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♦ TBA BRIEFINGS ♦

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Defining Liberty

By Jim Rankin

"It was because we failed to do the thing we really have a genius for, which is compromise... Our true genius is for compromise. Our whole government's founded on it. And, it failed."

— Shelby Foote – from Ken Burns', *The Civil War*

July is an excellent month to reflect upon the history of the United States and the numerous sacrifices made for freedom. On July 2, 1776, the Second Continental Congress voted to approve the resolution of independence from Great Britain. We celebrate July 4th because tradition ascribes that date in 1776 as the day Congress executed the Declaration of Independence. But war followed and independence was hard won. July, and July 4th in particular, is also a historically important time in the quest for freedom. On July 4, 1863, the Confederate fortress at Vicksburg, Mississippi, fell and the Army of Northern Virginia abandoned its Pennsylvania invasion with a defeat, the day before, at Gettysburg. Thus, in that July of 1863, the great rebellion known in the North as the Civil War, and in the South as the War for Southern Independence, began to collapse. The American Civil War was and is the bloodiest conflict the nation has experienced.

Approximately 1,264,000 Americans have died in America's wars and of that number, an astonishing 49% or 620,000 died in the Civil War. The numbers alone prompt a counter-factual historical analysis. What could have caused this great tragedy, and could it have been avoided? Close examination of the question might lead to consideration of regionalism, tariffs, industrialization, agrarianism, and fanaticism (both northern abolitionist and southern "fire eaters"). Ultimately, however, the issue was slavery, a question left unresolved by our nation's founders. But, did regional differences over slavery make war inevitable? Many scholars argue secession and war would have come sooner or later. Nevertheless, all-out war might have been avoided with the practice of slavery slipping into history's dustbin. Had the political process of debate and compromise been allowed to continue as it had over the prior 50 years, the war might have been avoided.

The Constitution was ratified because regional interests were accepted and compromise was achieved. As the country expanded west, other compromises, primarily involving slave vs. free labor territory were reached. In 1820, the Missouri Compromise established a line of demarcation at 36º30' (essentially, the southern border of Missouri) and made the admission of free states above the line (given population distribution) likely and admission of new slave states below the line less likely. The compromise itself fashioned by House Speaker, Henry Clay of Kentucky permitted the admission of Missouri as a state permitting slave ownership and Maine as a free state.

The Compromise of 1850 provided symbolic concessions to the South including a strengthened Fugitive Slave Act thus temporarily averting the growing conflict. These compromises and others were negotiated by politicians as "work arounds." Each compromise tamped down anger and delay of the seemingly inevitable war over slavery was achieved.

Some say Abraham Lincoln's plurality victory in the 1860 presidential election ended the chance for further compromise. On November 8, 1860, the *Charleston*

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Mercury editorialized, "Yesterday, November the 7th will long be a memorable day in Charleston. The tea has been thrown overboard – the revolution of 1860 has been initiated." The *New Orleans Delta* commented: "Americans can no longer be deluded… that the Black Republican Party is a moderate party. It is in fact essentially a revolutionary party."

Why this recalling of the 18th Century American Revolution? It was, in large part, because Southerners felt that the law was on their side and that Mr. Lincoln's party would refuse to work within the constitutional parameters Southerners believed had been established to protect states' rights and property rights. With Lincoln's election, Southerners could argue they were legally justified in seceding from the Union because they were convinced the Republican President and his party would refuse to work in good faith for compromise. Secession, argued Southern fire eaters, was the only viable option. After all, they argued, the Declaration of Independence was nothing if not a "secession" from the British Empire. But how could Southerners feel so confident about secession and their standing before the law?

On March 17, 1857, three years and nine months before South Carolina issued its December 1860 ordinance of succession, the *Charleston Mercury* reported:

> "The Supreme Court…by a decision of seven to two…established as law what our Southern statesmen have been repeating daily… that the whole action of this government on the subject of slavery…was without justifiable authority…and that slavery is guaranteed by the constitutional compact… Now… the highest tribunal has… condemned the interference of the federal government…"

Eleven days earlier, Roger Brook Taney, then Chief Justice of the United States Supreme Court, had issued his majority decision in the case of *Dred Scott v. John F. A. Sandford*, 60 U.S. 393 (March 6, 1857). Regarding the decision, the *Richmond Enquirer* stated:

> "A prize, for which the athletes of the nation have often wrestled in the halls of Congress, has been awarded at last, by the proper umpire, to those who have justly won it. The nation has achieved a triumph, sectionalism has been rebuked, and abolitionism has been staggered and stunned."

In the minds of the pro-slavery Southerners, their rights and the justice of their cause had finally been vindicated. Chief Justice Taney and the other six justices in the *Dred Scott* majority had imposed their will and prejudices on the Constitution in what was undoubtedly the most ill-conceived judicial decision in the history of the Republic. In hopes of removing the slavery question from the political process in both the state legislatures and the U.S. Congress, Justice Taney expanded what should have been a straightforward ruling about Dred Scott and his family into a breathtaking pronouncement regarding the inability of any black, free or slave, to be a citizen of a state or the United States; and even more amazingly, to declare the Missouri Compromise of 1820 unconstitutional. The decision effectively nationalized property rights in human beings and, Justice Taney must have hoped, resolved the slavery question for all time.

Dred Scott's case had first been tried in the courts of Missouri. The elected Missouri Supreme Court overruled its existing precedent of "once free always free" (Dred Scott had been voluntarily taken to free territory in Illinois and Wisconsin territory, thus giving him the strong argument that his master's voluntary removal of him—and his family—to free soil *ipso facto* resulted in emancipation) in favor of Justice Taney's opinion in *Strader v. Graham*, 51 U.S. 82 (1851). In *Strader*, Justice Taney ruled that the free labor laws of one state (Ohio) could not affect property rights in a slave state (Kentucky) even though enslaved individuals had been sent by their master from Kentucky to Ohio as minstrals for hire. Unlike *Dred Scott*, the slaves at issue in *Strader* had fled from Ohio to Canada. Nevertheless, the Missouri Supreme Court's slave friendly majority, claiming *Strader* as precedent, left Dred Scott a slave. The

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Scotts then sued in federal district court in St. Louis, claiming they were entitled to federal diversity jurisdiction as Dred Scott was a *citizen* of Missouri and one of the claimants to his slave hood was a citizen of New York. The St. Louis federal jury was instructed in accordance with *Strader* to find for the Scotts' owners and against the Scotts. Dred Scott was forced to appeal to the United States Supreme Court.

Before the United States Supreme Court, the fundamental issue was whether Dred Scott was a *citizen* of Missouri or any state so as to trigger diversity jurisdiction. Interestingly, the Dred Scott case was argued before the Court two times; once in February 1856 and again in December of 1856. The probable reason for the repetitive hearing was to delay a decision beyond the 1856 presidential election. Also, the Democratic candidate in 1856, James Buchanan, may have secretly pushed for delay in order to avoid complicating his election efforts. In any case, on March 6, 1857, two days following President Buchanan's inauguration as the fifteenth President of the United States. The Supreme Court ruled:

1. Dred Scott's sojourn in free territory did not result in his emancipation;

2. All blacks, free or enslaved, could never be U.S. citizens;

3. The Missouri Compromise of 1820 was unconstitutional because Congress had no power to decide the slavery question in U.S. territories. The "needful rules and regulations" phrase of the Territory Clause of the United States Constitution, Article IV. § 3, Clause 2, was limited to rules for governmental operations and could not affect property rights (this ruling ignored contrary precedent in Justice Marshall's opinion in *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828)). Justice Taney further held the Clause was not applicable beyond the Northwest Territories owned by the United States when the Constitution was adopted. Additionally, Justice Taney found a substantive and positive property right in slaveholding protected by the Fifth Amendment's due process clause from abrogation by Act of Congress.

The Southern reaction to the *Dred Scott* holding is noted above. In the North, the reaction was equally strong. The March 19, 1857, *Chicago Tribune* asserted:

> "The remedy is – UNION, ACTION, THE BALLOT BOX! There is on the side of the Free States the population and the power – the votes – and whenever these votes shall agree, 'that Slavery shall not be the fundamental law of the land.' …[L]et the next President be a Republican, and 1860 will mark an era kindred with that of 1776…"

Close on the heels of the *Dred Scott* opinion came the Illinois senatorial election of 1858. Stephen Douglas was challenged by Abraham Lincoln standing for the recently organized Republican Party. This contest, of course, set the stage for the Lincoln-Douglas debates. All seven of the formal debates focused on the *Dred Scott* decision. Douglas accused Lincoln and the Republicans of making war on the Constitution and the Supreme Court. Lincoln accused Douglas and the Democrats of seeking to tear the nation apart over slavery.

Earlier, in 1854 during the controversy over creation of the new Kansas and Nebraska territories, Douglas had helped construct the concept of popular sovereignty whereby settlers willing to move into those new territories could decide for themselves whether they would allow slavery.[1] The popular sovereignty argument contributed significantly to Douglas' victory over Lincoln in the 1858 Illinois senatorial election, but it served later to split the Democratic Party. At the 1860 democratic presidential nominating convention, Senator Jefferson Davis of Mississippi walked out over popular sovereignty. The slaveholding interests Davis represented no longer needed popular sovereignty. Strict adherence to the Supreme Court's holdings in *Dred Scott*[2] was a far better legal principle on which to stand. The split between Stephen Douglas' northern wing of the Democratic Party and Davis' southern wing—which nominated its own presidential candidate—made Abraham Lincoln's plurality victory in the 1860 Presidential election possible. War was soon to follow.

What if Justice Taney had ruled Dred Scott was emancipated not only because his master had voluntarily taken him to free territory but also because his services had been rented to others while on free soil? Such a decision was possible in spite of Justice Taney's unfortunate

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Community Events Calendar

KWAA Annual Meeting
July 16-18
Lindsborg

Arty Awards
July 25
TPAC

Are you involved in a community event you think your fellow TBA members should know about?
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holding in *Strader v. Graham,* 51 U.S. 82 (1851). *Strader* could have been limited to its facts. The slaves in *Strader* had been voluntarily sent from Kentucky to Ohio by their master, but instead of returning to Kentucky as expected, they fled to Canada. The facts surrounding Dred Scott's removal to free soil were distinguishable if for no other reason than Dred Scott did not flee. If the Supreme Court had set Dred Scott and his family free, the common law of emancipation would have been left intact.

In deciding the case, Justice Taney supposedly relied upon English and European law and general opinion regarding the state of blacks in Europe at the time the Constitution was adopted. Justice Taney, however, ignored Sir William Blackstone's 1765 Commentary on the Laws of England. Blackstone's commentary (well known in America and relied upon by the Supreme Court as guiding precedent on common law) stated: "And now it is laid down, … the instant [a black person, free or slave] lands in England he becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty, and his property." Blackstone, *Commentaries on the Laws of England*, (1765-1769), Bk 1, Ch. 14.

Further, the Court's erroneous ruling on citizenship would have been avoided. In fact, at the time the Constitution was adopted, free blacks were considered citizens of several states.

Had Justice Taney simply freed Dred Scott and his family, as he should have done, Southern slave interests would have been deprived of their putative constitutional authority and might have been stalled in their efforts to advance slaveholding into the territories.

In fact, had Justice Taney ignored the argument advanced by the Scotts' master that the Missouri Compromise was unconstitutional, delegates to the fractious Democratic Convention of 1860 might have rallied around Stephen Douglas. It is true that such a counter-factual would have relegated the name "Abraham Lincoln" to a footnote of history, but the American blood bath of the mid-1860s might have been avoided. The concept of popular sovereignty, originally adhered to by Southern slaveholding interests, would have eventually been undermined as the much more populous north with its advancing agrarians, industrial, and railroad interests, adopted state constitutions outlawing slavery or nullified earlier adopted slave constitutions. In fact, that is what happened in Kansas. Close on the heels of the Kansas Nebraska Act, Missouri "border ruffians" flowed into Kansas in order to influence the territorial legislature. Following the *Dred Scott* decision, supporters of slavery, mostly from Missouri, developed the Lecompton Constitution in September, 1857. That constitution did not prevail, even though it was supported by two Presidents: Franklin Pierce

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and James Buchanan. Jayhawkers and ordinary Freestaters began to outnumber Missouri slave friendly voters and, Kansas became a state in 1861 with a constitution prohibiting slavery. Kansas Constitution, Bill of Rights § 6.

By ruling differently in *Dred Scott*, the Supreme Court might have effectively ended slavery throughout the nation. Plantation owners would have been increasingly isolated. Even assuming the Missouri Compromise was effectively erased by the Kansas Nebraska Act and the doctrine of popular sovereignty had been freely applied, it is not unreasonable to argue the Kansas experience would have become typical. As the nation moved west, new states, even those South of the 32°30' might have come into the Union as free states. The principal Southern cash crop, cotton, could not be effectively grown in the climates of the northern and western territories. California, with its remarkably fertile and undoubtedly cotton friendly valleys, had already been admitted to the Union as a free state. Finally, increasing agricultural mechanization might have made use of slave labor, even in the southeast, increasingly impractical.

Perhaps the most poignant comment of the Court's folly in *Dred Scott* was expressed by one of its own writing in dissent:

> "There comes vividly to mind a portrait… [of] Roger Brook Taney … [painted] after his opinion in Dred Scott…There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment… [the] already apparent consequences [of Dred Scott] for the Court and … for the Nation – burning on his mind. I expect that two years earlier he, too, had thought himself 'call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.'
>
> "[B]y foreclosing all democratic outlet for the deep passions … by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish."

Planned Parenthood v. Casey, 505 US 833, (1992) (Scalia, J., dissenting).

Professional historians tend to reject counter factual analysis. This is fair for professional historians, but I am not such a professional. Nevertheless, it is true that Roger Brooke Taney and the six Associate Justices who voted with him in *Dred Scott* were aligned with slaveholding interests and would, under almost no conceivable circumstance, have ruled otherwise. Nevertheless, restraint and foresight might have led them to allow the political process—regardless of its drama and irritating complexity—to play out toward another compromise. Indeed, two Associate Justices filed dissents in *Dred Scott*. See *Dred Scott*, 60 U.S. 393 (1857) (Curtis, J., and McLean J., dissenting).

What is the point of considering, during this July, a history which might have been? Certainly, consideration and gratitude for lives lost establishing our nation's independence and freedoms. Certainly, consideration of our system of justice and the right to have issues addressed by a judicial tribunal. And certainly, on a more granular level, consideration of what such an experience could mean for Topeka lawyers working through careers that often involve unremarkable issues and ordinary controversies? Perhaps, the words of a lawyer, whose career as a lawyer spanned the 1840s and 50s, offers an answer:

> "Discourage litigation. Persuade your neighbors to compromise whenever you can… As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Abraham Lincoln, *Notes for a Law Lecture*, July, 1850.

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[1] In practical, if not final legal effect, the Kansas Nebraska Act of 1854, by incorporating the doctrine of popular sovereignty, greatly undermined the 1820 Missouri Compromise.

[2] The practical effect of 1857 Dred Scott case was to make the popular sovereignty concept (incorporated into the Kansas Nebraska Act of 1854 and, at that earlier time, favored by slave holders in the South) less desirable and an unnecessary solution for Southerners. Afterall, the Supreme Court had legally destroyed the Missouri Compromise and nationalized slavery with no need for territorial referendums.

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#1 Longest Putt Made: Phillip Turner

#2 Closest to the Pin (2nd Shot): Jason Robbins

#4 Closest to the Pin: Tim Resner

#5 Longest Drive (Women): Brenda Head

#8 Closest to the Pin (2nd Shot): Tim Resner

#13 Closest to the Pin: Jim Rankin

#15 Closest to the Pin: Harold Youngentob

#16 Longest Drive (Men): Tim Resner

#17 Closest to the Pin: Trent Byquist

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We appreciate you supporting the TBA during this Event!

Please mark your calendars for **Friday, September 18, 2015 for the YLD Fall Golf Tournament** at Cypress Ridge and for **Friday, May 27, 2016 for the 2016 Spring Golf Tournament at Lake Shawnee**.