The Riddle of Chief Justice Taney in the Dred Scott Decision

By Isabel Paterson

NINETY years have elapsed since the Supreme Court of the United States disposed of the appeal on the case of Scott vs. Sanford, by a pronouncement known ever since as the Dred Scott decision. To be exact, the date was March 6, 1857, two days after the inaugural of James Buchanan as president, a sequence by no means accidental. The platform approved of the people by Buchanan's election had declared for the preservation of the Union under the Constitution as the "paramount issue," and to that end promised "non-interference by Congress with slavery in state and territory or in the District of Columbia." The Dred Scott case might have been adjudged months earlier, but moderate men considered the postponement wise, to avoid making it a campaign issue.

It was, indeed, eight years since the plea of the Negro Dred Scott had first been entered in any court. Briefly, the case was this: Dred Scott was born in slavery in Virginia, sold as a slave in Missouri, and taken thence by his new owner to Illinois (a free state), and subsequently to Fort Snelling in the Northwest Territories. Later Dred Scott returned to Missouri with his master. Years afterward, he brought suit in St. Louis, in the Missouri state courts, for his liberty, claiming that his residence in Illinois had freed him by virtue of the state constitution; and further, that his residence in Wisconsin Territory gave him freedom by virtue of the Missouri Compromise, which was in effect during his sojourn, though since abrogated.

The legal shifts and changes during those eight years would be tedious to recite, and are hard to follow except by a lawyer. One assumes that a lawyer would thread the maze with facility, though I have been asked by a well known "liberal" member of the bar, in a candid moment: "What *was* the Dred Scott decision?" He really did not know; yet he had just referred to it as a symbol or slogan. It is a classic in that line.

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Perhaps if the celebrated case were not thus obscure to the average man, the phrase would not serve so well. Stripped of the sustaining arguments, the actual decision was sadly lacking in dramatic quality. It was simply that the Court had no jurisdiction.

So tame a conclusion hardly has the ring of battle. But the Dred Scott decision certainly was a subject of embittered debate during Buchanan's administration, while the Civil War was brewing. Surely it had something to do with splitting the old political parties and throwing the next election to the candidate of the new Republican party, in which the abolitionist element was influential.

This is the more curious in that the sentiment of the Court was the same as that expressed in the Democratic platform. Its earnest desire was to "settle a controversy" which had "long and seriously agitated the country." So said one justice (Catron); while another (Wayne) said a judicial decision was required to secure "harmony." It is an interesting sidelight that the first intention of the justices who concurred in the decision was to avoid mentioning either the Missouri Compromise or the contention of the defense which denied the right of a Negro to sue in the Federal courts. There were other technical grounds sufficient for dismissal on "no jurisdiction." But two of the justices, McLean and Curtis, meant to dissent and they let their colleagues know that they would bring both the dangerous topics into their judicial opinions. So Chief Justice Taney thought it incumbent upon him to expound his reasons fully and make it final.

He spent two weeks of arduous labor on the task. It is only fair to believe that his object was to compose disputation, not to inflame it.

Buchanan hoped for repose. Alexander H. Stephens, so soon to become vice president of the Confederacy, thought that a decision must end "the political question as to the power of the people in their Territorial legislatures. It will be, in effect, a *res adjudicata*." And Lincoln in the Fremont campaign, had said that the Supreme Court was the proper tribunal to settle such points, and that when it did so the Republicans would abide by what the Court held to be the law, challenging the Democrats to do the same. (These comments are taken from *Abraham Lincoln* by Albert J. Beveridge.) It seemed that everyone yearned for peace and quiet, and counted upon obtaining those happy conditions from a Supreme Court decision in the Dred Scott case. They got their decision; and the controversy burst forth with redoubled fury.

Naturally the first blast was directed against Chief Justice Taney,

especially for the arguments which he had designed to copper-rivet his conclusion. These were that the Missouri Compromise had never been valid (the import being that the Federal government had no constitutional power to forbid slavery in a territory); and further, that no Negro, of slave ancestry, could ever be a citizen of a state or of the nation. The "practical" politicians were most concerned over the status of the Territories. Abolitionists were most exasperated by the denial of any chance of citizenship to Negroes. So the Dred Scott decision became a raging campaign issue for the next four years.

The Civil War reversed Taney's judgment by force of arms; the Thirteenth and Fourteenth Amendments wiped out chattel slavery and recognized the citizenship of the ex-slaves; and Taney's reputation has been deemed *res adjudicata* for all time. He stands morally condemned as the man who misused the highest office of justice to condemn the Negro race to perpetual bondage in a nation dedicated to liberty. His decision was generally interpreted as saying that a Negro had no human rights and should never be free.

Now however wrong Taney was, that is not what he said; and there is a riddle in his position or intention which has never been cleared up.

It is not proposed here to evade the popular verdict by discovering in Taney qualities irrelevant to the charge. Whitewashing notorious historical characters or "humanizing" great men by their foibles may be an entertaining pastime, but it has no other value. Maybe Torquemada was kind to his mother; but it is quite beside the point on which he is rightly detested. It is equally immaterial to Washington's merits that in his later years he had false teeth. But the mystery about Taney concerns the very action which gave him his unenviable place in history. Taney himself would not unravel it while he was alive; yet most mysteriously, he expected posterity to vindicate him, as he wrote in a private letter: "I have an abiding confidence that this act of my judicial life will stand the test of time and the sober judgment of the country."

His previous career and personal life should have some significance in relation to his crucial decision; but they do not add up neatly either. I will take the main items from Beveridge: Roger Brooks Taney belonged to one of the old Catholic families of Maryland and was devout in his religion. He was well educated, well-read and widely informed, with a sound legal training. As a young man he became a leader of the Maryland bar; and during middle life he held cabinet positions

in the Federal government. In politics he was an adherent and adviser of Andrew Jackson; and Jackson as president appointed Taney to succeed John Marshall as Chief Justice in 1836. During the ensuing twenty years, he won the respect of the nation and the affection of his associates. Like Washington, he was said to hold a fiery temperament under firm control; his demeanor was calm, courteous, and considerate.

And he might have avoided the thankless Dred Scott case by retiring from the bench. He was eighty years of age, in feeble health, and saddened by the recent loss of his wife, and of a dearly loved daughter. Probably a sense of duty prompted him to make his great mistake.

Again, there is a basic contradiction in the several reasons he gave to support his ruling. In deciding that the Missouri Compromise had been unconstitutional, he seemed a "strict constructionist," determined to limit the Federal powers to the closest interpretation of the document. He may have been strong on "states' rights," though that is not quite the same thing. But when he said that the Constitution excluded Negroes from citizenship, he read into it a proviso neither expressed nor implied by its wording, and a power encroaching on the primary attribute of the states by virtue of which they had federated—the attribute of original citizenship.

Taney's contention was lamentably weak, being nothing but inference from antecedent and external circumstances. He cited the fact that slavery did exist in the Colonies; and said that Negroes were then regarded as "beings of an inferior order . . . so far inferior that they had no rights which a white man was bound to respect," and that "this opinion was at that time fixed and universal in civilized portions of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute." Hence (he said) the axiom of the Declaration of Independence, that all men are endowed by their Creator with inalienable rights, was not meant or understood when written as including Negroes. He said the Founders used "the ordinary language of the day," and could not have meant "all men" when they said "all men," because if they did, their conduct as slaveholders was inconsistent with their words.

Taney's position was absurd. The special habit of mind of the Founders was that they were great generalizers, abstract thinkers, reasoning logically from principles to ascertain how men should conduct their lives and frame their institutions, rather than following

precedent or confusing the local with the universal. To them, an ancient wrong was all the worse for its antiquity. Theirs was the Age of Reason in opposition to precedent.

As an educated man, Taney must have known that sentiment against slavery had risen noticeably throughout the "civilized world" during the eighteenth century, following Locke. Various writers, clerics and public men had expressed anti-slavery opinions; such an easy worldling as Horace Walpole took for granted that it was wrong and hoped it might pass away. Feeling against slavery had even got into romantic fiction. The only plea offered in extenuation was the trouble and cost of abolishing it. Above all, it is impossible to suppose that Taney was not acquainted with Mansfield's decision, the famous ruling that English law gave no warrant for slavery, so that a slave who set foot upon the soil of England thereby became free. Mansfield's decision was immediately recognized as a legal landmark; and it was made in 1772, before the American Revolution began or the Declaration of Independence was written. Incidentally, in Jefferson's first draft of the Declaration there was a phrase, deleted from the accepted text (perhaps by someone with a nicer sense of irony than Jefferson), stating as a grievance that England had imposed the slave trade on the Colonies! If no one thought slavery an injustice to the Negroes, it is hard to see why Jefferson should complain of it.

If Taney had read the Constitution with no end of his own in view, he could have seen in its expressed terms how the Founders reconciled *for the time being* and hoped to square *in the long run* the inconsistency of their professions and practice, their public and private affairs. Though the Constitution as adopted did not abolish slavery, neither did it admit the word "slave." The references which would include the slaves designate them as "persons held to service"—persons, not property—classifying them with apprentices and indentured servants. The one clause relating solely to slavery, but still not using the word, was that which allowed the power and indicated the intention of the Federal government to stop the importation of slaves after 1808—which was done when the time came.

After Federation, the expectation that general emancipation would proceed gradually and peacefully seemed in course of realization. One after another the Northern states became free states; ultimately Virginia was to come within one legislative vote of passing an emancipation act; and there was always some private manumission by slave owners to indicate that "all men" was understood to mean all men.

Is any confirmation of Taney's argument to be found in the informal opinions of the Founders and their contemporaries? On the whole, they run to the contrary; yet they do not supply any positive political conclusion either.

Washington wrote in a private letter that he didn't like to think of the subject of slavery, meaning that it was embarrassing and painful; but he had resolved never to buy or sell a slave. When he broke the resolution a few times in the matter of buying, he was apologetic. Finally, he emancipated his slaves in his will, which took effect.

Jefferson should yield more illumination, since he was more of a theorist than Washington. But Jefferson's various statements seem to leave confusion worse confounded. He called slavery despotism. He said it depraved the masters as much as the slaves; and "violated the liberties" which are "the gift of God." He acknowledged the very inconsistency which Taney said the Founders could not have committed. And Jefferson said flatly that "whatever their [the Negroes] degree of talent, it is no measure of their rights." That is plain enough, anyhow; and it refutes Taney authoritatively.

But Jefferson never made any direct move nor advocated any immediate measure for emancipation. His will provided for the emancipation of no more than five of his slaves (and he owned above two hundred). As he died insolvent, even those five would not have been freed but for the personal donation of his executors. His other slaves were sold to satisfy his debts. It was like Washington that his intention was carried out; and perhaps like Jefferson that his eloquent reflections on the injustice of slavery did his slaves no good.

Yet Jefferson's cogitations recurred repeatedly to one proposal—that was the deportation of the slaves. Certainly if there were no Negroes in the country there would be no problem of Negro slavery. It is not apparent when he adopted this notion; but he had it in mind as early as 1797, for he wrote then: "Whither shall the colored emigrants go? . . . If something is not done, and done soon, we shall be the murderers of our own children." He feared the possibility of a slave insurrection, such as had so lately occurred in the French West Indies. It didn't happen; but in 1817 he still advocated deportation. "I am ready and desirous to make any sacrifice which shall ensure their gradual but complete retirement from the States and . . . establish them elsewhere in freedom and safety. But I have not perceived the growth of this disposition in the rising generation, of which I once

had sanguine hopes . . . I leave it, therefore, to time, and not at all without hope that the day will come."

By 1824 he thought it impossible to "retire" all the Negroes. There were already a million and a half of them, and cost of the project looked prohibitive. Still he did not think that "getting rid of them is forever impossible." His modified suggestion was that from a date to be fixed, the "afterborn" (children of slave parents) should be free, and should be deported as they grew up. The older slave generation would then die out in time. Jefferson does not seem to have considered the feelings of the slave parents losing their children. He said: "I have never yet been able to conceive any other practicable plan." So it would seem that he took for granted that any plan to abolish slavery must require the deportation of the Negroes.

With all this, one cannot avoid the supposition that Taney was disingenuous in his argument. He was born in 1776; he was cradled in the Revolution. He was twenty-four before Washington died; Jefferson and John Adams survived until Taney was fifty. That is to say, he spent his formative years among men who made or remembered the Revolution and the intellectual atmosphere of the Revolutionary period. He must have been familiar with the scheme of deportation. As early as 1786 the English started a colony in Sierra Leone to take care of ex-slaves; and the American Colonization Society began the settlement of freed slaves in Liberia about 1821. What is more, John Marshall, Taney's predecessor as Chief Justice, was active in supporting the Liberian project.

As a young man, Taney himself inherited some slaves from his father, and he emancipated them promptly, excepting two or three aged ones who were past work, whom he supported for the rest of their lives. Obviously, then, Taney did not believe that Negroes as such should properly be slaves.

Nor did the Dred Scott decision say so. It simply left the power of emancipation in the States and with the slave owners individually, where it was before. Then what difference did it make?

The answer to that is the key to Taney's decision, the reading of the riddle. If the Dred Scott decision stood, what must be its general and permanent effect? The novel feature of it was the ruling that Negroes could never be citizens of the United States. But there is no inherent or inevitable reason why a non-citizen, an alien, may not be free, own property, and enjoy the equal protection of the law in his person. Large numbers of aliens have resided comfortably in the United

States for indefinite periods with no manifest disadvantage or harm. In what respect does the status of an alien *necessarily* differ from that of a citizen?

In just one thing: the alien cannot claim the right to remain in the country. *He must be always deportable.*

During the Revolutionary period there was an important idea, widely discussed and tentatively held, which Taney did not mention, though it bears on the subject of slavery. That was the secular theory of the "perfectibility" of man. One must presume that Taney never subscribed to it himself, for it is contrary to Catholic doctrine; but he could hardly have been ignorant of it. (The nineteenth century translated it into the term "progress.") Precisely by that notion the Founders could undertake their resolute fight for their own liberty, pledging "their lives, their property and their sacred honor," in spite of being the direct inheritors and owners of slaves. "Perfectibility" must involve a process in time. The founding of the United States was looked on to some extent as an experiment or test case to be tried out consciously.

Belonging to a genuinely scientific era, the Founders supposed it must be within the range of the mind to ascertain how political organization worked, and by that knowledge to form a government for free men. They had over two thousand years of history to draw on for data, if only of errors to be avoided. With that perspective, it was evident that between the civilization in which they had been bred, however imperfect it might be, and the primitive culture from which the African slaves had recently been taken by force, there was a gap of ages. If the theory of perfectibility were universally true, possibly the gap could be closed by education and environment; the time might be shortened, perhaps reduced to a few generations as against millennia; but at the very least some time was required. The change would not be effected instantaneously by emancipation. On the contrary, it seemed as if emancipation must confront the States in which the Negro population was numerous with an equally grave question, to which the supposed answer was obviously disastrous. Self government is not automatic; yet if the slaves were to become free men and citizens, must they not also have the vote? If not, why not?

Chief Justice Taney burked theories, facts, and sentiments to serve his hidden purpose. He transposed the conditions of two periods, both well within his knowledge.

The dangerous reaction, the intellectual defense of slavery on the

grounds of the innate inferiority of the Negro race, and the emergence of a minority of Southerners determined to maintain slavery permanently, was a rather late development as positive doctrine. It came after the first quarter of the nineteenth century. The modern "economic interpretation of history" tends to trace this reaction to nothing but zooming cotton profits. It is idle to debate that opinion, for if it were true it would be idle to debate any course of human action. By such interpretation the American Revolution could not have occurred —not with the pre-Revolutionary slave-owner interest so strong. George Washington could not have existed, and it would be impossible to invent him. Jefferson would be inconceivable.

On the other hand, the defensive explanation that the changed attitude of the South in regard to slavery was due mainly to resentment of Abolitionist denunciations is glaringly inadequate. It bears no proportion to the vital importance of the principles at stake, the critical danger of conflict, and the character and mental level of the best men of the South. Certainly it is not adequate to the material interests affected. Injured sensibilities are not negligible; but economic factors have physical weight and force. The error of the "economic interpreters" is that they do not see the most obvious fact about the material things they say are determinant, the laws governing physical weight and force—which is that the incidence depends upon direction, turning on pivot points; and the pivot points are established from an intellectual position, an idea. An erroneous position sets a wrong direction. The lack of any idea or direction spells disequilibrium, random motion, and destruction.

Then if the movement toward full freedom was slowed down, and the direction shifted, what was the error—whether a wrong idea or the absence of any idea to govern the physical elements?

Trying to get around this question instead of reasoning it through to a correct answer, Taney landed in the most perilous position imaginable. No doubt he was a more learned jurist than Jefferson, and that was his undoing. Believing, like Jefferson, that Negro slavery in the United States involved some peculiar danger that could be averted only by eliminating the Negroes, he saw also that they could be shipped out as "property" as long as they were slaves; but if they were freed first, how could they be compelled to go if they were not willing? Perhaps Jefferson had an uneasy apprehension of the difficulty when he said that "if a slave can have a country in the world, it must be any other in preference to that in which he is born

to live and labor for another." But the context implies that he was thinking only of the doubtful loyalty of the slaves. Taney obviously saw the real point. A citizen cannot be deported. *And an alien has no claim to vote.*

Such was his legal "solution." But in order to exclude the native-born American Negro from citizenship, he left no rational or natural basis of citizenship for anyone. If it is not a birthright, from what source can it be derived? Citizenship by naturalization is a grant validated by the native right in the grantor; it is impossible to confer what one has not got oneself. And without original or natural rights anywhere, constitutions and laws can be nothing but verbal statements of temporary dominant forces (as Justice Holmes was to say they were half a century later—"force is the ultima ratio"). If Taney meant that, he miscalculated the dominant forces. But he did not mean that; he said that the Court was not to be "a mere reflex of the popular opinion of the day." He thought he was taking the long view.

Here one can but conjecture: if he saw that he was undercutting the reality of natural rights, he may have persuaded himself that the special case could not arise again after the Negroes were cleared out.

The bribe of the righteous is usually a supposed good to be secured by a little twisting of principle, of course only this once. It is easy to understand why Taney did not explain his purpose, when the controversy was already so complex and heated. He thought he had insured an indefinite lease of time for deportation, during which it would make no difference if the Negroes were freed. He may even have believed that he had removed the substantial obstacle to emancipation.

For indeed the opposition to emancipation, the inertia or reaction of the South, most marked in the tendency to silence discussion, had increased commensurately with the movement of the whole country toward democracy, that is, toward unqualified suffrage and the assumption that the "will" of the majority is the equivalent of a moral principle. "The propertyless masses were beginning to enter politics. Between 1812 and 1821 six Western states entered the Union with constitutions providing for universal white manhood suffrage or a close approximation; and between 1810 and 1821 four of the older states substantially dropped property qualifications for voters . . . Between 1828 and 1848 the vote trebled, although the population did not quite double."*

*Richard Hofstadter, *The American Political Tradition.*

The great difficulty was the matter of the vote. And though the Dred Scott decision did not settle it, neither did the Civil War. It is not yet settled, nor ever will be until the function of the vote is understood—as it never has been.

In every branch of science, the major hindrance to the advance of knowledge is the human propensity to fix upon some superficial or accidental aspect of a combination and take it for an integral, causative element. The phrase "race problem" is a false fixation of this kind. There are no race problems; what are called such are strictly political problems. The two general questions are: what is the true function of government? and by what instrumentality can it be performed?

The axiom of the inalienable rights of the individual says that government rightly is only the agent of the citizen (as John Jay defined it); and its sole purpose is to preserve individual liberty. Thus hereditary monarchy and aristocracy, as well as sheer tyranny, are debarred. It must be a republic, "a government of laws and not of men," with the necessary offices filled by representatives.

Voting seems to be the indicated method of choosing representatives; and in an election, the majority must be decisive.

Yet there is no moral reason why the will of the majority should prevail; else slavery, for example, would be right if a majority imposed it on a minority. This is an extremely disconcerting truth which the Founders did not blink. The Constitution, a strict limitation of the scope of government, must restrict majority action closely. But a constitution cannot be foolproof. It can always be destroyed, and most easily by the voters. And it is destroyed, it is inoperative, whenever the *scope* of government is so extended that "anything goes" on a majority vote; it is no matter, then, if the hollow forms of the legislative, executive and judiciary remain.

The modern democratic presumption is that the vote itself is a "right." This is a confusion of terms. Rights are abstractions. But they are exercised concretely in action. Voting is an action intended to authorize some material effect, though it is physically a discontinuous action, a signal, not a direct impulsion. On the signal, physical forces are released or checked, not by the voter directly, but by other persons. If the material effect does occur, and is to be controlled, kept to its specific purpose, by the voter, he must be in some real physical relation to his agent. What is the real physical relation, if any, of the voter to government? It must be that of any principal to his agent.

He is the source of supply. The material effect is the levying and spending of tax money. The supplier is in control as long as it is possible for him to cut the supply, that is, to resist undue exactions or misapplications of the funds, and no longer. Further, action can be controlled only from a physical base of resistance. Land is the only base. The action of voting, giving the signal, is justified by the right of the voter only if he can control the result of his action. Nobody can have a right to perform any action when he cannot answer and pay for the consequences. He must be materially qualified to do so. The true qualification for the vote is real property; and the voter must qualify himself. If he does not choose to do so, his abstract right is unimpaired, since he is still free to qualify himself whenever he chooses. But when one man must pay taxes and another may vote to elect the officials who levy and spend them, the supplier has no control, and the function of the vote is nullified. Government then becomes an agency of extortion. Thenceforward the producer, the taxpayer, is under a disguised and partial system of slavery, forced "to live and labor for another."

By the democratic premise of unqualified "manhood" suffrage with its concomitant assumption of a "right" of majority over-riding the true primary right of the individual, the free white Southerners were logically boxed. In that position, it was more than likely that if they freed the slaves they must also in effect change places with them. They were naturally reluctant to take such a chance. To evade it, the desperate argued that a Negro was not quite a human being, a man. The ordinary man, at a loss for reasons, merely hoped for delay enough to last his time. Taney as a jurist fell back on expediency by a legal device which in his philosophy he may have deemed justified by human imperfection. But neither desperation, delay, nor device availed. They never do. Only a correct solution will answer a problem.

With the Civil War and Reconstruction, that which the Southerners feared exceedingly came upon them. If it be retorted that they got what they deserved, the whole modern world falls under the judgment, having incurred the same disaster by the same error. It was Taney's worst luck that he had a majority with him; and he has it to this day, in a world enslaved.