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ARTICLES

Strader v. Graham: Kentucky's Contribution to National Slavery Litigation and the *Dred Scott* Decision

Robert G. Schwemm¹

INTRODUCTION

IN 1841, three Kentucky slaves in Louisville boarded a steamboat bound for Cincinnati. Within days, they had made their way to Detroit and then to permanent freedom in Canada. Their owner, a prominent central Kentucky businessman, soon tracked them down and tried to lure them back to bondage in the United States. When these efforts failed, he sued the steamboat owners for the value of the lost slaves in a Kentucky court. After ten years of litigation, this case reached the U.S. Supreme Court. The Court's decision in favor of the Kentucky slaveholder would prove to be an important precedent a few years later when the Court considered the freedom claim of another slave, Dred Scott.

The latter case, *Dred Scott v. Sandford*,² may be the most important decision ever handed down by the U.S. Supreme Court. Decided in 1857, *Dred Scott* was only the second time the Court held unconstitutional an Act of Congress, and it was a far more important exercise of this judicial review power than the first in *Marbury v. Madison*.³ *Dred Scott* prompted Abraham Lincoln's rise to the presidency and was a major cause of the Civil War,⁴ the

¹ Copyright 2008 Robert G. Schwemm. Ashland-Spears Professor, University of Kentucky College of Law. I thank Pen Bogert, Sharon Davies, Mary Davis, Andrea Dennis, Gene Gaetke, and Sarah Welling for their helpful comments on this paper.

² *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857).

³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* held unconstitutional a provision of the 1789 Judiciary Act that authorized the Supreme Court to issue writs of mandamus. *Id.* at 173–74. Chief Justice Marshall's determination that this power exceeded that given to the Court in Article III had the effect of denying a judgeship to one of his political allies, which meant that *Marbury* involved only one man's career and was not at all politically contentious. On the other hand, the ruling in *Dred Scott* that the anti-slavery provisions of the Compromise of 1820 were unconstitutional favored the prevailing Justices' political views on the most important issue of the day, and it caused a national firestorm of unprecedented proportions. See *infra* notes 446–58 and accompanying texts.

⁴ For the role that *Dred Scott* played in Lincoln's rise from obscure prairie lawyer to

event that drove much of subsequent United States history. Something like the Civil War may have occurred without *Dred Scott*, but the timing of the war and many of its particulars were shaped by this decision, as were the key provisions of the Fourteenth Amendment, which still define to a great degree what liberty and equality mean in the United States today.⁵

The key issue in *Dred Scott*—how, if at all, a Negro slave could obtain his freedom by spending time on free soil—had also been considered by the Court in prior cases.⁶ This Article deals with one of these, *Strader v. Graham*,⁷ the case brought by the Kentucky businessman whose slaves escaped on the defendants' steamboat and the only Kentucky slave case ever to reach the Supreme Court.⁸

In *Strader*, the Kentucky slave owner, Dr. Christopher Graham, had allowed three of his slaves who were musicians to go to Ohio and Indiana for occasional performances, after which they would return to Kentucky. When the slaves later fled to Canada, making the first part of their journey on a steamboat owned by Strader and another man, Graham sued the boat owners for the monetary value of his lost slaves. One of the defenses was that the slaves had become free as a result of their time in Ohio and Indiana and were therefore no longer Graham's property at the time of their escape. The Kentucky Court of Appeals—then the state's highest court⁹—ruled for Graham, holding that the slaves' brief sojourns to Ohio and Indiana had

national political figure, see DAVID HERBERT DONALD, *LINCOLN* 199–209 (1995). For *Dred Scott's* role as a cause of the Civil War, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 417–567 (1978); and CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64* 650 (1974) (“[T]he Lincoln–Douglas debates, with the *Dred Scott* decision at their core, led to [Lincoln's] nomination and election as President in 1860, and thereby precipitated the Civil War.”); *infra* notes 450–58, 467–72 and accompanying texts.

5 See *infra* notes 479–81, 496–97 and accompanying texts.

6 See *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 230–32 (1847) (upholding Kentucky slave owner's damage claim against Ohio defendant pursuant to the 1793 Fugitive Slave Act and rejecting defendant's arguments that this Act was unconstitutional or conflicted with the Northwest Ordinance and that slavery violated natural law); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 546–48, 573 (1842) (holding unconstitutional a Pennsylvania law that barred the use of force in removing any person from the state to return that person to slavery). See generally William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820–1860*, 65 J. AM. HIST. 34 (1978), reprinted in *THE LAW OF AMERICAN SLAVERY* 635 (Kermit H. Hall ed., 1987).

7 *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851).

8 Like *Strader*, *Jones v. Van Zandt* involved a Kentuckian's claim for the loss of his slave, but the claim in *Jones* was initially presented in an Ohio federal court, whereas *Strader* is the only U.S. Supreme Court case involving a Kentucky slave claim whose prior history involved the Kentucky courts. See also *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 68, 109 (1861) (rejecting Kentucky's effort to have the Supreme Court order Ohio's governor to surrender a free black who had allegedly violated Kentucky law by helping a Kentucky slave girl escape).

9 See *infra* note 191.

not changed their status in Kentucky,¹⁰ and the defendants appealed to the U.S. Supreme Court. In an opinion by Chief Justice Taney, the Court held that it lacked jurisdiction to review the Kentucky court's ruling because this ruling was based entirely on state law and then went on to declare that, in any event, it agreed with the Kentucky court's determination that the slaves' time in Ohio and Indiana had not changed their status.¹¹ Both rulings—on the jurisdictional point and on the slaves' status—were later relied on by the Justices in their opinions in *Dred Scott*.¹²

This Article provides a detailed description of *Strader*, including its factual background, its reflection of Kentucky slave law in the first half of the nineteenth century, and its significance for *Dred Scott* and other subsequent slave-related matters. Part I provides an overview of Kentucky slave law as it evolved up to the time of the *Strader* litigation. Part II describes *Strader's* factual background and the Kentucky court decisions it produced. Part III covers *Strader* in the U.S. Supreme Court. Part IV deals with post-*Strader* events, including a review of the *Dred Scott* case and the role that *Strader* played in that litigation. Part V provides some concluding observations about how the *Strader* case reflects the role of slavery, law, and lawyers in antebellum Kentucky and what *Strader* and *Dred Scott* might teach us in the modern era.

I. KENTUCKY SLAVE LAW AT THE TIME OF STRADER

“The development of the state along every line was either directly or indirectly affected by slavery.”¹³

A. *Early Times Through 1800*

Kentucky was originally part of Virginia and was settled at about the time of the American Revolution by frontiersmen who often brought slaves with them.¹⁴ In 1777, a census taken at Fort Harrod, Kentucky's first settlement, “counted 19 slaves, 7 of them children under ten years of age, in a total population of 198.”¹⁵ By the time of the first national census in 1790, Kentucky had a total population of 73,077, of whom 61,133 were

10 *See Strader v. Graham*, 46 Ky. (7 B. Mon.) 633 (Ky. 1847), *aff'd*, 51 U.S. (10 How.) 82 (1851); *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173 (Ky. 1844).

11 *Strader*, 51 U.S. (10 How.) at 93–95. The Court's opinion in *Strader* is discussed *infra* Part III.C.

12 *See infra* notes 389, 431, 435–38, 443 and accompanying texts.

13 2 WILLIAM ELSEY CONNELLEY & E.M. COULTER, *HISTORY OF KENTUCKY* 796 (Charles Kerr ed., 1922).

14 THOMAS D. CLARK, *A HISTORY OF KENTUCKY* 192–93 (1992).

15 LOWELL H. HARRISON & JAMES C. KLOTTER, *A NEW HISTORY OF KENTUCKY* 167 (1997).

white, 11,830 were slaves, and 114 were free colored.¹⁶ By 1840, the year before Graham's slaves fled Kentucky,¹⁷ the state's total population had increased ten fold to almost 780,000, of whom over 182,000 (23%) were slaves and about 7300 (1%) were free colored.¹⁸

Virginia's original dominion extended not only to Kentucky, but also to a vast stretch of land north of the Ohio River, and this territory is crucial to our story. In the 1780s, Virginia and other states ceded their claims to these lands to the United States.¹⁹ On July 13, 1787, Congress, acting under the Articles of Confederation, created a formal territory out of these ceded lands in an act titled the "Northwest Ordinance."²⁰ This Ordinance created the Northwest Territory out of the region north of the Ohio River, south of the Great Lakes, and east of the Mississippi River, and provided for its governance and ultimate division into "not more than three, nor more than five States."²¹ The governance provisions of the Northwest Ordinance included a prohibition of slavery in the Northwest Territory, albeit one that required the return of fugitive slaves who fled to the territory.²² After the

¹⁶ See JOSEPH C.G. KENNEDY, POPULATION OF THE UNITED STATES IN 1860: COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 600 (1864), available at <http://www2.census.gov/prod2/decennial/documents/1860a-15.pdf>. The Kentucky population figures in the following chart are derived from this source:

Year	Whites	Free colored	Slaves	Slaves vs. Total	TOTAL
1790	61,133	114	11,830	16%	73,077
1800	179,871	741	40,343	18%	220,955
1810	324,237	1,713	80,561	20%	406,511
1820	434,644	2,759	126,732	22%	564,135
1830	517,787	4,917	165,213	24%	687,917
1840	590,253	7,317	182,258	23%	779,828
1850	761,413	10,011	210,981	21%	982,405
1860	919,484	10,684	225,483	20%	1,155,684

¹⁷ See *infra* notes 141-42 and accompanying texts.

¹⁸ See *supra* note 16.

¹⁹ See, e.g., Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-22 (1845); NORTHWEST TERRITORY CELEBRATION COMMISSION, HISTORY OF THE ORDINANCE OF 1787 AND THE OLD NORTHWEST TERRITORY 14 (1937).

²⁰ The Northwest Ordinance, whose formal title was "An Ordinance for the Government of the Territory of the United States, north-west of the river Ohio," is reprinted in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51-53 n.(a).

²¹ Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51-53 n.(a) (Art. V of the Northwest Ordinance). Eventually, the states of Ohio (in 1802), Indiana (in 1816), Illinois (in 1818), Michigan (in 1837), and Wisconsin (in 1848) were formed out of the Northwest Territory and joined the Union on an equal footing with the original states. See note (a) in 1 Stat. 53 (regarding Ohio, Indiana, Illinois, and Michigan); Act of May 29, 1848, ch. 9, Stat. 233 (regarding Wisconsin).

²² Art. VI of the Northwest Ordinance provided:

adoption of the Constitution, the first Congress passed a statute re-enacting the Northwest Ordinance with a few minor modifications that did not alter its anti-slavery provision.²³ These laws governing the Northwest Territory, along with Kentucky's being part of the slave state of Virginia, established the Ohio River as the boundary between free and slave territory in the region between the Appalachian Mountains and the Mississippi River.²⁴

In 1789, Virginia enacted a law to make "the District of Kentucky into an Independent state."²⁵ Known as the "Compact with Virginia," this law provided for the holding of a Kentucky constitutional convention and for delegates to this convention to be elected by "the free male inhabitants of each county above the age of twenty-one years."²⁶ Pursuant to this process, Kentucky adopted its first constitution on April 19, 1792,²⁷ and was admitted to the Union as the fifteenth state on June 1, 1792.²⁸

Kentucky's first constitution recognized slavery in Article IX, which barred the legislature from emancipating slaves without the consent of, or payment to, their owners.²⁹ This article was adopted by the constitutional

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: Provided always, that any person escaping into the same from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53 n.(a).

23 See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–53.

24 This boundary was further confirmed in 1790 when Congress enacted the "Southwest Ordinance" to govern the area south of the Ohio River generally corresponding to the modern state of Tennessee in a law whose language closely tracked the Northwest Territory statute, except that slavery was allowed. See Act of May 26, 1790, ch. 13, 1 Stat. 123.

25 13 WILLIAM WALLER HENING, HENING'S STATUTES AT LARGE, 17–21 (1823), reprinted in 1 MICHIE'S KENTUCKY REVISED STATUTES 841–43 (2002) [hereinafter MICHIE].

26 See *id.* at 17–18, reprinted in 1 MICHIE, *supra* note 25, at 841.

27 See KY. CONST. of 1792, reprinted in 1 MICHIE, *supra* note 25, at 777–88.

28 See Act of Feb. 4, 1791, ch. 4, 1 Stat. 189, reprinted in 1 MICHIE, *supra* note 25, at 845.

29 KY. CONST. of 1792, art. IX, reprinted in 1 MICHIE, *supra* note 25, at 784. In its entirety, Article IX provided:

The Legislature shall have no power to pass laws for the emancipation of slaves without the consent of their owners, or without paying their owners, previous to such emancipation, a full equivalent in money for the slaves so emancipated; they shall have no power to prevent emigrants to this State from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this State; that they shall pass laws to permit owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a charge to the county in which they reside; they shall have full power to prevent any slaves being brought into this state as merchandise; they

convention after a bitter debate by a 26–16 vote.³⁰ The leading opponents of this provision were religious leaders—indeed, all six of the ministers who were constitutional delegates voted against Article IX³¹—and, perhaps in reaction to this, the new constitution also barred ministers from serving in the General Assembly.³²

Kentucky's first constitution also provided that “[a]ll laws now in force, in the State of Virginia, not inconsistent with this Constitution, of a general nature, . . . shall be in force in this State until they shall be altered or repealed by the Legislature,”³³ which meant that Virginia's slave laws were carried over to the new state.³⁴ At the time, Virginia had a number of such laws,³⁵ one of which, enacted on October 17, 1785, divided the populace

shall have full power to prevent any slave being brought into this State from a foreign country, and to prevent those from being brought into this State, who have been since the first day of January, one thousand seven hundred and eighty-nine, or may hereafter be, imported into any of the United States from a foreign country. And they shall have full power to pass such laws as may be necessary, to oblige the owners of slaves to treat them with humanity, to provide for them necessary clothing and provision, to abstain from all injuries to them, extending to life or limb; and in case of their neglect or refusal to comply with the directions of such laws, to have such slave or slaves sold for the benefit of their owner or owners.

Id.

³⁰ See HARRISON & KLOTTER, *supra* note 15, at 175.

³¹ See J. WINSTON COLEMAN, JR., *SLAVERY TIMES IN KENTUCKY 290–91* (1940) [hereinafter *SLAVERY TIMES*]. The principal opponent of Article IX was a Presbyterian minister named David Rice, who a few months before the convention had published a pamphlet, *Slavery Inconsistent with Justice and Good Policy*, arguing that slavery was harmful to whites, as well as blacks, because it reduced public and private virtue and promoted sloth. *Id.* at 290–91; see also HARRISON & KLOTTER, *supra* note 15, at 174.

³² See KY. CONST. of 1792, art. I, § 24, *reprinted in* 1 MICHIE, *supra* note 25, at 779; see also CLARK, *supra* note 14, at 95. Both slavery and the prohibition on clergy serving in the General Assembly were also made part of Kentucky's two subsequent antebellum constitutions in 1799 and 1850. See KY. CONST. of 1850, art. II, § 27, *reprinted in* 1 MICHIE, *supra* note 25, at 779; KY. CONST. of 1799, art. II, § 26 (1800), *reprinted in* 1 MICHIE, *supra* note 25, 791 (barring clergy from service in the legislature); *infra* note 54 (providing for slavery).

³³ See KY. CONST. of 1792, art. VIII, § 6, *reprinted in* 1 MICHIE, *supra* note 25, at 783–84.

³⁴ See, e.g., *infra* notes 35–36 and accompanying texts.

³⁵ In Virginia's early decades, most people from Africa were indentured servants, but by the late 1600s, Africans and their descendants were increasingly seen as slaves. See Virginia Historical Society, *Becoming Virginians: A Selection of Virginia Slave Laws, 1662–1705*, <http://www.vahistorical.org/sva2003/slavelaws.htm> (last visited Jan. 8, 2009). In 1705, the Virginia General Assembly confirmed their status as slaves, declaring that: “All servants imported and brought into the Country . . . who were not Christians in their native Country . . . shall be accounted and be slaves. All Negro, mulatto and Indian slaves within this dominion . . . shall be held to be real estate.” See PBS, *Africans in America/Part 1/Virginia's Slave Codes*, <http://www.pbs.org/wgbh/aia/part1/1p268.html> (last visited Jan. 7, 2009). This 1705 law also limited slaves' ability to travel and associate with whites, provided for whipping, hanging, and

into three groups—whites; negroes; and mulattos, who were defined as those persons with at least one fourth negro blood—with slavery being confined to the latter two groups.³⁶

After almost six years of statehood, the Kentucky General Assembly in 1798 adopted what amounted to the state's own slave code, a lengthy statute with forty-three sections entitled "An Act to reduce into one, the Several Acts respecting Slaves, Free Negroes, Mulattoes, and Indians."³⁷ This law, as amended over the years, "remained the basis for all legal action throughout the entire period of slavery."³⁸

Section 1 of the 1798 Kentucky statute defined, by negative implication, who could be slaves, providing: "No persons shall henceforth be slaves within this commonwealth, except such as were so on the 17th day of October, in the year 1785, and the descendants of the females of them."³⁹ The 1798 statute also implied that any "negro, mulatto, or Indian" could be a slave,⁴⁰ and it provided that "all such slaves" shall be treated as either "real estate" for purposes of inheritance or "other chattels or personal estate" for purposes of satisfying debts.⁴¹

other physical punishments for slaves found guilty of crimes, and absolved masters who killed slaves that resisted correction. *Id.* The basic features of this Virginia slave law remained in place through 1776, by which time African-American slaves accounted for 40% of Virginia's population. See Virginia Historical Society, *Becoming Virginians*, <http://www.vahistorical.org/svaz2003/virginians.htm> (last visited Jan. 7, 2009).

36 See 2 WILLIAM LITTELL & JACOB SWIGERT, *A DIGEST OF THE STATUTE LAW OF KENTUCKY* 1164 (1822). The full version of this law's definition of mulattoes provided:

Every person, of whose grandfathers or grandmothers any one is, or shall have been a negro, although all his other progenitors, except that descending from a negro, shall have been white persons, shall be deemed a mulatto; and so every person who has one fourth part, or more, of negro blood, shall in like manner be deemed a mulatto.

Id.

37 *Id.* at 1149–59.

38 SLAVERY TIMES, *supra* note 31, at 17 n.22.

39 2 LITTELL & SWIGERT, *supra* note 36, at 1149–50. The referenced date corresponded to the enactment of the Virginia statute described in the text two paragraphs earlier. See *supra* note 36 and accompanying text.

Children born to female slaves were automatically considered slaves for life and owned by their mother's owner, even if the mother was subsequently freed or had been promised her freedom at a later time. See *infra* note 74 (describing *Ned v. Beal*, 5 Ky. (2 Bibb) 238 (Ky. 1810)).

40 See 2 LITTELL & SWIGERT, *supra* note 36, at 1155 (quoting section 28 of this law to the effect that "[a]ll negro, mulatto, or Indian Slaves . . . shall be held, taken and adjudged to be real estate, and shall descend to the heirs and widows of persons departing this life, as lands are"); see also *id.* at 1150–54 (authorizing, in sections 5, 6, 13, 19, and 20, different treatment, compared to whites, of persons who are negro, mulatto, or Indian).

41 *Id.* at 1155–56 (setting forth sections 28–29).

Among its other provisions, the 1798 statute authorized private suits to “recover any slave” and for “damage for the detention, trover or conversion thereof.”⁴² It also set forth a procedure for how owners could emancipate their slaves.⁴³ Other provisions:

- specified how slaves could be sold, bequeathed, and inherited;⁴⁴
- restricted slaves in various ways, including their ability to travel, have guns, be on land belonging to others, assemble and speak in groups, and engage in commerce;⁴⁵
- limited the ability of all negroes, mulattos, and Indians, whether slave or free, to testify,⁴⁶ and made it a crime for every such persons to “lift his or her hand in opposition to any person not being a negro, mulatto or Indian”;⁴⁷
- dealt with how slaves could be punished for crimes, including “punished with stripes,” “ten laches on his or her bare back,” “thirty laches on his or her bare back, well laid on,” “laches not exceeding thirty nine, on his or her bare back, well laid on,” “burnt in the hand [and] such other corporeal punishment as the court shall think fit to inflict,” and death by execution,⁴⁸ and, in the case of execution, the monetary compensation due their owners from public funds;⁴⁹
- barred all persons, including whites, from harboring slaves and engaging in trade with them without their owners’ consent;⁵⁰ and,
- repealed all prior laws dealing with the importation of slaves into the state and barred such importation from foreign countries.⁵¹

In 1799, Kentucky adopted a new constitution, which became effective on June 1, 1800.⁵² This second constitution provided for the carry-over of

42 *Id.* at 1156 (setting forth section 32).

43 *Id.* at 1155 (setting forth sections 27, originally enacted Dec. 17, 1794).

44 *Id.* at 1155–59 (setting forth sections 28–31, 33–35, 37–43).

45 *Id.* at 1150–52 (setting forth sections 3–11).

46 *Id.* at 1150, 1153–54 (setting forth sections 2, 19, and 21).

47 *Id.* at 1153 (setting forth section 13).

48 *Id.* at 1150–54 (setting forth sections 3–5, 7, 12–13, 18, and 20). “Whipping was by far the most common form of punishment, both by the owner and by the governmental authorities for public crimes. County seats had public whipping posts, as did many small communities.” HARRISON & KLOTTER, *supra* note 15, at 170. “Branding and ear cropping were done to identify runaways.” *Id.* at 169. Executions were by hanging. For example, in 1831, “four slaves were hanged in Lexington, witnessed by a vast crowd estimated to be from 10,000 to 20,000.” 2 CONNELLEY & COULTER, *supra* note 13, at 809.

49 2 LITTELL & SWIGERT, *supra* note 36, at 1154–55 (setting forth section 24). “The amount of money paid out of the state treasury for slaves hanged was said to be \$68,000 in 1830.” 2 CONNELLEY & COULTER, *supra* note 13, at 809.

50 2 LITTELL & SWIGERT, *supra* note 36, at 1151–53 (setting forth section 10 (harboring) and section 12 (commerce)). Other restrictions on whites included subjecting slave owners to fines for allowing their slaves to gather in public groups and to “go at large and trade as a freeman.” *Id.* at 1151, 1153 (setting forth, respectively, sections 8 and 14).

51 *Id.* at 1154–55 (setting forth, respectively, sections 23 and 25).

52 See KY. CONST. of 1799, sched., § 6 (1800), *reprinted in* 1 MICHIE, *supra* note 25, at

all laws then in force⁵³ and also adopted virtually verbatim the slave article of the first constitution, this time as Article VII.⁵⁴ However, unlike the 1792 constitution, which extended suffrage to “all free male citizens of the age of twenty–one years,”⁵⁵ the new constitution barred “negroes, mulattoes and Indians” from voting.⁵⁶ This second constitution was in place for almost half a century and governed the state during the 1840s when the *Strader* litigation was in the Kentucky courts.⁵⁷

B. Steamboats and the 1800–1840 Period

An important occurrence in the early nineteenth century—and one of special relevance to our story—was the development of the steamboat. In 1807, Robert Fulton operated the first commercially successful steamboat in the United States, running on the Hudson River from New York City to Albany.⁵⁸ Four years later, Fulton built a steamboat in Pittsburgh and took it down the Ohio and Mississippi Rivers to Natchez, stopping in Louisville in October of 1811.⁵⁹ By 1816, a steamboat could make the journey upriver from New Orleans to Louisville in twenty–five days, a time that would be

789–802.

53 See KY. CONST. of 1799, sched., § 1 (1800), *reprinted in* 1 MICHIE, *supra* note 25, at 800.

54 Article VII, entitled “Concerning Slaves,” provided a first section that was virtually identical to Article IX of the 1792 constitution (*see supra* note 29), save for certain punctuation changes, changing “Legislature” to “General Assembly” in the first phrase, and changing “the county in which they reside” to “any county in this commonwealth” in the phrase dealing with preventing emancipated slaves from becoming a public charge. See KY. CONST. of 1799, art. VII (1800), *reprinted in* 1 MICHIE, *supra* note 25, at 797–98. A second section was added, as follows:

§ 2. In the prosecution of slaves for felony, no inquest by a grand jury shall be necessary but the proceedings in such prosecutions shall be regulated by law except that the General Assembly shall have no power to deprive them of the privilege of an impartial trial by a petit jury.

Id.

55 See KY. CONST. of 1792, art. III, § 1, *reprinted in* 1 MICHIE, *supra* note 25, at 781.

56 KY. CONST. of 1799, art II, § 8 (1800), *reprinted in* 1 MICHIE, *supra* note 25, at 790 (quoting Article II, § 8 as extending suffrage to “every free male citizen, (negroes, mulattoes and Indians excepted), who at the time being, hath attained to the age of twenty–one years”).

57 See *infra* Part II.B–E and notes 272–77 and accompanying texts.

58 See Microsoft Online Encyclopedia 2008, Steamboat, http://encarta.msn.com/encyclopedia_761558257/Steamboat.html (last visited Jan. 7, 2008).

59 See Cincinnatiati.com, Two Centuries on the Ohio River, http://www.cincinnati.com/tallstacks/history_2centuries.html (last visited Oct. 12, 2008). Louisville was a natural stopping point on the Ohio River, because the near–by rapids, or “falls,” was the only serious impediment to boat traffic along the river. In the late 1820s, a canal was built to bypass these rapids, allowing cargo and passengers to travel on one steamboat all the way from Pittsburgh to New Orleans without changing vessels or waiting for high water. *Id.*

steadily reduced through improved vessel design until it took less than five days in 1853.⁶⁰

The *Zebulon Pike*, built in Cincinnati in 1817, was the first steamboat designed primarily for passenger service.⁶¹ Within two years, seven more steamboats were built in Cincinnati, and by 1834, 304 such vessels had been built at Pittsburgh, 221 at Cincinnati and Covington, and 103 at Louisville.⁶² Steamboat traffic helped establish Cincinnati and Louisville as major cities in the first half of the nineteenth century.⁶³ The steamboat trade along the Ohio River was flourishing in 1841 when Graham's three slaves fled Kentucky on a steamboat from Louisville to Cincinnati,⁶⁴ and it continued to grow until about 1852 when some 8000 landings were recorded in Cincinnati.⁶⁵

Eventually, Kentucky slave law came to reflect the increased use of steamboats on the Ohio River and the opportunity these boats presented to escaping slaves. Thus, in 1824, the General Assembly passed a law that made the master of such a boat subject to liability—and criminal sanctions—for taking slaves “out of the limits of this state” without their owner's permission.⁶⁶ Four years later, this law was amended to also make

⁶⁰ See About.com, The History of Steamboats, <http://inventors.about.com/library/inventors/blsteamship.htm>.

⁶¹ See Cincinnati.com, *supra* note 59.

⁶² *Id.*

⁶³ For example, in 1810, Cincinnati's population was 2540, but by 1850, “the city had 115,435 residents, a population second only to New Orleans among western river cities in that year.” See Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990* tbl. 4 (Population Division U.S. Bureau of the Census, Working Paper No. 27, 1998), available at <http://www.census.gov/population/www/documentation/twps0027/tab04.txt>. Cincinnati's vast population stemmed in part from the city's large manufacturing sector. “Steamboats helped . . . enable capitalists to restructure urban commodity production in Cincinnati and to create racialized labor markets. Members of the city's African American community, one of the largest in the North in 1850, . . . numbered 3,172.” THOMAS C. BUCHANAN, *BLACK LIFE ON THE MISSISSIPPI: SLAVES, FREE BLACKS, AND THE WESTERN STEAMBOAT WORLD* 47 (2004).

⁶⁴ See *infra* notes 141–42 and accompanying texts.

⁶⁵ See Cincinnati.com, *supra* note 59.

⁶⁶ The Act of 1824 provided:

That any master or commander of a steam-boat or other vessel, who shall hereafter hire, or employ, or take as passenger, or otherwise, out of the limits of this state, or shall suffer to be hired or employed, or taken as passenger on board of such steam-boat or other vessel under his command or in his charge, or otherwise take out of the limits of this state any person or persons of colour; unless such coloured person or persons shall have in their possession, the record of some court of the United States, properly exemplified, providing his or their right to freedom; or unless such master shall have the permission of the master of such persons or persons of colour for such removal, every such master or commander of a steam-boat or other vessel, shall be liable to

liable, in addition to the boat's master, "the owners, mate, clerk, pilot and engineer of any steam vessel" and to make clear that the law did not apply "to any person of colour who is not a slave."⁶⁷ Graham's suit in *Strader* would be based on this law.⁶⁸ Of course, steamboats could also be used to transport Kentucky slaves down the Ohio and Mississippi Rivers to New Orleans and plantation work in the Deep South.⁶⁹

indictment, fine and imprisonment, at the discretion of a jury, and shall, moreover, be liable in damages to the party aggrieved by such removal; and the steam-boat or other vessel in which such coloured person or persons shall be hired or employed, or taken as passenger, or otherwise removed out of the limits of this commonwealth, shall be liable to the party aggrieved by such removal, and may be proceeded against by suit in chancery, and condemned and sold to pay and satisfy such damage and the costs of suit.

1824 Ky. Acts 406–07.

67 See 1827 Ky. Acts 178–79. The legislature's purpose in enacting this statute, according to an 1830 opinion of the Court of Appeals, was:

to prevent the removal of slaves out of the limits of the state, without the consent of their owners. The evil intended to be averted was, the loss of property to our citizens, resulting to owners of slaves, by tolerating the masters and commanders of vessels in hiring, or in any other manner, taking slaves on board, and transporting them out of the limits of the state. Such conduct, on the part of masters and commanders of vessels, might render it impossible for owners of a slave to reclaim him.

Edwards v. Vail, 26 Ky. (3 J.J. Marshall) 595, 596 (1830); see also *McFarland v. McKnight*, 45 Ky. (6 B. Mon.) 500, 506, 511 (1846) (noting that the offense condemned by this law "consists in taking of the slaves on board the steam vessel and transporting them" out of the state and that the statute thereby "has singled out a particular class of wrongs for the purpose of giving a more effective remedy").

The *McFarland* case involved the 1831 escape of a Kentucky slave couple aboard the steamship *Versailles* from Louisville to Cincinnati, which events and the couple's subsequent life as free persons in Canada are recounted in KAROLYN SMARDZ FROST, *I'VE GOT A HOME IN GLORY LAND: A LOST TALE OF THE UNDERGROUND RAILROAD* (2007).

68 See *infra* note 168 and accompanying text.

69 See, e.g., BUCHANAN, *supra* note 63, at 81–100; WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* 41–42, 47–50, 62–63 (1999). For example, in 1841 a few months after Dr. Graham's slaves escaped, Abraham Lincoln was returning from a Kentucky vacation on a steamboat:

[H]e encountered twelve chained slaves, "strung together precisely like so many fish upon a trot-line." A "gentleman" was taking them from their Kentucky homes to the Deep South, where, Lincoln recognized, "the lash of the master is proverbially more ruthless and unrelenting than any other where." Years later he would remember the brutality of the scene.

DONALD, *supra* note 4, at 89.

Kentucky slave law in the early decades of the nineteenth century also evolved through other legislative enactments and judicial decisions. For example, in its first year of operation under the 1800 constitution, the General Assembly adjusted the procedure by which owners could emancipate their slaves.⁷⁰ A number of laws passed in the early 1800s dealt with crimes committed by slaves and how such slaves were to be punished.⁷¹ Other statutes, passed in 1814 and 1815, modified the prohibition on the importation of slaves into the state for commercial purposes.⁷²

Judicial decisions relating to slaves during this period generally involved inheritance or commercial disputes between whites, reflecting the slaves' status as property.⁷³ A few cases dealt with emancipation and related issues.⁷⁴ As in other slave states,⁷⁵ Kentucky law allowed slaves to sue for their freedom in court.⁷⁶ One 1820 decision by the Court of Appeals in

⁷⁰ See 1 C. S. MOREHEAD & MASON BROWN, *DIGEST OF THE STATUTE LAWS OF KENTUCKY* 609 (1834) (quoting the Act of Dec. 15, 1800, which adjusted the emancipation provision, described *supra* note 43 and accompanying text, by providing that anyone over 18 years of age who owned slaves might emancipate them).

⁷¹ See 2 LITTELL & SWIGERT, *supra* note 36, at 1159–64 (setting forth, *inter alia*, section 3 of an Act passed Dec. 20, 1800 (dealing with bail for imprisoned slaves); section 19 of an Act passed Dec. 22, 1802 (providing for the death penalty for any slave “convicted of murder, arson, rape committed on a white woman, robbery from the person, or burglary” and for public whipping of slaves convicted of “any other offense”); section 1 of an Act passed Dec. 27, 1806 (providing for appointment of counsel for slaves accused of felonies); an Act passed Jan. 25, 1811 (providing punishments for various crimes by slaves, including death for conspiring “to rebel or make insurrection”); and section 1 of an Act passed Feb. 10, 1819 (providing death for any slave who shot a gun at or wounded with intent to kill a free white)).

⁷² See, e.g., 2 LITTELL & SWIGERT, *supra* note 36, at 1162 (setting forth the Act of Feb. 8, 1815). This prohibition was strengthened by a law passed in 1833, but was ultimately repealed in 1849. See, e.g., 2 CONNELLEY & COULTER, *supra* note 13, at 809; *infra* note 271 and accompanying text.

⁷³ See generally 2 LITTELL & SWIGERT, *supra* note 36, at 1165–68, for the Court of Appeals' decisions.

⁷⁴ See Court of Appeals' decisions described in 2 LITTELL & SWIGERT, *supra* note 36, at 1166–68. Among these cases were *Davis v. Curry*, 5 Ky. (2 Bibb) 238, 239–40 (Ky. 1810), which held that the burden of proof is on a person of color claiming freedom, because in a “great majority of instances . . . the characteristic marks of the African are found to be connected with slavery, and the existence of the latter may well be inferred from the proof of the former. Color being one of the criteria by which the African race is distinguished from the rest of the population of the country, must consequently afford . . . a presumption of slavery”; and *Ned v. Beal*, 5 Ky. (2 Bibb) 298, 299 (Ky. 1811), which held that the children of a female slave who were born after the death of her owner, who had by will directed that she be free at a certain later time, are slaves, based on the “general rule . . . that the children follow the condition of their mother at the time of their birth.”

⁷⁵ See, e.g., Dennis K. Boman, *The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri*, 44 AM. J. LEGAL HIST. 405, 406–13, 417–20 (2000) (reviewing freedom statutes and pre-*Dred Scott* cases in Missouri); Michael P. Mills, *Slave Law in Mississippi from 1817–1861: Constitutions, Codes and Cases*, 71 MISS. L. J. 153, 176–88 (2001) (discussing Mississippi freedom cases); *infra* text accompanying notes 311–14, 384–88 (describing Missouri freedom cases).

⁷⁶ The legal technique used by Kentucky slaves suing for their freedom was to bring “an

such a case, *Rankin v. Lydia*,⁷⁷ was still an important precedent over two

action of trespass, assault, battery, and false imprisonment” against the putative owner. *See, e.g., Amy v. Smith*, 11 Ky. (1 Litt.) 326, 327 (Ky. 1822); *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 467 (Ky. 1820). If the slave prevailed, he or she would be given judgment for a nominal amount (e.g., “one cent” in *Rankin*) and declared free. *See Rankin*, 9 Ky. (2 A.K. Marsh.) at 470.

In 1808, the General Assembly amended the law governing such freedom suits by providing a two-year statute of limitation for those actions based on Virginia or Pennsylvania records of freedom, finding that “creditors, purchasers and others are exposed to great injustice, by the assertion, by persons held in slavery, of dormant claims to their freedom, founded upon certain acts of the legislatures of Virginia and Pennsylvania.” *See Amy v. Smith*, 11 Ky. (1 Litt.) at 330 (quoting “an Act limiting actions in certain cases” approved Feb. 20, 1808). Further amendments to the freedom-suit law were enacted from time to time thereafter. For example, in 1840, an amendment made clear that such suits would not abate upon the putative owner-defendant’s death and that successful suits might result in damages for the slave-plaintiff covering “the value of the services of such free person of color, whilst retained in slavery.” *See KY. LAWS 225–26* (Loughborough 1842) (setting forth an Act approved Feb. 12, 1840).

⁷⁷ *Rankin*, 9 Ky. (2 A.K. Marsh.) at 467. In *Rankin*, the Kentucky Court of Appeals ruled in favor of the slave Lydia, on the grounds that she had become free when her master took her from Kentucky to reside with him in the free territory of Indiana and declared her to be free there and that this freedom could not be lost by her being sold back into Kentucky.

Rankin has a number of interesting aspects. One of Lydia’s putative owners after she was sold back into Kentucky was Robert Todd of Lexington, *see id.* at 468, who was the father of Abraham Lincoln’s future wife. *See DONALD, supra* note 4, at 84, 96. Also, the Kentucky Court of Appeals’ opinion in *Rankin*, written by Judge Benjamin Mills, contained some passages reflecting a clear hostility toward the institution of slavery. For example, Judge Mills wrote:

Slavery is sanctioned by the laws of this state, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law. . . . In a state such as ours, where we have been habituated to slavery, in black, if we read or hear of an African in another state or territory, bound to servitude of any character, whether limited or otherwise, we are apt to affix to him, not only the appellation, but the legal condition of a slave. . . . [F]reedom is the natural right of man, although it may not be his birthright. By municipal laws of a government it may be taken away . . . [W]e consider Lydia as free. Not because she acquired that freedom by the laws of Kentucky, but during her absence from the state, by the voluntary and unequivocal acts of her master, and that when it is thus acquired it ought to be held equally sacred here, whether she is brought against her will, as it would be, had it been her birthright. It is enough if it exists now—it is equally as precious, valuable and sacred as if it commenced with her existence.

Rankin, 9 Ky. (2 A.K. Marsh.) at 470, 474–75, 479. Two years later, Judge Mills, in dissent, wrote another dramatic opinion in favor of a slave’s freedom suit. *See infra* note 83 para. 2 (discussing *Amy v. Smith*). Mills lost his seat on the Kentucky Court of Appeals in 1828 when, after being re-nominated by the Governor, he was rejected by the Senate. *See H. LEVIN, THE LAWYERS AND LAWMAKERS OF KENTUCKY 316–17* (1897).

decades later in the *Strader* litigation.⁷⁸

Also in the 1820s, a variety of amendments to Kentucky's slave code were enacted. For example, in 1823, the General Assembly passed a law that required court clerks to keep records of emancipation certificates describing the ex-slaves "as to colour, age, form, height, and particular accidental marks" and that provided penalties for anyone who transferred such an emancipation certificate to a slave with the intent of illegally freeing him.⁷⁹ Meanwhile, the Kentucky Court of Appeals decided about a dozen cases dealing with emancipation issues,⁸⁰ but the bulk of its slave-based docket continued to involve inheritance and commercial disputes between whites.⁸¹ In 1822, this court also opined, in a 2-1 decision that anticipated the Supreme Court's ruling in *Dred Scott*,⁸² that blacks could never become U.S. citizens, nor could they, even if free, be considered citizens of Kentucky.⁸³

78 In its 1844 decision in *Strader*, the Kentucky Court of Appeals distinguished the experience of Dr. Graham's slaves, who had only been in free states for temporary visits, from Lydia's experience in *Rankin*, which was described as a case involving

a master [who] remov[ed] with his slave from this State to Indiana, then a territory, with the intention of residing there, and having become actually a resident there, and made a registry under the laws of the territory, of Lydia, whom he had taken as a slave from Kentucky, lost thereby his dominion as a master and owner over her, and could not resume or re-create it by bringing or selling her back to Kentucky.

Graham v. Strader & Gorman, 44 Ky. (5 B. Mon.) 173, 180 (Ky. 1844).

Years later in *Dred Scott*, the *Rankin* case would also be cited by Justice McLean in his dissent. See *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 536 (1857).

79 See MOREHEAD & BROWN, *supra* note 70, at 610 (setting forth "An Act to amend the law respecting the Emancipation of Slaves: Approved November 13, 1823").

80 See cases cited in MOREHEAD & BROWN, *supra* note 70, at 610 nn.2 & 3.

81 See, for example, the cases described in KY. LAWS 557-58 (Loughborough 1842).

82 See *infra* note 422.

83 See *Amy v. Smith*, 11 Ky. (1 Litt.) 326 (Ky. 1822). This decision ruled against the slave Amy, holding in relevant part that, because she could not be a citizen of any state, she was not entitled to invoke the Privileges and Immunities Clause of the U.S. Constitution to challenge a Kentucky law restricting freedom suits. *Id.* at 330-35. According to the majority: "No one can . . . be a citizen of a state, who is not entitled, upon the terms prescribed by the institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of society." *Id.* at 333. Thus, Amy, whose freedom suit here was based on her claim that she had become a free citizen in Pennsylvania or Virginia prior to her being sold into Kentucky:

can not have been a citizen, either of Pennsylvania or of Virginia, unless she belonged to a class of society, upon which, by the institutions of the states, was conferred a right to enjoy all the privileges and immunities appertaining to the state. That this was the case, there is no evidence in the record to show, and the presumption is against it. Free negroes and mulattoes are, almost everywhere, considered and treated as a degraded

The 1830 national census revealed that, for the fifth straight decade, slaves' proportion of the overall Kentucky population had grown (to 24%), but the next ten years would see the first reversal of this trend (to 23% in 1840).⁸⁴ It had become clear that Kentucky's climate and soils were not generally favorable to a slave-based economy. The main crops of grains, tobacco, and hemp did not need slaves in the fields during the growing and dormant seasons, and many Kentucky planters had moved south to the cotton belt, taking their slaves with them.⁸⁵

As a result, the slave trade between Kentucky and the lower South grew steadily from 1820 onward.⁸⁶ Cotton provided a continuous demand for slaves in the Deep South, and the Kentucky market was a major supplier of this demand.⁸⁷ In 1840, for example, a prominent Kentucky slaveholder estimated that "some 60,000 Kentucky slaves had been sold to the Deep South in the past seven years."⁸⁸

race of people; insomuch so, that, under the constitution and laws of the United States, they can not become citizens of the United States. . . . [A]s the laws of the United States do not now authorize any but a white person to become a citizen, it marks the national sentiment upon the subject, and creates a presumption that no state had made persons of colour citizens.

Id. at 334. Although these sentiments were expressed about citizenship status in Pennsylvania and Virginia, they obviously also meant that no colored person, even if free, could be a citizen of Kentucky, because, as the Court noted about Virginia, "we know that free people of colour have never been considered or treated, either in the practice of the country or by the laws of the state, as possessing the rights and privileges of citizens." *Id.*

In dissent, Judge Mills, whose general hostility toward the institution of slavery had been recorded in an earlier decision, *see supra* note 77 (discussing *Rankin v. Lydia*), concluded that Amy had indeed previously achieved all of the civil rights needed to make her a Virginia citizen and that she therefore could not lose her free status as a result of a Kentucky law limiting freedom suits. *Amy v. Smith*, 11 Ky. (1 Litt.) at 343–45.

84 *See supra* note 16.

85 Among the Kentucky planter-families to move south was that of Jefferson Davis, who was born in Kentucky in 1808 and moved with his family to Mississippi in 1812. Davis returned to Kentucky for schooling at Transylvania University before attending West Point. After two stints in the military, he returned to Mississippi as a slave-owning planter and pursued a political career. He served twice in the U.S. Senate (1847–51 and 1857–61) and was President Pierce's Secretary of War (1853–57), before becoming President of the Confederacy during the Civil War. *See, e.g.*, LIFE AND REMINISCENCES OF JEFFERSON DAVIS, BY DISTINGUISHED MEN OF HIS TIME 3–64 (1890); LEVIN, *supra* note 77, at 565.

86 *See, e.g.*, SLAVERY TIMES, *supra* note 31, at 145–94.

87 *Id.* at 149.

88 FROST, *supra* note 67, at 40 (referring to Robert Wickcliffe's comments to the Kentucky legislature).

With the legislative repeal in 1849 of the prohibition on slave-importation for commercial purposes, slave trading in the 1850s became even more widespread. *See* SLAVERY TIMES, *supra* note 31, at 144, 151, 155.

In the 1830s, with increased steamboat traffic on the Ohio River and the rise of abolitionism and the Underground Railroad,⁸⁹ the problem of runaway slaves grew in Kentucky.⁹⁰ One response was the General Assembly's enactment in 1835 of a bill that created a bounty system by authorizing various payments to any person "who shall hereafter arrest, and secure within any jail in this Commonwealth, or deliver to the owner, any slave that shall have runaway [sic] from his or her owner."⁹¹ A year later, the General Assembly adopted a resolution stating that the justice of human slavery could be judged only by God and suggesting that abolitionists were exercising freedom of the press to the point of "licentiousness."⁹²

89 As for the rise of steamboat traffic and the Underground Railroad, see, respectively, *supra* notes 58–65 and accompanying text and *infra* notes 148–51 and accompanying texts.

As to abolitionism, in 1827, Kentucky had eight abolitionist societies with about 200 members. HARRISON & KLOTTER, *supra* note 15, at 175. In 1833, Danville native James G. Birney helped organize a small group that called itself the "Kentucky Society for the Relief of the State from Slavery." 2 CONNELLEY & COULTER, *supra* note 13, at 800. Two years later, Birney organized the Kentucky Abolition Society as a branch of the American Anti-Slavery Society, which had been founded by William Lloyd Garrison in 1833. *Id.* at 800–01. In 1835, Presbyterian leaders issued "An Address to the Presbyterians of Kentucky, proposing a Plan for the Instruction and Emancipation of their Slaves." *Id.* at 802.

90 Records of runaways in the 1830s are sparse, but during the 1850s, it was estimated that Kentucky lost nearly 20,000 slaves annually across the Ohio River. CLARK, *supra* note 14, at 202–10. One of the witnesses in the *Strader* litigation testified in 1845 that "eight or ten years ago that it [allowing a slave of good character to go to Cincinnati] would not [lessen his value], but at this time it would not be safe to let a slave of any character to go Cincinnati." Deposition of Christopher Chinn, Transcript of Record at 116, *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851), *microformed on* U.S. Supreme Court Records and Briefs, Vol. 39, Reel 15 (Microform, Inc.) [hereinafter Supreme Court Record].

91 See KY. LAWS 523 (Loughborough 1842) (setting forth an Act approved Feb. 28, 1835). The payments ranged upward from \$10 depending on how far from the owner's home county the slave was arrested. *Id.* This law was amended three years later to specify \$100 in compensation "for apprehending fugitive slaves taken without this Commonwealth, and in a State where slavery is not tolerated by law." *Id.* at 524 (setting forth an Act approved Feb. 8, 1838).

Also in 1838, the legislature adopted a law patterned after the 1824 steamboat statute, see *supra* notes 66–67 and accompanying texts, that made "the owner and proprietors of any mail stage, or other coach, or railroad cars" liable for a \$100 penalty if a slave escaped after traveling thereon "without a written request of their owners, or in the company of their owners" and also made such owners and proprietors subject to private suit by "the owner for the full value" of all such slaves along with "damages as the owners may incur in attempting to recover such slaves." See KY. LAWS 554 (Loughborough 1842) (setting forth an Act approved Feb. 8, 1838).

92 According to this resolution, as to the institution of slavery:

the people of Kentucky hold themselves responsible to no earthly tribunal, but will refer their case to Him alone, through the mysterious dispensations of whose Providence, dominion has been given to the white man over the black. He alone may judge of its compatibility with his will, and of its political expediency, we who witness its practical operation, are best competent to speak.

Kentucky slavery had permeated the entire culture of the state. In 1816, a visitor to Kentucky noted that “the rich hold labor in contempt, and frequently make the possession of slaves a criterion of merit.”⁹³ Even though the “great majority of white Kentuckians never owned a slave . . . because they could not afford to,”⁹⁴ slave ownership connoted wealth and prestige,⁹⁵ and, then as now, the wealthier classes had a disproportionate influence on the laws and mores of the times.⁹⁶

2 CONNELLEY & COULTER, *supra* note 13, at 803. As to the abolitionist press, the resolution commented that “freedom of the press is one thing—licentiousness another.” *Id.*

93 2 CONNELLEY & COULTER, *supra* note 13, at 796.

94 HARRISON & KLOTTER, *supra* note 15, at 168. During the first third of the nineteenth century, a “slave cost more than many Kentucky farmers earned in cash over two or more years.” *Id.* According to the 1850 census, only 28% of white families held slaves, with a quarter of these owning just one. *Id.*

95 *See, e.g.*, DONALD, *supra* note 4, at 166:

Even nonslaveholders, who constituted an overwhelming majority of the Kentucky voters, were opposed to any form of emancipation. The prospect of owning slaves . . . was “highly seductive to the thoughtless and giddy headed young men,” because slaves were “the most glittering ostentatious and displaying property in the world.” As a young Kentuckian told [Lincoln], “You might have any amount of land; money in your pocket or bank stock and while travelling around no body would be any wiser, but if you had a darkey trudging at your heels every body would see him and know that you owned slaves.”

Id.

96 Henry Clay’s life provides an example of how one who seemed instinctively opposed to slavery came to moderate his views as his wealth and power increased. Born to a modest family in Virginia, Clay moved to Lexington in 1797 at the age of twenty and was admitted to the bar less than a year later. *See* STEPHEN ARON, *HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY* 83, 92–93 (1996); MAURICE G. BAXTER, *HENRY CLAY THE LAWYER* 18–19 (2000). In his early days in Kentucky, Clay called for emancipation, but after his marriage in 1799 to a woman from a rich and prominent family, his law practice flourished, and his views on slavery changed. BAXTER, *supra*, at 19. By 1804, Clay owned a great deal of land and many slaves, and he often represented slave interests, both in litigation and in his legislative activities. *See* ARON, *supra*, at 95–97; BAXTER, *supra*, at 23 (reporting that Clay’s 1808 tax bill showed he owned fourteen slaves). Later as a prominent Whig politician, Clay again opposed slavery and favored sending blacks back to Liberia, believing that the two races could not live together harmoniously. *See* CLARK, *supra* note 14, at 205. In 1829, Clay wrote that he desired to see Kentucky rid of slavery, which brought heavy criticism on him. 2 CONNELLEY & COULTER, *supra* note 13, at 796. Clay’s efforts to help elect anti-slavery delegates to the Kentucky constitutional convention in 1849 were soundly defeated, *see infra* note 272 and accompanying text, but he continued to be elected to the Senate, where he was a principal architect of the Compromise of 1850, as he had been of the Missouri Compromise of 1820. *See infra* notes 268–69 and 385 and accompanying texts. Clay continued to own slaves until he died in 1852. *See* Statement of Assets of Henry Clay (July 10, 1851), *in* 10 *THE PAPERS OF HENRY CLAY* 904 (Melba Porter Hay ed., 1991) (listing, in Clay’s Last Will and Testament of July 10, 1851, assets that included “27 or 28 slaves estimated at @ \$9,000”); Executive Order of Millard Fillmore (June 29, 1852), *in* 10 *THE PAPERS OF HENRY CLAY* 968 (Melba Porter Hay

Thus, from the mid-1830s, Kentucky was in constant dispute with its northern neighbors across the Ohio River.⁹⁷ “Kentucky was developing more and more into a common interest with the rest of the slave holding states, and her leadership was coming to be identified with the leadership of the South.”⁹⁸

II. *STRADER V. GRAHAM*: BACKGROUND AND KENTUCKY DECISIONS

A. *Factual Background*

1. *The Slaves and Their Owner*.—The slaves involved in the *Strader* case were three young men named George, Reuben, and Henry. At the time of their escape in 1841, they were described by their owner, Dr. Christopher Graham of Harrodsburg Springs, Kentucky, as:

three yellow men between nineteen and twenty-three years of age, well trained as dining room servants and as scientific musicians, in which capacity they had been in the habit, for some years, of playing together on various instruments, at balls and parties, and during the watering season were retained by [Graham] at the house kept by him at the Harrodsburg Springs, to play for the entertainment of his company.⁹⁹

Being “yellow” meant that these men were mixed-blood mulattoes.¹⁰⁰ The “scientific” nature of their musical training, which was attested to by many witnesses,¹⁰¹ is a description of musicians rarely used today, but then apparently meant having been trained in music theory as well as being performers.¹⁰² The men played the violin and numerous other

ed., 1991) (noting Clay's death on June 29, 1852).

97 See, e.g., 2 CONNELLEY & COULTER, *supra* note 13, at 804-06 (describing Kentucky's relations with Ohio, Indiana, and Illinois during this period).

98 *Id.* at 804. Further evidence of this was an 1835 resolution passed by the General Assembly noting that slave states “are hereby assured of the earnest co-operation of the state of Kentucky, to resist, at all hazards, every effort to interfere with the subject either by Congress, any state, or combination of private persons.” *Id.* at 803 (quoting 1835 Ky. Acts. 683-86 (Resolutions dated Mar. 1)).

99 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 173 (Ky. 1844). Graham's original complaint described George as “a yellow man . . . about five feet ten inches high, well formed and likely, about 20-21 years old”; Reuben as “also . . . a yellow man . . . about six feet in height, slender made, well formed, likely, and about twenty-one years old”; and Henry as “also . . . a yellow man about five feet ten inches in height, twenty-one years old, and of a fine countenance.” See Bill of Sept. 16, 1841, Supreme Court Record, *supra* note 90, at 6. “Likely” apparently meant having a pleasing appearance. See, e.g., Deposition of Joseph A. Thompson, Supreme Court Record, *supra* note 90, at 121 (describing Graham's escaped slaves as, *inter alia*, “likely, in fact, handsome young men”).

100 See, e.g., FROST, *supra* note 67, at 6, 11.

101 See, e.g., Depositions, Supreme Court Record, *supra* note 90, at 25, 31, 33, 121.

102 Interview with Ron Pen, Director, John Jacob Niles Ctr. for Am. Music, Sch. of Music,

instruments,¹⁰³ and Reuben, their leader, “was a very fine prompter, with a fine clear voice [who] directed the cotillions, and managed the ball room with great skill.”¹⁰⁴ The “watering season” referred to the months in summer and early fall when Dr. Graham’s resort in Harrodsburg was most popular.¹⁰⁵

The three young men were “slaves for life,” according to Graham, who wrote that he had “paid for them an unusual sum” and that they were “of good disposition and honest” and had been “faithful hardworking servants.”¹⁰⁶ According to one of Graham’s clerks who worked with George, Reuben, and Henry for many years, they were not only “musicians of the first order,” but also “the best trained dining–room servants I ever saw.”¹⁰⁷

Graham was an amazing man, an entrepreneur who lived to be 100 years old. Born in 1787 near what is now Danville, Kentucky,¹⁰⁸ he was a veteran

Univ. of Ky., in Lexington, Ky. (Oct. 13, 2008); *see also* Deposition of J. H. Rice, Supreme Court Record, *supra* note 90, at 133 (noting that deponent, “being a musician,” is “well acquainted with the principles of music himself” and considered Dr. Graham’s slaves more valuable for having played at various events and in various locales because “it was necessary to keep up with the fashionable music, and the figures and forms of cotillions”).

103 *See* Depositions, Supreme Court Record, *supra* note 90, at 25 (noting that “George generally played on the violoncello, though he played very well on the small violin”); *id.* at 83 (referring to the slaves as performing “well on a violin”); *id.* at 124 (testifying that deponent had sold to Dr. Graham “a fine violin with steel bow and a case, and a fine extra keyed clarinet, for one hundred twenty dollars, which he told me at the time were for the use of his boys”); *id.* at 134 (“their musical instruments were very fine, of the first quality; and they played upon a great variety of instruments”).

104 Deposition of R.D. Harlan, Supreme Court Record, *supra* note 90, at 135.

105 *See* J. WINSTON COLEMAN, JR., *THE SPRINGS OF KENTUCKY: AN ACCOUNT OF THE FAMED WATERING–PLACES OF THE BLUEGRASS STATE, 1800–1935*, at 40 (1955) [hereinafter *SPRINGS OF KENTUCKY*] (describing the “watering season” as just after April and May); Deposition of J.S. Everett, Supreme Court Record, *supra* note 90, at 50 (describing the “watering season” as “the summer and fall”); *see also* *SLAVERY TIMES*, *supra* note 31, at 40 (noting that prosperous guests flocked to Graham Springs and other Kentucky “watering–places during the summer and early autumn months”); *infra* notes 113–14 and accompanying texts.

106 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 174 (Ky. 1844); *see also infra* text accompanying notes 122–24. This description was of Reuben and Henry. For more on George, *see supra* notes 99, 103.

The details of Graham’s purchase of George are unknown. Graham purchased Reuben and Henry on November 28, 1836, at a court–house auction to settle the estate of their deceased prior owner (Anthony Hunn) in Stanford, Lincoln County, Kentucky, where “Reuben was struck off at the price of eleven hundred and fifty–five dollars, and Henry was struck off at the price of thirteen hundred dollars.” Deposition of Thomas Helm, Supreme Court Record, *supra* note 90, at 123.

107 Peter Davis’ deposition, Supreme Court Record, *supra* note 90, at 101; *see also* Deposition of J. G. Carter, Supreme Court Record, *supra* note 90, at 118 (“having been in the habit of visiting and being about taverns a great deal, I unhesitatingly state, that they excelled any as dining–room servants I have ever seen”).

108 *See* *THE ENCYCLOPEDIA OF LOUISVILLE* 362 (John E. Kleber ed., 2001) [hereinafter *LOUISVILLE ENCYCLOPEDIA*].

of the War of 1812, an early graduate of the Transylvania Medical School, and said to be “for many years the champion off-hand rifle shot of the world.”¹⁰⁹ In 1819, he moved to Harrodsburg, which a generation earlier had been Kentucky’s first settlement, and there he practiced as a family physician and came to know many of the original settlers, including Danial Boone.¹¹⁰ In 1827 and 1828, Dr. Graham purchased two “springs hotels” near Harrodsburg, then combined them under the name of “Graham Springs” (also known as “Harrodsburg Springs”), and successfully operated them for a quarter century “as the most fashionable resort in Kentucky.”¹¹¹ Graham Springs “became known as the ‘Saratoga of the West,’ uniting ‘society for pleasure and health from the extremes of the continent.’”¹¹²

Every year during the “watering season,” the Graham Springs resort would attract hundreds of well-to-do guests from all parts of the country, especially the South.¹¹³ Wealthy planters and their families from the Deep South came to “escape the dreaded yellow fever and hot weather.”¹¹⁴ Many famous Kentuckians also stayed at Graham Springs, including Isaac Shelby, Henry Clay, Robert Breckinridge, John Hunt Morgan, and Cassius M. Clay, as well judges and others who would eventually play a role in Graham’s slave litigation.¹¹⁵ In addition to the resort’s many amenities, bathing in the local “springs” was thought to be beneficial for one’s health.¹¹⁶

Graham Springs included a large main structure and various out buildings. The main building, according to one visitor in 1834, “contains a dining-room, in which one hundred and fifty persons may be comfortably seated, an excellent ball-room, parlours, chambers, &c., and two rows of

109 SPRINGS OF KENTUCKY, *supra* note 105, at 23.

110 2 LEWIS COLLINS & RICHARD H. COLLINS, HISTORY OF KENTUCKY 614 (1966).

111 SPRINGS OF KENTUCKY, *supra* note 105, at 24.

112 *Id.* (quoting an 1829 description in a Frankfort publication).

113 *See id.* at 26–29.

114 *Id.* at 26. Guests from the South would often bring their house slaves with them, and these family servants “pitched in and worked side by side with those attached to the establishment.” *Id.*

115 *Id.* at 29, 45–46. For example, the guest list in the mid-1830s included the Bibbs and the Marshalls, *id.* at 29, 46, families that included judges who would preside, respectively, over the trial and appellate proceedings in Graham’s case in the Kentucky courts. *See infra* notes 177–80 and accompanying text (regarding Chancellor Henry Bibb) and notes 197–200, 250 and accompanying texts (regarding Court of Appeals Judge Thomas Marshall). Another guest was John J. Crittenden, who stayed at Graham Springs while he was Governor of Kentucky, SPRINGS OF KENTUCKY, *supra* note 105, at 45–46, and who would later be Graham’s lawyer in the U.S. Supreme Court. *See infra* note 290 and accompanying text.

116 Proprietors of Kentucky’s springs hotels made “lavish . . . claims for the mineral waters, some of which were pronounced ‘most efficacious in restoring delicate females to health and vigor.’ A number allegedly restored ‘vigor and buoyancy to the diseased constitutions.’” SPRINGS OF KENTUCKY, *supra* note 105, at 41 (quoting ads appearing in a Frankfort newspaper in 1837 and a Lexington newspaper in 1845).

very comfortable cabins.”¹¹⁷ Guests were provided room and board for \$5.00 per week,¹¹⁸ which would be the equivalent today of about \$125 (using a conversion factor of \$1 in 1841 for just over \$24.50 in 2007 dollars).¹¹⁹ According to one well-traveled guest, “The table is the best that I have ever sat down to at any place.”¹²⁰

Dr. Graham was a genial host,¹²¹ whose establishment provided, in addition to the baths and various other day-time activities, many after-dinner entertainments, including a weekly cotillion conducted by a “professor of dancing,” performances by traveling actors, and, relevant here, a “splendid band of music.”¹²² During the day, this band was stationed in a stand on the grounds: “before daylight you are awakened by the delightful music which continues until night, when it is moved to a most splendid ball-room where you enter dazzled by the glittering lights and interesting company.”¹²³ As for the slave musicians:

Dr. Graham’s three slave boys composed the house orchestra, competing with the professional actors for the entertainment spotlight of the resort. George, Henry and Reuben’s musical abilities were well known throughout the South, and for years they furnished the music for the gay dances and cotillions held in the large ballroom at the Springs. During the fall and winter months, Dr. Graham allowed them to go to Louisville and Lexington to play for hire at fashionable dances and balls. In addition, they were excellent waiters; from their long experience at Graham Springs, their services were much in demand in the wealthy homes of the Bluegrass and on Kentucky and Ohio river steamboats.¹²⁴

117 *Id.* at 28.

118 *Id.* at 39.

119 Calculation, based on changes in the Consumer Price Index, performed by the Author on July 10, 2008, using the “Measuring Worth” section of the “How Much Is That?” Web site. Measuring Worth, Relative Value of U.S. Dollars, <http://www.measuringworth.com/uscompare/> (last visited July 10, 2008).

120 SPRINGS OF KENTUCKY, *supra* note 105, at 27. The young lady quoted in the text was particularly enamored of the fact that “ice-cream in profusion” was available. *Id.*

Graham, at least in his early inn-keeping days, was concerned about guests making off with food, admonishing the public: “Should there be found any one so regardless of their own character, so inconsiderate and so unjust as to take board out of this establishment, such are requested to avoid the society of the Springs, the pleasure of the walks and the use of the waters.” *Id.* at 40 (quoting an 1828 advertisement for Graham Springs in a Lexington newspaper).

121 *Id.* at 27, 45.

122 *Id.* at 27. “The evening meal was at seven and dancing began at eight.” *Id.* at 43.

123 *Id.* at 27 (quoting a young female guest). “The ball-room at night was a scene of enchantment; old Dr. Graham, the proprietor, was the master of ceremonies and the life of the party.” *Id.* at 29 (same).

124 *Id.* at 44.

In 1837, Graham sent two of these slaves, Henry and Reuben, “to live with Williams, a free man of color, to learn music.”¹²⁵ At the time, Williams led a band operated out of Louisville and made up of slaves, free blacks, and German immigrants.¹²⁶ When Graham sent his slaves to Williams, he signed a paper “to give liberty to my boys Henry and Reuben, to go to Louisville with Williams, and play with him till I may wish to call them home.”¹²⁷ This paper authorized Williams “to take them to Cincinnati, New Albany, or to any part of the south, even so far as New Orleans.”¹²⁸

While Henry and Reuben were with Williams, they went two or three times to New Albany (an Indiana town just across the Ohio River from Louisville), once or twice to Madison, Indiana (a town just across the Ohio River between Louisville and Cincinnati), and once to Cincinnati, “playing as musicians, at balls or other entertainments at those places.”¹²⁹ Whether

¹²⁵ *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 174 (Ky. 1844). This must have been soon after Graham purchased them. See *supra* note 106 para. 2 (giving November 28, 1836, as the date that Graham purchased Henry and Reuben). At the time, Williams was one of the 5000–7000 “free colored” living in Kentucky, who made up about one percent of the state’s overall population. See KENNEDY, *supra* note 16, at 603–04.

¹²⁶ Interview with Pen Bogert, Reference Specialist, Filson Historical Soc’y Library, Louisville, Ky., in Louisville, Ky. (June 16, 2006) [hereinafter Bogert Interview].

¹²⁷ Graham’s paper provided in its entirety:

Harrodsburg, August 30th, 1837.

This is to give liberty to my boys Henry and Reuben, to go to Louisville, with Williams, and play with him till I may wish to call them home. Should Williams find it in his interest to take them to Cincinnati, New Albany, or to any part of the south, even so far as New Orleans, he is at liberty to do so. I receive no compensation for their services, except that he is to board and clothe them.

My object is to have them well trained in music. They are young, one 17 and the other 19 years of age. They are both of good disposition and strictly honest, and such is my confidence in them that I have no fear that they will ever act knowing wrong, or put me to trouble.—They are slaves for life, and I paid for them an unusual sum; they have been faithful hard-working servants, and I have no fear but that they will always be true to their duty, no matter in what situations they may be placed.

C GRAHAM, M.D.

P.S. Should they not attend properly to their music, or disobey Williams, he is not only at liberty but requested to bring them directly home.

C. GRAHAM

Exhibit A. No. 2, filed by defendants, Supreme Court Record, *supra* note 90, at 14.

¹²⁸ *Id.*

¹²⁹ *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 174–75 (Ky. 1844); see also Deposition of M. D. Blaique, Supreme Court Record, *supra* note 90, at 52–53 (testifying, in a

George went with them during some of these trips was disputed.¹³⁰ In any event, the slaves' time with Williams and their out-of-state sojourns with him ended about two years prior to their escape in early 1841. During the next two years, their time was divided between Graham's resort in Harrodsburg "during the watering season" and another of Graham's homes in Lexington, from where they were at "liberty to go to the neighboring towns to play as musicians, and to give their master what they made beyond their expenses."¹³¹

The slaves' "running off" in 1841 imposed a "great loss" on Dr. Graham, "for he, notwithstanding the high prices he has had to pay for music ever since, has never been able to procure a band of music that gave the same satisfaction to his company, or that managed the ball-room with anything like the same skill."¹³² Still, Graham Springs continued to flourish for many

deposition given by a Cincinnati woman who operated dancing schools there and in Madison, Indiana, that Reuben, Henry, and George had played at Cincinnati "at a ball given by me in May, 1837" and also in Madison, Indiana, "the same season . . . at a ball given there by me"); Thomas Riddell's deposition, Supreme Court Record, *supra* note 90, at 53–54 (testifying that Reuben and Henry played two or three times in New Albany, Indiana, "during the Christmas holidays [sic] of 1837").

¹³⁰ *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) at 175; *see also* depositions cited *supra* note 129. Eventually, the trial court found that George was not authorized by Graham to travel outside the state, as Reuben and Henry had been. *See infra* notes 184–85 and accompanying texts.

¹³¹ *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) at 175. The three often earned \$50 or more (\$1225 in today's dollars, *see supra* text accompanying note 119) for a single night's performance. *See* Depositions, Supreme Court Record, *supra* note 90, at 90 (testifying that a Harrodsburg tavern keeper had "paid the sum of \$50 for their services one night at a ball, and that that sum was not an unusual price to be paid for them"); *id.* at 112 (testifying that Graham "was in the habit of getting for their services from \$50 to \$75 per night, at large balls and parties, and that was a customary sum for their services"); *id.* at 133 (testifying that students at near-by Bacon College had "paid to Dr. Graham the sum of \$50 for the services of said boys, to play for them on a public occasion" and that deponent's "father paid the sum of \$55 for said slaves to play one single night, for a ball at his father's house, in the town of Harrodsburg").

It was not unusual for Kentucky slaves to be hired out to earn money for their owners. *See, e.g.*, SLAVERY TIMES, *supra* note 31, at 123–26; FROST, *supra* note 67, at 76. In the process, slaves might even earn a little money for themselves (e.g., for overtime work), and some accumulated enough funds to buy their own freedom. SLAVERY TIMES, *supra* note 31, at 125. One Kentucky slave put up for sale in 1849 was described as a "very good rough lawyer . . . not fitted to practice in the Court of Appeals or in the Court of Chancery, but take him in a common law case, or a six-penny trial before a County Magistrate and 'he can't be beat.'" *Id.* at 127 (quoting a slave ad in a Louisville newspaper captioned "Negro Lawyer at Auction").

¹³² Peter Davis' deposition, Supreme Court Record, *supra* note 90, at 101–02; *see also* Deposition of H.S. McFatrige, Supreme Court Record, *supra* note 90, at 108 (testifying, in 1845, that Graham "incurred an expense annually, of at least five or six hundred dollars, in procuring music competent to fill their place, and yet the same satisfaction has never been given to his visitors"); Deposition of Chr. Chinn, Supreme Court Record, *supra* note 90, at 117 (testifying, in 1845, "that the loss of said slaves has been a serious one to [Graham's] watering place, and that in my estimation they were superior musicians to any other band [Graham] has ever had at his watering place, either French or German"); Deposition of Joseph A. Thompson,

years thereafter. During the off-season of 1842–43, Graham erected an even more “elegant and commodious brick hotel,” a “splendid building, costing upwards of \$30,000,” four stories high, and “now capable of accommodating one thousand persons.”¹³³ In 1853, Graham sold the resort and thereafter successfully pursued other ventures.¹³⁴ He died in Louisville in 1885 a few months after celebrating his 100th birthday.¹³⁵

2. *The Slaves’ Escape*.—In late 1840 and early 1841, Graham was spending the off-season in New Orleans,¹³⁶ while George, Reuben, and Henry remained at home, helping to entertain President-elect Harrison in Lexington¹³⁷ and playing at various other events in central Kentucky.¹³⁸ Eventually they went to Louisville,¹³⁹ from where they decided to escape from their Kentucky

Supreme Court Record, *supra* note 90, at 122 (“the loss sustained by complainant [Graham], by their running off, has been of great disadvantage to the watering place of complainant; and their place has never been supplied by any music he has been able to obtain, at from five to six hundred dollars per season”).

133 SPRINGS OF KENTUCKY, *supra* note 105, at 41–42 (quoting a Graham Springs ad in an 1845 Lexington newspaper). Using the conversion factor of \$1.00/\$24.50, *see supra* text accompanying note 119, the \$30,000 in renovations would cost about \$735,000 today.

134 SPRINGS OF KENTUCKY, *supra* note 105, at 79 (reporting that Graham sold the resort “[a]t the height of its prosperity in May, 1853, . . . to the United States of America for one hundred thousand dollars . . . to be used as a United States Asylum for aged and invalid soldiers”). After the main building burned in 1856, the government moved the old soldiers to a facility in Washington, D.C., and sold the Kentucky property. *Id.* at 79, 85. In 1911, a new owner revived the resort, but this business failed in 1934, and the property was eventually sold for use as a hospital. *Id.* at 85, 96–97.

After Graham sold the resort, he “traded in Mexico, and engaged in business successfully in various parts of the West and South, accumulating a large fortune.” THE BIOGRAPHICAL ENCYCLOPEDIA OF KENTUCKY OF THE DEAD AND LIVING MEN OF THE NINETEENTH CENTURY 439 (1878) [hereinafter KENTUCKY BIOGRAPHICAL]. At the age of ninety, he was described in a contemporary book as residing “in Louisville, and is engaged with much of his former zest in every good word and work,” *id.*, which included doing research and writing about the history of Kentucky’s early days. *See* LOUISVILLE ENCYCLOPEDIA, *supra* note 108, at 350.

135 *See* LOUISVILLE ENCYCLOPEDIA, *supra* note 108, at 350.

136 *See* Harvey McFatrige’s deposition retaken and Deposition of George P. Richardson, Supreme Court Record, *supra* note 90, at 35, 38.

137 *See* SPRINGS OF KENTUCKY, *supra* note 105, at 44 (reporting that, in connection with an early 1841 visit to Lexington by William Henry Harrison to confer with his fellow-Whig Henry Clay after the former’s election as president, “Dr. Graham’s musical waiters were sent over from Harrodsburg to assist in receiving the aged President-elect”).

138 *See* Harvey McFatrige’s deposition retaken and Deposition of George P. Richardson, Supreme Court Record, *supra* note 90, at 35, 37–38.

139 *See* Deposition of George P. Richardson, Supreme Court Record, *supra* note 90, at 38.

Deponent . . . was engaged in teaching classes in dancing, in Louisville; that knowing the said boys to be fine musicians, he saw Reuben the leader with them, and invited them to come to his class-room to play for his pupils, which he promised to do, but they did not come; deponent

bondage.¹⁴⁰ In Louisville, they boarded the steamboat *Pike*¹⁴¹ for its regular one-day trip to Cincinnati, probably sometime in late January of 1841.¹⁴² The *Pike's* captain, John Armstrong, had “a universal custom never to take a negro away from Louisville on board said boat, unless with his master, or unless some reference is made to some good and respectable citizen of Louisville.”¹⁴³ However, Graham’s slaves, who may have traveled on

then went to Williams and inquired where the boys were; Williams could not inform deponent, but said that the boys were shy of him.

Id.

140 Another slave later wrote that, while in Louisville, he:

met three slaves of Doctor Graham, of Harrodsburg, Kentucky. Their names were Henry, Reuben, and George; all smart, fine fellows, good musicians and yielding the doctor a handsome income. . . . “Now,” said I, “boys, is the time to strike for liberty. I go for Ohio to-morrow. What say you?” They pondered the question, and we all determined to start, as a company of musicians, to attend a great ball in Cincinnati—and, sure enough, it was the grandest ball we ever played for.

LEWIS CLARKE & MILTON CLARKE, NARRATIVES OF THE SUFFERINGS OF LEWIS AND MILTON CLARKE, SONS OF A SOLDIER OF THE REVOLUTION, DURING A CAPTIVITY OF MORE THAN TWENTY YEARS AMONG THE SLAVEHOLDERS OF KENTUCKY, ONE OF THE SO CALLED CHRISTIAN STATES OF NORTH AMERICA 82–83 (1846).

141 The *Pike*, according to its owners, “has, ever since she was built, except when prevented by ice or low water, been engaged as a regular mail packet between Louisville and Cincinnati, leaving each city every alternative day, except for a short time in 1840” Answer of Strader and Gorman, Supreme Court Record, *supra* note 90, at 13. The *Pike* began this service about 1839. See Deposition of Alfred Downing, Supreme Court Record, *supra* note 90, at 51.

142 Witnesses varied as to the exact date that George, Reuben, and Henry made their journey from Louisville to Cincinnati aboard the *Pike*. See Deposition of H.S. McFatrige, Supreme Court Record, *supra* note 90, at 24 (“about the 23d of January, 1841”); Deposition of W.W. Collins, Supreme Court Record, *supra* note 90, at 30 (“between the 25th and 30th of that month [January, 1841]”); Deposition of Jacob Hinkle, Supreme Court Record, *supra* note 90, at 32 (“the latter part of the month of January, A.D. 1841”); Deposition H.S. McFatrige, Supreme Court Record, *supra* note 90, at 109 (“they went off [on the *Pike*] on the 9th of January, year 1841”); *id.* at 112 (“in the trip of the steamboat *Pike* of the 23d of the month of January, 1841”); Deposition of Roger Turner, Supreme Court Record, *supra* note 90, at 28 (“some time in the month of February, 1841”); Deposition of George N. Cardwell, Supreme Court Record, *supra* note 90, at 93 (“about the month of February, 1841”).

143 Deposition of John Armstrong, Supreme Court Record, *supra* note 90, at 44. Other witnesses confirmed that this was Captain Armstrong’s policy and that the *Pike's* officers were “very particular” about enforcing this policy. See Depositions, Supreme Court Record, *supra* note 90, at 45–46, 48–49, 51, 138. As the *Pike's* clerk testified: “We never carry them unless we know them to be free, or travelling in company with their masters, or some person of respectability. We do not take written evidence of their freedom, unless we know the signature. We pay no attention to the common free papers that blacks carry, knowing that so many of them are forged.” Deposition of Charles C. Bacon, Supreme Court Record, *supra* note 90, at 47.

Indeed, another runaway slave, who initially fled on the *Pike* along with George,

the *Pike* before as part of Williams's band,¹⁴⁴ were able to go to Cincinnati without being challenged, "whence they escaped to Canada."¹⁴⁵ (Slavery in Canada had been abolished years before.¹⁴⁶)

Kentucky slaves who managed to get into Ohio were still subject to retrieval by their owners. Cincinnati and other Ohio River towns included both bounty-hunters who sought to capture and return such slaves¹⁴⁷ and also abolitionists whose Underground Railroad "stations" would temporarily hide runaways while they considered whether to travel farther north to permanent freedom in Canada.¹⁴⁸ Indeed, sometimes the same person would help slaves escape and then "capture" and return them to Kentucky for the ransom.¹⁴⁹ Whether a large or small number of Kentucky

Reuben, and Henry, was later apprehended on a second trip aboard that boat and returned to Kentucky:

[T]he boy Albert, who belonged to Mrs. Littell, of Louisville, and went off at the same time and in company with the slaves in controversy, and afterwards recovered from Canada, and sold in the South, having made his escape to Louisville, took passage again on the same steamboat Pike, and passed up the river on her as far as Carrolton, when he was discovered by some gentlemen to be a runaway slave, and lodged in the jail at Carrolton, by some one at that place, and afterward brought to Louisville, and there lodged in jail, when his master removed him . . .

Deposition of James S. Graham, Supreme Court Record, *supra* note 90, at 84.

144 See Deposition of Alfred Downing, Supreme Court Record, *supra* note 90, at 51 (testifying that, as the *Pike's* clerk in 1839 and 1840, he frequently saw Williams travel on the *Pike* with two mulatto musicians as part of his band: "They paid no passage, but were in the habit of playing on said boat. The captain of said boat told deponent to let them pass on the boat whenever they pleased, that they had a proper pass. They played on the boat for their passage.").

145 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 173 (Ky. 1844); see also *infra* notes 152-61 and accompanying texts.

146 Upper Canada—today's Ontario—banned slavery by a provincial statute passed in the 1790s. See FROST, *supra* note 67, at 24; see also *id.* at 221-33 (describing an 1833 Ontario case that refused to return a Kentucky slave couple who had escaped to that part of Canada). As for the rest of Canada, the British Parliament outlawed slavery in most parts of the British Empire, including all of Canada, in the Slavery Abolition Act of 1833, 3 & 4 Will. IV c. 73 (Eng.), which became effective in 1834. See *Canada, History of*, in 3 WORLD BOOK ENCYCLOPEDIA 145 (2003); *Slavery*, in 17 WORLD BOOK ENCYCLOPEDIA 504 (2003).

147 See, e.g., SLAVERY TIMES, *supra* note 31, at 203-04, 207-12, 238.

148 Some of the drama of these activities is captured in ANN HAGEDORN, *BEYOND THE RIVER: THE UNTOLD STORY OF THE HEROES OF THE UNDERGROUND RAILROAD* (2002). See also SLAVERY TIMES, *supra* note 31, at 218-44; FROST, *supra* note 67, at 241-44 (describing Underground Railroad activities in Canada).

Harriet Beecher Stowe, a Cincinnati native, based her classic *Uncle Tom's Cabin* (1852) on reports of the lives of slaves in the Maysville, Kentucky, area and on the activities of an abolitionist Underground Railroad stop operated by Rev. John Rankin in Ripley, Ohio, across the river north of Maysville. See SLAVERY TIMES, *supra* note 31, at 238-39.

149 See 2 CONNELLEY & COULTER, *supra* note 13, at 807.

slaves crossed the Ohio River as fugitives during this period—as George, Reuben, and Henry did—is a matter of dispute among modern historians,¹⁵⁰ but it is certain that thousands of American slaves did run away to freedom in Canada during the 1830s, 1840s, and 1850s.¹⁵¹

The details of Dr. Graham’s slaves’ journey to Canada are not known,¹⁵² but he went to extraordinary lengths to retrieve them.¹⁵³ He first sent his son, James, to search for them in Cincinnati.¹⁵⁴ When this failed, Graham hired three men to join him in a month-long pursuit of the slaves, which started with a trip aboard the *Pike* from Louisville to Cincinnati.¹⁵⁵ This

150 Compare HARRISON & KLOTTER, *supra* note 15, at 171 (arguing that the “number of runaways and the role of the Underground Railroad have been greatly exaggerated” and citing figures showing that, in 1850 “when Kentucky had nearly 211,000 slaves, only 96 fugitives were reported”), with CLARK, *supra* note 14, at 208 (noting estimates, *circa* 1850, “that Kentucky lost nearly 20,000 slaves annually” through the Underground Railroad); See also 2 CONNELLEY & COULTER, *supra* note 13, at 805–07 (contending that the number of fugitive slaves from Kentucky crossing the Ohio River “greatly increased” in the latter 1830s, that “the number of slaves carried away increased by leaps and bounds, beginning in 1841,” and that “losses to Kentucky in runaway slaves was said to be \$200,000 annually”); *supra* note 90 (discussing the number of runaway slaves from Kentucky).

151 See, e.g., HAGEDORN, *supra* note 148, at 214 (“By the early 1840s, there were approximately fifteen thousand former [slave] runaways living in Canada”); see also FROST, *supra* note 67, at 226 (describing how “hundreds of [black] families [went] north” into Canada in the early 1830s); *infra* note 161 (noting that some 20,000 ex-slaves lived in Canada in 1850).

152 According to another runaway slave who traveled with them on the *Pike*: “We came to Cincinnati, and the friends there advised us to go farther north. Doctor Graham’s boys struck for Canada, while I stopped at Oberlin, Ohio.” CLARKE & CLARKE, *supra* note 140, at 83.

153 Graham seems to have known immediately that the slaves were engaged in an escape attempt through Cincinnati. Bogert Interview, *supra* note 126. For example, he did not bother to place any ads in the local Louisville newspapers seeking their return. *Id.* (describing Bogert’s detailed study of ads for runaway slaves in the two Louisville newspapers of that time, the *Louisville Public Advertiser* and the *Louisville Daily Journal*). Furthermore, by early March, he had confirmed, through a conversation with the *Pike*’s captain, that the latter “had taken Dr. Graham’s slaves from Louisville to Cincinnati, on the steamboat *Pike* . . .” Harvey McFatridge’s deposition, Supreme Court Record, *supra* note 90, at 24.

154 Depositions of James S. Graham, Supreme Court Record, *supra* note 90, at 25, 32, 83.

155 See Deposition of Isaac C. Vanarsdale, Supreme Court Record, *supra* note 90, at 97. Apparently, the reason Graham chose to travel on the *Pike* was to surreptitiously gather evidence about the *Pike*’s role in the slaves’ escape. According to one of Graham’s hired companions:

[C]omplainant [Graham] conversed with some of the hands on said boat, and ascertained the fact [that the slaves had earlier been on the *Pike* during their escape], and drew Captain Armstrong, the commander of the boat, into conversation in relation to them in my presence, who not knowing complainant or his object, conversed freely in relation to them, and admitted the fact, that they had gone from Louisville to Cincinnati on said boat in my presence. . . . [C]omplainant asked whether they were free or not; the captain then replied, that from their general appearance

expedition followed the slaves' trail through various Ohio towns and ended up in Detroit,¹⁵⁶ from where Graham crossed the river into Canada and tried to persuade the slaves to return to Kentucky.¹⁵⁷ Once on the Canadian side, Graham claimed to have been set upon and nearly killed by a mob of fugitive slaves,¹⁵⁸ but other accounts paint quite a different picture.¹⁵⁹

and fine style they played, that he thought they were free, but afterwards, understood they belonged to some gentleman owning a watering place in Kentucky; complainant asked him whether they exhibited any pass or free papers; to which the captain replied, that supposing them to be free he did not ask them for any pass; complainant having ascertained what trip they went up the river, went to the register, and called several others, as well as myself, to aid him in getting the names of passengers and their residence, who had been on board said boat the same trip, that he might be able to obtain additional proof; seeing us thus *engage*, suspicion arose among the officers of said boat of what we were after; the clerk came and abruptly snatched the register from the table while complainant was examining it, saying that it was his property, and locked it up in his counting-room.

Deposition of H.S. McFatrige, Supreme Court Record, *supra* note 90, at 109.

156 See Harvey McFatrige's deposition, Supreme Court Record, *supra* note 90, at 24 (described *infra* note 157); *id.* at 34 (testifying that Graham's company pursuing the slaves "had previously search [sic] through many of the towns of Ohio" and thereafter "remained in Detroit between ten and twelve days" prior to complainant's foray into Canada); Depositions of Isaac C. Vanarsdale, Supreme Court Record, *supra* note 90, at 27 (testifying that Graham took "three men with him, deponent being one of the three men; that they were gone near about one month, travelling [sic] night and day. . . [and] he received two dollars per day, and expenses borne"); *id.* at 97 ("We [expected] to overtake them at Oberlin, in Ohio, but finding that they had left that place, we pursued them to Sandusky, and other points, to Detroit, where we ascertained they had crossed into Canada.").

157 See Harvey McFatrige's deposition, Supreme Court Record, *supra* note 90, at 24 (testifying that McFatrige and two others "accompanied complainant as far as Detroit, where he remained until complainant crossed over to Canada . . . in pursuit of said slaves").

158

Dr. Graham followed his runaway slaves to their Canadian destination, and near Malden he was mobbed by a band of fugitive slaves. He probably would have lost his life in the struggle had it not been for the gallant rescue by General Ironsides, half-brother of the famous Indian chief Tecumseh. The genial doctor from Harrodsburg returned home "without his sleeves, lucky, so he said, that he had escaped from the fiery fiends of perdition."

SPRINGS OF KENTUCKY, *supra* note 105, at 45.

159 According to an 1846 book written by an ex-Kentucky slave who had traveled with George, Reuben, and Henry during the early part of their escape, but was not an eyewitness to the Canadian encounter:

It was well they did [go beyond Ohio to Canada], for the doctor was close upon them, offering a large reward. He reached Detroit within a few hours after they had crossed the ice to Malden [in Canada]. He attempted to hire some one [sic] to go over, and capture them; no one would attempt this. He hired a man, at last, to go over and hire them

In any event, Graham's slaves refused his entreaties. They also rebuffed a final effort by Graham who, after returning to Kentucky, hired "a free man of color, named Shelton Morris, who lives in Louisville, who went to Canada for the purpose of inducing said slaves to return home."¹⁶⁰ As far as we know, George, Reuben, and Henry spent the rest of their lives as free men in Canada.¹⁶¹

to get on a boat, and go to Toledo, to play for a ball. Doctor Graham was to be in the boat, when it touched at Malden. For some reason, the boys were quite cautious, and very reluctant to go. When the wolf in sheep's clothing offered them five hundred dollars to go and play for one ball, they were more suspicious than ever. When the boat touched at the wharf, the boys were on the wharf, playing a gypsy waltz, a great favorite of Doctor Graham's. When the doctor found his plan did not work, sure enough, he came out to hear his favorite singers. He landed, and spent several days in fruitless endeavors to persuade them to return to Kentucky.

CLARKE & CLARKE, *supra* note 140, at 83. *See also* Deposition of Isaac C. Vanarsdale, Supreme Court Record, *supra* note 90, at 27 (testifying that Graham "raised a company of about thirty persons, and went to Maulden, having engaged an agent in Canada to bring the said slaves on board the chartered boat when she landed at Malden; but the plan was defeated by being betrayed, and that they did not get possession of the slaves, but returned home without them.").

At Detroit we remained about ten days, laying plans and making arrangements for the purpose of recovering said slaves; . . . complainant [Graham] then chartered a steamboat with officers and strong guard on board, having engaged an agent who pledged, upon being well paid, that he would bring them on board said boat at the wharf in Malden, but said agent betrayed the trust reposed in him, so that, upon the arrival of said boat, a mob of some hundred were collected upon the wharf, and it was with some difficulty the boat escaped. Complainant having been left alone in the midst of them, remained some three or four days, and upon his return we came home unsuccessful . . .

Deposition of H.S. McFatridge, Supreme Court Record, *supra* note 90, at 110.

¹⁶⁰ Deposition of H.S. McFatridge, Supreme Court Record, *supra* note 90, at 24. According to this deposition, the slaves had written a letter to Dr. Graham "in which they informed [Graham] if he would send Shelton Morris to Canada, with money to bear their expenses home, they would return with him." *Id.* Other witnesses confirmed Graham's employment of Morris in this unsuccessful endeavor. *See* Depositions, Supreme Court Record, *supra* note 90, at 26, 86, 91–92, 98, 110.

¹⁶¹ One account of the slaves' early days in Canada noted that there was a local election going on at the time, "and the negroes being privileged to vote; great excitement prevailed. That Col. Prince, the successful candidate for the provincial parliament of Canada, had engaged said boys Reuben, Henry, and George to play at the polls in Alinson, opposite to Detroit, during said election." Deposition of Isaac C. Vanarsdale, Supreme Court Record, *supra* note 90, at 27.

For a contemporary description of the living conditions of the estimated 20,000 escaped slaves and their children who were residing in Canada a few years after these events, see the 1850 letter by Gerrit Smith, one of these ex-slaves, STANLEY HARROLD, *THE RISE OF*

B. *The Trial Court Proceedings*

1. *The Parties and their Claims.*—On September 16, 1841, Dr. Graham filed a “Bill” in the Louisville Chancery Court¹⁶² against the *Pike* and its owner, Strader & Gorman, a partnership comprised of Jacob Strader and James Gorman, both citizens of Ohio.¹⁶³ The original sworn bill was signed on Graham’s behalf by his son James and was filed by the Louisville lawyers Guthrie & Tyler.¹⁶⁴ The *Pike*, whose role as a defendant was reflected in the fact that the case’s title at this stage was *Graham v. Steamboat Pike*,¹⁶⁵

AGGRESSIVE ABOLITIONISM 189–91 (2004) (describing a few years after these events in); see also John Davis Smith, *Slavery and Antislavery*, in *OUR KENTUCKY: A STUDY OF THE BLUEGRASS STATE* 112–13 (James C. Klotter ed., 2d ed. 2000) (setting forth an 1859 letter from an escaped slave in Canada to his former master in Springfield, Kentucky, asking for the release of his wife and children).

162 The Louisville Chancery Court was created by the Legislature in 1835 to “have all the equitable and chancery jurisdiction which the Jefferson circuit court now has.” KY. LAWS 157 (Loughborough 1842). Appeals from judgments of the Louisville Chancery Court were to be to the Kentucky Court of Appeals. *Id.* at 162 (section 18). A provision specifying how to add additional parties was added as part of a series of amendments to the original enabling act passed in 1839. *Id.* at 164 (section 4). Uniform rules governing chancery proceedings had been established by the Legislature in 1796. See 1 WILLIAM LITTELL, *THE STATUTE LAW OF KENTUCKY* 519 (1809).

163 See Bill, Supreme Court Record, *supra* note 90, at 6.

The original documents of the trial court proceedings in this case are still available for inspection at the Kentucky Department for Libraries and Archives, in Frankfort, Kentucky, at Location #B–58–F–S–C, Box 45, Case No. 3225 (Louisville Chancery Court). The original documents of the antebellum Kentucky Court of Appeals were lost in a fire in 1864. Interview with Mark Stone, Supervisor, State Archives Ctr., Ky. Dep’t for Libraries and Archives, Frankfort, Ky. (Sept. 7, 2005). In this Article, all references to the Kentucky trial and appellate court documents are to their printed versions in the record of the case in the U.S. Supreme Court. See Supreme Court Record, *supra* note 90.

164 See Bill, Supreme Court Record, *supra* note 90, at 6. The key member of this firm was James Guthrie, a “leading citizen” of Louisville whose earlier firm of Guthrie & Bullock had been “the most prominent law firm in all Louisville.” FROST, *supra* note 67, at 106, 128. Guthrie had been a member of both Houses of the Kentucky General Assembly and would go on to preside over Kentucky’s constitutional convention in 1849 and become Treasury Secretary under President Pierce (1853–57). See LOUISVILLE ENCYCLOPEDIA, *supra* note 108, at 362–63. A pro-slavery Democrat, Guthrie supported the Union during the Civil War and served as a U.S. Senator from 1865 until a year before his death in 1869. *Id.* at 363. Some years after representing Dr. Graham, Guthrie took the other side in a steamboat case involving escaped slaves, unsuccessfully representing the steamboat defendants there. See McFarland v. McKnight, 45 Ky. (6 B. Mon.) 500, 514 (Ky. 1846).

165 See, e.g., Order Filing Strader and Gorman’s Answer, Supreme Court Record, *supra* note 90, at 12.

was seized,¹⁶⁶ with the possibility that it would be sold to satisfy Graham's claim.¹⁶⁷

Graham's suit was based on the Kentucky statute passed in 1824 that made the owners, master, and boat subject to civil liability for taking slaves "out of the limits of this state" without the owner's permission.¹⁶⁸ The suit claimed \$1500 for each slave (about \$36,750 today¹⁶⁹) and other damages,¹⁷⁰ which eventually included \$250 for the musical instruments and books they took with them and \$700–\$1000 that Graham had expended "in fruitless efforts to recover them."¹⁷¹

Defendants Strader and Gorman were represented by an experienced Louisville lawyer, Garnett Duncan,¹⁷² who had also represented Strader

166 Seizure of the *Pike* took some time. The plaintiff's first effort to do so began a few days after the Bill's filing on September 23, 1841, but this and two subsequent efforts failed when the Marshal reported that the boat was "not found." See Marshal's Returns, Supreme Court Record, *supra* note 90, at 8–10. The fourth attempt succeeded, with the Marshal reporting on November 26, 1841, that he "levied same day on the steamboat Pike, her engine, furniture, &c.; and John Armstrong, captain of said boat, gave bond as required [\$5,000], with Charles M. Strader, as security, and restored them the boat." *Id.* at 11; see also *id.* at 16 (describing, in the Chancellor's subsequent opinion, that "[t]he boat was arrested in the port of Louisville, on the 26th November, 1841").

This was not the first time that the *Pike* had been seized, nor Strader threatened with a damage judgment, in such a case. See *Strader v. Fore*, 41 Ky. (2 B. Mon.) 123 (Ky. 1841) (further described *infra* note 173).

167 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 176 (Ky. 1844).

168 See *supra* notes 66–67 and accompanying texts.

169 Based on the conversion factor of \$1.00/\$24.50, described *supra* text accompanying note 119. This was substantially more than the average price of a slave in those days. "During the first third of the nineteenth century, a male slave in the prime working years of eighteen to thirty-five might cost \$400–700 in Kentucky." HARRISON & KLOTTER, *supra* note 15, at 168. Witnesses for Dr. Graham testified that the price of a common field hand in the early 1840s was in the \$800–\$1060 range. See Depositions, Supreme Court Record, *supra* note 90, at 24 (\$800), 105 (\$1000), 112 (from \$800 to \$1000), 127 (\$1000), 132 (\$1060); see also *id.* at 121 (testifying that the deponent had "paid for a boy without any of their qualifications, the sum of \$1,060 in the year 1840" and opining that "the value of the slaves in controversy was enhanced one hundred per cent., in consequence of their high musical attainments").

170 See Bill, Supreme Court Record, *supra* note 90, at 6.

171 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 173 (Ky. 1844).

172 See Answer of Strader and Gorman, Supreme Court Record, *supra* note 90, at 13 (listing "Duncan & Ripley, P.Q." as the defendants' lawyers); see also Defendants' exception to depositions, Supreme Court Record, *supra* note 90, at 74 (listing "Duncan & Ripley, P.Q." as the defendants' lawyers); Defendants' exception to deposition offered and rejected, Supreme Court Record, *supra* note 90, at 81 (listing "Duncan & Ripley, P.Q." as the defendants' lawyers).

As these filings show, Duncan practiced in a partnership with a lawyer named Ripley, but Duncan was apparently the defendants' main lawyer, as evidenced by the fact that he is listed alone as handling the Kentucky appeals (see Strader's assignment of errors, Supreme Court Record, *supra* note 90, at 56 (listing "Duncan" for Strader in the first appeal); Errors, Supreme Court Record, *supra* note 90, at 146 (listing "Duncan, P.Q." for the appellants in the second appeal)) and also as participating in the U.S. Supreme Court litigation. See *infra*

in another escaped–slave case involving the *Pike*.¹⁷³ On March 4, 1842, Duncan filed an answer for the defendants, generally denying that they had any personal knowledge of the slaves’ transport on the *Pike* and also alleging that the slaves had become “free negroes” based on their prior travels as authorized by Graham.¹⁷⁴

Later in March, the defendants filed an amended answer that more specifically alleged grounds for the slaves’ freedom and attached as an exhibit the 1837 letter from Graham to Williams authorizing the slaves’ travels in Ohio and Indiana.¹⁷⁵ The U.S. Supreme Court’s ability to review this case would eventually turn on the defendants’ argument that the slaves had become free as a result of their prior travels in these two states,

text accompanying note 289 (noting the defendants’ counsel’s use of Duncan’s brief in the Supreme Court); *see also* Defendants’ exceptions to deposition offered and rejected, Supreme Court Record, *supra* note 90, at 81 (listing first “Duncan & Ripley” and then “Duncan” alone as the defendants’ lawyer).

Garnett Duncan became a member of the Kentucky bar in 1823. He would later serve one term in the U.S. Congress (1847–49, the same term as Abraham Lincoln’s, *see infra* note 262) and teach law at the University of Louisville (1846–47) when the Legislature, by Act of Feb. 7, 1846, established there a “professor of the science of law, its history, and the law of nations.” LEVIN, *supra* note 77, at 165, 768.

Duncan’s partner was apparently Charles Ripley, a Louisville lawyer who later became a state senator (1855–59), *see* 2 COLLINS & COLLINS, *supra* note 110, at 357, and thereafter served on two committees in early 1861 whose purpose was to emphasize Kentucky’s neutrality in the impending conflict between the Lincoln Administration and southern secessionists. *Id.* at 67–68.

173 *See* *Strader v. Fore*, 41 Ky. (2 B. Mon.) 123, 126 (Ky. 1841). In this case, Duncan convinced the Court of Appeals to reverse a slave owner’s jury verdict against the *Pike* on the ground that the suit should not have been brought *only* against the steamship:

without making the owner or any officer of the boat a party to the bill. . . . Strader, the owner of the steamboat in this case, ought to have been made a defendant to the bill, and the Chancellor erred in overruling his application to be permitted to make himself a party and defend the suit. And we are of the opinion also, that if the owner was not on the boat at the time of the alleged wrong, and be not, therefore, personally liable therefor [sic], the master or other person who is personally responsible, should also be made a defendant, for otherwise it might be possible that damages may be assessed and enforced against the innocent owner of the boat without any notice to the only individual personally responsible for the alleged injury, and as against whom, therefore, the evidence taken in this case would be unavailing and inadmissible, in a suit by the owner for restitution or indemnity.

Id. at 124–26.

Duncan’s practice also included successfully representing at least one slave owner in such a case. *See* *McFarland v. McKnight*, 45 Ky. (6 B. Mon.) 500, 514 (Ky. 1846) (listing “Pirtle and Duncan” as representing the winning plaintiff).

174 *See* Answer of Strader and Gorman, Supreme Court Record, *supra* note 90, at 12–13.

175 *See* Amended Answer, Supreme Court Record, *supra* note 90, at 13–14.

whose anti-slavery status derived from the Northwest Ordinance and its re-enactment as an early U.S. statute.¹⁷⁶

2. *Pre-Trial Proceedings and Decision.*—The trial court proceedings yielded a mixed result. They were presided over by Chancellor George M. Bibb, “one of the legal giants of Kentucky” during the first half of the nineteenth century.¹⁷⁷ Bibb was born in 1776 in Virginia, where he practiced for a short time before moving to Lexington, Kentucky, in 1798. He was twice appointed to the Kentucky Court of Appeals, serving in 1808–10 and 1827–29 (including periods as the chief justice during both tenures) and was also twice elected to the U.S. Senate (1811–14 and 1829–35). When the Louisville Chancery Court was created in 1835,¹⁷⁸ Bibb became its first chancellor. He served until 1844, when President Tyler appointed him Secretary of the Treasury.¹⁷⁹

Pursuant to Chancellor Bibb’s orders, the parties took numerous depositions from witnesses from early 1842 through the summer of 1843.¹⁸⁰ Williams, the free black to whom Dr. Graham had entrusted Henry and Reuben beginning in 1837, was not one of those deposed, presumably because Kentucky law barred a negro from testifying in a case involving whites.¹⁸¹ Nor were depositions taken of the plaintiff or the individual defendants, because in those days a person having an interest in a case was not competent to testify.¹⁸²

176 See *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 179. The Northwest Ordinance and its re-enactment by the first Congress are described *supra* notes 20–24 and accompanying texts.

177 LEVIN, *supra* note 77, at 76. The description of Bibb in the remainder of this textual paragraph is from *id.* at 76–77, and KENTUCKY BIOGRAPHICAL, *supra* note 134, at 394–95.

178 See *supra* note 162.

179 After the Tyler administration, Bibb remained in Washington and practiced law there until he died in 1859, a period during which he was chief clerk of the Department of Justice (essentially equivalent to being an assistant Attorney General today). LEVIN, *supra* note 77, at 77; see also SWISHER, *supra* note 4, at 779 (discussing an 1855 case that Bibb successfully argued in the Supreme Court and describing him as “shrewd” and “a gentleman of the old school, never having abandoned the garb of knee breeches in court appearances”).

180 See Order, Leave Granted Complainant to Retake Depositions, and Order Opening Commission, Supreme Court Record, *supra* note 90, at 15; see also *id.* at 23–56 (setting forth a total of twenty-five depositions taken by both sides).

181 See 2 LITTELL & SWIGERT, *supra* note 36, at 1150 (quoting section 2 of Kentucky’s 1798 slave law as providing: “No negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes, or in civil pleas where negroes or mulattoes alone shall be parties.”); see also HARRISON & KLOTTER, *supra* note 15, at 169 (noting that, in antebellum Kentucky, the “testimony of blacks was usually not accepted against whites”).

182 Until well past the middle of the nineteenth century, courts in the United States followed the common-law rule of excluding “testimony by parties to the lawsuit and all persons with a direct pecuniary or proprietary interest in the outcome.” 1 KENNETH S. BROWN, MCCORMICK ON EVIDENCE 313 (6th ed. 2006); see, e.g., *Strader v. Graham*, 46 Ky. (7 B. Mon.) 633, 634 (Ky. 1847) (upholding exclusion of defendant Armstrong’s deposition on the ground

At the conclusion of the deposition stage, Chancellor Bibb issued an opinion that dismissed the claim as to Henry and Reuben on the ground that the paper signed by Graham in 1837 when he sent them to Williams had no time limit and therefore was sufficient authorization for the defendants to transport them to Cincinnati.¹⁸³ As to George, Chancellor Bibb “found no evidence of any license, permission, or liberty given, for taking him on board and carrying him out of the limits and jurisdiction of the State.”¹⁸⁴ Therefore, according to Bibb, the facts established that the *Pike* and its owners were liable “for the damages thereby caused to the plaintiff.”¹⁸⁵ Bibb ordered that a jury be empanelled “to ascertain such facts as shall be submitted to them, respecting the asportation of the slave George, and the damages to the plaintiff thereby.”¹⁸⁶ On March 1, 1844, a twelve-man jury heard evidence that was limited to the depositions.¹⁸⁷

that “he was interested, and therefore incompetent, at the time”), *aff’d*, 51 U.S. (10 How.) 82 (1851). This disqualification was eventually lifted by statute in Kentucky. See JOHN D. CARROLL, CIVIL AND CRIMINAL CODES OF PRACTICE OF KENTUCKY § 605, at 478–79 (6th ed. 1919) (providing that, in general, “every person is competent to testify for himself or another”).

183 See Chancellor’s Opinion, Supreme Court Record, *supra* note 90, at 17–18. This opinion also ordered suppression of the deposition of the *Pike’s* captain, John Armstrong, on the ground that Armstrong was bound to the plaintiff based on the bond he had given when the boat was originally seized. *Id.* at 18.

184 *Id.* at 18. As to the evidence that Williams “sometimes carried with him[] a third musician,” Bibb found that that person, being “described as a very black man,” was not George, who “is described by the witnesses as a yellow colored man.” *Id.* See also Defendant’s instructions, Supreme Court Record, *supra* note 90, at 22 (finding “no evidence conducing to prove” that Graham “permitted the slave George to go to Indiana or Ohio to perform services as a musician”).

185 Chancellor’s Opinion, Supreme Court Record, *supra* note 90, at 18.

This ruling suggests that the law under which Graham sued provided for what today would be called “strict liability” (i.e., the defendants would be liable regardless of whether they were negligent or not in checking whether George was authorized to travel out of the state aboard the *Pike*); see also *supra* note 173 (noting that liability might be assessed “against the innocent owner of the boat”); cf. *infra* note 239 (noting, in subsequent Kentucky Court of Appeals’ opinion, that the boat captain might be liable “for the loss which his act or neglect occasioned”). Compare *McFarland v. McKnight*, 45 Ky. (6 B. Mon.) 500, 509 (Ky. 1846) (noting that the offense in the steamboat statute “is in taking the slave on board the steam vessel and transporting thereon and thereby. The transportation so done is the gist of the offense.”), with *Singleton v. Carroll*, 29 Ky. (6 J.J. Marshall) 527, 531–32 (Ky. 1831) (holding that one who contracts with a slave owner for the services of a slave for a period of time is not liable to the owner if the slave runs away without the hirer’s negligence or fault).

186 Decree, Supreme Court Record, *supra* note 90, at 18. The jury was presumably empanelled pursuant to section 9 of the Act of 1837, 1836 Ky. Acts 106, which provided “The damage sustained by the owner shall be ascertained in any proceeding in chancery, under the . . . third section [referring to the substantive law], by a jury impaneled [sic] in the court where the proceeding is instituted.” C.A. WICKLIFFE, S. TURNER, & S.S. NICHOLAS, THE REVISED STATUTES OF KENTUCKY 143, 144 (1852).

187 See Order overruling defendants’ motion for a new trial, Supreme Court Record, *supra* note 90, at 23. The twelve jurors’ names are listed. *Id.* at 19, 20.

After receiving instructions from Chancellor Bibb,¹⁸⁸ the jury returned a verdict for Dr. Graham for “one thousand dollars in damages.”¹⁸⁹ Both sides filed motions requesting a new trial—the defendants on a variety of grounds and Graham on the ground that the verdict was “too small to be justified by the evidence”—which Chancellor Bibb denied on March 5, 1844.¹⁹⁰

C. *The First Court of Appeals’ Decision*

1. *Overview.*—Both sides appealed to the Kentucky Court of Appeals, then the state’s highest and only appellate court.¹⁹¹ At this stage, Graham was represented by new lawyers, Harlan & Craddock and Robertson.¹⁹² The

188 The jury instructions caused a good deal of dispute, *see* Complainant’s Instructions to Jury and Defendant’s Instructions, Supreme Court Record, *supra* note 90, at 20–22, particularly as they related to damages. *See, e.g., id.* at 21 (determining to give an amended version of Complainant’s fourth proposed instruction to the effect that, in deciding George’s fair market value, the jury may take into account his “education and skill as a house servant, or such like useful employment of labor, . . . but that skill in music is fanciful, and not to be taken into account”); *id.* at 21 (determining to give a defendants’ proposed instruction that the jury “must compare the chances or probability of [George’s] recapture with his value, and that this value must be taken to be his fair market value, and not any fancy price that complainant may have chosen to set upon him”).

189 Verdict, Supreme Court Record, *supra* note 90, at 23.

190 *See* Order Overruling Complainant’s Motion for a New Trial and Order Overruling Defendants’ Motion for a New Trial, Supreme Court Record, *supra* note 90, at 23.

191 Kentucky’s first constitution provided that the state’s judicial power “shall be vested in one supreme court, which shall be styled the Court of Appeals, and in such inferior courts as the Legislature may from time to time, ordain and establish.” KY. CONST. of 1792, art. V, § 1, *reprinted in* 1 MICHIE, *supra* note 25, at 781. The Judicial Article also provided for this court of appeals to have “appellate jurisdiction . . . with such exceptions and under such regulations as the Legislature shall make.” KY. CONST. of 1792, art. V, §5, *reprinted in* 1 MICHIE, *supra* note 25, at 782. On June 28, 1792, the legislature passed a law establishing the Court of Appeals. *See* 1 LITTELL, *supra* note 162, at 101–10. This law was superseded by the Act of December 19, 1796, which provided, *inter alia*, that the court of appeals shall consist of a chief justice and two judges (section 1) and have jurisdiction to review decisions of inferior courts by appeal or writ of error (section 11). *Id.* at 560–62. The second constitution, which became effective in 1800 and lasted until 1850, adopted the same basic features as the first constitution regarding the court of appeals and also maintained all laws then in force. *See* KY. CONST. of 1799, art. IV, §§ 1, 2, sched. (1800) (setting forth Art IV, §§ 1 and 2, and “Schedule”), *reprinted in* 1 MICHIE, *supra* note 25, at 795, 800. As a result of a set of constitutional amendments that became effective in 1976, Kentucky’s highest court is now the Kentucky Supreme Court, with the Kentucky Court of Appeals acting as an intermediate appellate court. *See* KY. CONST. §§ 109–124, *reprinted in* 1 MICHIE, *supra* note 25, 352–95 (setting forth §§ 109–124 of Kentucky’s current constitution).

192 *See* *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 187 (Ky. 1844); *see also* Graham’s assignment of errors, Supreme Court Record, *supra* note 90, at 57 (listing “Harlan & Craddock” for Graham).

James Harlan was born in Mercer County, Kentucky, in 1800. He had been a Commonwealth Attorney (1829–33) and served two terms in the U.S. Congress (1835–39) and,

defendants were again represented by Garnett Duncan.¹⁹³ The Kentucky Court of Appeals was made up of three judges, Ephraim M. Ewing,¹⁹⁴ Daniel Breck,¹⁹⁵ and Thomas A. Marshall.¹⁹⁶

On October 14, 1844, the Kentucky Court of Appeals ruled for Dr. Graham in a lengthy opinion by Judge Marshall. Thomas Marshall was born in 1794 in Woodford County to a prominent Kentucky family—his

while representing Dr. Graham, was serving as the Kentucky Secretary of State (1840–44). Later, he was elected to the General Assembly and served as the state's Attorney General from 1850 until his death in 1863. "He was a lawyer of great ability, and was one of the most worthy and successful members of his profession in the state." KENTUCKY BIOGRAPHICAL, *supra* note 134, at 26. "One of his sons, James Harlan, became a judge of the circuit court at Louisville, and another, John Marshall Harlan, associate justice of the United States Supreme Court." LEVIN, *supra* note 77, at 120. (For more on Justice Harlan, see *infra* notes 412 and 489.)

George W. Craddock, of Frankfort, was later described as "slow-moving, procrastinating, shaggy-browed George W. Craddock, the embodiment of fairness and kindness, linked to the irritability and pugnacity of a game cock, a living, perambulating storehouse of the basic principles of all law, that to be unlocked required a contest." LEVIN, *supra* note 77, at 108.

George Robertson (1790–1871) practiced as "Robertson, Harlan & Pirtle" and had been a member of the court of appeals (Chief Justice for a time) from 1828 through 1843. See 2 COLLINS & COLLINS, *supra* note 110, at 687–89. (For more on Henry Pirtle, see *infra* note 233 and accompanying text).

193 See *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 187 (Ky. 1844). For a description of Duncan, see *supra* notes 171–72.

194 Ephraim M. Ewing was born in Tennessee in 1789. The son of a Revolutionary War General, Ewing trained in law at Transylvania University and practiced for many years in Russellville, Kentucky, from where he was elected to several terms in General Assembly.

In 1835, he was appointed one of the Associate Judges of the Court of Appeals; in April, 1843, he became Chief-Justice of that Court, serving with distinction until June, 1847, when he resigned and returned to his private practice. . . . As a lawyer, he was exceptionally successful and popular, and managed to accumulate a large fortune. . . . [A]lthough probably not ranking as one of the most brilliant men of his State, his solid qualities and intrinsic worth made him a leader. He was a man of noble sentiments, and great liberality of heart. His conscientious convictions led him to free his slaves, and start them well in life for themselves.

KENTUCKY BIOGRAPHICAL, *supra* note 134, at 56. In 1847–49, Ewing was a Professor of Law at the University of Louisville. LEVIN, *supra* note 77, at 768. He died in 1860. KENTUCKY BIOGRAPHICAL, *supra* note 134, at 56.

195 Daniel Breck (1788–1871) served on the Kentucky Court of Appeals from 1843, when he replaced George Robertson, see *supra* note 192 para. 4, until 1849. Breck "was a native of Massachusetts, educated at Dartmouth, and came with a diploma, an unusual acquirement for Kentucky in those early days." LEVIN, *supra* note 77, at 520. He served many times in the Kentucky legislature, was a member of Congress, "filled many other distinguished positions, and was a successful banker." *Id.* Breck married a sister of Robert Todd of Lexington, who was the father of Lincoln's wife. *Id.*

196 For a description of Marshall, see *infra* notes 197–99 and accompanying texts.

father was a U.S. Senator and his uncle on his mother's side was U.S. Chief Justice John Marshall¹⁹⁷—and Thomas entered life with a “fortune which was colossal at the time.”¹⁹⁸ After graduating from Yale, Thomas married a niece of Henry Clay and lived for a time in Lexington, later serving as a professor of law at Transylvania University (1836–49). He was elected to the Kentucky House both as a young man (1827–28) and in his later years (1863–65, from Louisville). Marshall was a long-time judge on the Kentucky Court of Appeals (1835–1856 and again in 1866) and was its Chief Judge on three different occasions (1847–51; 1854–56; and 1866). He died in Louisville in 1871.¹⁹⁹

In Dr. Graham's case, Judge Marshall's opinion was made up of four parts. The first part concluded that Graham's 1837 writing concerning Henry and Reuben was directed only to Williams and therefore did not justify the defendants' transportation of the slaves to Cincinnati in 1841.²⁰⁰ The second, longest, and most significant part held that the slaves' earlier travels to the free states of Ohio and Indiana did not change their status as property owned by Graham in Kentucky.²⁰¹ (This part is discussed in detail in the next section.) A brief third part made clear that the slaves' activities in traveling about Kentucky after their time with Williams did not amount to an authorization by Graham for the defendants to take them to Cincinnati.²⁰² Based on these three points, the court of appeals concluded that Graham “has a right to maintain this suit for the recovery of damages.”²⁰³

The opinion's fourth part described the types of relief to which Graham was entitled. Given that the slaves were assumed to be “hopelessly and irrecoverably lost,”²⁰⁴ the main element of damages was their “fair value.”²⁰⁵ Judge Marshall's opinion described in some detail how the fair value of escaped slaves should be determined. He noted that if the slaves were present, their value could be ascertained “by putting them to sale.”²⁰⁶ In their absence, however, a less precise method would have to be used.²⁰⁷

197 See 2 COLLINS & COLLINS, *supra* note 110, at 393–94.

198 *Id.* at 394.

199 *Id.*; see also LEVIN, *supra* note 77, at 174.

200 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) 173, 176–79 (Ky. 1844).

201 *Id.* at 176–84.

202 *Id.* at 184–85.

203 *Id.* at 185.

204 *Id.*

205 *Id.*

206 *Id.* For more on Kentucky slave markets at this time, see *supra* note 86–88 and accompanying texts.

207 *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) at 185. Judge Marshall wrote that the jury:

should undoubtedly take into consideration the same circumstances

According to Judge Marshall, the jury might consider, among other factors relevant to the slaves' value, "their qualities as musicians, . . . their acquirements in literature as well as in music, [and] their habits of subordination or of independence."²⁰⁸ Overall, the jury was to determine "how far any of these considerations should operate to enhance or diminish the fair value of the slaves as such."²⁰⁹

With respect to other potential elements of recovery, the court of appeals held that Dr. Graham could not collect for the value of the books and musical instruments that the slaves took with them, but that these items, being essential to the slaves' value as musicians, could be "included in the estimate of their personal value as musicians."²¹⁰ The court also determined that Graham was entitled to damages for "the expenses incurred in the unsuccessful attempts to recover the slaves . . . if it was prudently made, that is, if the prospect of success authorized the attempt."²¹¹

Finally, the court of appeals noted that, in addition to the *Pike* and its owners, "it will be proper to make Armstrong, the master of the boat at the time of the asportation, a party."²¹²

2. Key Substantive Ruling: The Status of Kentucky Slaves Who Have Traveled in Free States.—The most important part of the court of appeals' opinion was its rejection of the defendants' argument that George, Reuben, and Henry were free at the time of their journey on the *Pike* as a result of their prior travels in the free states of Ohio and Indiana.²¹³ There was some question whether this freedom argument could be made only by the slaves themselves or also by third parties like the defendants, but the court of

which might be rationally supposed to affect [the slaves'] value in the mind of purchasers, and they should give to each of these considerations, and also to the opinions of witnesses having the requisite knowledge, such weight as in their judgment it is entitled to have.

Id.

²⁰⁸ *Id.* at 185–86. The "habit of . . . independence" would produce a lower value. Thus, the jury had a right to consider:

the liberties which had been allowed to [these slaves], and the effect of all these circumstances, not only upon the value of their services, but also in generating a restlessness under restraint, and a desire of freedom, and in affording facilities and opportunities of escape, even if they had not been taken on board the *Pike*.

Id. at 186.

²⁰⁹ *Id.* at 186.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 187; see also *supra* note 67 and accompanying text (regarding the liability of a steamboat's master).

²¹³ See *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon) at 179–84.

appeals chose to by-pass this point.²¹⁴ Rather, it proceeded to rule on the status of Graham's slaves and held that they were never free, because they had made only "a temporary and momentary sojourn" to free states and thereafter "chose to return" to Kentucky.²¹⁵ The court here distinguished one of its earlier decisions, *Rankin v. Lydia*,²¹⁶ which had held that a Kentucky slave became free as a result of her owner's moving with her to Indiana to take up residency there.²¹⁷ According to Judge Marshall's opinion, however, Graham's slaves did not come within this ruling, because of the short duration of their stays in Ohio and Indiana and the fact that they "voluntarily" returned to Kentucky.²¹⁸

This holding required the court of appeals to deal with the meaning of the Northwest Ordinance's anti-slavery provision.²¹⁹ The court rejected the defendants' argument that this provision conferred freedom on Graham's slaves, because, according to Judge Marshall, the Northwest Ordinance "was intended to apply to the inhabitants of the Northwestern Territory, and not to mere travellers or temporary sojourners."²²⁰ Referring to the "principle" embodied in Northwest Ordinance's anti-slavery provision, Judge Marshall wrote:

[W]hile it may be admitted, that in consequence of this principle, no citizen or inhabitant of one of those States can hold another person as a slave in that State, it does not follow, and we do not admit that the citizen of another State, whose laws recognize and establish this species of property, loses instantaneously and forever, by the mere force of this general principle, all dominion and right of property in his slave whom he has taken with him in travelling through one of those States . . . , so that upon the voluntary and immediate return of both into their own State, the pre-existing relation of master and slave must, in view of their own laws, be regarded as at an end.²²¹

Thus, according to Judge Marshall, neither the Northwest Ordinance nor any law of a state ultimately created out of the territory it governed "can, by its own mere force, produce the effect contended for [i.e., the freedom of Graham's slaves]."²²² Rather, their status continued to be controlled by

²¹⁴ See *id.* at 179–80.

²¹⁵ *Id.*

²¹⁶ *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 467 (Ky. 1820). The *Rankin* case is described *supra* note 77.

²¹⁷ *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) at 180 (describing *Rankin* as set forth *supra* note 77).

²¹⁸ *Id.* at 182.

²¹⁹ See *supra* note 22 and accompanying text.

²²⁰ *Graham v. Strader & Gorman*, 44 Ky. (5 B. Mon.) at 180–81.

²²¹ *Id.* at 180.

²²² *Id.* at 181. Judge Marshall did recognize that such a free state might refuse its "aid to a master voluntarily bringing his slave within its territory, even for a temporary purpose, to

Kentucky law, which, the court of appeals held, followed “the principle . . . that a slave returning voluntarily with his master from a free State, is still a slave by the laws of his own country.”²²³ Because George, Reuben, and Henry were merely “sojourners for a transient purpose, not inhabitants nor residents,” and because they “voluntarily returned” to Kentucky, they did not become “free by reason of any of the facts referred to.”²²⁴

D. Trial Court Proceedings on Remand

The case was returned for further proceedings to the Louisville Chancery Court, which by now was presided over by Bibb’s successor as Chancellor, Samuel S. Nicholas.²²⁵ Nicholas as a young man had studied law under Bibb, and, like Bibb, he was a distinguished lawyer who had earlier in his career been a judge on the Kentucky Court of Appeals (1831–37).²²⁶ Nicholas was a slave-owner,²²⁷ and, unlike Bibb, he “was a man of cold manners and exterior, and his affections and friendships were limited.”²²⁸ Nicholas served as Chancellor until the new state constitution of 1850 made this post elective, and he chose to resign rather than run for the office.²²⁹ “While his manners in the social circle were cold and

enforce his claim of dominion while there, but may aid the slave in resisting that claim, and thus enable him, if he will, to remain there as a free man.” *Id.* This potential for subjecting a slave owner to the “temporary suspension of the legal right of enforcing his dominion” would, however, be giving the principle of local freedom “its fullest effect.” *Id.* Thus, if a slave, like one of Dr. Graham’s, “acknowledges his subjection while there, and returns with his master in a state of servitude, we perceive no principle which would afterwards entitle him to claim his freedom in the domestic forum.” *Id.*

²²³ *Id.* at 182. This principle, according to Judge Marshall, had been “sustained by the opinion of eminent jurists.” *Id.* at 182–83 (citing Justice Story’s commentaries on conflicts of laws and an 1836 opinion by Massachusetts Chief Justice Shaw).

²²⁴ *Id.* at 183–84.

²²⁵ Born in 1797, Samuel Smith Nicholas was the son of a prominent Virginia native, George Nicholas, who had moved to Lexington, Kentucky, in time to be an influential member of the convention that wrote Kentucky’s first constitution. KENTUCKY BIOGRAPHICAL, *supra* note 134, at 680. Samuel Nicholas was orphaned at an early age and cared for by his mother’s family in Baltimore for a few years. *Id.* at 681. What little formal education Samuel received came in a country school near Danville, Kentucky, although he did travel extensively as a young man, working on a vessel that went to China and South America and as a fledgling merchant in New Orleans. *Id.*

In the Supreme Court record of *Strader v. Graham*, Nicholas’s name is mistakenly given as “S. S. Nichols.” See Bill of Exceptions, Supreme Court Record, *supra* note 90, at 81.

²²⁶ KENTUCKY BIOGRAPHICAL, *supra* note 134, at 681.

²²⁷ *Id.* at 682. However, according to a sympathetic account written in 1878, Nicholas “ardently desired the gradual emancipation of the slaves in his State, for the furtherance, as he supposed, of its material prosperity.” *Id.*

²²⁸ *Id.* at 682.

²²⁹ *Id.* at 681. Nicholas served as Chancellor from 1844 to 1851. LEVIN, *supra* note 77, at 162.

forbidding, his demeanor upon the bench, as judge, was unexceptionable—always courteous, patient, respectful, and attentive.”²³⁰

Pursuant to the direction of the Court of Appeals,²³¹ Chancellor Nicholas gave Graham leave to file an amended complaint adding Armstrong as a defendant party, which was done on November 15, 1844.²³² This new complaint was filed by yet another set of lawyers employed by Graham, the Louisville firm of Pirtle & Wolfe.²³³ A month later, Armstrong filed an answer that adopted his co-defendants’ position that the slaves had become free by the time of their journey aboard the *Pike*,²³⁴ a claim that Graham denied in a responsive pleading filed on January 10, 1845.²³⁵

Armstrong’s late addition to the case raised two procedural issues. The first was whether the depositions of other witnesses, which had been taken

230 KENTUCKY BIOGRAPHICAL, *supra* note 134, at 682.

After his service as Chancellor, Nicholas was appointed by Governor Crittenden, along with two others, to revise the Kentucky Code of Practice. *Id.* at 681. “The last years of his life were spent in interpreting and expounding the Constitution.” *Id.* at 682. When U.S. Supreme Court Justice Catron died in mid-1865, President Johnson offered the nomination to Nicholas, but he declined, “believing the Republican Senate would refuse to confirm him, because of his well-known hostility to them and their measures.” *Id.* at 681. Nicholas died in 1869. *Id.* at 682.

231 *See supra* note 212 and accompanying text.

232 *See* Amended Bill filed and Amended Bill, Supreme Court Record, *supra* note 90, at 68–69.

233 *Id.* Henry Pirtle (1798–1880) had been a Louisville circuit judge (1826–32), LEVIN, *supra* note 77, at 162, and a Kentucky state senator (1840–1843). KENTUCKY BIOGRAPHICAL, *supra* note 134, at 682. Pirtle’s practice in the 1840s included another steamboat case in which he represented a slave-owner claimant. *See* *McFarland v. McKnight*, 45 Ky. (6 B. Mon.) 500, 514 (Ky. 1846) (listing Pirtle and Duncan as representing the winning slave owners). In 1846, Pirtle filled the “Chair of Constitutional Law, Equity, and Commercial Law” at the University of Louisville, a position he held until 1869. KENTUCKY BIOGRAPHICAL, *supra* note 134, at 682. In 1850, he was appointed by Gov. Crittenden to succeed Nicholas as Chancellor of the Louisville Chancery Court; he held this post through 1856 and later was elected to another term (1862–68). *Id.*; LEVIN, *supra* note 77, at 239–42.

Pirtle’s junior partner in the *Graham v. Strader* litigation was Nathaniel Wolfe (1810–1865), who would later serve in both Houses of the Kentucky legislature and become “one of the most able and eloquent criminal lawyers in the country.” KENTUCKY BIOGRAPHICAL, *supra* note 134, at 165; *see also* 2 COLLINS & COLLINS, *supra* note 110, at 763.

By early 1845 as Graham’s lawyers prepared for the second trial, Pirtle & Wolfe became Wolfe, Pirtle & Speed. *See* Complainant’s Exceptions to Deposition of Armstrong, Supreme Court Record, *supra* note 90, at 72. James Speed, whose brother Joshua was Lincoln’s closest friend in the 1840s, had met Lincoln when the latter visited the Speed family home near Louisville in 1841. *See* DONALD, *supra* note 4, at 88. James Speed thereafter became “a prominent attorney in Louisville” and was named Attorney General by President Lincoln shortly after the latter’s second election in 1864. *Id.* at 299, 550.

234 *See* Answer of Armstrong to Original and Amended Bill, Supreme Court Record, *supra* note 90, at 69–71.

235 *See* Answer of Graham to Armstrong’s Cross Bill, Supreme Court Record, *supra* note 90, at 71–72. Graham filed an amended version of this response on February 25, 1845. *See id.* at 72.

before Armstrong became a party, could be used without unduly prejudicing him. Chancellor Nicholas allowed these depositions to be admitted against Armstrong,²³⁶ and the court of appeals ultimately affirmed this ruling.²³⁷ The other question was whether Armstrong's own deposition could be offered by the other defendants. Nicholas ruled against admitting this deposition on the ground that Armstrong was now a party.²³⁸ This ruling, too, was later affirmed by the court of appeals.²³⁹

Two separate juries were empanelled in April and June of 1845, but they were discharged based on the defendants' objections that the depositions were not ready to be presented.²⁴⁰ Many of the witnesses from the original trial were deposed again, and numerous other depositions were taken in the spring and summer of 1845.²⁴¹

Finally, a third jury was chosen,²⁴² and on October 2 and 3, 1845, it heard the depositions and Dr. Graham's 1837 note to Williams and received instructions from Chancellor Nicholas.²⁴³ After retiring for "a short time," the jury returned a verdict for Graham for \$3000.²⁴⁴ Both parties filed exceptions, which the Chancellor overruled in an opinion issued on November 6, 1845,²⁴⁵ and Nicholas thereupon decreed that the plaintiff was entitled to have the \$3000 verdict "paid by the 15th day of this month, or the said steamboat Pike, her engine, tackle, and furniture, be then forthcoming, to be sold for the purpose of raising the same, together with the complainant's costs."²⁴⁶ A few weeks later, the defendants posted a bond in order to take an appeal from this judgment.²⁴⁷

236 See Bill of Exceptions, Supreme Court Record, *supra* note 90, at 79–81.

237 *Strader v. Graham*, 46 Ky. (7 B. Mon.) 633, 633 (Ky. 1847), *aff'd*, 51 U.S. (10 How.) 82 (1851).

238 See *supra* note 183 and accompanying text.

239 *Strader v. Graham*, 46 Ky. (7 B. Mon.) at 634. The court of appeals was to note that, even if Armstrong was not a party at the time of his deposition, his potential liability—not only to Graham, but to his employers "for the loss which his act or neglect occasioned"—gave him sufficient interest in the case to make him "an incompetent witness for his principals." *Id.*

240 See Supreme Court Record, *supra* note 90, at 73–75.

241 See *id.* at 82–144 (setting forth twenty-eight depositions, all of which were taken from early April through mid–August of 1845).

242 See Supreme Court Record, *supra* note 90, at 76–77. The names of the twelve jurors are listed. *Id.* at 77.

243 See *id.* at 77–81.

244 *Id.* at 77–79.

245 See Bill of Exceptions, Supreme Court Record, *supra* note 90, at 79–81.

246 See Decree, Supreme Court Record, *supra* note 90, at 82.

247 See Order Granting Appeal and Appeal Bond, Supreme Court Record, *supra* note 90, at 82, 144–45.

E. The Second Court of Appeals Decision

In this second trip to the Court of Appeals, the defendants continued to be represented by Garnett Duncan. Graham was represented by Robertson, Harlan and Pirtle, a firm that included the lawyers James Harlan and George Robertson from the earlier appeal and Henry Pirtle from the just-completed trial.²⁴⁸ The same three judges—Ewing, Marshall, and Breck—made up the Court of Appeals, but by now, Marshall had become the Chief Justice.²⁴⁹

The Court of Appeals took almost two years to decide the case. It heard two days of oral argument in October of 1846, “but the court not being sufficiently advised, took time. And at a court of appeals held on the 28th day of July, 1847, the cause was reheard, and the court took time, &c.”²⁵⁰ Finally, on October 4, 1847, the Court of Appeals “being sufficiently advised,” upheld Dr. Graham’s victory in a brief opinion again authored by Chief Justice Marshall.²⁵¹

The opinion began by noting that the case “now presents essentially the same facts, and must be governed by the same principles.”²⁵² After resolving the two evidentiary issues noted above,²⁵³ the Chief Justice dealt again with the issue of whether the slaves’ sojourns into free states affected their status.

On this point, the opinion noted that, while there was “no room for farther question in this Court,”²⁵⁴ additional comment was required because another case (not identified) had since misperceived the earlier ruling.²⁵⁵ This unnamed case had apparently read the earlier decision as indicating that the slaves may have become free as a result of their time in Ohio and Indiana and then reverted to their original status upon returning to

²⁴⁸ For more on these lawyers, see *supra* notes 192 (Harlan and Robertson) and 233 (Pirtle).

²⁴⁹ Marshall began a four-year tenure as Chief Justice in 1847; he also held this position two other times, in 1854–56 and 1866. See *supra* text accompanying note 199; I COLLINS & COLLINS, *supra* note 110, at 498.

²⁵⁰ See Orders—Cause Read, Supreme Court Record, *supra* note 90, at 146.

During the time that the Kentucky Court of Appeals was considering this case, the U.S. Supreme Court decided another case involving a runaway Kentucky slave. In *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847), the Court ruled in favor of a damage claim brought by the slave’s owner against an Ohio defendant under the 1793 Fugitive Slave Act, whose constitutionality the Court upheld; see also *supra* note 6 (describing this case further).

²⁵¹ See Orders—Cause Read and Opinion of the Court of Appeals, Supreme Court Record, *supra* note 90, at 146–47.

²⁵² *Strader v. Graham*, 46 Ky. (7 B. Mon.) 633, 633 (Ky. 1847), *aff’d*, 51 U.S. (10 How.) 82 (1851).

²⁵³ See *supra* notes 237 and 239 and accompanying texts.

²⁵⁴ *Strader v. Graham*, 46 Ky. (7. B. Mon.) at 635.

²⁵⁵ *Id.*

Kentucky. This was wrong, according to Chief Justice Marshall. His earlier opinion had contained “no concession either express or implied, that the slaves in question were ever free, or could properly have become so by being temporarily in a free State with their master or other citizen of this State, having control over them.”²⁵⁶ Rather, the Chief Justice held that the earlier decision “does not admit” that a Kentucky slave’s travels to a free state affects “the relation of master and slave, as existing under the laws of their own State.”²⁵⁷ In other words, they were never free, but remained slaves even while traveling in Ohio and Indiana.

Having found no error in the trial court, the Court of Appeals issued its opinion affirming the Chancellor’s decree in favor of Graham on October 4, 1847.²⁵⁸ Four days later, Strader, Gorman, and Armstrong began the process of seeking review in the U.S. Supreme Court by causing a “writ of error” to be executed.²⁵⁹

III. *STRADER V. GRAHAM* IN THE U.S. SUPREME COURT

A. *Events Leading Up to the Court’s Decision*

The U.S. Supreme Court did not hear oral argument in the case until December 11 and 12, 1850, and decided it on January 6, 1851,²⁶⁰ which was more than three years after the Kentucky decision being reviewed, an extraordinary delay by today’s standards but apparently not very unusual in

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 636.

²⁵⁹ See Supreme Court Record, *supra* note 90, at 149–50 (noting that a writ of error on the defendants’ behalf and signed by Chief Justice Marshall was issued on October 8, 1847, and was executed on Graham twelve days later). On December 15, 1847, the clerk of the Kentucky Court of Appeals certified its decision to the U.S. Supreme Court, where the case was officially filed on February 12, 1948. *Id.* at 149–50.

A “writ of error” was a method of obtaining appellate review in common-law actions in which “[o]nly questions of law were open to review in the superior court; questions of fact were not subject to review.” WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1798: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING EVIDENCE* 67 (1990); see also Felix Frankfurter & James Landis, *The Supreme Court and the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 29 (1928) (noting that, in Supreme Court review by means of an “appeal” as opposed to a “writ of error,” the facts were open to review). For more on the “writ of error” method of Supreme Court review, see *infra* note 297.

²⁶⁰ See Anne Ashmore, *Dates of Supreme Court Decisions and Arguments: United States Reports Volumes 2–107 (1791–1882)*, at 2, 54 (Aug. 2006) (unpublished manuscript from the United States Supreme Court Library), available at <http://www.supremecourt.us/opinions/datesofdecisions.pdf> (reporting these dates for *Strader v. Graham* after noting that dates of oral arguments and decisions did not appear in the official reports of Supreme Court cases until 1854).

the mid–nineteenth century.²⁶¹ During this three–year period, a number of significant events occurred, both nationally and in Kentucky.²⁶²

Among the events of national importance were the discovery of gold in California in January of 1848;²⁶³ the treaty of Guadalupe Hidalgo in early 1848, which ended the Mexican–American War, guaranteed U.S. sovereignty over Texas, and secured for the United States the present–day states of California, Nevada, and Utah, and parts of Colorado, Arizona, New Mexico, and Wyoming;²⁶⁴ the election later that year of General Zachary Taylor, a Whig, as president;²⁶⁵ and Taylor’s death in July 1850 and his replacement by Millard Fillmore.²⁶⁶ Shortly thereafter, President Fillmore appointed the Kentuckian John J. Crittenden as Attorney General,²⁶⁷ and

261 See, e.g., SWISHER, *supra* note 4, at 281–92.

262 Although not an event of national importance at the time, it is noteworthy that in this period Abraham Lincoln was elected to serve one term in Congress (1847–1849), his only successful campaign for national office until the presidency in 1860. See DONALD, *supra* note 4, at 114–15. During his time in Congress, Lincoln stayed in a Washington rooming house with eight other Whig congressmen and unsuccessfully sponsored a proposal for the compensated emancipation of slaves in the District of Columbia, while his wife Mary and their two sons lived for a time with the Todd family in Lexington, Kentucky. *Id.* at 120–21, 135–37.

263 See ENCYCLOPEDIA OF AMERICAN HISTORY 247 (Richard B. Morris & Jeffery B. Morris eds., 6th ed. 1982).

264 See *Mexico, History of*, in 12 ENCYCLOPEDIA BRITANNICA (15th ed. 1978); see also ENCYCLOPEDIA OF AMERICAN HISTORY, *supra* note 263, at 234.

265 See ENCYCLOPEDIA OF AMERICAN HISTORY, *supra* note 263, at 249, 1166–67; Whitehouse.gov, Biography of Zachary Taylor, <http://www.whitehouse.gov/history/presidents/zt12.html> (last visited Oct. 19, 2008).

266 President Fillmore assumed office upon the death of Zachary Taylor on July 9, 1950. See ENCYCLOPEDIA OF AMERICAN HISTORY, *supra* note 263, at 254, 1029.

267 Fillmore appointed Crittenden to be Attorney General in July of 1850, less than two weeks after the former became president. See ROBERT J. SCARRY, MILLARD FILLMORE 153–54, 169 (2001).

John J. Crittenden (1787–1863) was a protégé of Henry Clay and a successful Whig politician in his own right. After studying law under George M. Bibb, see *supra* notes 177–79 and accompanying texts, Crittenden won his first election, to the Kentucky House of Representatives from Logan County in 1811, and later served a number of terms in the U.S. Senate (1817–19; 1835–41; 1842–48; 1854). See, e.g., Victor B. Howard, *John Jordan Crittenden*, in KENTUCKY’S GOVERNORS 54–56 (Lowell H. Harrison ed., 2004). Crittenden was governor of Kentucky (1848–50); was twice U.S. Attorney General (in 1841 under Harrison and in 1851–54 under Fillmore); and ended his career as a pro–Union, pro–slavery member of the U.S. House (1861–63), where, at the outbreak of the Civil War, he unsuccessfully pushed for a constitutional amendment reflecting the Missouri Compromise to preserve slavery. *Id.* at 56–57. He died in 1863. *Id.* at 57. For a biography by his daughter, see 1 THE LIFE OF JOHN J. CRITTENDEN (Chapman Coleman ed., 1871).

Crittenden was a distinguished advocate in a number of important pre–Civil War cases in the Supreme Court. See SWISHER, *supra* note 4, at 437–38, 779–808, 687 n.51; *infra* note 291 para. 2; *infra* note 308 and accompanying text. In 1861, at the age of seventy–three, he was given serious consideration as Lincoln’s first appointment to the Supreme Court. See SWISHER, *supra* note 4, at 811–12. Over three decades earlier, he had been nominated to replace U.S. Supreme Court Justice Robert Trimble of Kentucky late in the term of President John Quincy

the more moderate views on slavery of the new President and Attorney General helped lead to the Compromise of 1850,²⁶⁸ which included a more aggressive Fugitive Slave Act.²⁶⁹

In Kentucky, a House resolution, adopted unanimously in early 1849, opposed “abolition or emancipation of slavery in any form or shape whatever, except as now provided for by the constitution and laws of the state.”²⁷⁰ A few weeks later, the General Assembly repealed Kentucky’s ban on the commercial importation of slaves.²⁷¹ This was also the year that representatives for a new state constitutional convention were elected, an election in which Whig candidates, led by Robert J. Breckinridge and supported by Henry Clay, were overwhelmed by pro-slavery Democrats.²⁷² The new constitution, which was adopted on June 11, 1850,²⁷³ contained the same basic slavery provisions as the existing constitution,²⁷⁴ and also

Adams, but the Senate did not act on this nomination. *See* 1 THE LIFE OF JOHN J. CRITTENDEN, *supra*, at 73. The seat eventually went to John McLean of Cincinnati after President Jackson took office. *See* WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 1849 (12th ed. 2005).

268 The Compromise of 1850 was a series of bills that were enacted in September of that year. In addition to the Fugitive Slave Act, *see infra* note 269, these bills provided for: (1) California to be admitted as a free state; (2) the territories of New Mexico, Arizona, and Utah to determine by local vote (“popular sovereignty”) whether each would permit slavery; and (3) the abolition of the slave trade, but not slavery, in the District of Columbia. *See* DEPARTMENT OF AMERICAN STUDIES, AMERHERST COLLEGE, THE COMPROMISE OF 1850 i–vii (Edwin C. Rozwenc ed., 1957).

269 The 1850 Fugitive Slave Act greatly strengthened the Fugitive Slave Act of 1793. *See* Act of Feb., 12, 1793, 1 Stat. 302. The 1793 statute mandated the return of runaway slaves to their masters, but the 1850 version also required all U.S. citizens, even those in free states, to assist affirmatively in the return of such slaves. *See* ENCYCLOPEDIA OF AMERICAN HISTORY, *supra* note 263, at 253. In 1847, the Supreme Court upheld the constitutionality of the 1793 law in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847) (further described *supra* note 6). In the course of debate over the 1850 Fugitive Slave Act, Attorney General Crittenden issued an opinion that this tougher law would also be constitutional. *See* 2 THE LIFE OF JOHN J. CRITTENDEN, *supra* note 267, at 377–81.

270 2 CONNELLEY & COULTER, *supra* note 13, at 813.

271 *See id.*

272 *See, e.g., id.* at 813–16. Breckinridge “was defeated, and not a single out-and-out emancipation candidate was elected. The conservative democrats carried the day. In the same election that gave the Whigs a majority on a joint ballot in the Legislature of thirty votes, the democrats captured the convention by a majority of six.” *Id.* at 816.

273 *See* KY. CONST. OF 1850, *reprinted in* 1 MICHIE, *supra* note 25, at 803–24.

274 *See* KY. CONST. OF 1850, art. X, *reprinted in* 1 MICHIE, *supra* note 25, at 818–19 (setting forth Article X, entitled “Concerning Slaves”). Sections 1 and 3 of this Article were almost identical to the two sections of the slavery article in the existing constitution that had been adopted in 1799. *Compare id., with supra* notes 29, 54 (setting forth the 1799 constitution’s slave article). The principal change in § 1 of the new slave article was the addition of provisions prohibiting the General Assembly from “providing for their [slaves’] removal from the State” and requiring it to “pass laws . . . to prevent [emancipated slaves] from remaining in this State after they are emancipated.” KY. CONST. OF 1850, art. X, § 1, *reprinted in* 1 MICHIE, *supra* note

added a new provision directing the General Assembly to bar free Negroes and mulattoes from coming into the state and requiring newly freed slaves to leave.²⁷⁵ The 1850 constitution also mentioned slavery favorably in connection with its protection of property rights, providing that: “The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of any property whatever.”²⁷⁶ Suffrage was again denied to all but free white males.²⁷⁷

One thing that did not change during the 1847–1850 period, however, was the makeup of the U.S. Supreme Court, as no new justices were appointed during this time.²⁷⁸ The Court’s nine members during this period were:

- Chief Justice Roger Taney, a Maryland Democrat and one-time slave-owner who was appointed by President Jackson in 1836 and would serve until 1864;²⁷⁹
- John McLean, an Ohio Democrat from Cincinnati appointed by President Jackson in 1829 who later became a Republican and served until 1861;²⁸⁰

25, at 818 (quoting Article X’s § 1).

275 See Article X, § 2, which provided:

The General Assembly shall pass laws providing that any free negro or mulatto hereafter immigrating to, and any slave hereafter emancipated in, and refusing to leave this State, or having left, shall return and settle within this State, shall be deemed guilty of felony, and punished by confinement in the Penitentiary thereof.

KY. CONST. of 1850, art. X, § 1, *reprinted in* 1 MICHIE, *supra* note 25, at 818–19; *see also supra* note 274 (requiring, in Article X’s § 1, that the General Assembly pass laws preventing newly emancipated slaves from remaining in the state).

The goal here was “forever [to] end the menace of a free negro population.” 2 CONNELLEY & COULTER, *supra* note 13, at 817. In 1851, the legislature acted pursuant to this provision by declaring that all slaves emancipated must leave the state and by making it a felony for any free negro to enter and remain in the state for over thirty days. 2 CONNELLEY & COULTER, *supra* note 13, at 817–18.

276 Article XIII, § 3 (quoted in KY. CONST. of 1850, art. XIII, § 3, *reprinted in* 1 MICHIE, *supra* note 25, at 820).

“Thus it was,” as a 1922 history of Kentucky put it, “that while slavery was tending to die as a practical institution, it grew as a political and constitutional issue, that welded the people into a strong majority for its continuation.” 2 CONNELLEY & COULTER, *supra* note 13, at 820.

277 See KY. CONST. of 1850, art. II, § 8, *reprinted in* 1 MICHIE, *supra* note 25, at 803–05 (setting forth Article II, § 8, which authorized the vote for “[e]very free white male citizen, of the age of twenty-one years, who has resided in the State two years”).

278 See COHEN ET AL., *supra* note 267, at 1850 (setting forth a chart listing all Supreme Court justices and their times in office).

279 See *id.* at 1849–50. For more on Taney, see CARL BRENT SWISHER, ROGER B. TANEY (1935); SWISHER, *supra* note 4; *infra* notes 463–64 and accompanying texts.

280 See COHEN ET AL., *supra* note 267, at 1849–50. McLean would become one of the two dissenters in *Dred Scott*. See *infra* notes 443–44 and accompanying texts. While on the Ohio

- James M. Wayne, a Georgia Democrat and slave-owner who was appointed by President Jackson in 1835 and would serve until 1867;²⁸¹
- John Catron, a Tennessee Democrat appointed by President Jackson in 1837 who would serve until 1865;²⁸²
- John McKinley, an Alabama Democrat appointed by President Van Buren who spent his early adult years as a Kentucky lawyer and who died in Lexington in 1852 after moving back to Kentucky during his tenure on the Court;²⁸³
- Peter V. Daniel, a Virginia Democrat appointed by President Van Buren in 1841 who would serve until 1860;²⁸⁴
- Samuel Nelson, a New York Democrat appointed by President Tyler in 1845 who would serve until 1872;²⁸⁵
- Levi Woodbury, a New Hampshire Democrat appointed by President Polk in 1845 who died in September of 1851;²⁸⁶ and
- Robert C. Grier, a Pennsylvania Democrat appointed by President Polk in 1846 who would serve until 1870.²⁸⁷

Supreme Court, he had decided *Ohio v. Carneal* (1817), a case involving a Kentucky slave. See TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 79 (2001). For more on Justice McLean's background and service on the Court, see *infra* note 343.

281 See COHEN ET AL., *supra* note 267, at 1849–50. Wayne voted with the majority in *Dred Scott*, but favored the Union in the Civil War. See HALL, *supra* note 280, at 86–89.

282 See COHEN ET AL., *supra* note 267, at 1849–50. Catron had served for many years on Tennessee's highest court, was pro-slavery (having authored a major state-court decision against emancipation, *Fisher's Negroes v. Dabbs*, 14 Tenn. (6 Yer.) 119 (Tenn. 1834)), and voted with the majority in *Dred Scott*, but sided with the Union in the Civil War. See HALL, *supra* note 280, at 99–102. For more on Justice Catron's background and service on the Court, see *infra* notes 336, 461 and accompanying texts.

283 See COHEN ET AL., *supra* note 267, at 1849–50. McKinley was chronically ill toward the end of his tenure, dying in Lexington in 1852, and thus was one of two Justices who were replaced by the time of *Dred Scott* (by Campbell, an Alabama Democrat who voted with the majority in *Dred Scott*, see *infra* text accompanying notes 404–05). See HALL, *supra* note 280, at 103–06.

284 See COHEN ET AL., *supra* note 267, at 1849–50. Daniel was an extreme pro-slavery justice who would produce some of the most vitriolic anti-Negro language in *Dred Scott*. See HALL, *supra* note 280, at 107–10; *infra* note 421.

285 See COHEN ET AL., *supra* note 267, at 1849–50. Nelson had long been a state judge and would become one of two northerners (along with Grier) who voted with the majority in *Dred Scott*, see HALL, *supra* note 280, at 111–14, where he drafted what was initially to be the Court's opinion limited to the jurisdictional point and then refused to go beyond this, becoming the only member of the majority not to opine on the constitutionality of the Missouri Compromise. See *infra* notes 413, 434–37 and accompanying texts.

286 See COHEN ET AL., *supra* note 267, at 1850. Woodbury, a Northerner who was pro-slavery, was a one-time Democratic presidential candidate. See HALL, *supra* note 280, at 115–18. He wrote the Court's 1847 opinion in *Jones v. Van Zandt*, upholding the 1793 Fugitive Slave law. See *supra* notes 6, 269. He might well have become the Democrats' presidential nominee in 1852, but he died in 1851, thereby becoming one of two Justice who were replaced by the time of *Dred Scott* (by Curtis, a Massachusetts Whig who dissented in *Dred Scott*). See *infra* note 410–11 and accompanying texts.

287 See COHEN ET AL., *supra* note 267, at 1850. Grier had been a Pennsylvania trial judge

In December of 1850, the Justices heard two days of oral argument in the *Strader* case. Appearing for the defendant–appellants was Charles Lee Jones of Washington, D.C.,²⁸⁸ who was assisted on the brief by their long–time Kentucky lawyer, Garnett Duncan.²⁸⁹ Graham chose to be represented by an old Kentucky acquaintance, John J. Crittenden,²⁹⁰ who was at the time the U.S. Attorney General²⁹¹ and whose undertaking of this private case seems highly irregular by modern standards.²⁹²

The briefs have not survived, but the basic arguments made by both sides are available as a result of the practice in those days of the official Supreme Court report including a detailed summary of counsels' arguments prior to the Court's opinion.²⁹³ As will be seen in the next section, Mr. Jones and Attorney General Crittenden argued both the merits of the case and whether the Supreme Court had jurisdiction to review it.

and would become one of two northerners (along with Nelson) to vote with the majority in *Dred Scott*. See HALL, *supra* note 280, at 119–22. In his role as a circuit judge while on the Supreme Court, he presided over a federal case where he favored a Virginia slave owner's efforts to retrieve a fugitive slave in Pennsylvania, *Van Metre v. Mitchell*, 28 Fed. Cas. 1038 (C.C.W.D. Pa. 1847) (No. 16,865), and he wrote the Court's opinion in another fugitive slave case, *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852).

288 See *Strader v. Graham*, 51 U.S. (10 How.) 82, 85 (1850). Jones was an experienced Supreme Court advocate, having been admitted to the Court's bar some ten years earlier. See 40 U.S. (15 Pet.) x (1841).

289 See *Strader v. Graham*, 51 U.S. (10 How.) at 85. For more on Duncan, see notes 172–73 and accompanying texts.

290 See *Strader v. Graham*, 51 (10 How.) U.S. at 85.

291 Crittenden is listed as the Attorney General at the beginning of Vol. 51 of the U.S. reports (a. *) and within *Strader*, 51 U.S. (10 How.) at 85 (“Mr. Crittenden, Attorney General, for defendants in error.”).

During his tenure as Fillmore's Attorney General, Crittenden continued his active Supreme Court practice, which included representing “Samuel Colt, the inventor of the revolver in all his litigation there, a lucrative practice for Crittenden involving claims for interest on Texas bonds,” and obtaining substantial fees for representing Mexican claimants and others involved in disputes over interests in California land. ALBERT D. KIRWAN, JOHN J. CRITTENDEN: THE STRUGGLE FOR THE UNION 272–73 (1962). For more on Crittenden, including his experience as a Supreme Court advocate, see *supra* notes 267–69.

292 Current Justice Department rules prohibit its lawyers, including the Attorney General, from representing private clients for compensation. See 5 C.F.R. § 3801.106(b)(i) (2008); see also 18 U.S.C. § 205(a)(2) (2000) (providing criminal penalties for any officer or employee of the United States who “acts as agent or attorney for anyone before any . . . court . . . in which the United States . . . has a direct and substantial interest”); MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(1) (2008) (allowing government lawyers to represent private clients, but expecting that such lawyers will comply with conflict-of-interest rules).

293 This practice was followed from the first days of the Supreme Court, see, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 419–29 (1793), through the latter part of the 19th century, see, e.g., *Harrison v. Fortlage*, 161 U.S. 57, 59–63 (1896), after which the modern practice of the U.S. reports only providing a syllabus of the case and the Justices' opinions was adopted.

B. Counsels' Arguments and the Court's Decision

1. *Overview of the Court's Decision.*—On January 6, 1851, the Court in an opinion by Chief Justice Taney dismissed the writ of error, and thereby upheld the Kentucky judgment, on the ground that the U.S. Supreme Court lacked jurisdiction to review the case.²⁹⁴ In the course of his opinion, the Chief Justice also expressed his views on some of the substantive issues involved, suggesting that the Kentucky Court of Appeals had correctly rejected the defendants' freedom argument, that the Northwest Ordinance could no longer be used as the basis for such an argument, and that the U.S. Constitution did not allow Congress to ban slavery in new states formed out of territories like that governed by the Northwest Ordinance.²⁹⁵ Separate concurring opinions by Justices McLean and Catron agreed that the Court lacked jurisdiction, but did not opine on the other issues dealt with in Taney's opinion.²⁹⁶

2. *The Jurisdictional Issue.*—With respect to the jurisdictional point, the Court based its decision on section 25 of the Judiciary Act of 1789, where the first Congress gave the Supreme Court jurisdiction, inter alia, to "re-examine[] and reverse[] or affirm[] . . . upon a writ of error" a final judgment of a state's highest court "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity."²⁹⁷ This provision was still in effect at the time of *Strader* and indeed continued without change until well into the twentieth century.²⁹⁸

²⁹⁴ *Strader v. Graham*, 51 U.S. (10 How.) at 93–97; see also *supra* note 260 (giving date of the decision).

²⁹⁵ *Strader v. Graham*, 51 U.S. (10 How.) at 93–97. These points are discussed in greater detail *infra* notes 324–33 and accompanying texts.

²⁹⁶ *Strader v. Graham*, 51 U.S. (10 How.) at 97–98. These concurring opinions are described *infra* Part III.D.

²⁹⁷ Act of Sept. 24, 1789, ch.20, § 25, 1 Stat. 73, 85–86 (1845). The "writ of error" authorized by section 25 was a relatively new method of review in 1793 that was limited to questions of law. See *supra* note 259 para 2. The modern version of the statute governing the Supreme Court's jurisdiction to review state-court decisions is set forth, *infra* note 298.

²⁹⁸ First amended in 1925 (Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937), the modern version of this provision now provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

By the time of *Strader*, section 25 had been the subject of numerous Supreme Court decisions.²⁹⁹ By its terms, section 25 jurisdiction existed only when the state court decision being reviewed was “against [the] validity” of a federal law (i.e., state court decisions *favoring* the federal claim were not subject to section 25 review).³⁰⁰ However, once a case that did involve an “against [the] validity” decision was presented, the Supreme Court’s jurisdiction was mandatory.³⁰¹ Furthermore, this jurisdiction remained good even if the Court ultimately affirmed the state court’s ruling against the federal claim.³⁰²

Taney’s view, which was shared by the two concurring Justices, was that section 25 jurisdiction failed because the defendants’ claim of freedom for Dr. Graham’s slaves was based neither on the Northwest Ordinance nor its re-affirmation by the first Congress, but on the anti-slavery laws of Ohio. (Ohio was the only state mentioned by the Justices, although the opinion below and counsel’s arguments in the Supreme Court regularly referred to the slaves’ travels in Indiana as well as Ohio.³⁰³) Because the Kentucky court’s decision did not involve a ruling against the validity of a federal law, but only against a claim based on another state’s law, the Supreme Court lacked jurisdiction to review it under section 25.

Both Jones for the defendants and Crittenden for Dr. Graham devoted most of their argument to the substantive point (i.e., whether the slaves’ brief travels in free states had made them free),³⁰⁴ but both also dealt with

28 U.S.C. § 1257(a). For a discussion of the Supreme Court’s jurisdiction under this provision, see ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 136–41 (8th ed. 2002).

299 See Act of Sept. 24, 1789, ch.20, § 25, 1 Stat. 73, 85–86 n.(d) (citing, as of 1845, over two dozen such cases, including those described in this note and those cited *infra* notes 300, 302, and 308). These decisions included *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), where the Court upheld the constitutionality of section 25’s grant of jurisdiction to review state court judgments involving U.S. law. *Id.* at 337–52.

300 See, e.g., *Commonwealth Bank v. Griffith*, 39 U.S. (14 Pet.) 56, 58 (1840); *Gordon v. Caldwell*, 7 U.S. (3 Cranch) 268, 269 (1806).

301 See STERN ET AL., *supra* note 298, at 135. The modern version of this provision, see *supra* note 298, was adopted in 1988 and provides for review in such cases only by discretionary “certiorari” rather than the mandatory “writ of error” or “appeal.” See STERN ET AL., *supra* note 298, at 135–36.

302 See, e.g., *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 409–14 (1829); *Wilson v. The Blackbird Creek Marsh Ass’n*, 27 U.S. (2 Pet.) 245, 250–52 (1829); *Montgomery v. Hernandez*, 25 U.S. (15 Wheat.) 129, 130–35 (1827).

303 See, e.g., *Strader v. Graham*, 51 U.S. (10 How.) 82, 83–84 (1851) (referring to Indiana and Ohio in the reporters’ summary of the case), *id.* at 85–90 (referring to Indiana and Ohio in counsel’s arguments). Taney’s opinion does at times use the plural form in referring to “the States formed” out of the Northwest Territory, *id.* at 95, but neither he nor the two concurring Justices ever mention Indiana explicitly. See *id.* at 92–98.

304 *Id.* at 85–90. On the merits, the key disputed point was whether the temporary nature of the slaves’ trips to Indiana and Ohio was relevant to their becoming free. Jones argued that their “length of residence” there was “immaterial” and that they became free the “instant” they set foot on free soil, *id.* at 85–88, whereas Crittenden claimed that they were not

the jurisdictional issue. Making the case for jurisdiction, Jones argued that the freedom claim was based on the Northwest Ordinance, noting that the anti-slavery “laws of Ohio and Indiana only reiterate the provisions of that ordinance.”³⁰⁵ If, as Jones claimed on the merits, the slaves’ travels in those states made them free, then their freedom “was either by virtue of the Ordinance, or of the Constitution or laws of the United States admitting those states under that Ordinance with constitutions prohibiting slavery.”³⁰⁶ Jones concluded that, because the Kentucky court had ruled against this claim, the case was appropriate for section 25 jurisdiction.³⁰⁷

free because “in this case there was no residence at all . . . only a transient visit” followed by “the voluntary return of the slave to his master.” *Id.* at 88. For Jones, the temporary nature of the slaves’ activities in free states did not matter, because, unlike the case of a runaway slave, they were on free soil “with the consent of their master.” *Id.* at 85.

Even though *Strader* did not involve fugitive slave issues nor even the freedom of the actual slaves involved—they having safely reached Canada years before the Supreme Court argument—both lawyers concluded with dramatic rhetorical flourishes. In response to Crittenden’s point that George, Reuben, and Henry had waived their right to freedom by voluntarily returning to Kentucky, *see id.* at 86, Jones stated:

It is a monstrosity in morals and in law, that a man who has been made free by the operation of law can make himself a slave. On the coming of the slave into the free State, by the mere force of the prohibition, his shackles fall from him. Are they ever to be restored? By what law? If he be free in Ohio and Indiana, how shall he be a slave elsewhere? What power of man is to reintegrate that condition?

Id. at 90.

For his part, Crittenden noted that the Northwest Ordinance was enacted “for large purposes” and was not designed:

[t]o catch up a wandering fiddler, as in this case, upon a mere visit for playing at a ball It degrades the character of that ordinance to suppose so. It would give to it the effect of creating a border warfare, instead of cultivating the courtesies and amenities of life. . . . If the doctrine maintained on the other side be established, the Ohio [River] will be made like the fabled Styx, the river of death, which, if once crossed, can never be recrossed. It will destroy that amenity of intercourse, that interchange of social courtesies, which now exist, and which do so much to preserve those kindly and fraternal feelings upon which the success of our institutions so much depends.

Id. at 88–90.

³⁰⁵ *Id.* at 83.

³⁰⁶ *Id.* at 89.

³⁰⁷ *Id.* In favor of this jurisdictional argument, Jones here cited Justice Baldwin’s concurring opinion in *Pollard v. Kibbe*, 39 U.S. (14 Pet.) 353, 417 (1840), which had opined that the Northwest Ordinance became part of federal law as a result of Art. VI of the Constitution, a point that only Justice Catron’s concurrence in *Strader* ultimately dealt with. *See infra* note 340 and accompanying text.

Crittenden, who had once lost a Supreme Court case on a section 25 dismissal,³⁰⁸ responded that the “question here is, whether this [Kentucky] decision conflicts with the [Northwest] Ordinance of 1787. It may conflict with the law of Ohio, or Indiana, or the constitution of Ohio or Indiana; but that confers no jurisdiction on this court.”³⁰⁹ In reply, Jones noted that the basic issue was whether the slaves had become free by traveling in territory governed by the Northwest Ordinance and then argued: “And did not the court of Kentucky in this case decide upon the effect of the Ordinance of 1787? It is agreed that this case arises under the laws of Kentucky. But Kentucky could not pass laws inconsistent with the ordinance. They cannot make a slave of one whom the Ordinance makes free.”³¹⁰

Neither counsel nor the Court mentioned an 1831 slave case, *Menard v. Aspasia*,³¹¹ that involved some of the same issues. Aspasia was born to a slave woman in the Illinois territory after passage of the Northwest Ordinance, but before Illinois became a state. She was later sent as a slave to Missouri, but she filed a freedom suit there and ultimately obtained a ruling from the Missouri Supreme Court that she was free based on her earlier residence in Illinois.³¹² Her putative owner, Menard, sought review of this decision in the U.S. Supreme Court, but, in a unanimous opinion by Justice McLean, the Court held that it lacked jurisdiction under section 25, because the state court decision under review “was not against, but in favour of the express provision” banning slavery in the Northwest Ordinance.³¹³ The *Menard* opinion did suggest, however, that the Northwest Ordinance’s anti-slavery provision *could* be the basis for Supreme Court review of a state court decision that *rejected* a slave’s claim to freedom based on this anti-slavery provision. Thus, in an intriguing *dictum*, Justice McLean wrote that if the Missouri decision under review “had been against Aspasia, it might have been contended, that the revising power of th[is] court, under the twenty-

308 See *Commonwealth Bank v. Griffith*, 39 U.S. (14 Pet.) 56, 57–58 (1840).

309 *Strader v. Graham*, 51 U.S. (10 How.) 82, 90 (1851).

310 *Id.* at 90.

311 *Menard v. Aspasia*, 30 U.S. (5 Pet.) 505 (1831).

312 See *id.* at 511.

313 *Id.* at 515. Menard argued, unsuccessfully, for section 25 jurisdiction on the ground that the Missouri judgment was against *his* rights under the Northwest Ordinance, specifically a provision guaranteeing property rights. See *id.* at 514–15 (referring to that part of the Northwest Ordinance providing that “no man shall be deprived of his . . . property, but by the judgment of his peers”). In rejecting this argument, the Court held that this “general” provision in the Ordinance was not the basis for Menard’s asserted right to ownership of Aspasia, “which had its commencement in other laws and compacts [e.g., Virginia slave law that governed the Illinois territory before the Northwest Ordinance].” *Id.* at 515–16. Because Menard’s “title does not arise under an act of congress,” an “essential” element of section 25 jurisdiction was missing, and thus his appeal was dismissed for lack of jurisdiction. *Id.* at 517.

fifth section of the judiciary act, could be exercised.”³¹⁴ This was the very contention made by the *Strader* defendants, but the Court rejected it.

C. Taney's Opinion

In *Strader*, Chief Justice Taney, writing for seven members of the Court, held that the defendants' argument for the slaves' freedom could not be based on the Northwest Ordinance, because that law was no longer still “in force.”³¹⁵ Taney's view was that, once new states had been formed out of a territory, the law that had governed the territory gave way to those states' laws. This view, he argued, “has been settled by judicial decision in this court,”³¹⁶ citing an 1845 case involving the Louisiana territory.³¹⁷

Taney's conclusion that the Northwest Ordinance was not “still in force in the states since formed within the territory, and admitted into Union”³¹⁸ was based on the Constitution. First, he noted that the original Ordinance, having been enacted prior to the Constitution, “could have no force beyond its limits” and “ceased to be in force upon the adoption of the Constitution.”³¹⁹ Second, the Ordinance's re-enactment by the first Congress did not mean that its provisions continued in force after new states were formed, a view he contended the Court had made clear in an earlier “carefully considered” decision.³²⁰ To the extent that Ohio and

³¹⁴ *Id.* at 515.

³¹⁵ *Strader v. Graham*, 51 U.S. (10 How.) at 93.

³¹⁶ *Id.*

³¹⁷ *Id.* (citing *Permoli v. First Municipality*, 44 U.S. (3 How.) 589 (1845)). In *Permoli*, the Court, in a unanimous opinion by Justice Catron, declined jurisdiction under section 25 in a case where Louisiana's highest court had rejected a freedom-of-religion claim based on a provision in Louisiana's pre-statehood territorial ordinance that closely resembled the Northwest Ordinance, on the ground, as Chief Justice Taney put it in *Strader*, that “the Ordinance ceased to be in force when Louisiana became a State.” *Strader v. Graham*, 51 U.S. (10 How.) at 95. Based on *Permoli*, Taney concluded in *Strader* that if “this Ordinance is not in force in Louisiana, it follows that it [the Northwest Ordinance] cannot be in force in Ohio.” *Id.*

³¹⁸ *Strader v. Graham*, 51 U.S. (10 How.) at 93–95. In reaching the conclusion that the Northwest Ordinance was not “perpetual,” *see id.* at 94, Taney discounted that part of the Ordinance declaring that certain of its guarantees, including the ban on slavery, would “forever remain unalterable unless by common consent.” *Id.* (referring to the preamble to Articles I–VI of the Northwest Ordinance). In Taney's view, even if Congress had the power to make these provisions unalterable in the first place, the subsequent formation of the states within the Northwest Territory and their adoption of state constitutions and laws amounted to an alteration of the Ordinance “by common consent.” *Id.* at 96.

³¹⁹ *Id.* at 94, 97.

³²⁰ *Id.* at 95 (citing *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1844)). The principles established by *Pollard's Lessee v. Hagan* may have been clear to Taney, but the case is not an easy one for the modern reader to fathom. *Hagan* was a dispute over ownership of property in Mobile, Alabama, that was adjacent to navigable waters, in which one party's claim was based on current Alabama land law and the other's was based on various U.S. laws and treaties

Indiana had chosen to ban slavery by enacting laws consistent with the Ordinance's anti-slavery provision, Taney believed that those state laws "owe their validity and authority to the Constitution of the United States and the constitutions and laws of the respective states, and not to the authority of the [Northwest] Ordinance."³²¹

Because the *Strader* defendants' argument for George, Reuben, and Henry's freedom was based on the laws of the free states where they had traveled and not on any federal law, the Kentucky decision under review was not against the validity of any *federally* based claim. Therefore, Taney concluded, "this court has no [section 25] jurisdiction of the case, and the writ of error must on that ground be dismissed."³²²

Taney's jurisdictional holding was, as one commentator has put it, "unexceptionable contemporary legal doctrine."³²³ His opinion, however, included two other views that made *Strader* important. First, he opined that the Kentucky Court of Appeals had been correct in determining that, even if Ohio and Indiana law treated Graham's slaves as free, their status was to be governed by Kentucky slave law. According to Taney:

Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed on them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the

that pre-dated Alabama's statehood. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 219–21. The former won in the Alabama Supreme Court, and the latter, whose U.S.-based claims had thereby been ruled against, sought review in the Supreme Court. The Court had section 25 jurisdiction, but it went on to affirm the Alabama court's judgment. See *generally supra* note 302 and accompanying text. In an opinion by Justice McKinley, the Court determined that the earlier U.S. laws governing the Alabama territory "can have no controlling influence in the decision of the case before us," because the "shores of navigable waters, and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively[, and] new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." *Pollard's Lessee v. Hagan*, 44 U.S.(3 How.) at 230.

In *Strader*, Chief Justice Taney read *Hagan* as establishing the correct "reasoning and principles" by which the "whole question" of the Northwest Ordinance's applicability to the defendants' claims should be governed; that is, that these claims should be governed by the current laws of Ohio and Indiana, rather than the provisions of the Northwest Ordinance, *Strader v. Graham*, 51 U.S. (10 How.) at 93–95, because these new states had the sovereign right under *Hagan* to choose to adopt or reject the anti-slavery provision of the Northwest Ordinance.

³²¹ *Strader v. Graham*, 51 U.S. (10 How.) at 95–97.

³²² *Id.* at 97.

³²³ Wiecek, *supra* note 6, at 53, *reprinted in* THE LAW OF AMERICAN SLAVERY 654 (Kermit H. Hall ed., 1987).

laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return.³²⁴

This meant that the Kentucky Court of Appeals' decision "that by the laws of the state [of Kentucky] they continued to be slaves" was "conclusive upon this court, and we have no jurisdiction over it."³²⁵ As we shall see, this deference to state-court determinations regarding slavery would become an important factor in the *Dred Scott* litigation.³²⁶

Taney's second gratuitous point was even more dramatic. Having announced that nothing in the U.S. Constitution limited state law on the subject of slavery,³²⁷ he then went on to suggest that slavery could not be limited in new states by Congress. This suggestion was in that part of the *Strader* opinion holding that the Northwest Ordinance's anti-slavery provision was no longer in force.³²⁸ One reason it could not be in force, wrote Taney, was that "it is impossible to look at" this provision "without seeing at once that [it is] inconsistent with the present Constitution."³²⁹

According to Taney, the people who had migrated to the Northwest Territory after adoption of the Constitution were "entitled to its benefits" on an equal basis "as the people of the then existing states."³³⁰ These benefits included certain rights of "commerce" and the opportunity "in due time . . . [to] be admitted into the Union upon an equal footing with the old states."³³¹ This meant that if the people of a state formed out of the Northwest Territory chose to have slavery, that choice—being one that the original states had been constitutionally entitled to make—could not be limited by anything Congress had said in the Northwest Ordinance. The Constitution extended to the people of the Northwest Territory "much greater power over their municipal regulations and domestic concerns than the [Northwest Ordinance] had agreed to concede."³³² In other words, when the first Congress re-enacted the Northwest Ordinance, it exceeded its constitutional power to the extent that this statute purported to ban slavery in the new states. The fact that a state like Ohio had chosen to ban slavery after it became a state was entirely a choice made by its people; this determination could not be imposed by Congress.³³³

324 *Strader v. Graham*, 51 U.S. (10 How.) at 93–94.

325 *Id.* at 94.

326 *See infra* text accompanying notes 430–31.

327 *See supra* text accompanying note 324.

328 *See supra* notes 315–18 and accompanying texts.

329 *Strader v. Graham*, 51 U.S. (10 How.) at 95.

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.* Taney conceded that many of the original Ordinance's key provisions, including its ban on slavery, "have been the established law within this territory ever since the ordinance

Taken together, Taney's two key *dicta* in *Strader* went a long way towards establishing total state power over the issue of whether an individual was slave or free. Nothing in the federal Constitution, either by itself or through any power given to Congress, could limit what a state chose to do about slavery. Furthermore, like his endorsement of state discretion to determine the status of slaves, Taney's comments about the lack of congressional power to require the people in a new territory to forever abandon slavery would have a significant impact on *Dred Scott*.³³⁴

D. *The Two Concurring Opinions*

Only two justices—McLean and Catron—refused to join Taney's opinion in *Strader*. Each wrote a brief opinion, concurring in the determination that the Court lacked section 25 jurisdiction, but expressing concern with the broader aspects of Taney's opinion.³³⁵

Justice Catron, a senior member of the Court from Tennessee who would take an active role in advocating for a broad pro-slavery decision in *Dred Scott*,³³⁶ dealt primarily with non-slavery issues. He first agreed with Taney that the Northwest Ordinance's anti-slavery provision had been replaced in Ohio by a similar provision in that state's law and that, because the defendants were therefore basing their freedom claim on state rather than federal law, "no [section 25] jurisdiction exists to examine the [Kentucky] state decision."³³⁷ However, Catron's reason for believing that Ohio law had replaced the Northwest Ordinance was different from Taney's. Catron felt that, as a result of Ohio's constitutional ban of slavery having been agreed to by Congress upon Ohio's admission as a state, the Ordinance's anti-slavery provision had, according to its own terms, been altered "by common consent."³³⁸ As for the rest of the Ordinance's "unalterable" provisions, however, Catron was "unwilling to express any opinion, as no part of either is in any degree involved in this controversy."³³⁹ He suggested that these other provisions, not having been altered, might still be in force and that

was passed." *Id.* He concluded, however, that this was because "in the States since formed in the territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective States, and not to the authority of the [Northwest O]rdinance." *Id.* at 95–97.

334 See *infra* text accompanying notes 426–27.

335 See *Strader v. Graham*, 51 U.S. (10 How.) at 97–98.

336 See *infra* notes 414–15 and accompanying texts. For more on Justice Catron's background and service on the Court, see *supra* note 282 and accompanying text; Frank Otto Gatell, *John Catron*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 737–49 (Leon Friedman & Fred L. Israel eds., 1969) [hereinafter JUSTICES–I].

337 *Strader v. Graham*, 51 U.S. (10 How.) at 98.

338 See *id.* (referring to the Northwest Ordinance's provision that its articles would "forever remain unalterable unless by common consent").

339 *Id.*

this would be consistent with the Constitution.³⁴⁰ Catron was particularly concerned about the on-going validity of a provision in the Ordinance's fourth article, which "secured the free navigation of the waters leading into the rivers Mississippi and St. Lawrence."³⁴¹ He considered maintenance of such free navigation to have been "a wholesome course of decision," one he was "unwilling to disturb" in a case like *Strader* "where the fourth article is in no wise [sic] involved."³⁴²

Justice McLean's concurrence in *Strader* focused exclusively on the jurisdictional issue and, though shorter than Catron's, proved to be more significant. McLean, a former Ohio Supreme Court justice and politician from Cincinnati, had been on the Court since 1829 and was its most senior justice at the time of *Strader*.³⁴³ Later in his career, he would pen one of the two dissents in *Dred Scott* and also entertain hopes of becoming the Republican nominee for president in 1856.³⁴⁴

McLean's concurrence agreed with the Court and Catron that section 25 jurisdiction was lacking because the defendants' freedom claim was based on state rather than federal law.³⁴⁵ McLean believed that the Northwest Ordinance's anti-slavery provision "was incorporated into the constitution of Ohio, which received the sanction of Congress when the state was admitted into the Union," meaning that this Ohio constitutional provision "must be considered, in regard to the prohibition of slavery, as substituted for the ordinance."³⁴⁶ As a result, McLean wrote, "all questions of freedom must arise under the [Ohio] constitution, and not under the Ordinance. This . . . decides the question of jurisdiction, which is the only question before us."³⁴⁷ This meant, as McLean pointedly concluded his opinion, that "anything that is said in the opinion of the court, in relation to the ordinance beyond this, is not in the case, and is, consequently, extrajudicial."³⁴⁸

³⁴⁰ See *id.* According to Catron, the Northwest Ordinance was an "engagement entered into" before the Constitution's adoption, *id.*, and therefore, in the words of Art. VI, "shall be as valid against the United States under this Constitution, as under the Confederation." See U.S. CONST. art. VI, § 2.

³⁴¹ *Strader v. Graham*, 51 U.S. (10 How.) at 98 (referring to article four of the Northwest Ordinance).

³⁴² *Id.* at 99.

³⁴³ For more on Justice McLean's background and service on the Court, see *supra* note 280 and accompanying text; Frank Otto Gatell, *John McLean, in JUSTICES-I, supra* note 336, at 535-46.

³⁴⁴ See *infra* note 409 and accompanying text. McLean also had presidential aspirations earlier in his career. See HALL, *supra* note 280, at 81.

³⁴⁵ *Strader v. Graham*, 51 U.S. (10 How.) at 96-97.

³⁴⁶ *Id.* at 97.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

E. Summary of the Supreme Court's Performance in Strader

As the two concurring opinions demonstrate, it was possible for the Court in *Strader* to decide the case based on its lack of jurisdiction without the Justices' expressing their views on other issues. Indeed, until *Strader*, the Court's practice in cases where it found section 25 jurisdiction lacking had simply been to dismiss the writ of error for want of jurisdiction without commenting on the merits of the federal issue.³⁴⁹ Of course, as the *Strader* concurrences showed, some comment on the meaning of the relevant U.S. law was necessary in such cases to explain why that law was not the source of the appealing party's challenge to the state court's decision.³⁵⁰ And there had been a few pre-*Strader* cases in which the Court went beyond what seemed necessary in discussing the lurking federal law before concluding that that law did not apply and therefore section 25 jurisdiction failed.³⁵¹

Still, Taney's opinion seemed extreme in this regard. As noted above, he used *Strader* to opine not only that the Kentucky Court of Appeals had correctly handled the slavery issue, but also that Congress was without constitutional power to ban slavery in perpetuity in the Northwest Ordinance—and therefore presumably in any other territory where new states were to be formed.³⁵²

Even more remarkable, Taney was able to persuade six other Justices to join this opinion and to eschew the more narrow ground advocated by their senior colleagues, Justices McLean and Catron. These six other Justices

349 See, e.g., *Permoli v. First Municipality*, 44 U.S. (3 How.) 589, 610 (1845) (cited on other grounds in *Strader* by Chief Justice Taney, see *supra* note 317 and accompanying text); *McDonogh v. Millaudon*, 44 U.S. (3 How.) 693, 707 (1845); *The Commonwealth Bank v. Griffith*, 39 U.S. (14 Pet.) 56, 58–59 (1840); *M'Bride v. Hoey*, 36 U.S. (11 Pet.) 167, 171–72 (1837); *Cromwell v. Randall*, 35 U.S. (10 Pet.) 368, 398 (1836); *City of New Orleans v. De Armas*, 34 U.S. (9 Pet.) 224, 235–36 (1835); *Menard v. Aspasia*, 30 U.S. (5 Pet.) 505, 517 (1831); *Fisher v. Cockrell*, 30 U.S. (5 Pet.) 248, 259 (1831); *Hickie v. Starke*, 26 U.S. (1 Pet.) 94, 98–99 (1828); *Winn v. Jackson*, 25 U.S. (12 Wheat.) 135–36 (1827); *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 128 (1827); *Gibbons v. Ogden*, 19 U.S. (6 Wheat.) 448, 449–50 (1821); *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 311, 315 (1819); *Houston v. Moore*, 16 U.S. (3 Wheat.) 433, 434 (1818); *Inglee v. Coolidge*, 15 U.S. (2 Wheat.) 363, 368 (1817); *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 350 (1809); *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268, 269 (1806).

Under such circumstances, Chief Justice Marshall early on established the practice of denying costs to the party that had successfully argued the absence of section 25 jurisdiction. See *Inglee*, 15 U.S. (2 Wheat.) at 368 (“The court does not give costs where a cause is dismissed for want of jurisdiction.”); accord *Houston*, 16 U.S. (3 Wheat.) at 434. This practice was invoked by the Court in denying costs to Dr. Graham after he prevailed based on the absence of section 25 jurisdiction. See *infra* note 382 and accompanying text.

350 See *supra* notes 337–38 and 345–47 and accompanying texts.

351 See, e.g., *Menard v. Aspasia*, 30 U.S. (5 Pet.) 505, 514–15 (1831) (described *supra* notes 310–14 and accompanying texts); see also *Fisher v. Cockrell*, 30 U.S. (5 Pet.) 248, 253–55, 258–63 (1831) (presuming, over a dissent, how the state court proceedings below dealt with a particular land–title issue on appeal).

352 See *supra* notes 324–33 and accompanying texts.

thus made *Strader* an indicator of just how willing the Supreme Court was in the early 1850s to defend a state's efforts to maintain slavery and also to curb any federal attempt to restrict those efforts. And four of these Justices—Wayne, Daniel, Nelson, and Grier—would still be on the Court six years later to help Taney form a majority to rule against Dred Scott's claim for freedom.³⁵³

IV. AFTERWARDS: THE IMPACT OF *STRADER V. GRAHAM*

A. *Post-Strader Events*

The Nation was made aware of the Supreme Court's decision in *Strader*, but the reaction it engendered seems to have been modest. Four days after the Court's ruling, at least one Washington newspaper covered "the decision at length."³⁵⁴ The first Kentucky-area paper to report on *Strader* was Cincinnati's *Enquirer*, which published an eight-paragraph article on January 14, 1851, entitled "Important Slave Case Decision."³⁵⁵ Two days later, both of Louisville's major newspapers reported the *Strader* decision, with the *Louisville Daily Journal* providing without comment an excerpted version of Chief Justice Taney's opinion³⁵⁶ and the *Louisville Daily Courier* simply re-printing the *Cincinnati Enquirer's* story.³⁵⁷

This latter article provided a summary of the case's facts and Taney's opinion, concluding that the main point of the decision was that the Northwest Ordinance "ceased to be of any binding force; and if in force, could have no influence on the State laws of Kentucky."³⁵⁸ This being the "substance of the decision," the article accepted Taney's view that this "was so decided by the same court in *Pollard vs. Hagan*, 3 How. 212,"³⁵⁹ thereby implying that *Strader* had not broken any new ground. The main commentary provided in the article was based on a factual error—that Taney's decision for the Court was "dissented from by Judges McLean, Wayne and Catron."³⁶⁰

353 See *infra* note 406 and accompanying text.

354 *Important Slave Case Decision*, CINCINNATI DAILY ENQUIRER, Jan. 14, 1851, at 2 (referring to coverage in the WASHINGTON REPUBLIC of Jan. 10, 1851); see also *id.* (referring to "an item in the Washington *Union*, which stated than an important case was decided in the Supreme Court of the United States on the 6th inst. . . . on the subject of slavery").

355 *Important Slave Case Decision*, CINCINNATI DAILY ENQUIRER, Jan. 14, 1851, at 2. This article mentioned that the *Enquirer* had also "alluded" to a Washington newspaper's report of the case "Saturday last" (i.e., January 11, 1851). *Id.*

356 See *Supreme Court of the United States*, LOUISVILLE DAILY J., Jan. 16, 1851, at 3.

357 See *Important Slave Case Decision*, LOUISVILLE DAILY COURIER, Jan. 16, 1851, at 3.

358 *Id.*

359 *Id.*

360 *Id.* The article's final paragraph commented: "It will be remarked, that of the three judges who dissented, two are from slave States—Wayne, of Georgia, and Catron, of

The limited coverage of *Strader* provided by the Louisville newspapers seems somewhat surprising, given the fact that both regularly reported what they viewed as important news from Washington.³⁶¹ Obviously, the papers understood the importance of the case's subject matter, as evinced by the *Louisville Daily Courier's* publication a few days later of a full column devoted to a Senate speech by Henry Clay in which he presented a petition that identified slavery as "the greatest cause of discord" in "our land."³⁶²

On this issue, however, the Nation was still focused primarily on the recently enacted Fugitive Slave Act of 1850.³⁶³ The *Strader* decision, to the extent it was noted nationally, was generally seen as a part of the overall slavery debate that the 1850 legislation was designed to diffuse. Thus, for example, in April of 1851, a pro-slavery periodical published an article that, in the course of challenging Northerners to obey the new law lest they become responsible for nullification of the entire Compromise of 1850, simply mentioned *Strader* in a footnote for the proposition that "the Constitution and Laws of the United States have superseded" the Northwest Ordinance's anti-slavery provision.³⁶⁴

On the other side, Kentucky-born abolitionist leader James G. Birney³⁶⁵ sharply criticized Taney's opinion in *Strader* in an 1852 pamphlet in which he charged that "in order to reach our colored people—especially the

Tennessee—and one, McLean, from a free State. Of the Judges who concurred in the opinion, three are from slave states and three from free States." In reality, as described above, there was no dissent in *Strader*, although McLean and Catron (but not Wayne) did file concurring opinions. See *supra* notes 294–96 and accompanying texts.

361 For example, on the very page with its report of Taney's opinion in *Strader*, the *Louisville Daily Journal* included a five-paragraph report on the previous day's activities in Congress. See *Thirty-First Congress—Second Session*, LOUISVILLE DAILY J., Jan. 16, 1851, at 3; see also *infra* note 362 and accompanying text (reporting on a recent speech by Senator Clay); *Opinion of Foreign Papers in Regard to President Fillmore and His Message—Goin's Speech in the Senate on the California Question, &c., &c.*, LOUISVILLE DAILY COURIER, Jan. 14, 1851, at 2 (reporting on reactions to an address by President Fillmore); *Mr. Crittenden's Levee, on New Year's Day—The Ritchie and Rives Quarrel—Publication of Letters from Gen. Jackson by Mr. Blair—Gov. Foote's Union Speech in Philadelphia—Feeling in Favor of a Union Ticket at the Next Presidential Election—The Austrian Charge d'Affaires at the Hon. Daniel Webster's on New Year's Day—Attempt of the Abolitionists to Create Unkind Feeling Between Messrs. Clay and Webster, &c., &c.*, LOUISVILLE DAILY COURIER, Jan. 9, 1851, at 2 (reporting on New Year's Day events in Washington, including a reception given by Attorney General Crittenden).

362 *Colonisation—Slave Trade: Mr. Clay's Speech*, LOUISVILLE DAILY COURIER, Jan. 22, 1851, at 2 (quoting "Mr. Clay's Speech" of Jan. 15, 1851).

363 See *supra* note 269.

364 *The Fugitive Slave Law; Shall It Be Enforced?*, U. S. MAGAZINE AND DEMOCRATIC REVIEW, Apr. 1851, at 352, 356 n.*. This article warned that if "the free states [were] prepared to say, that . . . the delivery of fugitive slaves, has become so odious and distasteful . . . that they will no longer carry it out . . . , a refusal here . . . will fully justify the other party[] in a dissolution at their volition. . . . It is, then, a question of Union or disunion. . . . Well may the free states pause and ponder." *Id.* at 358–59.

365 See *supra* note 89.

free portion of them—our Supreme Court are willing to trample down & disregard the constitutional safeguards of all our rights.”³⁶⁶ According to Birney, *Strader’s* holding would help empower southern states to enslave any free black found within their borders.³⁶⁷ This, in turn, would virtually legitimize kidnapping of northern blacks under the easy mechanism of the 1850 Fugitive Slave Act.³⁶⁸ Free blacks in free states were therefore little better off than slaves in the South in terms of security for their personal liberty, and Birney despondently recommended that blacks migrate to Liberia.³⁶⁹

Also in 1852, Harriet Beecher Stowe, a Cincinnati native, published her novel about slavery, *Uncle Tom’s Cabin*,³⁷⁰ which featured a dramatic escape by a black woman and her child from northern Kentucky across a half-frozen Ohio River to freedom in the North. The book was a best-seller whose harsh view of slavery generated strong reactions in both the North and the South,³⁷¹ and Lincoln, as president, would later greet Stowe by remarking, “So this is the little lady who made this big war?”³⁷²

The 1852 presidential election resulted in a landslide victory for the Democratic candidate Franklin Pierce.³⁷³ The Whig party, having engineered the Compromise of 1850, was dying, as those in the South found its emphasis on national power threatening and those in the North and West found its support for slavery’s on-going power unacceptable. The Whigs’ greatest leader, Henry Clay, died in 1852.³⁷⁴

Anti-slavery Whigs founded the Republican party in 1854, and its first candidates stood for election that year.³⁷⁵ Earlier in 1854, Congress passed the Kansas–Nebraska Act,³⁷⁶ which provided that each of these two new states would choose whether to have slavery, despite their being north of the “free” line established by the 1820 Missouri Compromise.³⁷⁷ The

³⁶⁶ Wiecek, *supra* note 6, at 54, reprinted in *THE LAW OF AMERICAN SLAVERY* 655 (Kermit H. Hall ed., 1987) (quoting James G. Birney).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* (1852).

³⁷¹ See, e.g., SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 656–57 (2005).

³⁷² See DONALD, *supra* note 4, at 542.

³⁷³ J. CLARK ARCHER ET AL., *HISTORICAL ATLAS OF U.S. PRESIDENTIAL ELECTIONS, 1877–2004*, at 67–68 (2006).

³⁷⁴ See *supra* note 96.

³⁷⁵ See, e.g., DONALD, *supra* note 4, at 180–81.

³⁷⁶ See Act of May 30, 1854, ch. 59, 10 Stat. 277. The political events leading up to passage of the Kansas–Nebraska Act are described in FEHRENBACHER, *supra* note 4, at 178–87.

³⁷⁷ See *infra* note 385.

Kansas–Nebraska Act created a “firestorm” in the North, energizing the new Republican Party and bringing Lincoln out of political retirement.³⁷⁸

Five years passed between the Supreme Court’s decision in *Strader* and the first oral argument in *Dred Scott* in early 1856.³⁷⁹ During this period, two new justices joined the Court: Benjamin Curtis, a Massachusetts Whig, appointed by President Fillmore in late 1851 to fill the seat made vacant by the death of Justice Woodbury,³⁸⁰ and John Campbell, an Alabama Democrat appointed by President Pierce in 1853 to the seat made vacant by the death a year earlier of Justice McKinley.³⁸¹

These new justices were in place by the time the Court denied Crittenden’s motion for an award of costs on behalf of Dr. Graham in the *Strader* litigation on May 9, 1856.³⁸² Three years earlier in 1853, Graham had sold his resort in Harrodsburg.³⁸³

B. *The Dred Scott Case*

1. *Background and Supreme Court Opinions.*—The basic facts of the *Dred Scott* case are well known.³⁸⁴ Scott was a Missouri slave owned by an Army surgeon, John Emerson, who took Scott with him in 1834 to a fort in Illinois, a free state, and then in 1836 to a fort in Minnesota, a territory where slavery was forbidden by the Missouri Compromise of 1820.³⁸⁵ In 1838, Scott returned to Missouri with Mrs. Emerson while Dr. Emerson continued to travel with the Army until his death in 1843, when his widow became Scott’s owner. In 1846, Scott sued Mrs. Emerson for his freedom in a Missouri state court, claiming that his time in Illinois and Minnesota made him free.³⁸⁶ After more than five years of litigation—during which

378 See, e.g., DONALD, *supra* note 4, at 168–71; FEHRENBACHER, *supra* note 4, at 188–92.

379 See *supra* note 260 and accompanying text and *infra* note 399 and accompanying text.

380 See COHEN ET AL., *supra* note 267, at 1850.

381 See *id.*

382 See *Strader v. Graham*, 59 U.S. (18 How.) 602 (1856); Ashmore, *supra* note 260, at 67. The basis for this denial was that the Court did not make such an award “in a case dismissed for want of jurisdiction.” *Strader v. Graham*, 59 U.S. (18 How.) at 602. See generally *supra* note 349 para. 2.

383 See *supra* note 134.

384 The background of the *Dred Scott* case given in this and the following textual paragraph is based on FEHRENBACHER, *supra* note 4, at 239–83.

385 Enacted by Congress on March 6, 1820, the Missouri Compromise provided that Missouri would be admitted to the Union as a slave state, but prohibited slavery in other areas covered by the Louisiana Purchase north of latitude 36° 30’ (i.e., Missouri’s southern border); territories below this line could decide whether to allow slavery and could make that choice when admitted as states. See Act of Mar. 6, 1820, ch. 22, 3 Stat. 545, 545–48.

386 Both this suit and Scott’s later federal suit were also brought on behalf of his wife and their two children. See FEHRENBACHER, *supra* note 4, at 250, 251 n.2, 255, 276 n.25.

time the *Strader* case was making its way to the Kentucky Court of Appeals for the second time and then to the U.S. Supreme Court³⁸⁷—the Missouri Supreme Court in 1852 ruled against Scott, holding that he was still a slave under Missouri law.³⁸⁸

Scott could not appeal this ruling to the U.S. Supreme Court under the jurisdictional precedent laid down in *Strader*.³⁸⁹ Therefore, he brought a new action to secure his freedom in a U.S. trial court in Missouri against John Sanford,³⁹⁰ the brother of Mrs. Emerson to whom Scott had been sold.³⁹¹ Sanford was a citizen of New York, and Scott invoked the federal court's diversity jurisdiction based on the claim that he was a citizen of Missouri. Sanford disputed Scott's claim to citizenship, thereby challenging both Scott's right to invoke the court's diversity jurisdiction and his claim to freedom on the merits. The federal court rejected the challenge to its jurisdiction, but ruled against Scott in a trial on the merits in 1854, holding that, based on Missouri law and the Missouri Supreme Court's earlier

387 See *supra* notes 250–51 and 260–61 and accompanying texts.

388 *Scott v. Emerson*, 15 Mo. 576 (Mo. 1852). This ruling reversed a jury verdict in favor of Scott, who had initially lost but succeeded in having that first verdict set aside on a technicality. See *Emmerson* [sic] v. *Scott*, 11 Mo. 413 (Mo. 1848) (affirming trial court's grant of a new trial for Scott, which Mrs. Emerson challenged in an interlocutory appeal). The Missouri court proceedings in *Dred Scott* are described in FEHRENBACHER, *supra* note 4, at 250–65, and Boman, *supra* note 75, at 420–28.

In ruling against Scott in 1852, the Missouri Supreme Court relied on Justice Taney's opinion in *Strader* to support its view that a slave who returns with his master after spending time in a free state remains a slave. See Boman, *supra* note 75, at 425–26 (discussing *Scott v. Emerson*, 15 Mo. at 586–87).

389 See *supra* notes 315–23 and accompanying texts. This point would be confirmed in Chief Justice Taney's opinion in *Dred Scott*, which stated:

If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of *Strader* and others v. *Graham* is directly in point; and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy.

Scott v. Sandford, 60 U.S. (19 How.) 393, 453 (1857). For an argument that *Strader* did not block *Dred Scott*'s appeal, see FEHRENBACHER, *supra* note 4, at 269 (noting that Scott's freedom claim had been based on U.S. law (i.e., the 1820 Missouri Compromise that provided for freedom in the Minnesota territory) whereas the freedom claim in *Strader* was seen to be based on the state laws of Ohio and Indiana, and characterizing Taney's conclusion to the contrary in the quotation above as "preposterous").

390 Sanford's name is misspelled in the official U.S. report of the *Dred Scott* case as "Sandford." See FEHRENBACHER, *supra* note 4, at ix.

391 *Id.* at 270–76.

decision against Scott, he was still a slave.³⁹² Scott challenged this judgment by bringing a writ of error in the U.S. Supreme Court.³⁹³

The jurisdictional problem in *Dred Scott*, unlike the one in *Strader*, did not involve the Supreme Court's jurisdiction, which in *Dred Scott* was clearly appropriate under a provision of the 1789 Judiciary Act that gave the high court jurisdiction to review certain decisions of lower federal courts.³⁹⁴ Rather, the problem was whether the U.S. trial court had jurisdiction based on diversity,³⁹⁵ a problem that, then as now, could be raised throughout the litigation, even at the appellate stage in the Supreme Court.³⁹⁶

392 It seems natural in the modern era after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), for a federal court sitting in diversity to follow state law, but in the nineteenth century, such a court was empowered to disagree with the Missouri Supreme Court's view and to have ruled that Missouri law favored Scott. See generally *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). This point, as illustrated by *Swift*, is further discussed *infra* note 432 para. 2.

393 See *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 396, 400 (1857). For more on the significance of the "writ of error" procedure by which this Supreme Court review was conducted, see *supra* notes 259 para. 2, 297.

394 See Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73, 84–85, which provided, *inter alia*, that

upon a writ of error, . . . final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process . . . [may] be re-examined and reversed or affirmed in the Supreme Court But there shall be no reversal . . . on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact.

395 Diversity jurisdiction has always included both constitutional and statutory components. In the Constitution, Article III's section 2 grants the federal judiciary power over only a specified set of disputes, one of which is "Controversies . . . between Citizens of different States." In the Judiciary Act of 1789, Congress established a system of lower federal courts and provided, in section 11, that the U.S. circuit courts—then the principal trial courts—would have original jurisdiction where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79. In 1875, Congress amended this statute to eliminate the local-party requirement, thus broadening diversity jurisdiction to include all suits between "citizens of different States," see Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470, which is the phrasing that has continued through the present day. See 28 U.S.C. § 1332(a)(1) (2000). The only statutory changes to this particular type of jurisdiction since 1875 have been periodic increases to the additional amount-in-controversy requirement, which was originally set at \$500 in 1875 and is today \$75,000. See 28 U.S.C. § 1332(a) (2000).

396 See, e.g., *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) (illustrating "then" by reversing judgment below upon finding that the trial court lacked diversity jurisdiction). This rule has been steadfastly maintained throughout the two centuries since *Capron*. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 369–77 (1978); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Coal Co. v. Blatchford*, 78 U.S. 172, 178 (1871); *Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 555 (5th Cir. 1985).

Justice McLean's dissent in *Dred Scott*, however, argued that the jurisdictional point could be and had been waived because of the particular responsive technique employed by the

As to the merits (i.e., Scott's freedom and thereby capacity for citizenship), both sides cited *Strader* in their briefs. Scott's lawyer argued that the *Strader* opinion's recognition of the first Congress's re-enactment of the Northwest Ordinance showed the Court felt that congressional power over slavery in the territories had been appropriately exercised there and thus was constitutional here.³⁹⁷ For his part, Sanford's lawyer quoted that part of the *Strader* opinion recognizing each state's power to determine the slave-or-free status of all residents within its borders, by way of arguing that Missouri's determination here that Scott was still a slave should control.³⁹⁸

The Supreme Court heard oral arguments in *Dred Scott* for four days in February of 1856.³⁹⁹ Three months later, the Court ordered that the case be re-argued,⁴⁰⁰ which did not occur until mid-December.⁴⁰¹ In the meantime, national elections were held in which Democrat James Buchanan won the presidency by a narrow margin over John C. Fremont, the Republicans' first presidential nominee.⁴⁰²

After the second argument in *Dred Scott*, the Supreme Court met in private and voted 7-2 against Scott.⁴⁰³ The majority was made up of:

defendant (a "plea in abatement"). See *Scott v. Sandford*, 60 U.S. (19 How.) at 529-32 (McLean, J., dissenting). In their initial consideration of the case, the Justices were divided over this issue. See John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373, 377-39 (1988); *infra* note 400. When the final opinions were delivered, however, a majority favored reviewing the jurisdiction point, see Vishneski, *supra*, at 404, 409-11, and only Justice McLean's opinion continued to dispute this point.

397 See 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 214, 216 (Philip B. Kurland & Gerhard Casper eds., 1978).

398 *Id.* at 236. This brief also cited the Kentucky Court of Appeals' first decision in *Strader* to support the propositions that an owner's taking a slave to a free state for a temporary stay did not establish the slave's freedom and that, upon their return to a slave state, the owner's full control of the slave must be recognized. *Id.* at 233-34.

399 See FEHRENBACHER, *supra* note 4, at 288.

400 See *id.* at 290 (suggesting that the Court ordered re-argument because it was split over whether the jurisdictional point had been preserved); SWISHER, *supra* note 4, at 608 (same, and noting that postponement of the decision "deprived the newly organized Republican Party of what might have been grist for campaign oratory in its first Presidential campaign. In particular, it deprived Justice McLean of the opportunity to deliver a ringing dissent, with a denunciation of the Kansas-Nebraska Act, as a means of getting the nomination.").

401 FEHRENBACHER, *supra* note 4, at 290, 293. John J. Crittenden, now a U.S. Senator, attended this argument, and his presence was noted by Scott's new lawyer (George Curtis, the brother of Justice Curtis, see *id.* at 293), who was discussing Kentucky's status at the time of the Northwest Ordinance's enactment when he remarked: "... Kentucky, of whose matured sovereignty we are reminded by the benignant presence of my venerable friend, her Senator, (Mr. Crittenden.), was then just ready, in her stalwart youth, to be separated from her parent, Virginia." See 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 397, at 255.

402 See CARDINAL GOODWIN, JOHN CHARLES FREMONT vii (1930); ARTHUR M. SCHLESINGER, HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968, at 1032 (1971).

403 See FEHRENBACHER, *supra* note 4, at 305-06.

- Chief Justice Taney;
- Justice Campbell, a pro-slavery Alabama Democrat who had replaced Justice McKinley,⁴⁰⁴ who in 1851 had joined Taney's opinion in *Strader*,⁴⁰⁵
- Justices Wayne, Daniel, Nelson, and Grier, all of whom had joined Taney's opinion in *Strader* and were still on the Court,⁴⁰⁶ and,
- Justice Catron, who had filed a concurring opinion in *Strader*.⁴⁰⁷

All seven of these Justices had been appointed by Democratic presidents, and all except Nelson and Grier were from slave states.⁴⁰⁸ The two votes for Scott came from Justices McLean and Curtis: the former was the Court's most senior member, had written one of the concurring opinion in *Strader*, and, in the interim, had sought the Republican presidential nomination in 1856;⁴⁰⁹ the latter, a Massachusetts Whig, was the Court's second most junior member,⁴¹⁰ having six years earlier replaced Justice Woodbury, who had joined Taney's *Strader* opinion.⁴¹¹ (No member of the Court at the time of *Dred Scott* was a Kentuckian, a situation that was unusual in the nineteenth century.⁴¹²)

Initially, the Court's principal opinion was assigned to Justice Nelson, one of two Northerners in the majority, who focused solely on the lack of diversity jurisdiction based on Scott's slave status in Missouri, noting that *Strader* had established that a territorial law of Congress could have no extraterritorial force superior to that of state law.⁴¹³ As the weeks wore

404 See *supra* note 283 and accompanying text.

405 See *supra* note 315 and accompanying text.

406 See *supra* notes 315, 353 and accompanying texts.

407 See *supra* note 337–42 and accompanying texts.

408 The slave-state Justices were Taney from Maryland; Wayne from Georgia; Catron from Tennessee; Daniel from Virginia; and Campbell from Alabama. See *supra* notes 279, 281–84, 381 and accompanying texts. Nelson was from New York, and Grier was from Pennsylvania. See *supra* notes 285, 287 and accompanying texts.

409 See FEHRENBACHER, *supra* note 4, at 291 (noting that “McLean had strong support at the Republican convention, receiving about 35 per cent of the votes on a first informal ballot” before Fremont was eventually chosen); *supra* note 400.

410 See *supra* note 380 and accompanying text.

411 See *supra* notes 286, 315 and accompanying texts.

412 The first Kentuckian to become a member of the Supreme Court was Thomas Todd, who was appointed by President Jefferson in 1807 and served until 1826. See COHEN ET AL., *supra* note 267, at 1848–49. He was succeeded by another Kentuckian, Robert Trimble, who served until 1828. *Id.* at 1849. As noted above, Justice McKinley, who was a member of the Court from 1837 to 1852, had strong Kentucky ties and lived in Lexington toward the end of his tenure. See *supra* note 283. The first Kentuckian to become a Supreme Court Justice after the Civil War was John Marshall Harlan, who served from 1877 until 1911, see COHEN ET AL., *supra* note 267, at 1851–52, and came to be considered one of the Court's greatest justices based, *inter alia*, on his now vindicated dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See HALL, *supra* note 280, at 173–77.

413 See FEHRENBACHER, *supra* note 4, at 307–08; SWISHER, *supra* note 4, at 618–19. Nelson's

on, however, backroom negotiations—including a series of letters in which Justice Catron alerted president-elect Buchanan of the case's likely outcome and the latter agreed to help lobby his fellow Pennsylvanian, Justice Grier, to join a broader pro-slavery decision⁴¹⁴—led Chief Justice Taney to draft what would become the Court's main opinion, one that was eventually agreed to by all of the concurring Justices except Nelson.⁴¹⁵

On March 6, 1857, two days after Buchanan's inauguration,⁴¹⁶ the Court handed down its decision in the *Dred Scott* case in a series of opinions by all nine Justices that take up 234 pages in the U.S. Reports.⁴¹⁷ As he had in *Strader*, Taney authored the principal opinion. The Chief Justice first concluded that the trial court lacked power to hear Scott's suit for want of diversity jurisdiction.⁴¹⁸ This conclusion was based on Taney's view that African slaves and their descendants could *never* become citizens under the Constitution and thus could not claim a citizen's rights or privileges under that document, including the right to invoke a federal court's jurisdiction.⁴¹⁹

eventual opinion maintained this position, but it was not joined by any other Justice. See *Scott v. Sandford* (*Dred Scott*), 60 U.S. (19 How.) 393, 457–69 (1857).

414 See FEHRENBACHER, *supra* note 4, at 307, 309–12; SWISHER, *supra* note 4, at 616–18.

415 See *Scott v. Sandford*, 60 U.S. (19 How.) at 399–454. Taney's opinion is described *infra* text accompanying notes 418–33.

416 In his inaugural address on March 4, Buchanan referred to the issue of how the western territories would determine whether to have slavery and stated, somewhat disingenuously given his advanced knowledge:

This is, happily, a matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be.

FEHRENBACHER, *supra* note 4, at 313.

417 *Scott v. Sandford*, 60 U.S. (19 How.) at 399–633.

418 *Id.* at 403–30. Five of the six other concurring Justices agreed with Taney on this jurisdictional point. See *id.* at 457–59 (Nelson, J., concurring); *id.* at 454–55 (Wayne, J., concurring); *id.* at 472–82 (Daniel, J., concurring); *id.* at 493, 517–18 (Campbell, J., concurring); *id.* at 469 (Grier, J., concurring). Justice Catron felt that Scott's claim sufficiently disclosed a diversity case, but that Scott should lose on the merits. See *id.* at 518–19 (Catron, J., concurring). Both dissenters thought that jurisdiction was proper, but for different reasons: Justice McLean felt that the defendant could not challenge the trial court's jurisdiction in this type of appeal, *id.* at 530–33 (McLean, J., dissenting), while Justice Curtis believed that the Supreme Court could review this point, but that Scott's pleading was sufficient to establish diversity jurisdiction. *Id.* at 564–88 (Curtis, J., dissenting).

419 See *Scott v. Sandford*, 60 U.S. (19 How.) at 405–07. In so holding, Taney was requiring that, for a person to invoke diversity jurisdiction, he must be a citizen of the United States as well as a state citizen and that the latter did not necessarily establish the former. Justice Curtis's dissent, by contrast, opined that “every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.” *Id.* at 576.

Taney described such people as “an inferior class of beings” who were “doomed to slavery”⁴²⁰ and who, at the time of the Constitution’s adoption, were simply not thought to be part of the governing people.⁴²¹ Noting that state laws then in existence generally did not recognize blacks as citizens,⁴²² Taney concluded that a “perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery.”⁴²³ In any event, according to Taney, even if a state were to grant blacks freedom and civil benefits such as the right to vote, this would be insufficient to make them U.S. citizens entitled to sue in federal court.⁴²⁴

The Supreme Court could have ended its decision based on this jurisdictional ruling,⁴²⁵ but Taney decided, as he had in *Strader*, to go further. On the merits of the case, the Chief Justice opined that Scott’s time in Minnesota and Illinois had not made him free, because Congress lacked power to limit the rights of white settlers in new territories to have slaves.⁴²⁶ To so limit slaveholding settlers would violate their Fifth Amendment property rights.⁴²⁷ Since slave owners could not be constitutionally limited by Congress, its determination in the Missouri Compromise to outlaw slavery in the Minnesota territory and other northern places was unconstitutional,⁴²⁸ a conclusion that five of the six concurring justices specifically endorsed.⁴²⁹

420 *Id.* at 405, 410; *see also id.* at 407 (referring to them as an “an inferior order”).

421 *Id.* at 404–05. Justice Daniel’s concurring opinion made the same point, arguing that “the introduction of that [African] race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term,” meaning that “the African was not deemed politically a person.” *Id.* at 475, 481 (Daniel, J., concurring).

422 *Id.* at 412–17 (majority opinion). Taney here cited an 1822 Kentucky case for the proposition that even free negroes were not considered citizens. *Id.* at 413. Although Taney did not name this case, it appears to be *Amy v. Smith*, 11 Ky. (1 Litt.) 326 (Ky. 1822), which is described *supra* note 83.

423 *Scott v. Sandford*, 60 U.S. (19 How.) at 409.

424 *Id.* at 405–06.

425 *See, e.g.,* *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) (described *supra* note 396); *see also* *Brown v. Keene*, 33 U.S. (8 Pet.) 112, 114–15 (1834) (reversing plaintiff’s judgment based on his failure to aver positively that defendant was a citizen of a diverse state from the plaintiff’s state without discussing the merits of the case).

Indeed, there is evidence that a prior draft of Justice Nelson’s opinion, which relied solely on the jurisdictional point and *Strader*, *see infra* notes 434–37 and accompanying texts, was originally to be the Court’s opinion. *See supra* note 413 and accompanying text.

426 *Scott v. Sandford*, 60 U.S. (19 How.) at 432–52.

427 *Id.* at 450–52. According to Taney, “the right of property in a slave is distinctly and expressly affirmed in the Constitution.” *Id.* at 451.

428 *Id.* at 452. Under the same reasoning, Scott’s time in Illinois could not make him free. *Id.* at 452–54.

429 *See id.* at 454–56 (Wayne, J. concurring); *id.* at 482–92 (Daniel, J. concurring); *id.* at 517 (Campbell, J. concurring); *id.* at 469 (Grier, J. concurring); *id.* at 519–29 (Catron, J. concurring). The remaining concurrence—Justice Nelson’s—rejected Scott’s claim solely on jurisdictional

Because no federal power could make Scott free, his status, under *Strader*, was to be based on the law of the state where he resided.⁴³⁰ According to Taney, this part of the *Dred Scott* case depended on a principle that:

was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham*, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio, and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois.⁴³¹

Taney then determined that the laws of Missouri considered Scott a slave, as shown particularly by the Missouri Supreme Court's earlier ruling against Scott.⁴³² Taney concluded, therefore, that Scott remained a slave and rejected his claim to freedom.⁴³³

grounds. *See id.* at 457–69 (Nelson, J., concurring).

Both dissenters would have upheld the Missouri Compromise, being of the view that Congress's power to govern the territories and admit new states was sufficient to justify banning slavery in these areas. *See id.* at 539–47 (McLean, J., dissenting), and *id.* at 604–33 (Curtis, J., dissenting).

⁴³⁰ *Id.* at 452 (majority opinion).

⁴³¹ *Id.*

⁴³² *Id.* at 452–54. Interestingly, the two dissenters agreed that Scott's status upon his return to Missouri was to be determined by Missouri law, but, contrary to Taney, they concluded that Missouri law did recognize Scott's freedom based on his time on free soil. *See id.* at 555–64 (McLean, J., dissenting), and *id.* at 594–95 (Curtis, J., dissenting). For a modern argument that the Missouri Supreme Court in *Dred Scott* had indeed deviated from prior Missouri decisions in ruling against Scott, see Boman, *supra* note 75, at 420–26.

The dissenters' idea that federal judges in a diversity case are entitled to interpret a state's law inconsistently with a recent state supreme court decision seems odd to a modern reader familiar with the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), but this was not unusual in the pre-*Erie* days of *Dred Scott*. *See, e.g.*, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (holding, in a commercial case, that state court decisions are not binding on U.S. courts in diversity cases if those decisions "differ from the principles of established general commercial law"); *see also* *Pease v. Peck*, 59 U.S. (18 How.) 595, 598–99 (1856) (describing, in a diversity case decided the year before *Dred Scott*, the circumstances under which federal courts have a right not to defer to a state supreme court's interpretation of that state's law). Indeed, Taney's opinion, itself, included a review of Missouri law as a necessary element in determining Scott's status. *See Scott v. Sandford*, 60 U.S. (19 How.) at 452–54.

⁴³³ Within a few weeks of the Supreme Court's decision, Sanford died, and *Dred Scott*

Among the seven justices voting against Scott, only Justice Nelson chose to limit his opinion to the jurisdictional point.⁴³⁴ Nelson's opinion relied heavily on *Strader*.⁴³⁵ He concluded that *Strader's* principle of exclusive state sovereignty over the status of its people and slaves was not affected by the Northwest Ordinance nor could it have been constitutionally, because Congress "possesses no power to regulate or abolish slavery within the States."⁴³⁶ Because Missouri law, as determined by the Missouri Supreme Court, held Scott to be a slave, that, "according to the decision in the case of *Strader et al v. Graham*, is conclusive of the case in this court."⁴³⁷ Another concurring opinion—that of Justice Daniel—also relied on *Strader* to support his view that the Northwest Ordinance ceased to be in effect after adoption of the Constitution.⁴³⁸

Thus, Nelson, Daniel, and Taney cited *Strader* for what they viewed as the principle it established (i.e., that state, not federal law, controlled whether a person was slave or free), and Taney went even further by viewing *Strader* as establishing *which* state's law controlled this determination. In doing so, all three relied on *Strader* as making authoritative substantive rulings, not merely determining that the Supreme Court lacked jurisdiction to decide that case.

Taney in particular seemed anxious to push *Strader* beyond its obvious limits. Thus, even though he recognized that *Strader's* holding was that the Court "had no jurisdiction to revise the judgment of a State court upon its own laws,"⁴³⁹ he still went on to say that one of his key substantive conclusions—that Scott's status was to be controlled by "the laws of Missouri, and not of Illinois"—was the "point directly before the court" in *Strader*.⁴⁴⁰ Taney concluded this part of his opinion with an obvious misstatement—that "the decision [in *Strader*] that this court had not jurisdiction turned upon it [that

and his family were freed by their new owners. See FEHRENBACHER, *supra* note 4, at 272.

434 See *supra* note 429.

435 See *Scott v. Sandford*, 60 U.S. (19 How.) at 462–66.

436 *Id.* at 464.

437 *Id.* at 466.

438 See *id.* at 490–91 (Daniel, J., concurring). According to this part of Justice Daniel's opinion:

This court has, in repeated instances, ruled, that whatever may have been the force according to this ordinance of 1787 at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the Constitution, from the period of the adoption of the latter. Such is the principle ruled in the cases of *Pollard's Lessee v. Hagan*, (3 How., 212), *Permoli v. The First Municipality of New Orleans*, (8 How., 589), *Strader v. Graham*, (16 How., 82).

Scott v. Sandford, 60 U.S. (19 How.) 490–91 (Daniel, J., concurring).

439 *Id.* at 452 (majority opinion).

440 *Id.*

Kentucky law controlled]"⁴⁴¹—whereas in truth the jurisdictional point in *Strader* turned on the fact that the defendants' freedom claim was based on the laws of Ohio and Indiana, not those of the United States.⁴⁴²

Justice McLean's dissent challenged Taney's use of *Strader*. According to McLean, the fact that *Strader* was being cited "as having a direct bearing in the case before us" was inappropriate, because:

No question was before the court in that case, except that of jurisdiction. And any opinion given on any other point is *obiter dictum*, and of no authority. In the conclusion of his opinion, the Chief Justice said: "In every view of the subject, therefore, this court has not jurisdiction of the case, and the writ of error must on that ground be dismissed."⁴⁴³

McLean may have seen this coming at the time of *Strader*, for, as noted above, he was at pains there to file a special concurrence limiting his ruling to the jurisdictional point and noting that anything else said in Taney's opinion for the Court "is not in the case, and is, consequently, extrajudicial."⁴⁴⁴ In his separate dissent in *Dred Scott*, Justice Curtis, who had not been on the Court when *Strader* was decided, did not mention that case, but he did criticize the majority for reaching the substantive issue of the Missouri Compromise's constitutionality once it had decided that jurisdiction was lacking.⁴⁴⁵

2. *The Reaction to Dred Scott*.—Unlike *Strader*, *Dred Scott* was one of those Supreme Court cases whose importance was apparent at the time of its argument and decision.⁴⁴⁶ The Justices, themselves, were aware, as

⁴⁴¹ *Id.*

⁴⁴² See *supra* notes 315–23 and accompanying texts.

⁴⁴³ *Scott v. Sandford*, 60 U.S. (19 How.) at 560.

⁴⁴⁴ See *supra* text accompanying note 347.

⁴⁴⁵ See *Scott v. Sandford*, 60 U.S. (19 How.) at 590. According to this part of Justice Curtis's opinion:

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, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. 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.

Id. (citation omitted).

⁴⁴⁶ See, e.g., FEHRENBACHER, *supra* note 4, at 305 ("By Christmas 1856, *Dred Scott's* name was probably familiar to most Americans who followed the course of national affairs.").

Taney's opinion put it, that the case presented questions "of the highest importance."⁴⁴⁷ (Justice Curtis, one of the two dissenters, developed such an animosity with Taney over the Court's decision that he resigned a few months later.⁴⁴⁸) Coverage in the Nation's newspapers was widespread.⁴⁴⁹

Nevertheless, the national reaction to the decision was perhaps more strident than Taney and the other concurring Justices could have imagined. Although it was predictably applauded in the slave-holding South,⁴⁵⁰ the decision prompted an extremely hostile reaction elsewhere,⁴⁵¹ even among non-abolitionists such as Abraham Lincoln.⁴⁵² The problem, as Lincoln and others in the North and West saw it, was not that *Dred Scott* had rejected one slave's claim to freedom or even that the decision foreclosed the federal courts to such claims. Rather, it was that part of the decision holding that Congress lacked the power to provide for free areas within the country. With the Missouri Compromise declared unconstitutional, those in the North and West who wished to preserve their states' free-labor status now felt at risk, for *Dred Scott* offered constitutional protection to slave owners everywhere in the country, including in free states and the vast western territories.

Furthermore, changing the constitution to overturn *Dred Scott* would be virtually impossible, given the ability of the many slave-holding states to block constitutional amendments.⁴⁵³ Short of the kind of long-term political success that could elect presidents and congresses who would eventually replace the current Supreme Court justices with those willing to overturn *Dred Scott*, there was no longer any possibility of a "political" solution to the issue of whether slavery could be limited in the United States. By taking this issue away from Congress and therefore making a political solution impossible, the Supreme Court in *Dred Scott* created a situation where the only course open to anti-slavery forces was radical political success or war.

447 *Scott v. Sandford*, 60 U.S. (19 How.) at 399.

448 See FEHRENBACHER, *supra* note 4, at 316–18; HALL, *supra* note 280, at 126. Curtis was replaced by Nathan Clifford, a Maine Democrat nominated by President Buchanan. See COHEN ET AL., *supra* note 267, at 1850.

449 See, e.g., DONALD, *supra* note 4, at 199–200; FEHRENBACHER, *supra* note 4, at 417–19.

450 See FEHRENBACHER, *supra* note 4, at 428–29.

451 *Id.* at 424–27, 431–35.

452 Lincoln, in a speech in June of 1857, stated: "[W]e think the *Dred Scott* decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it to overrule this." Abraham Lincoln, Speech in Springfield, Illinois (June 26, 1857), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 418 (Philip Van Doren Stern ed., 2000). Lincoln also said: "I do not resist it. . . . [A]ll that I am doing is refusing to obey it as a political rule. . . . We will try to reverse that decision . . . [W]e mean to reverse it and we mean to reverse it peaceably." Abraham Lincoln, Speech at Chicago (July 10, 1858), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN*, *supra*, at 445–46.

453 Then, as now, a constitutional amendment required approval by "two thirds of both Houses" and ratification "by the Legislatures of three fourths of the several States." U.S. CONST. art. V.

For those who opposed *Dred Scott*, the Court's decision gave the Republican Party what it had lacked in the elections of 1856—a powerful issue that led to increased electoral successes in 1858 and ultimately the election of a president in 1860.⁴⁵⁴ As to the latter, the Republican platform denounced *Dred Scott* as a “dangerous political heresy,”⁴⁵⁵ and its convention nominated Lincoln on the third ballot, eschewing more aggressive abolitionists like Seward and Chase.⁴⁵⁶ In the general election, Lincoln easily defeated the Democratic nominee (his long-time rival Senator Stephen Douglas of Illinois) and two other candidates (Kentucky's John C. Breckinridge and John Bell of Tennessee),⁴⁵⁷ although Lincoln received hardly any votes in his native Kentucky and other slave states.⁴⁵⁸

454 See, e.g., FEHRENBACHER, *supra* note 4, at 562–67 (describing the Republican Party's growing vote percentages in Northern states from the 1856 elections to those of 1858 and 1860 in the course of evaluating *Dred Scott*'s impact on national politics). Also as part of the 1858 elections, Lincoln became a national figure as a result of his debates over the potential spread of slavery with Stephen Douglas in the Illinois race for a U.S. Senate seat. See, e.g., DONALD, *supra* note 4, at 214–46.

455 See ROBERT K. CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 258 (1942).

456 See, e.g., DONALD, *supra* note 4, at 246–49.

457 See, e.g., ARCHER, *supra* note 373, at 72–74. The Democratic Party split, with the southern wing nominating Breckinridge, the incumbent Vice President. John Bell ran as the nominee of the “Constitutional Union Party.”

A grandson of a U.S. Senator from Kentucky, Breckinridge was born near Lexington, graduated from Centre College, studied law at Transylvania University, was an officer in the Mexican–American war, served in Congress, and, in 1856 at the age of 36, became—and still is—the youngest person ever elected Vice President. See FRANK H. HECK, *PROUD KENTUCKIAN: JOHN C. BRECKINRIDGE, 1821–1875*, at 1–3, 6–11, 20–25 (1976). In the 1860 presidential election, he came in third in the popular vote with 18% and second in electoral votes, winning all of the states in the deep South along with two other slave states, Maryland and Delaware (Bell won Kentucky). See ARCHER, *supra*, at 72–74. During the Civil War, Breckinridge was a Confederate General and, for a few months in early 1865, the Confederacy's last Secretary of War. He fled the country after the war, but, upon being granted amnesty, returned to Lexington in 1869 and practiced law there until his death six years later. See HECK, *supra*, xi–xii.

458 Lincoln, who was not even on the ballot in nine southern slave-holding states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and Texas), polled 1,865,908 (40%) of the popular vote and won 180 (59%) of the total 303 electoral votes; Douglas won just over 29% of the popular vote, but only 12 electoral votes; Breckinridge won 18% of the popular vote and 72 electoral votes; and Bell won just under 13% of the popular vote and 39 electoral votes, including Kentucky's. See ARCHER, *supra* note 373, at 72–74; HECK, *supra* note 457, at 90–91.

Within Kentucky, Lincoln received only 1364 votes (less than 1%) out of over 146,000 cast; Bell won the state with 66,058 (45%), while Breckinridge received 53,143 (36%) and Douglas polled 26,651 (just under 18%). See HECK, *supra* note 457, at 90–91.

C. *The Civil War and Beyond*

Within weeks of Lincoln's election, secession movements began in various southern states, including Virginia, one of whose native sons, Justice Daniel, had returned home after the Court's 1858 term and died in 1860.⁴⁵⁹ Shortly after Lincoln's inauguration in early 1861, Justice Campbell also resigned, returning to his native Alabama.⁴⁶⁰ Justices Wayne of Georgia and Catron of Tennessee, however, remained loyal to the Union and continued to serve on the Court throughout the Civil War.⁴⁶¹ Justice McLean, the lone *Dred Scott* dissenter still on the Court after Justice Curtis's resignation in 1857, died in late 1861.⁴⁶²

As for Chief Justice Taney, he continued to serve, clashing with Lincoln in a famous 1861 case that pitted the President's war powers against the constitutional right of habeas corpus.⁴⁶³ Taney's death in 1864 brought to an end what would remain the second longest tenure of any Chief Justice in our history, shorter only than John Marshall's.⁴⁶⁴

Lincoln replaced Taney with Salmon Chase, a long-time opponent of slavery who was then Treasury Secretary and a Lincoln rival within the Republican Party.⁴⁶⁵ In the two prior years, Lincoln had made four other Supreme Court appointments.⁴⁶⁶ By the end of 1872 when Justice Nelson resigned shortly before his death,⁴⁶⁷ the last member of the Court who had participated in *Strader* and *Dred Scott* was gone.⁴⁶⁸

Of course, Lincoln's election had more important consequences than changing the Court's make-up. It prompted secession by seven Southern slave states before he was even inaugurated, and four more followed soon thereafter.⁴⁶⁹ Armed hostilities began in April of 1861 when secessionist

459 See HALL, *supra* note 280, at 110.

460 *Id.* at 129.

461 See *supra* text accompanying notes 281–82.

462 See *supra* text accompanying note 280.

463 See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). For descriptions of the *Merryman* case, see DONALD, *supra* note 4, at 299, 303–04; SWISHER, *supra* note 4, at 844–54.

464 See COHEN ET AL., *supra* note 267, at 1848–56. Taney served for over twenty-eight years compared to Marshall's more than thirty-four. See *id.* at 1848–49.

465 See COHEN ET AL., *supra* note 267, at 1850; DONALD, *supra* note 4, at 535–36, 551–52; HALL, *supra* note 280, at 154–55.

466 Samuel Miller of Iowa was appointed in 1862 to take the seat vacated as a result of Justice Daniel's death; Noah Swayne of Ohio was appointed in 1862 to replace Justice McLean; David Davis of Illinois was appointed in 1862 to take the seat vacated by Justice Campbell's resignation; and Stephen Field of California was appointed shortly after Congress created a new seat by an Act dated March 3, 1863. See COHEN ET AL., *supra* note 267, at 1850.

467 See HALL, *supra* note 280, at 113.

468 See COHEN ET AL., *supra* note 267, at 1850.

469 See Philip Van Doren Stern, *The Life of Abraham Lincoln*, in *THE LIFE AND WRITINGS*

forces in South Carolina attacked the federal garrison at Ft. Sumter.⁴⁷⁰ “And,” as Lincoln’s second inaugural would later put it, “the war came.”⁴⁷¹ It had been just four years since the Court’s decision in *Dred Scott*.⁴⁷²

Lincoln’s first inaugural actually sought to reassure slave owners that he did not seek abolition: “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”⁴⁷³ As the war dragged on, however, Lincoln tried several times to persuade Kentucky to adopt a gradual scheme of compensated emancipation.⁴⁷⁴ He also warned that if the war continued, slavery would not survive: “It will be gone, and you will have nothing valuable in lieu of it.”⁴⁷⁵

But moderation and gradual change were not to be. The Civil War and Kentucky slavery continued until 1865,⁴⁷⁶ by which time the unprecedented carnage of modern warfare had resulted in over 600,000 casualties.⁴⁷⁷

The Union’s victory led to constitutional amendments that reversed the key holdings of *Dred Scott*. Within months of the war’s end in 1865, the Thirteenth Amendment banning slavery was adopted.⁴⁷⁸ Three years

OF ABRAHAM LINCOLN, *supra* note 452, at 95–96. Kentucky was one of five slave-holding states that did not secede. *See generally* 2 CONNELLEY & COULTER, *supra* note 13, at 853–67 (describing Kentucky’s neutrality and the Union).

470 *See* Philip Van Doren Stern, *The Life of Abraham Lincoln*, in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 452, at 112–13.

471 Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 452, at 841.

472 *See supra* note 417 and accompanying text.

473 Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 452, at 647.

474 *See* HARRISON & KLOTTER, *supra* note 15, at 179 (“If a state would commit itself to a definite date for ending slavery, say January 1, 1882, then [Lincoln] would recommend to Congress that owners receive four hundred dollars for each slave.”).

475 *Id.*

476 Slavery was abolished in the District of Columbia by congressional statute on April 16, 1862. *See* Act of April 16, 1862, ch. 54, 12 Stat. 376, 376–78; DONALD, *supra* note 4, at 348. Maryland emancipated its slaves by amending its constitution in 1864. DONALD, *supra* note 4, at 544.

477 *See generally* DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2008) (describing the terrible death toll of the Civil War and its subsequent impact on the lives of nineteenth-century Americans).

478 *See* U.S. CONST. amend. XIII, § 1 (providing that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”).

The Thirteenth Amendment became a part of the Constitution in December of 1865. After being approved by Congress some ten months earlier, it was sent to the states for ratification, a process that covered the period of Lee’s surrender at Appomattox and Lincoln’s assassination. *See* HARRISON & KLOTTER, *supra* note 15, at 180.

The Thirteenth Amendment freed the approximately 40,000 slaves remaining in Kentucky in 1865, a number that had been greatly reduced from the approximately 225,000

later, the Fourteenth Amendment was adopted,⁴⁷⁹ overruling another part of *Dred Scott* in its first sentence by declaring: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁴⁸⁰ The remainder of the Fourteenth Amendment’s first section provided that such persons were entitled to “due process” and “equal protection of the laws” and were to be protected against state infringement of their “privileges and immunities.”⁴⁸¹ Both amendments included final sections giving Congress additional powers to enforce the amendments’ substantive provisions.⁴⁸²

Kentucky refused to ratify these amendments for over a century.⁴⁸³ Indeed, for most of the century following the Civil War, Kentucky generally chose to follow the states of the old Confederacy in creating and maintaining a “Jim Crow” system of legally mandated racial segregation.⁴⁸⁴ For example, Kentucky: (1) continued, after enactment of the Thirteenth and Fourteenth Amendments, to forbid blacks from testifying in cases

slaves counted in the 1860 census, *see supra* note 16, by runaways, service in the Union army, and individual emancipations. *See* HARRISON & KLOTTER, *supra* note 15, at 180. Kentucky’s remaining slaves had not been affected by Lincoln’s Emancipation Proclamation of 1863, because this proclamation applied only to slaves in states that had seceded. *See, e.g.*, MICHAEL PERMAN, EMANCIPATION AND RECONSTRUCTION, 1862–1879, at 15 (1987).

479 Congress proposed the Fourteenth Amendment to the states on June 13, 1866. *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 105 (1998). It took over two years for the necessary number of states to ratify the amendment, which occurred by July 9, 1868. *Id.* Kentucky rejected the amendment on January 8, 1867, although Missouri and six states of the old Confederacy—Tennessee, Arkansas, Florida, North Carolina, Louisiana, and South Carolina—did ratify it. 2 CONNELLEY & COULTER, *supra* note 13, at 916.

480 U.S. CONST. amend. XIV, § 1.

481 *See id.*

482 *See* U.S. CONST. amend. XIII, § 2, amend. XIV, § 5. These enforcement provisions have been the basis, *inter alia*, of Congress’s power to enact civil rights laws outlawing racial discrimination. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437–44 (1968). As the Court stated in *Jones*, these enforcement clauses “clothed ‘Congress with the power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*’” *Id.* at 439 (quoting *United States v. Stanley (Civil Rights Cases)*, 109 U.S. 3, 20 (1883)).

483 *See* HARRISON & KLOTTER, *supra* note 15, at 180 n.1 (reporting that Kentucky agreed to ratify these amendments only as part of the Nation’s bi-centennial in 1976).

484 The term “Jim Crow” as an abbreviation for demeaning portrayals of African-Americans and eventually the entire post-Civil War system of legislated segregation traces back to an elderly Kentucky slave (Jim, owned by a man named Crowe), whose songs and shuffling dances were mimicked by a blackfaced white comic in a minstrel show first performed in Louisville in the 1830s. *See* FROST, *supra* note 67, at 88.

involving whites;⁴⁸⁵ (2) barred blacks from serving on juries until 1880,⁴⁸⁶ when this practice was held unconstitutional by the Supreme Court;⁴⁸⁷ (3) adopted, in 1891, a law mandating separation of the races in railroad cars;⁴⁸⁸ (4) adopted, in 1904, the "Day Law" banning racial integration in all levels and types of schools, even private colleges;⁴⁸⁹ and (5) adopted, by 1903, a law barring inter-racial marriages,⁴⁹⁰ a practice whose counterpart in Virginia was eventually struck down by the Supreme Court.⁴⁹¹ In 1917, the Court also struck down a Louisville zoning ordinance that mandated racial segregation in residential areas.⁴⁹²

485 See *Blyew v. United States*, 80 U.S. 581, 583, 593 (1872) (noting that "two persons who witnessed the murder [in 1868 of a "colored woman" by two white men] were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that State," which then provided that "a slave, negro, or Indian[] shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, *but in no other case.*"). For more on this Kentucky law, see *supra* note 182 and accompanying text.

486 See 1 RICHARD H. STANTON, *THE REVISED STATUTES OF KENTUCKY* 77 (1867) (setting forth section II of Article III ("Petit Jurors") as providing: "No person shall be a competent jurymen for the trial of criminal, penal, or civil cases in any court unless he be a white citizen, at least twenty-one years of age, a housekeeper; likewise, sober, temperate, discreet, and of good demeanor"); *Commonwealth v. Johnson*, 78 Ky. 509, 509 (Ky. 1880) (quoting this statute and also noting another statute that limited grand-jury service to whites).

487 See *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Commonwealth v. Johnson*, 78 Ky. 509 (Ky. 1880).

488 KY. REV. STAT. ANN. § 276.440 (West 1963). This practice's counterpart in Louisiana was upheld by the Supreme Court a few years later in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

489 1904 Ky. Acts 181 (Act of Mar. 22, 1904). This law was upheld by the Supreme Court in *Berea College v. Kentucky*, 211 U.S. 45, 58 (1908), where Kentucky's brief "spent significant effort attempting to persuade the Court to take judicial notice that African-Americans are mentally inferior to whites. 'This is not the result of education,' Kentucky argued, 'but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race.'" David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 831-32 (1998) (quoting Brief of Commonwealth of Kentucky at 40, *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908)). As he had in *Plessy*, Justice Harlan filed a vigorous dissent in the *Berea College* case, arguing that that "[t]he right to impart instruction . . . is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States." *Berea Coll.*, 211 U.S. at 67.

490 See *Moore v. Moore*, 98 S.W. 1027, 1028 (Ky. 1907) (referring to the prohibition on inter-racial marriages in "sections 2097 and 2098 of the Kentucky Statutes of 1903"); KY. STAT. ANN. § 2097, at 998 (Carroll 1922) (setting forth the prohibition in § 2097); KY. REV. STAT. ANN. § 402.020 (West 1966) (setting forth the prohibition as of 1966).

491 See *Loving v. Virginia*, 388 U.S. 1, 2, 6 n.5 (1967) (noting that Kentucky was one of sixteen states at the time to have such laws and holding that they violated "the central meaning of those constitutional commands" in "the Equal Protection and Due Process Clauses of the Fourteenth Amendment").

492 *Buchanan v. Warley*, 245 U.S. 60 (1917). For a detailed review of the *Buchanan* litigation, see Bernstein, *supra* note 489, at 839-56.

In 1954 when the Supreme Court began the process of dismantling this system in *Brown v. Board of Education of Topeka*,⁴⁹³ Kentucky law still mandated the segregation of public schools by race.⁴⁹⁴ Louisville's efforts to comply with *Brown* by de-segregating its school system and then trying to maintain an integrated system produced significant litigation well into the twenty-first century.⁴⁹⁵ The modern era has also seen the Court employ the Fourteenth Amendment's Equal Protection and Due Process Clauses to strike down non-racial forms of discrimination⁴⁹⁶ and other restrictions on individual liberties.⁴⁹⁷

D. Strader and Dred Scott in the Modern Era

Historians and legal scholars who commented on *Strader* in the twentieth century generally saw its importance solely as a precursor to *Dred Scott*.⁴⁹⁸ For example, in a 1978 article, Missouri history Professor William M. Wiecek concluded that, while *Strader's* jurisdictional holding was unexceptionable, "Taney was uneasy over the crescendo of abolitionist attacks on slavery, and went on to indulge himself in a tendency he had that was to produce the fatal result of *Dred Scott*: he let fall several gratuitous dicta on issues not before him in an effort to resolve, through judicial means, questions

493 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

494 KY. REV. STAT. § 158.020 (1953).

495 *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 127 S. Ct. 2738, 2749 (2007).

496 For example, governmental sex discrimination was generally outlawed under the Equal Protection Clause. *See, e.g., United States v. Virginia*, 518 U.S. 515, 519 (1996); *Reed v. Reed*, 404 U.S. 71, 75–77 (1971).

497 *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (holding that state's ban of homosexual sodomy violates the right of adults to engage in private consensual sexual intimacy "in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment"); *Planned Parenthood v. Casey*, 505 U.S. 833, 845–46 (1992) (affirming the determination in *Roe v. Wade*, 410 U.S. 113, 153 (1973) that "the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990) (holding that the Due Process Clause includes "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment").

The Due Process Clause has also been the basis for applying the substantive provisions of the First Amendment to state and local governments. *See, e.g., Stone v. Graham*, 449 U.S. 39, 40 n.2 (1980); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

498 *See, e.g., FEHRENBACHER, supra note 4, at 260–62; ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 61–62 (3d ed. 2000); SWISHER, supra note 279, at 484–85; SWISHER, supra note 4, at 556–58 (describing *Strader* in a chapter entitled "Sectionalism and Slavery" that precedes two chapters on, respectively, "Soil for Slavery" and "The Dred Scott Case" and concluding the discussion of *Strader* by observing that a "battle was shaping up for the courts . . . which was to divide the country more and more and lead eventually to civil war"); *see also id.* at 604–05, 611, 629 n.142 (discussing *Strader's* role in the *Dred Scott* case).*

that were metajudicial.”⁴⁹⁹ Wiecek also noted that Taney’s dicta in *Strader*, by suggesting that Congress could not require any new state to abolish slavery, was seen, when added to the Court’s 1842 holding in *Prigg* and the 1850 Fugitive Slave Law,⁵⁰⁰ as fueling fears in the North that any southern state could enslave any free black found within its borders.⁵⁰¹ Wiecek concluded:

If ever a court needed a sense that issues coming before it presented questions that could not be resolved by judges, it was in the slavery cases of the 1840s and 1850s. . . . Slavery in some of its aspects was a constitutional problem, but the Supreme Court’s disastrous handling of it serves as a caution that not all constitutional issues are susceptible of being resolved by courts.⁵⁰²

As for the exact jurisdictional issue in *Strader*, the decision is no longer relevant, because section 25 of the 1789 Judiciary Act was amended in later times to extend the Supreme Court’s jurisdiction to review state court decisions involving federal issues well beyond the limited scope provided for in section 25.⁵⁰³

In contrast, some aspects of the Court’s handling of the jurisdictional issue in *Dred Scott* remain good law. It is still true, for example, that a federal trial court’s diversity jurisdiction remains open to challenge through all appellate stages even up through the Supreme Court;⁵⁰⁴ that

⁴⁹⁹ Wiecek, *supra* note 6, at 53, *reprinted in* THE LAW OF AMERICAN SLAVERY 654 (Kermit H. Hall ed., 1987).

⁵⁰⁰ See *supra*, respectively, note 6 (describing *Prigg*), 268 and accompanying text (describing the 1850 Fugitive Slave Act).

⁵⁰¹ Wiecek, *supra* note 6, at 54, *reprinted in* THE LAW OF AMERICAN SLAVERY 655 (Kermit H. Hall ed., 1987).

⁵⁰² *Id.*, *reprinted in* THE LAW OF AMERICAN SLAVERY 660 (Kermit H. Hall ed., 1987). By way of contrast, a 1935 Taney biography by Columbia professor Carl Brent Swisher wrote approvingly of the Chief Justice’s performance in *Strader*, commenting that Taney spoke “in a clear opinion” and that “the court acted wisely in not presuming to decide more points than were necessary to the decision of the particular case before it.” SWISHER, *supra* note 279, at 485. Between these comments, however, Professor Swisher conceded that Taney in *Strader* did opine that the slaves’ return to Kentucky there meant that “they were subject to Kentucky laws; and under those laws they were slaves. *Strader* had therefore been aiding slaves when he helped them to escape, and was subject to punishment.” *Id.* In view of this observation, Professor Swisher’s conclusion that Taney’s *Strader* opinion did not “decide more points than were necessary,” *id.*, seems odd, particularly in light of his willingness to criticize *Dred Scott* on this ground. See *id.* (concluding, by way of contrasting *Strader* and *Dred Scott*, that it was “a major tragedy that [the court] did not exercise the same self-restraint six years later in the handling of the *Dred Scott* case”).

⁵⁰³ See *supra* note 298.

⁵⁰⁴ See, e.g., *Cameron v. Hodges*, 127 U.S. 322 (1888); post-*Dred Scott* cases cited in *supra* note 396.

the plaintiff has the burden of proof of establishing such jurisdiction,⁵⁰⁵ and that, even though the diversity issue turns on the parties' state citizenship, determinations thereof are a matter of federal law.⁵⁰⁶

On the merits, of course, *Dred Scott* has been overruled by subsequent constitutional amendments.⁵⁰⁷ It is such a discredited decision that it is never cited even for the jurisdictional points that are still good law.

Indeed, the high degree of contempt with which the modern era views *Dred Scott* goes far beyond its lack of continuing substantive significance. *Dred Scott* is now uniformly viewed as among the worst decisions ever produced by the Supreme Court.⁵⁰⁸ Modern advocates who want to criticize a contemporary Court decision in the most extreme way often compare it to *Dred Scott*, a technique engaged in by critics of all political persuasions, e.g., from Justice Scalia's condemnation of the Court's approval of abortion on the right⁵⁰⁹ to those on the left outraged by *Bush v. Gore*.⁵¹⁰ In short, *Dred Scott* has become the gold standard for arrogant judicial ineptitude.

505 See, e.g., *Anderson v. Watts*, 138 U.S. 694 (1891); *Cameron v. Hodges*, 127 U.S. 322 (1888); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 7 (5th ed. 1994).

506 See, e.g., *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973) (citing, inter alia, MOORE'S FEDERAL PRACTICE, § 0.74[1], at 707.1 (1972)).

507 See *supra* notes 478–80 and accompanying texts.

508 See, e.g., FEHRENBACHER, *supra* note 4, at 573, 580 (providing examples of historical criticisms of *Dred Scott*); McCLOSKEY, *supra* note 498, at 62 (describing Taney's decision in *Dred Scott* as "the most disastrous opinion the Supreme Court has ever issued"); SWISHER, *supra* note 4, at 631 (the *Dred Scott* decision "has gone down in history as a major disaster, degrading the Court and the Constitution and precipitating the Civil War"); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 800–01 n.41 (2003) (providing examples of disparaging remarks made about *Dred Scott* by modern professors and judges).

509 See *Planned Parenthood v. Casey*, 505 U.S. 833, 1101–02 (1992). In *Planned Parenthood v. Casey*, Justice Scalia compared the plurality opinion upholding the constitutional right to abortion with Taney's performance in *Dred Scott* and noted:

It is no more realistic for us in this litigation, than it was for him in that, to think than an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, 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.

Id. at 1002 (citation omitted).

510 See, e.g., Sherry, *supra* note 508, at 800–02 (arguing that the Court's decisions in *Dred Scott* and *Bush v. Gore* "have much in common," including their reflection of a high degree of "institutional arrogance" by the prevailing Justices).

V. CONCLUDING OBSERVATIONS

Kentucky slavery is the story of how a small, but virulent, malignancy that was first transported across the mountains by Virginia settlers grew to dominate Kentucky's legal and social institutions for generations. When this cancer was not excised in Kentucky's first constitution in 1792, it grew too strong to kill, becoming a force that drove much of Kentucky's development in its first half-century of statehood. By 1841 when Dr. Graham's slaves boarded the *Pike* for Cincinnati and their journey to ultimate freedom in Canada, Kentucky slavery permeated every part of the state's culture, including its government and legal system.

This is hardly surprising. After all, slaves "were property, and a basic function of government was to protect property."⁵¹¹ In 1840, Kentucky had more than 182,000 slaves,⁵¹² and, at \$500–\$1000 each, their value exceeded \$100 million, or about \$2.5 billion in today dollars.⁵¹³

The law played a crucial role in creating, protecting, and administering this form of property. The *Graham v. Strader* litigation provides a vivid example of how a "property" loss suffered by one Kentuckian came to be protected by a powerful network of legislative enactments designed first to prevent the harm (e.g., by creating a strict liability scheme that made steamboat operators diligent in protecting the rights of complete strangers like Graham and, by extrapolation, the system of slavery itself), and after that failed, other rules aimed at remedying this loss (e.g., laws rewarding bounty hunters and making Graham's loss actionable against third-parties like the *Pike's* owners).

The case also illustrates how the courts aggressively came to the rescue—not only by providing compensation for Graham, but also by deciding along the way questions they could have avoided (e.g., the Kentucky Court of Appeals' decision to allow the *Strader* defendants to assert the slaves' freedom claims, presumably so it could rule against these claims on the merits; the Supreme Court's determination to proceed, after finding it lacked jurisdiction, to opine on the inability of federal power to restrict Kentucky slave law). Clearly, the phenomenon of activist courts is not a recent development. Nor is a rather schizophrenic approach to states' rights by the Supreme Court, which first concluded in *Strader* that states had unbridled authority to declare blacks slaves and then held in *Dred Scott* that states lacked the power to make such persons citizens.

For their part, the lawyers in the *Strader* litigation, particularly in the Kentucky courts, seemed to perform well according to traditional standards. They were thorough and appropriately zealous advocates. In fact, it is hard

⁵¹¹ HARRISON & KLOTTER, *supra* note 15, at 174.

⁵¹² See *supra* note 18 and accompanying text.

⁵¹³ See *supra* note 119 and accompanying text and note 169.

not to be impressed generally with the talents, skill, and quality of Kentucky lawyers and judges in the first half of the nineteenth century. To the extent that these men labored to advance Kentucky slave interests, however, it is equally hard not to believe that their many talents were wasted, if not misused.

The story of Kentucky's commitment to slavery leading up to the time of Graham's litigation against the *Pike's* owners has few heroes, but there were some. Among these were the sixteen men who voted against the slavery article in the 1792 constitution; if only five more of their twenty-six other colleagues had voted with them, they could have defeated the slavery article, and Kentucky's subsequent history would have been vastly different. Another hero was Judge Benjamin Mills, who wrote two impassioned opinions favoring freedom over slavery before losing his Court of Appeals seat.⁵¹⁴ Another might be Garnett Duncan, the lawyer for the *Pike's* owners, who devoted an entire decade of his professional life to arguing, albeit unsuccessfully and in a purely commercial case, that George, Reuben, and Henry were free.⁵¹⁵ And, of course, there were the three young slaves themselves, who chose to put at risk their relatively easy form of bondage in order to gain freedom in a far-off land.

However, most Kentuckians who participated in the *Strader* litigation appear to modern eyes as, at best, misguided and amoral. Dr. Graham, for example, seems to have thought of himself as a kindly slave owner who had real admiration for the skills of George, Reuben, and Henry, and who sought to expand and use those skills for his guests' pleasure as well as his own commercial gain. Graham reflects the fact that Kentucky slavery, as a number of its critics at the time noted,⁵¹⁶ had negative consequences for whites as well as blacks, such as creating a poorly developed sense of civic virtue and private morality, an aversion to manual labor, and a willingness to accept a stratified social order even among whites and other free persons.

Another example of this phenomenon was the great Whig lawyer and politician, John Crittenden, whose constant need to defend slavery often overcame his better political instincts, which otherwise might have helped move the state in more progressive directions. As a result, he, like his mentor Henry Clay, is now consigned to the second tier of American political figures instead the loftier position that his vast skills might have achieved.⁵¹⁷ Lesser men, of course, fell even farther under slavery's spell, as illustrated by the Harrodsburg-area witnesses who, in the course of

⁵¹⁴ See *supra* notes 77 para. 2, 83 para. 2.

⁵¹⁵ See *supra* notes 172, 193, 289 and accompanying texts.

⁵¹⁶ See *supra* notes 31, 93 and accompanying texts.

⁵¹⁷ A similar fate befell Virginia's leaders in the two generations after the presidencies of Thomas Jefferson and James Madison. See SUSAN DUNN, *DOMINION OF MEMORIES: JEFFERSON, MADISON, AND THE DECLINE OF VIRGINIA* (2008).

testifying for Dr. Graham, blithely made scurrilous attacks on a neighbor's character simply because he advocated negro freedom.⁵¹⁸

To undo this pervasive and cancerous system would not be easy, and the carnage of the Civil War was the price that the Nation paid to do so. As Lincoln's second inaugural put it, "every drop of blood drawn with the lash shall be paid by another drawn with the sword."⁵¹⁹

The war ended slavery, but not its effects. Kentucky joined other former slave states in continuing to treat blacks as an inferior class of people by adopting segregation laws and otherwise denying them equal protection. For almost a century after enactment of the Thirteenth and Fourteenth Amendments, states south of the Ohio River—still the "River of Styx" of race relations, as Crittenden put it in his Supreme Court argument in *Strader*⁵²⁰—operated a legal and social system characterized by the separation and inferior treatment of everyone of African descent.

Only in the second half of the twentieth century were efforts made to dismantle this system. At first, those efforts came almost exclusively from the Supreme Court, a high irony in view of the Court's historic performance in *Strader*, *Dred Scott*, and other antebellum slave cases.

Modern Kentuckians are still fighting battles over the remaining "badges and incidents of slavery,"⁵²¹ as the work of dismantling slavery's effects continues into the twenty-first century. One example of this is Louisville's school desegregation litigation,⁵²² but education is hardly the only area of entrenched racial isolation. Virtually every aspect of modern Kentucky life, from where we live to how we worship, is characterized by a high degree of racial segregation. We still reap what our eighteenth- and nineteenth-century forebears sowed.

⁵¹⁸ See Supreme Court Record, *supra* note 90, at 85, 87, 93, 107 (criticizing Harrodsburg abolitionist Peter R. Dunn as, respectively, not being worthy of "confidence in what he might state . . . owing to strong natural prejudice, particularly on the subject of slavery"; "a man of exceedingly high prejudices, and that I would not regard the man entitled to any credit in a controversy of this kind"; "a man of very violent prejudices, and [deponent] does not think with those prejudices would give an impartial statement on oath"; and "violent . . . and a man of high prejudices").

⁵¹⁹

Yet, if God wills that it [the Civil War] continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."

Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 452, at 842.

⁵²⁰ See *supra* note 304 para. 3.

⁵²¹ See *supra* note 482.

⁵²² See *supra* note 495 and accompanying text.

History, of course, is not a total straight-jacket that defines every element of our current situation. Change is always occurring, sometimes in small ways—as represented by the decision of George, Reuben, and Henry to board the *Pike* on a January day in 1841—and sometimes in cataclysmic events such as the Civil War.

What does seem certain in the United States, however, is that law and those who make and administer it will always be engaged in protecting and legitimizing our deepest social commitments. In the *Strader* litigation, this was reflected in judicial decisions about which of the various competing legal and social interests would prevail and in the willingness of courts to become activist players in pursuit of the dominant social position of the day. The case also offered an example of ironic justice in which men like the *Pike*'s owners were forced to make arguments in favor of negro freedom that, one suspects, they would never have done unless their own pecuniary interests required it.

Can this story of an old case spawned by the failed relationship of a successful Kentucky resort owner and his wonderfully talented slaves teach anything to those of us who are part of the modern legal system? One lesson from the Supreme Court's miscues in *Strader*—and later in *Dred Scott*—is that courts should be wary of making broad pronouncements in cases where a narrower ground will do, particularly where that ground is their own lack of jurisdiction. But Americans have always brought their most troubling issues to the courts,⁵²³ and, on occasion as in *Brown v. Board of Education*,⁵²⁴ judicial leadership has clearly advanced the Nation's interests. How are we to know at the time whether decisions like *Roe v. Wade* or *Bush v. Gore* will similarly advance the Nation's interests or, on the other hand, eventually be seen, as *Strader* and *Dred Scott* now are, as examples of judicial hubris that are both inappropriate for a democratic society and ultimately extremely harmful? One obvious conclusion is that a Supreme Court decision that seeks to "solve" a major national problem without being grounded in America's key values of liberty and equality seems doomed to failure.

Another lesson is that it will always be dangerous—and exhaustive of legal resources—for law-givers to create or support any doctrinal system that divides people into inferior and superior classes. Furthermore, if one's own interests are being advanced by an aggressive use of such resources—as were those of the Supreme Court's pro-slavery justices in *Strader* and *Dred Scott*—a certain degree of modesty and restraint is highly desirable.

Finally, one always feels safe in closing with Lincoln. In his second inaugural in 1865, Kentucky's greatest son urged the Nation to "strive on to

523 "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945).

524 See *supra* note 493 and accompanying text.

finish the work” of ending the offense of American slavery.⁵²⁵ Unfortunately, succeeding generations in Kentucky and elsewhere failed to heed this admonition. The result is that in our time, as in his, much remains to be done to achieve a society based on equal justice under law.

⁵²⁵ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 452, at 842.