



## B.R. CURTIS & G.T. CURTIS

*Curtis E. Gannon & Ross E. Davies*

THIS IS OUR INTRODUCTION to the first installment of a larger planned *Green Bag* salute to Benjamin R. Curtis of Massachusetts. Why Curtis and why the salute? Curtis, because he is an interesting and important figure in nineteenth-century American law who has not received the scholarly attention he deserves.<sup>1</sup> The salute, because March 2007 is the 150th anniversary of one of Curtis's highest achievements and one of the lowest moments of the court on which he was serving in 1857: the Supreme Court's decision in the case of *Dred Scott v. Sandford*.<sup>2</sup> Curtis dissented, comprehensively and authoritatively.

Now seems like a good time to recall Curtis and his work.

The next article in this issue of the *Green Bag* – “The *Dred Scott* Case as Remembered by Justice Curtis's Family”<sup>3</sup> – is one chapter of the memoir of Justice Curtis written by his brother George Ticknor Curtis, edited by Justice Curtis's son (also named Benjamin R. Curtis), and published in 1879 as the first half a two-volume life-

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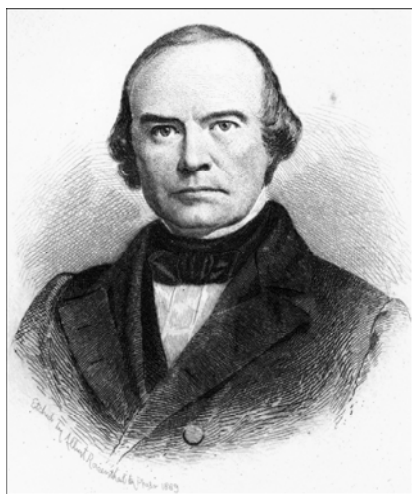
<sup>1</sup> A defect that Professor Stuart Streichler has begun to address. See STUART STREICHLER, *JUSTICE CURTIS IN THE CIVIL WAR: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM* (Virginia 2005).

<sup>2</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>3</sup> 10 GREEN BAG 2D 213 (2007).

and-letters biography of Justice Curtis. The version presented here has been gently abridged and illustrated by the *Green Bag*. Later this year the Green Bag Press will release a new edition of the entire biography.

In addition, the *Green Bag* is departing from its customary annual practice of issuing a bobblehead of a sitting Supreme Court Justice. Instead, this year we will be giving away Benjamin R. Curtis bobbleheads, once they arrive at Green Bag World Headquarters, and then while supplies last. For more information please see the inside back cover of this issue. It is, thus, a three-part salute – one article (now), one book (soon), one bobblehead (later).



*Benjamin Robbins Curtis* (1809-1874) served on the Supreme Court of the United States from 1851 to 1857. Other than the mere holding of that office, he has four major claims to fame: First, he wrote the majority opinion for the Supreme Court in *Cooley v. Board of Wardens*, in which he masterfully fabricated the forerunner of modern Commerce Clause jurisprudence.<sup>4</sup> Second, he wrote the best dis-

sent (and thus also the best opinion) in the *Dred Scott* case. Third, in 1862 he wrote a widely read pamphlet titled “Executive Power,” in which he took President Abraham Lincoln to task for two acts that exceeded, according to Curtis, the President’s power under the Constitution – the suspension of the writ of habeas corpus and the issuance of the Emancipation Proclamation.<sup>5</sup> Fourth, he was lead

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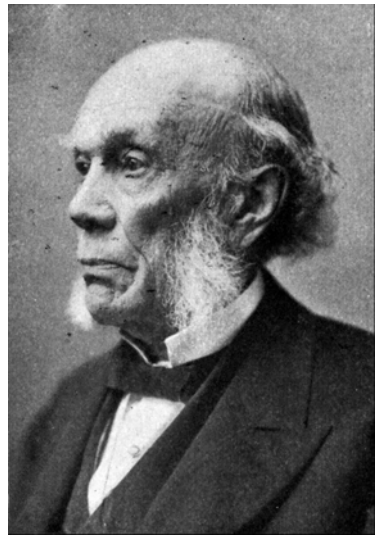
<sup>4</sup> 53 U.S. (12 How.) 852 (1852); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 230-34 (Chicago 1985).

<sup>5</sup> B.R. CURTIS, *EXECUTIVE POWER* (Little Brown & Co. 1862), reprinted at 4 *GREEN BAG* 2D 430 (2001).

counsel for the defense in the impeachment trial of President Andrew Johnson in 1868.<sup>6</sup>

This is not the whole story. There were plenty of other interesting but less important episodes in Curtis's life, including his work as a Massachusetts state legislator, his refusals to serve in the cabinet of President Johnson and to return to the Supreme Court as Chief Justice in 1873 after the death of Salmon P. Chase, his extraordinarily interesting and lucrative private practice (including dozens of cases in the Court on which he had previously sat), his work as a reporter of decisions and as a treatise-writer, and his relations with many of the leading figures in nineteenth-century American law, industry, and government. For all of this and a good deal more, you will have to read his biographies.<sup>7</sup>

George Ticknor Curtis (1812-1894) was Justice Curtis's younger brother and also a lawyer. Their careers overlapped on several important occasions. G.T. Curtis appeared in the Supreme Court on behalf of petitioner Dred Scott in the case for which his brother is most remembered. Several years earlier, in 1851, G.T. Curtis had been a federal commissioner in Boston when a fugitive slave named Thomas Sims was arrested. After several days of high-profile legal proceedings in-



volving Massachusetts Chief Justice Lemuel Shaw, a U.S. District Judge, and circuit-riding U.S. Supreme Court Justice Woodbury (as

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<sup>6</sup> 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* 18, 198, 377 (GPO 1868); see also STREICHLER, *supra* note 1, ch. 7.

<sup>7</sup> See generally BENJAMIN R. CURTIS, 1 & 2 *A MEMOIR OF BENJAMIN R. CURTIS*, LL.D. (Little, Brown 1879) (*Green Bag* edition, abridged by Curtis E. Gannon, forthcoming 2007); STREICHLER, *supra* note 1.

well as an appearance by B.R. Curtis, defending a U.S. Marshal), G.T. Curtis was obliged to issue a certificate of removal for Sims, pursuant to which 300 guards took Sims under cover of darkness to a ship that carried him back to Savannah.<sup>8</sup>

In addition to the memoir from which “The *Dred Scott* Case as Remembered by Justice Curtis’s Family” is excerpted, George Curtis wrote a treatise in 1854 (greatly expanded in 1889-1896) espousing a Whig view of constitutional history, the first real biography of Daniel Webster, and several other legal and biographical books.

G.T. Curtis’s account of *Dred Scott* still fascinates for multiple reasons. By way of preface, we mention a couple. First, it reprints a series of acrimonious letters between Chief Justice Roger Taney and Justice Curtis about the public release of the opinions in the case. Second, G.T. Curtis criticizes the majority’s decision in terms that seem strikingly modern. He thinks the majority’s decision was wrong on the merits, but rather than fault Taney for what has become “his well-known appeal to the doctrine of substantive due process,”<sup>9</sup> G.T. Curtis excoriates Taney for purporting to decide a merits question even after concluding that the Court lacked jurisdiction over the case. He also criticizes the Court for yielding to “the temptation ... to enter[] into the politics of the time,” because it is “too obvious” that the Justices were not “qualified to discover ... the means” to “promote the peace and harmony of the country.”<sup>10</sup> Thus, G.T. Curtis’s 1879 verdict on the most notorious Supreme Court case of the nineteenth century established the template for countless critics of opinions of the Warren, Burger, and Rehnquist Courts: “This was the office of statesmen and not of judges.”<sup>11</sup>



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<sup>8</sup> See STREICHLER, *supra* note 1, at 52-54.

<sup>9</sup> Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995, 2003 (1996).

<sup>10</sup> CURTIS, *supra* note 3, at 241, 224.

<sup>11</sup> *Id.* at 224.



# THE *DRED SCOTT* CASE

AS REMEMBERED BY JUSTICE CURTIS'S FAMILY

*An abridged and illustrated excerpt from*  
A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. (1879)

*George Ticknor Curtis*

THE TERM OF THE SUPREME COURT commencing in December, 1856, and ending in March, 1857, was the last that Judge Curtis attended as a member of that body.

As there has never been a full and accurate account given of the part taken in the Dred Scott case by Judge Curtis, as his action has sometimes been misunderstood, and as he expressed in his last illness a sense that some injustice had been done to him in connection with this case, which he expected those who were to come after him to repair, I think it proper to give a circumstantial account of the whole matter.

The course of a majority of the judges in this case of Dred Scott precipitated the action of causes which produced our civil war, and which would otherwise have lain dormant until the period of danger to the Union, arising out of the existence of slavery, had passed by.

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*This abridgement of Chapter 8 of the MEMOIR, done by the editors of the Green Bag, includes minor changes to paragraphing, capitalization, punctuation, and spelling. Omissions and additions have not been indicated, except in direct quotations of judicial opinions or rules.*

If, without such an excitement as was occasioned by what was claimed to have been the “decision” of the Supreme Court on the subject of slavery in the Territories, we could have gained ten years more in the growth of the North and in the peaceful development of the power of the Federal government within the just limits of the Constitution, Southern secession would never have been attempted.

For a period of nearly seventy years, the Supreme Court of the United States had been looked to as the final arbiter on constitutional questions, with a confidence such as has not been reposed, on so great a scale and upon such important subjects, in any other human tribunal in which the powers of a great government have been subjected to the forms of judicature – if indeed there has been any other tribunal of parallel functions known in history. Nobly had that confidence been earned, and well had it been deserved. It constituted one of the dearest treasures of this nation. Wise men felt that its loss would be as great a public calamity as war, pestilence, or famine.

That distrust, that first fatal loss of confidence in the high chamber of justice, now came to a large part of the people, because the belief that party spirit had taken possession of the court, even if it was erroneous, had too much to support it. This was the first time, on any subject affecting the welfare of the whole Union, that such a belief concerning the court had seriously taken hold of the public conviction in any part of the country; and this conviction sunk deeply into the minds of men who struggled hard to exclude it, and who were pained beyond expression that they could not reject it.

This was a consequence which the judges should have had the wisdom to foresee and to prevent. They should have taken the utmost care, by the formation of a majority concurring accurately upon the effect of every part of the record, to make a real decision – one that would be a judicial determination consistent in all its reasoning and consistent with the requirements of the case. If such a majority could not be formed – and it never was so formed that the constitutional question relating to slavery in the Territories could be legitimately reached by five or more out of the nine judges – the case should have been disposed of quite otherwise than as it was.

## The Dred Scott Case

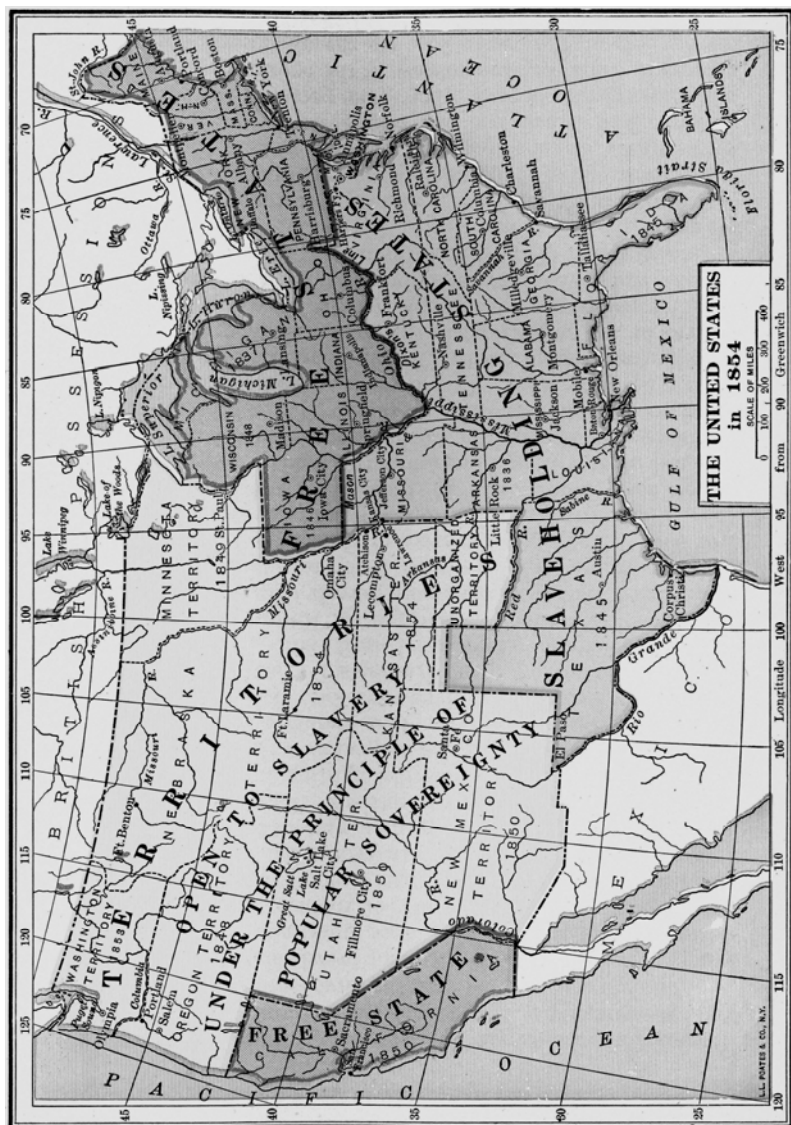
But an opinion written, read, and promulgated by the Chief Justice as the opinion of the court, followed by a separate opinion of each judge who concurred with him in the main result, but differing upon the grounds on which each thought himself entitled to act upon the constitutional question, left their declarations of opinion upon it in the category of *obiter dicta*, and left the general public to believe that there was something wrong in the whole internal history of the case. Thus a great misfortune befell the Supreme Court of the United States. A vast majority of the legal profession throughout the whole North, and some of the best legal minds in the South, alike rejected the supposed decision and were alike dissatisfied.



The facts in this case were these. Scott, a negro of African descent, brought an action in the Circuit Court of the United States for the District of Missouri, to establish the freedom of himself, his wife, and their two children. As was necessary, in order to obtain the jurisdiction of the court, he described himself, plaintiff in the case, as a citizen of the State of Missouri; and the defendant, the administrator of his reputed master, as a citizen of the State of New York. The defendant interposed a plea to the jurisdiction, alleging that the plaintiff was not a citizen of Missouri, because he was a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves. To this plea there was a general demurrer; and the defendant was ordered “to answer over,” which meant that he must plead to the merits of the action. The defendant then pleaded in bar of the action, that the plaintiff and his wife and children were negro slaves, the property of the defendant.

When the record reached the Supreme Court of the United States, it presented two principal questions:

First, whether Scott, by reason of his African descent from ancestors who were imported into this country and sold as slaves, independent of the question of his personal freedom, could not be a “citizen” of one of the States of this Union?



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Second, whether Scott, who was formerly a slave in the State of Missouri, having been taken by his master into a free State (Illinois), and thence into a part of the Louisiana purchase where slavery was prohibited by an act of Congress, and then brought back to the State of Missouri, was in legal effect emancipated by residence with his master in a free State or a free Territory, so that the condition of servitude would not reattach to him on his return into Missouri?

The first of these questions arose under the plea to the jurisdiction of the Circuit Court. If it should be decided by the Supreme Court that Scott was not a “citizen,” by reason of his African descent, the only thing that could be done would be to direct the Circuit Court to dismiss the case for want of jurisdiction, without looking to the questions raised by the plea to the merits. But if the Supreme Court should decide that he was a “citizen,” notwithstanding his African descent, then the questions raised by the plea to the merits, relating to his personal *status* as affected by his residence in a free Territory and his return to Missouri, would have to be acted upon. One of these questions involved the constitutional power of Congress to prohibit slavery in a part of the Louisiana Territory.

It will be apparent to the professional reader, that the judges who held that Scott, even if a freeman, could not be a “citizen” of Missouri, should, in judicial consistency, have expressed no opinions upon the questions arising on the merits of his action, but that they should, if they were a majority, have ordered the case to be dismissed for want of jurisdiction.

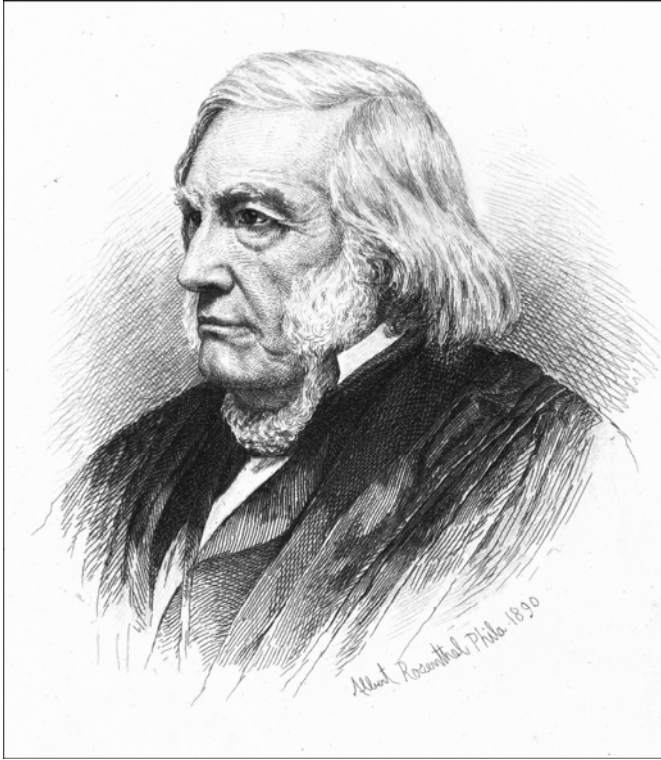
The court at this time consisted of Chief Justice Taney and Justices McLean, Wayne, Catron, Daniel, Nelson, Grier, Curtis, and Campbell. The Chief Justice and Justices Wayne, Catron, Daniel, and Campbell were from slave-holding States; Justices McLean, Nelson, Grier, and Curtis were from non-slave-holding States.



The case of Dred Scott was first argued at the December term, 1855. After consideration and comparison of views, it was determined by a majority of the judges that it was not necessary to

## George Ticknor Curtis

decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of the merits; that is to say, by deciding whether he was a freeman or a slave, upon the facts agreed upon by the parties under the plea in bar of the action.



Justice Samuel Nelson served on the Court from 1845 until 1872. He was the author of the original opinion of the Court in *Dred Scott*.

It was assigned to Judge Nelson to write the opinion of the court upon this view of the case; in which view, however, Judge McLean and Judge Curtis did not concur. Judge Nelson wrote an opinion, which was manifestly designed to stand and be delivered as the opinion of a majority of the bench. This opinion, after referring to the question of Scott's citizenship as arising on the plea to the jurisdiction, said: "In the view which we have taken of the case, it will not

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be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits.” The opinion then proceeded to a decision of the case upon the merits, upon the ground that the highest court in the State of Missouri had decided that a residence in the free State of Illinois had not changed the original condition of Scott; that this was a question of the law of Missouri, on which the Supreme Court of the United States should follow the law as it had been laid down by the highest tribunal of that State. The conclusion reached by this opinion was not, as was afterwards directed, that the case should be dismissed for want of jurisdiction, but that the judgment of the Circuit Court, which had held Scott to be still a slave, should be affirmed.

The astuteness with which this opinion avoided a decision of the question arising out of the residence of Scott in a Territory of the United States where slavery was prohibited by an act of Congress, and the remarkable subtlety of the reasoning that this too was a matter for the State court to decide – because the law of the Territory could have no extra-territorial force except such as the State of Missouri might extend to it under the comity of nations – show very distinctly that, after the first argument of the case in the Supreme Court, it was not deemed by a majority to be either necessary or prudent to express any opinion upon the constitutional power of Congress to prohibit slavery in the Territories of the United States. It was said in the opinion prepared by Judge Nelson, that “the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it.”<sup>1</sup>

If this view of the case had been adhered to, no judge would have placed himself on record as holding that a free negro could not be a citizen, and therefore could not obtain a standing in the Circuit

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<sup>1</sup> Of course, this question of the binding force of the State decision, upon a matter depending upon international comity, and the effect to be given in Missouri to the law of a Territory of the United States, was one on which a different view could be taken. How far Judge Curtis considered it as a mere question of local law, or as being a broader one of the rules of private international law, can be seen by any one who reads his dissenting opinion.

Court, and at the same time its holding, under a subsequent plea to the merits, that he had no claim to freedom because the Congress of the United States had no power to prohibit slavery in the national domain. All that Judge Curtis would have had to do would have been to show that he regarded the plea to the jurisdiction as necessarily before him, as a special traverse of the plaintiff's citizenship; that the plaintiff was a citizen; and that consequently the Circuit Court had jurisdiction of his case; and then to have shown that on the merits it was necessary for him to decide the constitutional validity of the Territorial law, and to express his opinion upon it, with his reasons for regarding its effect on the *status* of the plaintiff, after his return to Missouri, as a question of more than mere local law, and not one to be determined necessarily by the views of the State court of Missouri. This was the course of reasoning which Judge Curtis felt bound to adopt, and did adopt, in the dissenting opinion which he read in March, 1857; and if the opinion of Judge Nelson had stood as the opinion of the majority, no judge on the bench would have needed to express the opinion that the restriction of the Missouri Compromise Act was unconstitutional.



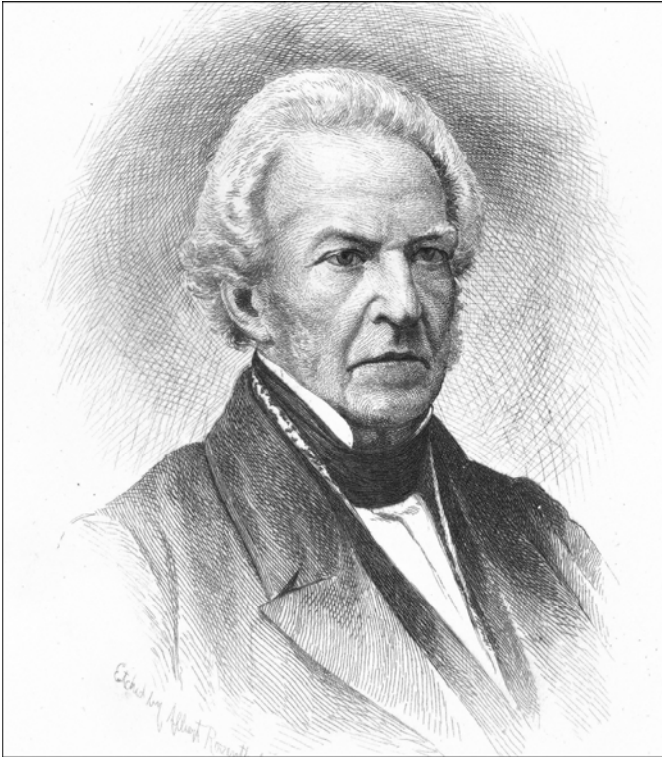
At some time after Judge Nelson's opinion had been written, a motion was made in a conference of the court for a reargument of the case at the next term. This motion prevailed, and Judge Nelson's opinion was consequently set aside. Two questions were then carefully framed by the Chief Justice, to be argued *de novo* at the bar, in the following terms:

1. Whether, after the plaintiff had demurred to the defendant's first plea to the jurisdiction of the court below, and the court had given judgment on that demurrer in favor of the plaintiff, and had ordered the defendant to answer over, and the defendant had submitted to that judgment and pleaded over to the merits, the appellate court can take notice of the facts admitted on the record by the demurrer, which were pleaded in bar of the jurisdiction of the court

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below, so as to decide whether that court had jurisdiction to hear and determine the cause?

2. Whether or not, assuming that the appellate court is bound to take notice of the facts appearing upon the record, the plaintiff is a citizen of the State of Missouri, within the meaning of the eleventh section of the Judiciary Act of 1789?



Justice James M. Wayne served on the Court from 1835 until 1867, outlasting Taney on both ends of his tenure. After *Dred Scott* was reargued, Wayne “became convinced” that the Court could “quiet all agitation on the question of slavery in the territories” and persuaded Taney and others to try. He is the only justice who concurred in all of the Taney opinion that was labeled the “Opinion of the Court.”

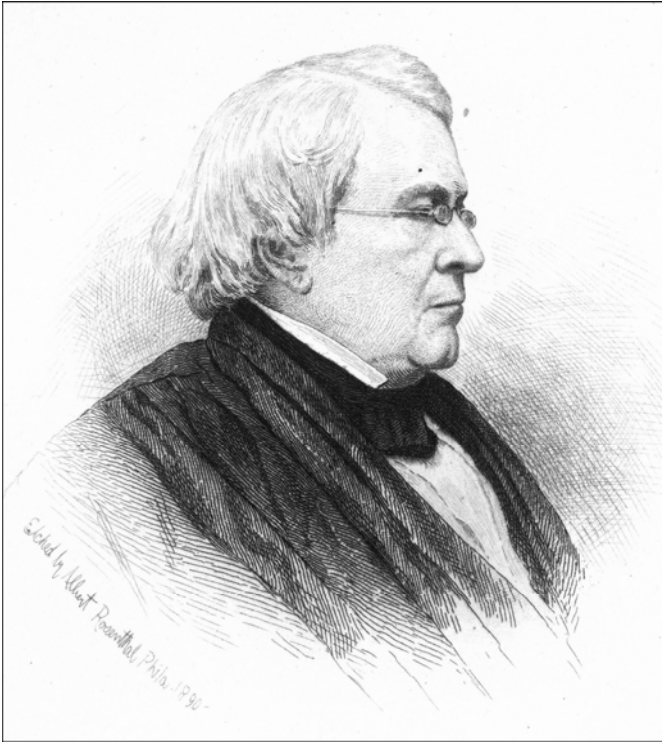
It will be seen that these questions, in substance and in terms, related to the facts set up in the plea to the jurisdiction, and to the power of the appellate court to act upon those facts, after that plea

had been overruled by the Circuit Court. If the facts of Scott's African descent and the slavery of his ancestors set forth in the plea to the jurisdiction could be rightly taken notice of in the appellate court, as admitted by the plaintiff's demurrer to that plea, and if it should be held that these facts amounted in law to proof that he was not a "citizen," then there was nothing that could in judicial propriety be done but to order the case to be dismissed for want of jurisdiction. But if it should be held that on these facts that Scott was a "citizen," within the meaning of the Judiciary Act, then, and only then, it would be necessary for the judges to act upon the merits of the case and determine the constitutional validity of the Missouri Compromise restriction.

The counsel for Scott, on the second argument, which took place December 18, 1856, argued the technical questions arising out of the plea to the jurisdiction, the question of the citizenship of a free negro, and the constitutional validity and effect of the Territorial law, as well as the effect of the residence in Illinois and in the Territory. The counsel for the alleged owner of Scott also argued most elaborately all of the same questions.

After this second argument, Mr. Justice Wayne became convinced that it was practicable for the Supreme Court of the United States to quiet all agitation on the question of slavery in the Territories, by affirming that Congress had no constitutional power to prohibit its introduction. With the best intentions, with entirely patriotic motives, and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the court. He persuaded the Chief Justice, Judge Grier, and Judge Catron of the public expediency of this course; and being perfectly convinced, as he somehow had convinced himself, that the appellate court could hold that the Circuit Court had no jurisdiction of the case, because a free negro could not be a "citizen," and yet could go on and decide all questions arising upon the merits, he could conscientiously concur in every part of the opinion which was denominated the opinion of the court, although no other judge excepting Mr. Justice Wayne concurred in all its points, reasonings, and conclusions.

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Justice Robert C. Grier served on the Court from 1846 until 1870. The nine opinions in *Dred Scott* totaled more than 230 pages in the official reports, but Grier's 165-word opinion received particular scorn from G.T. Curtis: "Perhaps no man ever said, in the compass of less than half a printed page, more that was unsound . . . ."

No imputation is here intended to be cast upon the purity and good intentions of any of the judges. But it was a fatal mistake for any of them to suppose that the doctrine could be received by the people of the North. It was a fatal mistake for any of them to suppose that they could convince the judicial mind of the Free States that it was at once proper for them to hold that the Circuit Court had no jurisdiction of the case, and then to decide a constitutional question which arose only on the pleas to the merits of the action. It was not so that the legal profession had been accustomed to see constitutional questions reached, acted upon, and decided in the Su-

preme Court of the United States. All lawyers who knew much of the Federal jurisprudence, knew that a constitutional question, like any other question of law, can be decided by the Supreme Court of the United States, so as to bind the consciences of public or private men, only when the case, as the court finds it to be, is one to which the judicial power of the United States extends.

The action of a majority of the judges in this case, instead of promoting the peace and harmony of the country, as Judge Wayne hoped it would, was in reality most disastrous to them.



It is often said that a judge is to declare what he believes to be the law, regardless of consequences; and, within proper limits, this is a just and accurate theory of the judicial function. When those limits are observed, there is no more noble exhibition of human character, as there is no more necessary and salutary exercise of human independence, than is displayed by a judge who looks to nothing that may flow as an incidental consequence from his declaration of the law. This is as true of constitutional questions as it is of all others.

But the judge who expects immunity from the consequences of his acts must take care that his judicial duties strictly require of him the act which he performs. And even if we give, as I have always certainly desired to give, all personal credit for purity of purpose to those judges who sought, in this case, to promote the peace and harmony of the country, it is too obvious that they were not, from their positions and habits of life, qualified to discover or to weigh the means by which it could be done. This was the office of statesmen and not of judges.<sup>2</sup>

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<sup>2</sup> Among all the strange things that were said in this case, perhaps the most unaccountable is what was said by Judge Grier, who thought that the record showed a *prima facie* case of jurisdiction, requiring the court to decide all the questions properly arising in it; that, as the decision of the pleas in bar allowed that the plaintiff was a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment was of little importance; for, he said, whether the judgment (of the lower court) be affirmed, or dismissed for want of jurisdic-

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After the second argument of the case, the Chief Justice prepared, and read in a conference of the court, the opinion which was read publicly as “the opinion of the court” on the 6th of March, 1857. Of course, the judges who did not concur in that opinion had an opportunity to write their dissents from what they had heard read in the conference. Judge Curtis deemed it his duty to dissent from it throughout. When the time for acting publicly upon the case arrived, and on the last day of the term (the 7th of March), Judge Curtis’s dissenting opinion was read. It was immediately filed in the clerk’s office, as the rule of the court required; but the opinion of the Chief Justice, which had been publicly read on the previous day, was not filed.

After the adjournment of the court, and on that day, the editor of a Boston newspaper applied to Judge Curtis for a copy of his dissenting opinion. It was given to him, because Judge Curtis supposed that all the opinions had been filed as the rule required, and that they would therefore be accessible to the press, and would be published for the information of the public, just as they had been read. The copy of his dissenting opinion was taken to Boston, and in a few days it was published. In the mean time, Judge Curtis was informed that the opinion of the Chief Justice had been revised and materially altered. Thereupon, on the 2d of April, he wrote to Mr. Carroll, the Clerk of the Supreme Court, requesting him to send him a copy of the Chief Justice’s opinion when printed. The Clerk replied as follows:

MY DEAR SIR, I am this morning in the receipt of your favor of the 2d instant, and regret that it is not in my power to send you a copy of the opinion in No. 7, *Scott v. Sandford*. That, as well as

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tion, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

Perhaps no man ever said, in the compass of less than half a printed page, more that was unsound, than Mr. Justice Grier said in his few recorded observations in this case. He was a man of great vigor of mind, and of no common logical power. But he had somehow become convinced that it would be useful to the country for him to agree with the Chief Justice, that Congress could not prohibit the existence of slavery in a Territory.

*George Ticknor Curtis*

the opinions of yourself, Judge Wayne, Judge Nelson, and Judge McLean, we have not yet had printed. But hope to have them done in about ten days.

As, however, the Chief Justice had directed me not to furnish a copy of his opinion to any one, without his permission, before it is published in Howard's Reports, allow me to suggest that you request him to direct me in the premises.

Very sincerely yours,

WM. THOS. CARROLL.

WASHINGTON, April 6, 1857.

On the 9th of April, Mr. Justice Curtis replied to the above:

I wish to see only this opinion of the court, and you will please send me a copy of that as soon as it is in print, and charge any expense to me. You mention that the Chief Justice had directed you not to furnish a copy of his opinion to any one, without his permission, before it is published in Howard's Reports. I can hardly suppose the direction was intended to apply to and include a member of the court who has occasion to examine the opinion before its publication. If you have the least doubt upon the point, it is certainly proper for you to consult him before you send me the copy.

In answer to this letter Mr. Justice Curtis received the following:

MY DEAR SIR, I duly received your favor of the 9th instant, suggesting that I might have mistaken the directions of the Chief Justice referred to by my letter of the 6th instant. In reply, I beg to inform you that, after mailing that letter, I called to see the Chief Justice; and that he then told me that I had understood him correctly, and reiterated the direction.

With the highest esteem and regard, I remain, dear sir,

Very truly yours,

WM. THOS. CARROLL.

WASHINGTON, April 14, 1857.

Even after this second letter from the Clerk had been received, Mr. Justice Curtis could not believe it possible that one of the members of the court should be refused access to its records; and

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with the desire to discover the actual state of affairs, he wrote to Mr. Chief Justice Taney, on the 18th of April, and said:

I cannot suppose it was your intention to preclude me from having access to an opinion of the court in the only way possible for me to obtain it; and if it was not, you will confer a favor upon me by directing the Clerk to comply with my request.

To this the Chief Justice replied as follows:

BALTIMORE, April 28, 1857.

DEAR SIR, I have been in Baltimore for the last two weeks, holding the Circuit Court; and, owing to my absence from Washington, did not receive your letter until a few days ago, and could not answer it until I obtained from Washington a copy of the order under which the clerk declined to send you a copy of the opinion of the court in the case of *Scott v Sandford*. I herewith enclose it.

It is, however, proper that I should explain to you the reasons for giving the order. Soon after the decision was given, circumstances occurred which satisfied the court that justice to itself required that the opinion in this case should be reported and brought before the public under the usual supervision and responsibility of the officer appointed by the court to perform that duty; and that it ought not to be separated from all of the other opinions delivered by the court during the term, and hurried before the public in an unusual manner, by irresponsible reporters, through political and partisan newspapers, for political and partisan purposes. It became my duty to carry into effect this determination of the court; and I therefore gave an order to Mr. Carroll not to give a copy to any one but the official reporter.

The order in the first instance was verbal. But some time before the opinion was printed and had undergone the accustomed revision of a printed copy, Mr. Carroll mentioned to me that he had been applied to for a copy by Mr. Charles P. Curtis, [who said he was] about to publish a large edition of your opinion in a pamphlet and wished "to introduce that of the Chief Justice" with yours, meaning, I presume, the opinion of the court delivered by me.

*George Ticknor Curtis*

I told Mr. Carroll he could not have it for such a purpose. For the publication of your individual opinion in this manner, in connection with that of the court, leaving out the individual opinions of the other judges, would hardly be respectful to them; and, also, he would hardly feel justified in anticipating the official reporter and thereby taking for his own emolument the profits arising from its sale. And it is due to frankness also to say, that I thought it would have been as well for any gentleman, before he undertook to report the opinion of the court under his own supervision, anticipating the officer of the court, to have asked and obtained leave of the tribunal to do so.

As I was about to leave Washington for some weeks, I put the order in writing, with the concurrence and approbation of Mr. Justice Wayne and Mr. Justice Daniel, who were the only two justices beside myself then in Washington.

It would seem from your letter to me that you suppose you are entitled to demand [a copy of the opinion] as a right, being one of the members of the tribunal. This would undoubtedly be the case if you wished it to aid you in the discharge of your official duties. But I understand you as not desiring or intending to use it for that purpose. On the contrary, you announced from the bench that you regarded the opinion as extra-judicial, and not binding upon you or any one else. And if the opinion of the court is desired by the judge, not to aid him in the discharge of his official duties, but for some other unexplained purpose, I do not see that his position in relation to a copy of the opinion differs in any respect from that of any other person.

I am, respectfully, dear sir, your obedient servant,

R.B. TANEY.

The “order of the court,” which is referred to above, is contained in the following communication addressed to the clerk:

TO WILLIAM THOMAS CARROLL, ESQ.,  
*Clerk of the Supreme Court, Washington*

WASHINGTON, April 6, 1857.

DEAR SIR, I understand several applications have been made to you for a copy of the opinion in the case of *Dred Scott v. Sandford*. No one has a right to a copy of the opinion of the court

## *The Dred Scott Case*

until it is reported and published by the reporter. He is the officer to whom the law confides the duty of bringing the opinions of the Supreme Court fairly and fully before the public, and of making them equally accessible at the same time to every one.

I have observed that the opinion of the court has been greatly misunderstood and grossly misrepresented in publications in the newspapers. It is impossible that the court, or any member of the majority which gave the opinion, having a proper regard to their judicial positions, can enter into discussions with gentlemen who write for newspapers, in order to correct misstatements in these publications. The opinion in the case above mentioned should be allowed to speak for itself, and not be brought before the public garbled and mutilated, and with false glosses attached to it. The law and the court confide it to the reporter to do this, and to no one else.

You will therefore give no copy of this opinion to *any* one, until the reporter has printed it, and has it in readiness for general distribution, so as to be accessible to any one who may choose to purchase it.

Respectfully, dear sir, your obedient servant,

R.B. TANEY.

I have read this letter from the Chief Justice to Mr. Carroll, and concur in it entirely.

JAMES M. WAYNE.

I entirely concur in the opinion and instruction given by the Chief Justice to the clerk.

P.V. DANIEL.

Having received the above, called forth by his simple request for a copy of the opinion of the court, Judge Curtis sent the following reply to the Chief Justice:

PITTSFIELD, May 13, 1857.

DEAR SIR, Your letter of the 28th ultimo came here during my absence from home on the circuit. It is due to that harmony of feeling among the members of the court, and it is due to the unaffected respect I feel for you, that I should reply to it frankly.

## George Ticknor Curtis

I wrote to the clerk of the Supreme Court, saying I had occasion to examine its opinion in the case of *Scott v. Sandford*, and desiring him to send me a copy of the opinion when it should be in print. I was told, in reply, that you had directed him not to allow any one to have a copy of the opinion until it should be published by the reporter; and that I was included in the prohibition. I thought there must be some mistake, and therefore addressed myself to you.

Your letter informs me he did not [misinterpret his instructions], and also details some matters personal to myself.

As respects what you say concerning Mr. C. P. Curtis's application to the clerk for a copy of the opinion of the court, I have only to observe that whatever application Mr. Curtis may have made was without my knowledge; that I had no connection with it whatever, and do not perceive why I should make any observations concerning it.

You speak of my desiring the copy for some unexplained purpose. I certainly did not think it necessary to explain to the clerk of the court the purpose for which I wanted a copy of one of its records. I thought it enough for me to say I had occasion to examine it. You appear to have assumed that I desired the paper for some other than an official use.

In my judgment, and I cannot doubt you will agree with me, a judge who dissents from an opinion of a majority of the court upon questions of constitutional law which deeply affect the country, discharges an official duty when he lays before the country the grounds and reasons of his dissent. This opinion of the court was read in conference of all the judges. I shaped my dissent from that opinion accordingly. After I returned home, I was informed that this opinion had been revised and materially altered. I did not know whether the information was true or false. I thought I had a right to know, before my own opinion should be published by the reporter in a permanent form, whether any alterations material to my dissent had been made after its promulgation from the bench.

In respect to the order to which you refer, I may be in error, but at present I do not perceive how the court could make an order in vacation, without allowing to all the judges opportunity to deliberate on it, and concur therein, or offer reasons

## *The Dred Scott Case*

why it should not be passed. If consulted, I should have urged the propriety and expediency of not withholding from immediate publication the opinions in this case; that their publication would prevent those great misunderstandings and gross misrepresentations in the newspapers, which are mentioned in your letter to Mr. Carroll. I am not able to perceive how the allowance of an authentic copy of the opinion could have had any other effect than to correct misapprehensions, and put an end to misrepresentations.

It was for this reason, not only entertained but expressed at the time, that I consented to the publication of my own opinion; and when I left Washington, I had not the least doubt that every opinion filed in the case would immediately appear in the newspapers. I supposed that others would think as I did, that in our country it is impossible to keep from the public what passes in an open court of justice; especially in the Supreme Court, where the interests of the nation are discussed; that in such a case the usual forms of reporting would inevitably be disregarded; that if the public cannot get the opinions of the court authentically, and in the usual way, they will get them in the best way they can; that in England, if any similarly important case had occurred, a detailed report of every opinion would have appeared the next morning in the leading newspapers; that in our country there was the same desire and the same right to know what is done in the courts, but not the same means at present to know accurately; but that all concerned would suffer by attempting to withhold the opinions in this case after they had been regularly promulgated in open court.

I do not endeavor to convince you that the order was erroneous. I have not the presumption to form an opinion upon your act without knowing its reasons. But I wish you to understand the grounds on which I acted.

I feel a very sincere reluctance to trouble you with this long letter. I have no personal feeling to express other than regret that what I consider my rightful access to the records of the court has been denied me, and, as I fear, under misconstruction of my motives and purposes.

With great respect, I am, dear sir, your obedient servant,

B.R. CURTIS.

*George Ticknor Curtis*

After a lapse of several weeks, Judge Taney replied as follows:

WASHINGTON, June 11, 1857.

DEAR SIR, I received your letter of the 12th of May, the day before I set out for Richmond to hold the Circuit Court for the District of Virginia.

I have no desire to continue the unpleasant correspondence which you have been pleased to commence. But there are some passages which cannot be passed by without notice, because my silence in relation to them might lead to erroneous inferences.

You say that you were informed, after you returned home, that the opinion of the court was materially altered after it was delivered from the bench. I do not mean to inquire through what channel you sought or obtained information on that subject. Perhaps the more usual and appropriate course between members of the same tribunal would have been to address an inquiry to the judge who delivered the opinion. You would have been promptly and frankly answered. But as you now inform me that this information induced you to address your letter to me demanding a copy, it is proper to say that it had no foundation in truth.

There is not one historical fact, nor one principle of constitutional law, or common law, or chancery law, or statute law, in the printed opinion, which was not distinctly announced and maintained from the bench; nor is there any one historical fact, or principle, or point of law, which was affirmed in the opinion from the bench, omitted or modified, or in any degree altered, in the printed opinion. You will find in it proofs and authorities to maintain the truth of the historical facts and principles of law asserted by the court in the opinion delivered from the bench, but which were denied in the dissenting opinions. And until the court heard them denied, it had not thought it necessary to refer to proofs and authorities to support them; regarding the historical facts and principles of law which were stated in the opinion as too well established to be open to dispute. But you will find nothing altered, nothing in addition but proofs to maintain the truth of what was announced and affirmed in the opinion delivered.

You speak of the opinion of the court as having been improperly kept back from the public when they had a right to

## *The Dred Scott Case*

know it. It is true that the opinion was not given to a partisan, political journal, to be published for political and partisan purposes. But it was delivered in open court, in the hearing of every one who chose to listen. It was placed in the hands of the officer appointed by law to report it, as soon as it had undergone the usual revision. And it has been published in the manner in which the opinions of the court have been published for more than fifty years.

It is also true, as you say, that the constitutional questions decided by the court in this case were at the time, and still are, the subjects of earnest discussion as political questions, and the public mind much excited about them. But this has often happened before — yet it was never deemed necessary, on that account, to depart from the usual and established mode of promulgating the opinion of the court, nor the opinion of any one of the dissenting judges.

And if you supposed there was any thing new and peculiar to this case which made it proper to depart from the established usage, it is to be regretted that you did not suggest such a measure to the court. If the majority had come to the same conclusion, all of the opinions would have appeared simultaneously and together.

But the measures taken by you effectually prevented the publication of the opinions together or simultaneously. I learned with great surprise that, immediately on your return to Boston, you had published [your opinion] in a political journal, and that it was distributed, not only to the subscribers to the newspaper, but widely circulated throughout the country. You yourself, therefore, rendered it impossible that the opinions could come out together, as you say would have been the case in England; and equally impossible that the readers of one should have the other always at hand in order to compare them and judge between them; for the thousands, and tens of thousands, of persons who read your opinion in the journal in which it was published, and in other newspapers associated with it in political partisanship, could by no possibility have the opinion of the court before them until some time after yours had been read, and made its impression. And the far greater part of the readers among whom it was hurried and profusely scattered

will never have an opportunity of reading the opinion of the court.

In this respect the case undoubtedly differed from all former ones. For although the opinion of the court on former occasions has been assailed in political journals and by political partisans before the opinion itself could be published, yet this is the first instance in the history of the Supreme Court in which the assault was commenced by the publication of the opinion of a dissenting judge.

No one could fail to see that this circumstance would encourage attacks upon the court and upon the judges who gave the opinion, by political partisans whose prejudices and passions were already enlisted against the constitutional principles affirmed by the court. Hence the order of which you complain. The order prevented the court from being placed in the attitude of a combatant in the political arena without its consent, but it did nothing more.

You complain also, that you were not consulted when the court came to this conclusion. But you will recollect that you had then published your own opinion, adverse to that of the court, without consulting the judges who gave the opinion, or apprising them of your intention; and I cannot see any just ground upon which you could claim the right to share in the control and disposition of the opinion of the court, when the avowed object of your dissenting opinion was to impair its authority and discredit it as a judicial decision.

I have now done. I had, indeed, supposed that, whatever difference existed on the bench, all discussion and controversy between members of the tribunal was at an end when the opinions had been delivered; and I believed that this case, like all others that had preceded it, would be submitted calmly to the sober and enlightened judgment of the public in the usual channels of information, and in the manner in which it has heretofore been thought that judicial decorum and propriety required. But if it is your pleasure to address letters to me charging me with breaches of official duty, justice to myself, as well as to those members of the court with whom I acted, makes it necessary for me to answer and show the charges to be groundless; and a plain and direct statement of the facts appears to be

## *The Dred Scott Case*

all that is necessary for that purpose. And having now made it, I have only to add that

I am, respectfully, your obedient servant,

R.B. TANEY.

To this letter Judge Curtis replied as follows:

PITTSFIELD, June 16, 1857.

DEAR SIR, Your letter of the 11th instant was received by me this morning. I read it with surprise. I did not suppose I had expressed myself in such a manner as to be open to the misapprehensions your letter shows.

It is certain that our correspondence has become unpleasant; but I do not find, by reviewing it, that it began to be so by any act of mine. In my first letter to you, I simply requested you to remove from the mind of the clerk what I then thought was some misapprehension on his part. I wrote the letter without expectation that any thing unpleasant would grow out of it.

You speak of it as "a demand made on you for a copy of the opinion of the court." It was not so intended, and no circumstances were known to me which could impress on the letter that or any other unpleasant construction.

You speak of my addressing letters to you, charging you with breaches of official duty. I do not know where you find such charges.

I do state reasons which would have induced me, if consulted, to favor the immediate publication of *all* the opinions; and after carefully considering what you have said in your last letter on that subject, though I never supposed any one or more of the judges should do any thing as a partisan, yet I still think it was highly inexpedient to restrain others from publishing the opinion of the court.

But surely there is a wide distance between a difference of opinion on a question like this, and a charge of official misconduct. I must be allowed to entertain my own opinions on all points connected with my office, and to express plainly my reasons for them; but I claim no privilege to charge any one of my brethren with official misconduct, nor have I done so. What I complained of was the assumption that I wanted a copy of the opinion for publication, and not to enable me to discharge an

*George Ticknor Curtis*

official duty. If I was otherwise understood, I regret that I did not express my ideas more clearly.

You describe to me, in your last letter, the extent of the alterations made in the opinion of the court after it was delivered, and you intimate I might have had this information earlier.

I feel no hesitation in leaving it to your own candor to judge whether, if I had received this information earlier, it would have prevented my reasonable wishes to see the document itself, that I might know what were "the proofs and authorities to maintain the truth of the historical facts and principles of law asserted by the court, in the opinion of the court delivered from the bench," which you say were afterwards added to the opinion; since it must be admitted that these terms may embrace a wide field of examination and argument.

A large part of your letter seems designed to show that I published my opinion for political and partisan purposes, and that I could not have failed to see that it must be read by great numbers of persons who would never read the opinion of the court, and thus have an unfair effect.

I shall not yield to the desire I feel to reply at length to this part of your letter. To carry on such a discussion without bitterness would seem to be almost, if not quite, impossible — and therefore I do not think it would be profitable either to you or myself. I have no connection whatever with any political party, and have no political or partisan purpose in view, and no purpose whatever, save a determination to avoid misconstruction and misapprehension, from which I have suffered enough in times past.

I had not the least doubt, when I consented to the publication of my own opinion, that the opinion of the court would be at once published in a similar way in the principal newspapers of the country — as it undoubtedly would have done, if its publication had not been prevented by a special order.

Being conscious of the truth of these facts, I deem them a sufficient reply to that part of your letter, and have only to add, that I remain,

Respectfully, your obedient servant,

B.R. CURTIS.

## *The Dred Scott Case*

Chief Justice Taney replied as follows:

WASHINGTON, June 20, 1857.

DEAR SIR, I received your letter of the 16th instant this morning, and am glad to find that there is nothing in it that requires me to do more than acknowledge its receipt, and to say that I am not aware of any thing in either of my letters that is not strictly defensive in its character. The acts of no other person are alluded to in either of them, further than was necessary to show the circumstances under which I and those with whom I concurred have acted, and the motives which induced us to adopt the course we have pursued.

I am, respectfully, your obedient servant,

R.B. TANEY.

The above letter closed the correspondence. Judge Curtis filed the letters among his private papers, with the following careful and deliberate summing up of the whole matter, in his own handwriting, entitled,

### SOME OBSERVATIONS ON THE ABOVE CORRESPONDENCE

The 42d rule of the Supreme Court contains the following words:

“All the opinions delivered by the court since the commencement of the term ... shall be forthwith delivered over to the clerk to be recorded.

“And all opinions hereafter delivered by the court *shall immediately upon the delivery thereof* be in like manner delivered over to the clerk to be recorded.”

Instead of conforming to this rule, the opinion delivered by the Chief Justice was retained, and many material additions were made to it. Those additions amount to upwards of eighteen pages. No one can read them without perceiving that they are in reply to my opinion.

Having thus retained the opinion contrary to the rule of the court, and inserted in it without notice to me what was designed to be a reply to parts of my opinion, the clerk was prohibited from furnishing it to me; and I was thus deprived of all opportunity to see what had been inserted until the reporter's

## *George Ticknor Curtis*

volume was issued, and it was too late to avail myself of the knowledge.

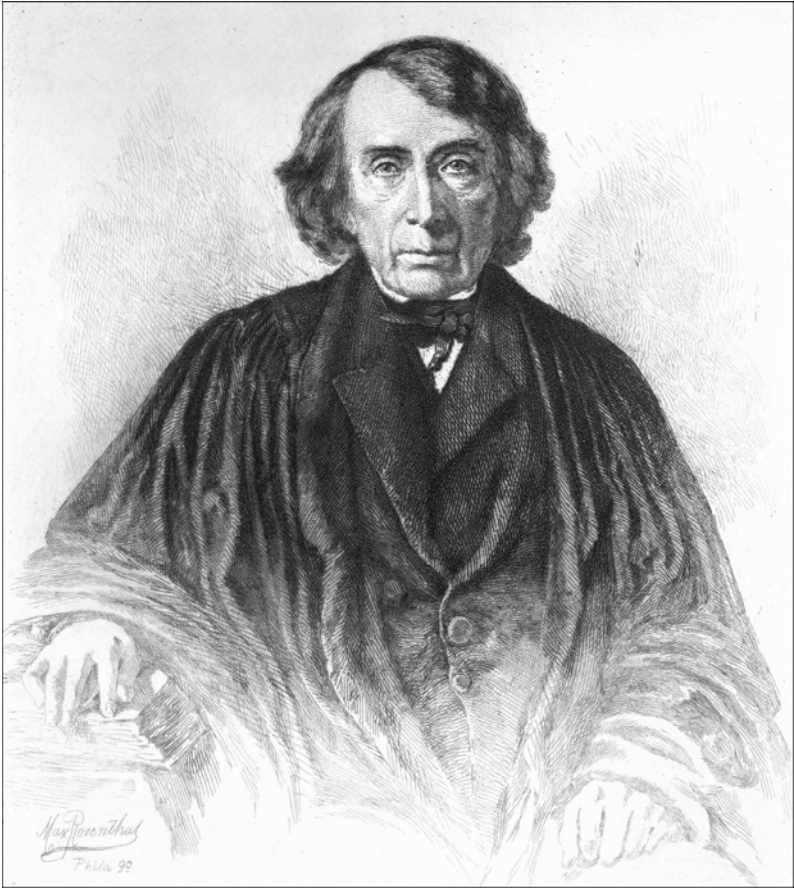
And when I complained of this, instead of answering my complaint, an elaborate attack is made, after a month's reflection, upon my motives in consenting to the publication of my opinion.

In obedience to the rule of the court, I delivered a copy of my opinion to the clerk forthwith after it had been read. It then became one of the public records of the country. Any citizen had a right to a copy of it, and to print and publish it. I desired to have it printed correctly and in full, and took measures to effect this. The Chief Justice withheld his opinion, contrary to the rule, and for the purpose of altering it. The order to the clerk not to furnish a copy was quite useless while there was no original on file, unless for the purpose of concealing the fact that the original was retained to be altered. I do not believe any such order, wholly unprecedented as it was, would ever have been passed if the opinion had been ready for publication when delivered. But whether this be so or not, the prohibition to give me a copy after it was completed, was an act of usurpation; and the reason which is insinuated, but not stated, that it was conjectured I wanted it for publication, certainly does not render the act less offensive.

My purpose in the above correspondence was to place before Judge Taney the true character of his act, not to enter into an embittered controversy with him. I believe I have accomplished this purpose, and that he knows it.

Although I read this correspondence soon after it was closed, and have now thought it proper to include it in this Memoir, I do not deem it necessary to add any thing to the comments which he himself made upon it, and which he left where they would be accessible after his death. I believe that those comments were deliberately made and deliberately preserved. I ought, however, to say that my brother had as high an appreciation of the judicial character and public services of Chief Justice Taney as any man who ever knew him. This is abundantly manifested in what he said of the Chief Justice, publicly, after his decease.

## The Dred Scott Case



Chief Justice Roger B. Taney presided over 19 different Associate Justices of the Supreme Court between 1836 and 1864. He had previously been Secretary of the Treasury and Attorney General of both the United States and Maryland. But for *Dred Scott*, he would be remembered for several important and persuasive opinions, and for what G.T. Curtis called his “singularly graceful and easy” writing style. Curtis especially appreciated Taney’s decision as a Circuit Justice in *Ex parte Merryman*, holding that President Lincoln did not have the power to suspend the writ of habeas corpus in Maryland.

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The dissenting opinion of Judge Curtis in this case was greatly praised throughout the Northern States, for the clear, learned, and able manner in which it maintained the capacity of free persons of color to be “citizens” within the meaning of the Judiciary Act, and for the power with which he asserted the authority of Congress to exclude slavery from the Territories. These were the topics that most deeply interested the public mind at that time; and it so happened that his view of his judicial duty, under the requirements of the case, made it necessary for him to discuss them. But the practical importance of these questions has passed away.

What then remains of this dissenting opinion, as of lasting value in the national jurisprudence? In my judgment, its permanent importance consists in the demonstration which it made of this proposition: That the Supreme Court of the United States, sitting as an appellate tribunal to correct the errors of a Circuit Court, cannot, under a plea to the jurisdiction, decide that the lower court had no jurisdiction to hear and determine the cause, and then proceed to decide a question of constitutional law which arises only on a plea in bar to the merits of the action. The following impressive close of Judge Curtis’s discussion of this part of the subject comprehends the whole substance of his objection to the course of a majority of his brethren: “I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff’s citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. The judgment of this court is, that the case is to be dismissed for want of jurisdiction . . . . Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.”<sup>3</sup>

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<sup>3</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 590 (1857) (Curtis, J., dissenting) (internal citation omitted).

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To those who do not fully appreciate the judicial functions of the Supreme Court of the United States, or who do not fully understand the limits within which it should carefully act, this may seem to have been hypercritical in its technicality. But to the instructed and enlightened student of our national jurisprudence, who contemplates the true function of the Supreme Court as the judicial arbiter of constitutional questions, these apparent technicalities will be recognized as pregnant with most important substance; for it cannot be doubted that the temptation to be drawn into the expression of opinions on constitutional questions, because they are entering into the politics of the time, is one against which that court should be hedged by the strict and logical order of judicial action, which can alone produce a judicial, and therefore a binding determination.

### NOTE ON THE DRED SCOTT CASE

I deem it proper to say, in reference to the active exertions of Judge Wayne to bring about a change in the determination of the court after the second argument, that neither he nor Judge Grier was at all reticent on the subject, and that on the day when the vote was adopted by a majority of the judges to set aside the opinion which had been prepared by Judge Nelson and to have the constitutional validity of the Missouri restriction acted upon and denied, Judge Wayne spoke of the result as an important achievement effected by himself. I have therefore felt entirely at liberty to comment upon facts which became known, at the time of this occurrence, without any agency of Judge Curtis. He did not speak of these occurrences for many years, even after he had left the bench, excepting to the members of his own family and one or two confidential friends.

The biographer of the Chief Justice has deemed it proper to vindicate him from a charge of complicity with Mr. Buchanan, the incoming President, in regard to the decision to be given in this case. I never heard Judge Curtis intimate a word that could give countenance to this charge, or impute to Judge Wayne or the Chief Justice any motive but the mistaken supposition that the public excitement

in regard to slavery in the Territories could be quieted by a judicial decision adverse to the power of Congress to prohibit its introduction. I do not imagine that Mr. Buchanan was a man who would tamper with the administration of justice, and I am sure that the Chief Justice and Judge Wayne would never have brooked such an attempt.

I cannot take leave of this case and its various incidents, without expressing my regret that Chief Justice Taney did not finish the autobiography which he began. The late Chief Justice was master of a singularly graceful and easy style, perfectly perspicuous and correct; and when he sat down in his old age to write an account of his own life, he commenced a work which, if he had completed it, would have been a most valuable addition to our political, juridical, and personal literature.

Nor can I pass from the mention of his name, without a tribute of respect to his public and private virtues. He was indeed a great magistrate, and a man of singular purity of life and character. That there should have been one mistake in a judicial career so long, so exalted, and so useful, is only a proof of the imperfection of our nature. The reputation of Chief Justice Taney can afford to have any thing known that he ever did, and still leave a great fund of honor and praise to illustrate his name. If he had never done any thing else that was high, heroic, and important, his noble vindication of the writ of *habeas corpus*, and of the dignity and authority of his office, against a rash minister of state, who, in the pride of a fancied executive power, came near to the commission of a great crime, will command the admiration and gratitude of every lover of constitutional liberty, so long as our institutions shall endure.<sup>4</sup>



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<sup>4</sup> I refer to the case of John Merryman, a citizen, who in 1861 was imprisoned in Fort McHenry, near Baltimore, by a military order; and in whose case the writ of the Chief Justice of the United States was refused entrance into the fort, upon the excuse that the President had suspended the writ of *habeas corpus*. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

## *The Dred Scott Case*

I have dwelt thus long and minutely upon the case of Dred Scott, for two reasons:

First, because I felt it to be my duty to Judge Curtis to make known accurately whatever he did, thought, or felt, concerning it.

Secondly, because we still have, and future ages to which our Constitution may descend will continue to have, a Supreme Court of the United States; and in the present and in all coming time, it is and will be important that those who occupy or shall ever occupy the exalted seats upon that bench shall understand, and take warning from, the mistakes of their predecessors.

Perhaps it may not be improper for me to state that my professional connection with this case did not lead me, at that time, to examine the question of the citizenship of a free negro. The Hon. Montgomery Blair, who had sole charge of the case for Scott, requested me to assist him in the argument about three days before the case was called. I told him that there was not sufficient time for me to make any investigation of the technical questions arising on the pleadings, or to be of much service to him on the question of the capacity of a free negro to be a "citizen"; but that I thought I knew enough of the constitutional history of the country to be able, on very short notice, to maintain the affirmative of the proposition that Congress could prohibit the existence of slavery in any Territory of the United States, if it saw fit to do so, and that, if he would assign to me one hour of the time allowed by the rule of the court for the argument of his side of the case, I should be happy to assist him by a discussion of this constitutional question to the best of my ability. Mr. Blair very politely acceded to this arrangement, and I argued the constitutional question thus assigned to me. But at the time I made the argument, I little thought what turn the case was to take, although I had a strong presentiment that great public mischief would be done, if the extreme views about slavery that were maintained by our opponents should prevail, by any thing short of a judgment arrived at by the strictest requirements of the record, and in entire judicial consistency. Of course, there has been, and perhaps will continue to be, a great difference of opinion in regard to the judicial propriety of the final judgment in this case; but I think

there can be no sound opinion, among lawyers, which will justify the assumption that a majority of the court “decided” that Congress could not prohibit the existence of slavery in a Territory of the United States.



Federal judges, therefore, must not only be good citizens, educated and upright men – qualities necessary to all magistrates – one must also find statesmen in them; they must know how to discern the spirit of their times, to confront the obstacles they can defeat, and to turn away from the current when the flood threatens to carry away with them the sovereignty of the Union and the obedience due to its laws.

The president can fail without the state’s suffering because the president has only a limited duty. Congress can err without the Union’s perishing because above Congress resides the electoral body that can change its mind by changing its members.

But if the Supreme Court ever came to be composed of imprudent or corrupt men, the confederation would have to fear anarchy or civil war.

*Alexis de Tocqueville*