Volume 6 | Issue 4 Article 4

1961

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Recommended Citation

Edward J. Bander, *The Dred Scott Case and Judicial Statesmanship*, 6 Vill. L. Rev. 514 (1961).
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THE DRED SCOTT CASE AND JUDICIAL STATESMANSHIP

EDWARD J. BANDER*

ON MARCH 6, 1857 the Supreme Court decided the case of *Scott v. Sandford*;[1] a decision which many critics have condemned in the ensuing years, not only as the flame that lit the fuse that led to the Civil War, but as an ineradicable blot upon the history of the United States. For on that infamous date, so they reason, the highest court in the land not only denied one man and his family freedom from slavery, but attempted to perpetuate for all time that inherently evil institution in a country where "all men are created equal." Nevertheless, good law and sound logic paradoxically prevailed in the Dred Scott case; so much so that the man who wrote the lead opinion and who bears the obloquy for its consequences was able to assure an ex-President, "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."[2] Badly timed, boringly long and innocently political as Chief Justice Roger B. Taney's opinion in this case may have been, the fact remains that it was a technically flawless interpretation of the law in 1857. His reliance upon technical perfection alone, however, without reference to time, place or people, led Chief Justice Taney to an interpretation which did the greatest disservice to the Constitution, the law, and consequently the Supreme Court itself.

Let us examine first the uncontested facts of the case. In 1834, the plaintiff, Dred Scott, was the slave of one Dr. Emerson of the United States Army. In that year Dr. Emerson took the plaintiff from the slave state of Missouri to the free state of Illinois, holding him in bondage there until April or May of 1836. In 1836 Dr. Emerson purchased Harriet, who thereafter married Dred, and two children were born to them. Later in 1836 Dr. Emerson was transferred to the Territory of Upper Louisiana, which was free territory according to the Missouri Compromise Act of 1820. There Scott

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1. 60 U.S. (19 How.) 393 (1857).

2. 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 38 (1924).

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remained until 1838, in which year Dr. Emerson returned to Missouri and sold his slaves to a Mr. Sandford, a citizen of New York and the defendant in Scott's bid for freedom.

The case was tried first in the Missouri courts. Counsel for the plaintiff claimed that the Northwest Ordinance of 1787 which prohibited slavery in that territory (including the area which subsequently became the State of Illinois), and the Missouri Compromise Act of 1820, prohibiting slavery in Upper Louisiana combined to make Scott a free man, inasmuch as he had been a resident of both areas. This claim the highest court in the State of Missouri denied.

On the same facts, Scott brought his action before the Circuit Court of the United States for the District of Missouri. The only means by which Scott could bring his action into a federal court necessitated showing "diversity of citizenship," *i.e.,* that the parties to the action be citizens of different states. Sandford's lawyer, immediately upon the commencement of the action, argued that Scott was a slave and therefore not a citizen in possession of the right to bring this action. The court set this claim aside, heard the case on its merits, but decided against the plaintiff. An appeal brought the matter before the Supreme Court.

At this point, Associate Justice Nelson was assigned to write the opinion. Nelson felt that Missouri law should govern the case and under Missouri law, Scott was a slave. However, three developments intervened to result in the scrapping of Nelson's opinion, though it subsequently became one of the six concurring opinions of the "majority" view.[3] First, a Presidential election was drawing near, and the Court wisely refrained from leaving itself open to charges of electioneering by decision. Secondly, the dissenting Justices had gone into the problems of citizenship and constitutionality, two tender issues which required answering lest the Southern position be defaulted by silence. Last and most important, Associate Justice Wayne felt that this case offered an ideal set of facts for settling once and for all the controversy on slavery, and he convinced Taney of the need for such a settlement.

Thus with quixotic bravery Chief Justice Taney, in his opinion, launched himself into the entire question of slavery and with capable, coldly precise logic attempted to settle the most fiery, violently partisan,

3. It has been argued that there was no "majority" view in the Dred Scott decision, *i.e.,* that the only unanimous concurrence among the six concurring Justices (Catron, Wayne, Nelson, Campbell, Grier and Daniels) consisted of denying Dred Scott's claim to freedom, and that they supported Taney's views on the other issues in widely varying degrees. The individual opinions of all nine Justices were incorporated into the total 240 pages of the decision.

bitterly emotional crisis that this country has ever faced. There is little to criticize in his logic, when abstracted from the opinion, for it may be reduced to sylogisms nearly as concise and indisputable as one which declares, "Circles are round; this figure is a circle: therefore, this figure is round." He reasoned thus:

First, to be a citizen within the meaning of the Constitution of the United States, one must look to the Constitution itself; The Founding Fathers, having written slavery (in the person of African Negroes) into the Constitution,[4] did not even consider the possibility of African Negroes becoming citizens: therefore, Dred Scott, an African Negro, is not a citizen of the United States.

Second, to sue in a federal court under the "diversity clause" of the Constitution, one must be a citizen; Dred Scott is not a citizen: therefore, Dred Scott cannot sue in a Federal Court.

Third, slavery is lawful under the Constitution of the United States; Congress cannot pass laws that are unconstitutional; therefore, the Missouri Compromise which outlawed slavery in a portion of our territories, is unconstitutional.

Fourth, the right of property in a slave is distinctly and expressly affirmed in the Constitution; A citizen can take his property where he will: therefore, a master's right in his slave cannot be denied simply because he has crossed into any territory of the United States with that slave.

Fifth, the status of an individual is determined by the state where the action is brought; In Missouri, Scott was a slave: therefore, Scott's sojourns to other areas could not affect his status in Missouri, where this case was brought to trial.

In short, with something very close to round circle logic, Taney had declared that: an African negro could not be a citizen; Scott could not sue in a federal court; the federal government could not legislate against slavery in the states or territories; Scott's status in Missouri was that of a slave and his sojourns in free areas could not affect that status upon his return to Missouri. Chief Justice Taney had legally encompassed Dred Scott and the federal government was safely removed from the controversy. Outside of an amendment to the Constitution, slavery was now a matter of each state's conscience. The Supreme Court had acted, and now North and South, powerless to alter the irrevocable, need but to forget this quarrel and go back to those that were seemingly less troublesome.

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4. See, THE CONSTITUTION OF THE UNITED STATES OF AMERICA. ANALYSIS AND INTERPRETATION 312 (Corwin, ed. 1953).

On the surface, criticizing Taney amounts to criticizing the Founding Fathers, the Constitution of the United States, the Declaration of Independence, and a host of state cases, statutes, and practices including those of abolitionist-ridden Massachusetts. The Chief Justice had ample precedent for his opinion. And he could not resist the justifiable jibe that there had been little indignation in the North toward the practise of slavery, while Northern shipowners accumulated fortunes in transporting captured negroes from Africa to Southern ports.

In their dissents, Associate Justices McLean and Curtis pointed out a line of cases which showed a trace of social enlightenment, yet by and large it cannot be denied that from 1789 to 1857, the negro in America had remained legally unrecognized as even a second class citizen. The verdict of one Southern jurist on the Taney opinion adequately states the contention of Taney's supporters:

> "It is proper to say that notwithstanding the calumny and abuse which were heaped upon the Chief Justice because of his decision in the Dred Scott case, as far as we have been able to discover not one statement of fact or principle of law as set forth by him in that opinion has ever been successfully controverted."[5]

It is significant, however, that Taney, in his efforts to settle once and for all the whole issue of slavery, chose to make use of many procedural devices which the Supreme Court today would very likely consider unnecessary and even ill-advised in such a decision. In fact, today's Court might well leave off where Taney began, *i.e.*, if it had established that Scott had no right to sue in a federal court, it would not assume the necessity for settling any other issue. As Justice Frankfurter said, ". . . the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible."[6] Taney could have avoided the whole issue of the constitutionality of the Missouri Compromise,[7] the most tender point in the entire case, by never even raising it — or by simply following the Nelson view.

5. Christian, *Roger Brooke Taney*, 46 AMERICAN LAW REVIEW 14 (1912).
6. United States v. Lovett, 328 U.S. 303, 320 (1946).
7. "The power [to declare an act unconstitutional] was not again exercised until Taney's condemnation of the Missouri Compromise in holding that the due process clause of the Fifth Amendment prevents Congress from forbidding slavery in the Territories. This was a monstrous piece of judicial effrontery in the Dred Scott case, when the Northwest Ordinance had forbidden slavery and when free states, notwithstanding due process clauses in their state constitutions, had never had their power questioned. Taney may have thought that he could stifle sectional strife by his partisan promulgation, but he succeeded only in fostering what he

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Today, moreover, even from the purely technical standpoint, Taney's reasoning on this most crucial issue in the Dred Scott decision would be subject to criticism. If a court today must face a constitutional issue involving a federal law it maintains a strong presumption toward the constitutionality of that law. This presumption Taney obviously did not share in declaring the Missouri Compromise unconstitutional, and though he acknowledged that the Constitution speaks of Congress making "needful rules and regulations" for the territories, he maintained that this provision applied only to territories already acquired when the Constitution was written. Subsequent acquisitions were, he reasoned, subject to the same constitutional limitations which applied to the states. A fine distinction, and an example of how exceedingly narrow Taney's logic grew in some of the issues upon which he had chosen to build — so much so that we begin to see how he might as easily and as consistently have chosen a broader and far different line of reasoning throughout.

Aside from the technical aspects of his views on the Missouri Compromise, it is worth noting that Taney had to go back over fifty years for his only precedent in declaring a federal law unconstitutional — Chief Justice John Marshall's 1803 decision in the case of *Marbury v. Madison*.[8]

Let us compare Taney's action with Marshall's. Both men acted boldly. Both enraged a political party. However, the differences are more fundamental. Marshall was dealing with a theoretical question which was not likely to arouse the discontented. Taney was dealing with a political and economic question which had been smoldering for a generation. Marshall was not settling any issue by his act. He was simply, and significantly, creating a balance which gave each department of government a check on the others; and in denying a political compatriot his commission, he showed the give and take of a judicial statesman. Taney, in a situation where even compromise had failed, attempted to settle in completely uncompromising fashion an issue with which the President, Congress, and the Websters, Clays

meant to forestall. This I venture to think, has not been the only instance in which this important Supreme Court power has been unwisely exercised." POWELL, VAGARIES AND VARITIES IN CONSTITUTIONAL INTERPRETATION 20 (1956).

8. 5 U.S. (1 Cr.) 137 (1803). Marshall had declared that the Supreme Court had no jurisdiction to order Secretary of State Madison to deliver the commission which outgoing President John Adams had prepared for a lame-duck appointee named Marbury; he then exercised his judicial license to declare that an Act of Congress which had attributed such jurisdiction to the Court unconstitutional, and thereby established the doctrine of judicial review. For a current discussion of this and other landmark cases on judicial review, and indirectly a probe on great decision writing, see MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

and Calhouns had grappled long and unsuccessfully. Marshall, by his act, established the priceless and enduring doctrine of judicial review — a valuable end in itself. Taney was werely using this doctrine as a means to an end — the unenviable one of protecting the practice of slavery.[9]

It is interesting to note, moreover, that Taney had taken the greatest pains to declare unconstitutional an act which had already been repealed (by the Kansas-Nebraska Act of May 30, 1854). His obvious intent in so doing was, of course, to preclude the possibility of any future legislation similar to the Missouri Compromise, and the end result of his reasoning spelled sheer disaster to the abolitionist. Slavery had not only been once more legally affirmed, but never again would an appeal to Congress — let alone the federal courts — be permissible! This denial of any further recourse was more than Taney had right or reason to impose on the anti-slavery mind.

It is difficult to believe that the Chief Justice could not have foreseen the consequences of his decision, and yet it is as if he wrote it in a political and social vacuum, oblivious to the conditions of his day and the limited power of the Supreme Court to enforce its decisions, as well as the flesh and blood which he was relegating to perpetual slavery. Even a foreign observer, de Tocqueville,[10] could point out the explosively political nature of Supreme Court decisions to which Taney paid so little heed. During that pre-Civil War period when North and South were engaged in a relentless word war, fair decisions by the Court were likely to offend both sides, and always offended one. The Court was being constantly abused, its members scandalously attacked by the press, and at times its decisions were even disregarded. There was talk in the North of nullification and, inconceivable as it may seem, of interposition.[11]

Taney was astute enough to postpone announcing the decision until after the election, and yet he chose the day after Buchanan's inauguration to deliver an opinion which, coupled with the election of a man the abolitionists detested, would appear to the North, as

9. For a general discussion of judicial statesmanship see Hofstadter & Levitan, *Four Chief Justices — A Study in Judicial Statesmanship,* 143 N.Y.L.J. 4 (1960). Also republished separately. See also, Professor Schlesinger's discussion of the "Gold Clause Cases," THE POLITICS OF UPHEAVEL 258 (1960) where he describes an attempt by Chief Justice Hughes to hew a course between the unprecedented solution of Marshall and the tactical approach of Taney.

10. "The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls. The peace, the prosperity and the very existence of the Union are placed in the hands of the Judges." I DEMOCRACY IN AMERICA 149 (1899).

11. See, Crownover, *The Segregation Cases: A Deliberate and Dangerous Exercise of Power,* 42 A.B.A.J. 728 (1956).

Lincoln suggested, a cloaked conspiracy to throttle the country with slavery. Prior to the Dred Scott decision the Supreme Court was at low ebb among the citizenry; subsequently, it was to plummet to such a depth that the time honored right of *habeas corpus* could be suspended with little fear of Court reprisal.[12] Had he paid sufficient need to the storm warnings, Taney might have foreseen such effects mushrooming uncontrollably from his decision.

It is interesting to speculate on the possible effects which one of the dissenting opinions in the Dred Scott decision might have had upon the population of the day and the history of our country, had it prevailed as the majority view. Passing over Justice McLean's dissent (he was seeking through it a presidential nomination), no personal motivation can be attributed to dissenter Benjamin R. Curtis, beyond his conscientious desire to uphold the Constitution.[13] Curtis was a conservative man who had at one time unsuccessfully defended the right of a slaveholder to bring his slave into Massachusetts. He had, moreover, supported Chief Judge Lemuel Shaw's opinion upholding the Fugitive Slave Law in Massachusetts. In both these instances, Curtis had looked to the Constitution for guidance. Following the same star in the Dred Scott case, Curtis arrived at an opinion which Southerners regarded as a complete about face, and Northerners, as his only "honest" act.[14]

He maintained that Dred Scott's claim to citizenship had not been disproven, and in his mind, there was nothing in the Constitution which explicitly denied an African Negro citizenship. He considered Taney's excursion into the constitutionality of the Missouri Compromise an abuse of his office, foreshadowing the Frankfurter *caveat* on avoiding constitutional issues, with the statement, "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."[15]

Curtis' opinion was no "Uncle Tom's Cabin" tract on slavery. It was a compromise view which allowed for both slavery and citizenship of the Negro. Yet, one may consider the possibility that such a compromise might have pacified both sides long enough to allow the economic weaknesses of the slavery system to become self-evident in the South, or the power of the North to spiral to such a degree that the South would not have dared to commence hostilities.

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12. 3 Warren, *op. cit. supra* note 2, at 90-96.

13. For detailed information on Justice Curtis see, A MEMOIR OF BENJAMIN ROBBINS CURTIS (1879).

14. Perry, LIFE AND LETTERS OF HENRY LEE HIGGINSON 110 (1921).

15. Scott v. Sandford, 60 U.S. (19 How.) 393, 590 (1857).

There are some jurists who would maintain that Taney's opinion subsequent to deciding that Dred Scott had no right to bring his action in a Federal Court was nothing more than verbiage and not binding in future cases, *i.e., obiter dicta,* merely a judge's passing comments. Inasmuch as judicial license attaches to this practice, which preceded and followed Taney, there has been a tendency to be overly critical of his use of this particular device. However, *obiter dicta* was only one of the network of technicalities which Taney called upon in his eagerness to delve deeper into the many waters of the slavery question. Judicial restraint should have dictated to the Chief Justice that while great decisions are not born in Heaven, neither are they the offspring of technicalities.

Up to this point we have been trying to suggest how the flaw in Taney's opinion was not one of legal technique but rather how, in its narrowness, it bore no reference to time, place, or people. Let us turn now to what emerges as the most specifically grievous aspect of the Taney decision, its "backward look." The narrowness of the legal stand which Taney chose to take, regardless of its technical perfection and logic, remains mysteriously inexcusable, for it virtually made the Constitution a dead letter, with provisions inflexible and unadaptable to changing times and circumstances. "When an eighteenth century constitution forms the charter of liberty of a twentieth century government," said a judge in a 1911 decision, "must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes."[16]

It was the underlying "conditions and ideals" of the year 1789 which Taney attempted to freeze into the constitution forever. In its general provisions, the possibility of slaves becoming citizens was not even considered and, in effect, Taney was maintaining that if the possibility was not considered in 1789, it could not, *ipso facto,* be considered in 1857, nor at any time thereafter! Now, though it is an unfortunate, if understandable, fault of human nature that it allows the horse and buggy to be replaced by the automobile and the ice-box by the refrigerator, while it continues to regard with suspicion and hostility new social ideas, no matter how sound or necessary, we must demand more from our Supreme Court Justices than that they seal such clouded reasoning into the Constitution. "We must never forget," wrote Chief Justice Marshall, "that it is a

16. Borgnis v. Falk Co., 147 Wis. 327, 349-50, 133 N.W. 209, 215-16 (1911).

Constitution we are expounding . . . a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[17] Taney ignored the necessity for adapting that Constitution to the worst crisis which had ever arisen in human affairs in our history.

There were men who sat on the Supreme Court bench after Taney who contributed much to a more enlightened view of the law than it is, perhaps, fair to have expected from Taney in his day, yet what a difference their kind of reasoning might have made in that crucial decision. Holmes could have answered Taney's fifty-five page opinion with a brief, "The life of the law has not been logic; it has been experience."[18] And Brandeis, who had pointed out the compatibility of social data and rules of law, had this to say about a Supreme Court making dogma out of doctrine:

> "It is a peculiar virtue of our system of law that the process of inclusion and exclusion so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen."[19]

The application of the Holmes-Brandeis philosophy is nowhere more evident than in the Supreme Court decision on desegregation.[20] The rule of "separate but equal" (found nowhere in the Constitution and constantly violated by its adherents) has finally yielded after over a half century of experience to a rule more consistent with American ideals. Men like Holmes and Brandeis wrote growth into the Constitution; Taney, in the Dred Scott decision, attempted to create a Maginot line.

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17. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 407, 415 (1819).

18. HOLMES, THE COMMON LAW 1 (1881). While this author has no insight into how Justice Holmes would have decided the segregation cases, which will be touched on later, many have interpreted his insistence that states be allowed to experiment without Supreme Court interference without taking into account his statement in Laurel Hill Cemetery v. San Francisco, 216 U.S. 358, 336 (1910) "The plaintiff must wait until there is a change of practice or at least an established concensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold." Professor Llewellyn's views should also be heard "Its [writing the Grand Style] very existence has been obscured and buried by the incursion later of a way of work in which the appellate judges *sought* to do their deciding without reference to much except the rules, *sought* to eliminate the impact of sense, as an intrusion, and *sought* to write their opinions as if wisdom (in contrast to logic) were hardly a decent attribute of a responsible appellate court." LLEWELLYN, THE COMMON LAW TRADITION 5, 6 (1960).

19. Jaybird Mining Co. v. Weir, 271 U.S. 609, 619 (1926).

20. Brown v. Board of Education, 349 U.S. 294 (1955); Brown v. Board of Education, 347 U.S. 483 (1954).

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And yet, it is interesting to note that Taney's opinions were not characterized by blind obedience to the past, contrary to the impression which one receives throughout the Dred Scott decision. In a prior decision,[21] for example, the Court had been asked to rule on whether or not it had jurisdiction over an admiralty action which had occurred on the Great Lakes. Taney acknowledged in his opinion that, at the time the Constitution was written, the Founding Fathers accepted the English law which explicitly defined navigable waters as those affected by the ebb and flow of the tide, and that there was already on record a Supreme Court opinion affirming that such was the law of this land. In this case, however, Taney brushed aside hoary precedents, ruling that we could not be bound by an interpretation which ignored new and unforeseen conditions such as those created by our inland states and their advantages. It would be quite absurd, he reasoned, to deny the navigability of the Great Lakes merely because they did not respond to the pull of the sun. How unfortunate that he could not bring such reasoning to bear in the Dred Scott case.[22]

The preceding discussion may serve to point up the irony and even the tragedy of the statement which Taney wrote on August 29, 1857, to ex-President Pierce. Far from standing "the test of time and the sober judgment of the country," consider what this one decision did to the reputation of the jurist who wrote it. Taney was accused of conspiring with Southern leaders, his attitude toward the Negro was maliciously distorted, and he was labelled an implacable states righter. Yet in reality, Taney was the epitome of proper personal conduct and integrity, he had not only manumitted but subsequently supported the slaves he had inherited, and his leanings toward states rights served as a valuable counter-balance to the strong centralism of Chief Justice Marshall. Moreover, the fourteenth amendment, granting citizenship to all persons born in the United States, has removed any Taney taint from the Constitution and rendered the slavery aspect of the Dred Scott decision meaning-

21. Propeller Gennesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

22. ". . . the office of Justice of the Supreme Court similarly calls for an understanding, almost intuitive, of the judicial function. A Supreme Court Justice must be able to distinguish between those cases which call for exercise of the normal judicial process in which decision is based on precedent and the usual tools of interpretation, and those rare but great cases which call for the higher skills necessary to the growth and development possible under a living constitution." McKay. *Selection of United States Supreme Court Justices,* 9 KAN. L. REV. 109, 135 (1960). President Theodore Roosevelt, not an entirely reliable guide on matters judicial, expressed a similar thought, "The Judges of the Supreme Court of the land must be not only great jurists, they must be great constructive statesmen, and the truth of what I say is illustrated by every study of American statesmanship." BENT, JUSTICE OLIVER WENDELL HOLMES 252 (1932).

less, so that it is today but a page in history. The fact remains, nevertheless, that on that page is recorded the low mark of Supreme Court prestige in this country, and the whole unfortunate event is best summed up in the words of one of the great constitutional authorities, Edward S. Corwin: "The Dred Scott decision . . . can and must be written down as a gross abuse of trust by the body which rendered it."[23]

Let us point out in closing that it has not been the purpose of this article to speculate on Justice Taney's personal motivation, or lack of it, in deciding the Dred Scott case. The legal market is today flooded with behavioral accounts of why judges act the way they do based on mischievous theories that would do better in gossip columns than under the university imprint. The significant conclusion which emerges from our discussion is that Taney — whether deliberately or naively it is left for others to debate — wove an opinion of deadly rigid technicality which did the gravest injustice of all to the Constitution of the United States. Great minds before, as well as after Taney, have been quick to realize that the Constitution must forever remain a living, flexible doctrine, able to be expanded and adapted to new or changing conditions, if it to continue serving the purpose which the Founding Fathers intended it to serve and which they set themselves to achieve with their blood and their most cherished ideals for all future generations.

23. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrine* 17 AM. HIST. REV. 68 (1911).