

## NAME

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## 5 SPEAKERS

Adia Samba-Queue

Hannah McCarthy

Nick Capodice

Lynne Jackson

Chief Judge John Tunheim

## START OF TRANSCRIPT

**[00:00:00] Adia Samba-Queue**

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**[00:00:05] Hannah McCarthy**

There are some decisions made by the Supreme Court that are considered to be canon, meaning they are considered so obviously right and true and in keeping with correct constitutional meaning that they set unimpeachable precedent. Brown v. Board of Education, for example, racial segregation of children in public schools is unconstitutional. This is almost universally agreed upon as a right and true in keeping with the word of law in the United States. It's both about constitutional interpretation and ethical and moral principle. And then there are cases that represent the exact opposite. The rulings in these cases have been described by scholars and judges as bad, grievously mistaken, odious. These are the Supreme Court's mistakes. We call them the anti canon.

**[00:01:13] Nick Capodice**

Anticanon, as in the opposite of cannon?

**[00:01:18] Hannah McCarthy**

Sort of, but still a form of cannon, still something that should be used. If Cannon should be used as precedent, antique cannon should be used as antiprecedent decisions so wrong that their incorrectness stands as a glaring warning. This is what not to do. This is what the Constitution does not mean. And today we're going to tell you about the first anticannon case and many would say the worst. This is civics 101. I'm Hannah McCarthy.

**[00:01:51] Nick Capodice**

I'm Nick Capodice.

**[00:01:52] Hannah McCarthy**

And today, a decision incendiary enough to help to push our nation to the brink of war and inhumane enough to require constitutional amendments to fix its results. The 1857 case, Dred Scott v. Sanford.

**[00:02:16] Lynne Jackson**

Dred Scott, aside from being my great great grandfather, is also a hero.

**[00:02:20] Hannah McCarthy**

This is Lynn Jackson,

**[00:02:22] Lynne Jackson**

Great great granddaughter, and Scott, founder and president of the Dred Scott Heritage Foundation.

**[00:02:28] Hannah McCarthy**

In 1846, Dred Scott was living in St. Louis, Missouri, with his wife, Harriet and daughters Eliza and Lizzie. The family was enslaved and suing for their freedom. That is how this case starts. And we're going to come back to that now. Lynn formed the Dred Scott Heritage Foundation back in 2007 with the goal of getting a statue of dread and his wife, Harriet, erected in front of the St. Louis, Missouri, courthouse where the case started. Lynn got the statue. And since then, she's been telling the Scott story and connecting other descendants of impactful Americans to share their stories and reconcile their pasts.

**[00:03:05] Lynne Jackson**

What we've done to help Scott's legacy go forward into the future, because when you think about it, there was a period of time when Scott's name was known, but not talked. The case was not taught. I even that was beautiful, very thick black book on Afro-American history. And it's just like this thing. But Dred Scott is not in that book. It was written by black people. It was written by black people, and it was written in the 40s. And I couldn't believe it.

**[00:03:37] Hannah McCarthy**

And I think like to Lynn's point, I had just sort of a glancing blow of a lesson about Dred Scott when I was in school. I know teachers teach it now. Right. But I really barely knew the story of Dred Scott. What about you back then?

**[00:03:54] Nick Capodice**

I also knew nothing about it. I knew it was about a formerly enslaved person and whether or not the court could decide if they were citizens or not.

**[00:04:01] Hannah McCarthy**

I think there was a period during which this case kind of lay dormant or not deeply explored.

**[00:04:08] Lynne Jackson**

Things like that can drop off sometimes. Well, he's back,

**[00:04:15] Nick Capodice**

Ok, 1846, St. Louis, Missouri. Dred and Harriet are enslaved and suing for their freedom. So first, what are the laws about slavery in the United States at this time?

**[00:04:28] Hannah McCarthy**

Yeah, enslavement was legal in some states and prohibited in others. There was something called the Northwest Ordinance. It was passed just before the Constitution was ratified and it prohibited slavery in this area. Specifically, it had to be west of Pennsylvania, northwest of the Ohio River and east of the Mississippi. Something called the Missouri Compromise admitted Missouri to the nation as a state where you could enslave people, Maine to the nation as a free state and said, OK, here on out new states north of a certain latitude will be free states. New states south of that latitude will be states where you can enslave people.

**[00:05:06] Nick Capodice**

But if Dred and Harriet were in Missouri, which was a slave state, how could they sue for their freedom?

**[00:05:12] Hannah McCarthy**

Freedom suits actually stretch back to the colonial era in North America. They're a holdover from English common law. They were often based on enslaved persons having been held in a free state or territory. There was a once free, always free principle that was respected even in many slave states. So the Scots suing for their freedom. It's not that big of a thing, even in Missouri.

**[00:05:38] Lynne Jackson**

Well, no one in the beginning and really even 1854, it probably wasn't that much of a situation because locally in Missouri, there were slaves who sued for their freedom.

**[00:05:50] Hannah McCarthy**

Hundreds of enslaved people petitioned for and won their freedom in St. Louis.

**[00:05:55] Lynne Jackson**

In order to do that, you had to have some serious proof, OK, grounds and proof, evidences and certain criteria had to be met. So they were met. The courts would allow them to petition and sue.

**[00:06:06] Nick Capodice**

What kind of proof are you talking about?

**[00:06:08] Chief Judge John Tunheim**

The rule of law at the time, even in many of the Southern states, was that if an enslaved person lived and worked for a period of time in a free jurisdiction, they became free.

**[00:06:20] Hannah McCarthy**

This is Chief Judge John Tunheim of the U.S. District Court in Minnesota.

**[00:06:25] Nick Capodice**

So what point had the Scotts lived in a free territory?

**[00:06:29] Hannah McCarthy**

All right, here's the quick rundown. Dred Scott had been enslaved by a man named Peter Blow, and Scott had lived in Virginia, Alabama and Missouri in his early years.

**[00:06:41] Nick Capodice**

All slave states.

**[00:06:42] Hannah McCarthy**

That's right. Now, the Blows eventually sold Scott to an army surgeon, Dr. John Emerson. And we're not 100 percent certain of when that happened.

**[00:06:51] Chief Judge John Tunheim**

Dred Scott himself, when he was sold to Dr. John Emerson, followed him to a number of different jurisdictions, the state of Illinois and a military reservation, the Wisconsin territory, Fort Snelling in what is now Minnesota, various times in St. Louis, in the state of Missouri, and even a short stint in Louisiana, all four of those jurisdictions at the time recognized that enslaved people would become free because they had lived in a free jurisdiction.

**[00:07:25] Hannah McCarthy**

So Dred is taken by Emerson to Fort Snelling, where he meets a woman, Harriet Richardson. She is also enslaved in her enslaver, transfers her ownership to Emerson when she marries Scott. This was typically done through deeding, specifically quitclaim deeding, used to transfer physical property. And the Scotts are taken by Emerson to his various army posts, staying at times in free territories. Harriet eventually gives birth to their first born daughter, Eliza, while traveling by Steamboat on the Mississippi River. Eliza is born in free territory.

**[00:08:01] Chief Judge John Tunheim**

Now.

**[00:08:02] Chief Judge John Tunheim**

I think the precipitating factor of the Scotts suing for freedom came after Dr Emerson died in 1840, too. I believe they were in St. Louis at the time. The Scotts were they were inherited by his wife Irene, and they tried to buy their freedom from her, which many, many people had done in Missouri, in St. Louis. And there was a growing community of free blacks living in St. Louis. And that probably decided this was time no longer with Dr Emerson. He's passed away and maybe not any particular attachment to his wife. So they sued in state court a freedom lawsuit, which is what they were called at the time. Missouri had recognized the right of enslaved people to sue for freedom that since at least eighteen twenty four and it was settled law, they probably thought this was a slam dunk case. And so they sued and essentially they lost on a technicality, the technicality was that they didn't have a witness who could testify that Irene Emerson actually own them.

**[00:09:26] Nick Capodice**

So they had to prove that the person who was enslaving them was, in fact, enslaving them.

**[00:09:32] Chief Judge John Tunheim**

Seem strange to us today that that would be the case, but that was the law back in that time. And so, therefore, the case was dismissed for lack of a witness who could testify as to the person they were suing actually own them. And so that was appealed to the Missouri Supreme Court at the time, the Missouri Supreme Court said this is nonsense and ordered a new trial.

**[00:10:00] Nick Capodice**

I have to ask, at this point, the Scotts had been in and out of free territories a number of times and their daughter was born in a free territory. So why are they just petitioning for their freedom now?

**[00:10:11] Chief Judge John Tunheim**

No one really knows exactly why they may not have known their rights, certainly in Fort Snelling during the time they were slaves held by many of the officers who were stationed there, including Zachary Taylor, who later became president. But it was a common practice.

**[00:10:31] Nick Capodice**

So it wasn't unusual for enslaved people to be held in free territories. And I would imagine that enslavers were not in the business of broadcasting that once free, always free doctrine.

**[00:10:44] Hannah McCarthy**

That seems like a safe bet. And even if you did know your rights, you're facing the legal fees required to launch a lawsuit. In the Scotts case, their initial fees were actually paid by the very same family who initially enslaved Dred Scott. The Blows.

**[00:11:00] Nick Capodice**

The Blows, really?

**[00:11:02] Hannah McCarthy**

Turns out that within a generation the family had become abolitionists. There's a lot in this story that you really couldn't make up. Now, getting back to the case, the Missouri court orders this new trial. At this point, Dred and Harriet lawsuits had been combined into one and the trial happens. This is in 1850.

**[00:11:26] Lynne Jackson**

And so the second trial, they did win their freedom by a jury of 12 white men.

**[00:11:31] Nick Capodice**

They won. They were free.

**[00:11:33] Lynne Jackson**

And that was a happy day, except that Mrs. Emerson appealed it and then it just continued to go from there.

**[00:11:41] Hannah McCarthy**

This whole case is gutting and it's only going to get worse. But it is this moment when the Scots, who at this point have two young daughters, actually win their freedom and their enslaver moves to take it away again. That I just can't stop thinking about. And that appeal is successful. Irene Emerson wins.

**[00:12:06] Nick Capodice**

And at this stage, the Scots freedom has been through three hearings. They just were going through it over and over again.

**[00:12:14] Lynne Jackson**

They had many opportunities after the Supreme Court of Missouri said no, they could have stopped their case anytime they wanted, especially up until the point of the Missouri Supreme Court decision, which was March 22nd of 1852. After that, they did not have to continue and there were times when they could have broken it off. But they were they went forward. And I think that's quite brave.

**[00:12:38] Hannah McCarthy**

At this stage. It is not just their freedom that is at risk. It is the ability to sue for freedom that becomes at risk as well.

**[00:12:47] Lynne Jackson**

There were other slaves who were talking, saying, oh, they got to drop this case. What if it goes back? We're all going to be in trouble, you know? So if you think about it from that perspective, it's like they were going to take the flak from even their maybe own community.

**[00:13:03] Hannah McCarthy**

Now, the Scots had the support of lawyers, but to me, the most compelling reason to keep pushing this case and taking the risk was much closer at hand.

**[00:13:13] Lynne Jackson**

The hard part was when it became a national or federal case in a national issue, in which case that's when the hiding of the girls became something they felt they should do. You know, young girls were sold all the time because they were young and fertile, and if you bought them, then you were investing in your future slaves so that they didn't want that they wanted to keep the family together until they knew the verdict at least. All right. Why win your freedom when your girls have been sold away from you and it was about them.

**[00:13:46] Nick Capodice**

So how does this case finally get to the Supreme Court?

**[00:13:50] Hannah McCarthy**

One important factor is that over the course of these cases and appeals, Emersons widow, Irene moves to Massachusetts and marries a congressman and staunch abolitionist named Calvin Chaffee. And Irene's brother, John Sanford claims ownership of the Scots. Sanford, by the way, lives in New York and the Scotts are still. St. Louis being hired out,

**[00:14:14] Nick Capodice**

Ok, there's that name Sanford, except this case is Dred Scott v. Sandford, right?

**[00:14:21] Hannah McCarthy**

It is. It's a misspelling that the court couldn't undo. The Supreme Court has actually made a tremendous amount of spelling mistakes over history. And they just stick around.

**[00:14:30] Nick Capodice**

And Dred Scott ends up suing Sanford for his freedom.

**[00:14:34] Hannah McCarthy**

He does. And Sanford being a New Yorker is actually the reason Dred and Harriet get their case to the Supreme Court. To go before a federal court. A case has to either be a matter of federal law or it has to be between citizens of different states who are also claiming damages of a certain amount. The Scots lawyer argued that federal courts could hear this case because Sanford was a New Yorker and the Scotts were from Missouri. But when the case does get to the Supreme Court, here is the question. Are the Scots citizens of Missouri, are they citizens of the United States?

**[00:15:11] Chief Judge John Tunheim**

You know, ultimately, the Supreme Court again struggled with the jurisdiction question, do we have jurisdiction to hear this case? If Dred and Harriet Scott were not United States citizens, then there was no federal jurisdiction and perhaps no jurisdiction for this case to even move forward. And ultimately, that's what the opinion said in an opinion that indicated, first and foremost, there is no jurisdiction here because blacks who are slaves, any black, actually is what the Supreme Court said. Chief Justice Taney's opinion could not be a citizen of the United States.

**[00:15:59] Hannah McCarthy**

Anticanon point number one, black people, regardless of freedom status, cannot be American citizens and cannot sue in federal courts. Here's anticannon point number two.

**[00:16:12] Chief Judge John Tunheim**

Taney's opinion, I think, was well over 50 pages in and of itself. So this is what he did. Well, he declared unconstitutional that portion of the Missouri compromise, which had prohibited slavery in all the federal territories north and west of Missouri, a critical part of the Missouri compromise in existence for and understood by everyone for some thirty five years, it declared, he declared also that Congress had no power to regulate slavery in the territories, even though Congress had been doing so even since the Articles of Confederation Congress in 1787 when the Northwest Ordinance was passed, which which guaranteed no slavery in that portion of the United States territories. And then it also went on to say that free blacks could never be considered citizens or protected by the Constitution. That may have been the view of some of the framers, but it certainly was not how the Constitution had been interpreted throughout those many years.

**[00:17:32] Hannah McCarthy**

Taney's thinking here, and we're pretty sure that he conferred with President James Buchanan before issuing this opinion, was OK. The slave debate is roiling in this country and comes up every time we add a new state and I'm just going to put an end to it. And he is explicit about this in the opinion itself. He quotes the Declaration of Independence. "All men are created equal" with "unalienable rights." And then he writes, "The enslaved African race were not intended to be included." He writes that black people, quote, 'had no rights, which the white man was bound to respect' and that they, quote, "might justly and lawfully be reduced to slavery for their own benefit." Taney is thinking, I'm going to end this debate now. Black people cannot be citizens and the framers never intended for them to be. Enslavement is justified and legal conversation over. But of course, in a country intensely divided on the issue of slavery, this opinion was like gasoline on a fire.

**[00:18:42] Chief Judge John Tunheim**

It was a catalyst for creating the crisis that led to Lincoln's election and then secession, civil war and the end of slavery. It helped create the timing. I think more than anything else, I do think it helped create Lincoln as a national politician and figure it based his soon thereafter Senate campaign in 1858, an opposition to this decision and to what what he had done. And it undercut Stephen Douglas, who is a Democrat, of course, and is striving to work with Southern Democrats in that period of time. And then, of course, the 13th and 14th Amendments were later passed in part to overturn the holdings in Scott vs. Sandford.

**[00:19:32] Nick Capodice**

What year was this opinion issued?

**[00:19:34] Hannah McCarthy**

This is 1857.

**[00:19:35] Nick Capodice**

So civil war starts in 1861 and then the reconstruction amendments are passed in 1865 and basically overturn the provisions of the Dred Scott decision. So it must have been immediately apparent that this case was wrongly decided

**[00:19:52] Hannah McCarthy**

And it has been seen that way ever since.

**[00:19:55] Hannah McCarthy**

It is quoted whenever a justice in modern times thinks something is dreadful, it's dreadful. Like the Dred Scott decision, it's usually referred to in a dissent. Justices compare it to what they disapprove of and think is awful in the court's current jurisprudence. William Brennan used to use the decision in his opposition to the death penalty, in his view that the death penalty was racist. Justice Scalia has used it in dissents and I think his was in an abortion related case. So it is used and it is universally recognized as completely wrong and bad.

**[00:20:42] Hannah McCarthy**

We have this appallingly bad decision issued by the Supreme Court, something truly wrong and loathsome, and it has massive reverberations to this day. But I think what can get lost in the Dred Scott decision is the family who had the courage to make it happen, to risk everything and to lose. Dred, Harriet and their daughters, Eliza and Lizzie, are still enslaved people at the end of this protracted saga. But there is one last element to this story.

**[00:21:19] Lynne Jackson**

Finally, of course, within three months, the family got their freedom and that was a good thing.

**[00:21:24] Hannah McCarthy**

It's ultimately determined that Sanford does not even legally own the Scotts. So it's up to Irene and Calvin Chaffee to do something about this, especially because, remember, Chaffee's an abolitionist and his supporters in Massachusetts won't stand for his being an enslaver. But the Chaffee's cannot management or release the Scotts only if an enslaver lives in the same state as they're enslaved could they do so. Instead, the Chaffee's sell the Scotts.

**[00:21:57] Lynne Jackson**

They actually use a quitclaim deed to transfer them and claim D is a property instrument. So I usually indicate that in order to make it legal, since they were legally their property, then that was the instrument that they had to use. But yes, again, the Blow family was there and they bought them with the express purpose to free them that they did on May 26 of 1857.

**[00:22:27] Nick Capodice**

So the Scots last owners are the same family who first enslaved Dred Scott.



**[00:22:33] Hannah McCarthy**

Yeah. And Dred, Harriet, Eliza and Lizzie are free. Dred got a job as a porter at the Barnum Hotel in St. Louis and he passed away 18 months later.

**[00:22:46] Lynne Jackson**

He died on September 17th, 1858, which ironically is Constitution Day.

**[00:22:55] Hannah McCarthy**

This is the story of one of the worst rulings in Supreme Court history. It's the story of a man and woman who fought for and did not win their freedom. And that man, when he finally got that freedom, could only enjoy it for a year and a half. But this story is not isolated in time. The inheritors of this case, including Dred Scott's great great granddaughter, and those of Supreme Court Chief Justice Taney, keep it alive and for good reason.

**[00:23:27] Nick Capodice**

And what I love about the Taney's is that they own that story and they don't defend it. You know, they're out and aboveboard about how how it was. And so we're all here to try to make it better. I absolutely do know that we are a reconciled group that whenever I called Charlie, he says, if you think it's a good idea, I'm there. And we get to share the stories of our ancestors and how these how this case came about. We also share about what we're doing today. And we have few ideas of how people can work reconciliation within their own communities, their own families, their own small groups of friends.

**[00:24:06] Hannah McCarthy**

When Lynne says she is part of a reconciled group, it's actually got a name, the Sons and Daughters of Reconciliation, this cohort of descendants who work together on education programs within the Dred Scott Heritage Foundation, specifically designed to keep their histories alive and educational.

**[00:24:24] Lynne Jackson**

That program was always designed to bring our histories together, and that way we could share what we know as individuals, which nobody else knew because they barely were in the history books.

**[00:24:39] Nick Capodice**

I feel like what Lynn and all these descendants are doing with their stories, keeping history at top of mind, educating the public, encouraging action that flies in the face of this egregious past, it reminds me of what we were talking about at the beginning. This principle of antique cannon itself, Dred Scott, is enshrined as antiCannon because we should never forget it. We should always consider it as grave legal decisions are made to ensure that we never again make a decision like it.

**[00:25:10] Hannah McCarthy**

And the Dred Scott case is almost universally considered the very worst of what can happen when the Supreme Court makes the wrong choice. When we ask why these cases are important to us today in the United States, the anti cannon serves as this reminder that we are not infallible, that throughout our history, immoral constitutional interpretations have happened that reflect what some voices of power believe. And then that interpretation gets applied to our most foundational word of law. You cannot merely condemn these cases and leave them in the past. You have to keep talking about them. I want to give a special thanks to the team at the Old Courthouse in St. Louis, Missouri, where Dred and Harriet first petitioned for their freedom, to National Parks employee John Pellerin, in particular, for sharing the story of the Scotts with me for this episode and to Pamela Sanfilippo for her generosity. Shout out to Rebecca Fanning at U.S. Courts for knowing everyone and everything and sharing with us. Lynne Jackson, by the way, is currently petitioning for a Dred Scott postal stamp. You can see that design and all of what Lynne's Foundation does at [DredScottlives.org](http://DredScottlives.org).

**[00:26:39]**

This episode of Civics 101 was produced by me, Hannah McCarthy, with Nick Capodice. Our staff includes Jacqui Fulton. Erika Janik is our executive producer. You can check out resources and other episodes at our website, [civics101podcast.org](http://civics101podcast.org). And if you're a listener but not a follower, might I inquire as to why? Don't miss a single episode of Civics 101. Follow us and leave a review on Apple podcasts or wherever you get your podcasts. Music in this episode by the Young Philosophers Club, Xilo-Xico and Chris Zabriskie. Civics 101 supported in part by the Corporation for Public Broadcasting and is a production of NHPR, New Hampshire Public Radio.



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