion from Justice McLean for use in the presidential campaign of 1856. Justice McLean's ambitions for the presidency are, and were at the time, well known. Foiled in his apparent design to make immediate political capital via the *Dred Scott* case, McLean wrote "a long and thoroughly political letter—the letter of a candidate,"[46] publicly indicating his views on the constitutionality of the Missouri Compromise.[47] "It was because of this statement of Justice McLean and of the eagerness and expectation of the Republican press and leaders that the Supreme Court would pass upon the Missouri Compromise in its decision in the *Dred Scott* case, that Lincoln had said in the Fremont campaign [the Galena speech, quoted above] that that tribunal was the one to settle such questions, that when it did so, the Republicans would abide by what the Court held to be the law and Lincoln had challenged the Democrats to do the same. If they would not, 'who are the disunionists, you or we?' "[48]

After the presidential campaign was safely out of the way the case was reargued in December, 1856. Two months later, on February 15, Justice Nelson was directed to write the Court's opinion ignoring the constitutional issue entirely and turning the decision on the ground that regardless of Scott's status when he was in free territory he was, according to Missouri law, a slave when he voluntarily returned to Missouri and therefore could not come into a federal court on diversity of citizenship grounds.[49] But within a few days it became clear that Justices McLean and Curtis intended to give extended dissenting opinions emphasizing

44. Curtis, The Life and Writings of Benjamin Robbins Curtis, LL.D. 180 (1879).
45. New York Tribune, May 15, 1856.
46. 2 Beveridge, *op. cit. supra* note 39, at 461.
47. New York Tribune, June 16, 1856.
48. 2 Beveridge, *op. cit. supra* note 39, at 461-462.
49. 3 Warren, *op. cit. supra* note 39, at 15.

the constitutionality of the Missouri Compromise.[50] According to Justice Catron, this "forced" a majority of his brethren to take up that issue, and upon the motion of Justice Wayne the Chief Justice undertook to write his fateful opinion for the Court.[51] Something of Justice Wayne's motives and the motives of those who concurred in his motion, is seen in his observation that "[t]he case involves . . . constitutional principles of the highest importance, about which there had become such a difference of opinion that the peace and harmony of the country required the settlement of them by judicial decision."[52] As ex-Justice Campbell and Mr. Justice Nelson put it almost fifteen years later "[t]he apprehension had been expressed by others of the Court [as well as Justice Wayne], that the Court would not fulfill public expectation or discharge its duties by maintaining silence upon these [constitutional] questions. . . ."[53]

In the presidential campaign of 1860 Lincoln and Douglas held the positions they had taken in their famous Illinois debates in 1858—the one bitterly rejecting the *Dred Scott* decision, the other supporting it. Breckinridge, nominee of the Southern wing of the Democratic Party, also endorsing the famous decision, demanded its implementation by a Congressional "slave code" for the territories.[54] This was the South's answer to the Douglas Freeport Doctrine. Clay and Douglas had held the nation and the Democratic Party together by a compromise that removed the most vexing problem of the day from the political to the judicial arena. This entailed an understanding that, win or lose, each claimant would accept the judicial settlement when it should finally come. But the North proved unwilling to do so. The Republicans, notwithstanding Lincoln's Galena pledge, repudiated the *Dred Scott* decision outright.[55] The Northern Democrats, following the "little giant," attempted escape by a legal quibble—the *Dred Scott* case, they held, ruled only upon the question of Congressional power over slavery. Their platform pledged them to await and accept a Supreme Court decision on the power of the territorial legislatures.[56] Upon the

50. *Ibid.*
51. *Id.* at 16.
52. Scott v. Sandford, 19 How. 393, 454-455 (U.S. 1857).
53. Quoted in Tyler, Memoir of Roger Brooke Taney, LL.D. 384-385 (1872).
54. 1 Morrison and Commager, *op. cit. supra* note 5, at 636-638.
55. *Ibid.*
56. Douglas spells out the constitutional theories behind this position in *The Dividing Line Between Federal and Local Authority, Popular Sovereignty in the Territories*, 19 Harper's New Monthly Magazine 519 (1859). His main point is that the territorial legislative power is not derivative but independent of, and broader than, Congressional power in respect to slavery.

issues so joined Lincoln received 1,866,452 votes, as against a combined total of 2,226,738 for Douglas and Breckinridge. Lincoln's party obtained only a minority in each house of Congress.[57] This could hardly be called a popular repudiation of the principle of judicial settlement or indeed of the *Dred Scott* decision itself.

Shortly after the election, on the eve of Secession, Senator Crittinden, Clay's successor in the Senate as fate would have it, proposed a settlement which would have written an extended Missouri Compromise into the Constitution. He could not even get it through a Senate Committee![58] That approach to the slavery problem had not been politically feasible since the impasse of 1846-1850. Resort to war between the states followed not, as some would have it, because political settlement had been foreclosed by judicial action,[59] but more likely because the issues cut too deeply to be solved either by courts or legislatures. The real misfortune of the *Dred Scott* decision was that, duly distorted, it served as a powerful weapon for the Abolitionists—always a small, fianatical minority. The Court's fault, if it may be so described, lay in accepting the buck which Congress and the statesmen had passed, and in failing to anticipate the partisan, political use which its efforts could be made to serve.

57. 1 Morrison and Commager, *op. cit. supra* note 5, at 637-639.
58. Hicks, A Short History of American Democracy 363 (1943).
59. See, for example, Jackson, The Struggle for Judicial Supremacy 327 (1941).