Arguments in Dissent to Chief Justice Taney’s Opinion in *Dred Scot v. Sandford*

1. **Standing to Sue — Argument #1:** Citizenship is not a prerequisite of access to the federal courts. The courts have jurisdiction over all cases arising under the Constitution, laws, and treaties of the US as well as over cases affecting ambassadors, etc. Surely this jurisdiction embraces persons who are not citizens. Surely non citizens have various rights under federal law, and the court has said that for every right there is a remedy. Denying access to the courts by non-citizens seeking to vindicate legal rights, contradicts the logic of the judicial power as defined in Article III as well as the court's claim in *Marbury v. Madison* that for every right, there is a remedy.

2. **Standing to Sue — Argument #2:** The constitution does not define national citizenship. It equates citizenship in a state with national citizenship. Dred Scott was not a fugitive slave. Rather, he accompanied his master to Illinois, a free state where there was no slavery. Scott became a citizen of Illinois, and citizenship in a state confers national citizenship as well. Further Art IV, §2 says that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.” The constitution thus requires Missouri to accord Scott the same rights it would accord to citizens of any other state, and it likewise requires the federal government to accord him access to the federal courts.

3. **The Constitutionality of the Missouri Compromise -- Argument #1 (Why Taney's arguments are unpersuasive):** There is no need to proceed further, but if you insist on raising the issue of the Missouri Compromise, Congress has every right to forbid slavery in the federal territories as it has done. The territory of the United States is divisible into two kinds: that which is within the boundaries of an established state and that which is not. It is true that the federal government has no powers other than those delegated to it, but it has ample power to write rules for the federal territories that are not states.

   a. First, the court’s conclusion that powers not delegated to the central government are reserved to the states is inapplicable in the absence of any state to which they could logically be reserved. Logic dictates that in territories where the federal government is the only government, the federal government must have the authority to govern. Furthermore, this is not idle speculation. The court has said that the power to govern acquired territory is implicit in the concept of the modern nation-state. As John Marshall wrote for the court in *American Insurance Company v. Cantor* (1828), “Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source, whence the power is derived, the possession of it is unquestioned.” In peaceful circumstances the power may flow from treaty, but it may also flow from war powers.

   b. Second, the court’s assertion that the Property Clause applies only to property held at the time the constitution was made is without support in the language of the constitution and produces results that are logically absurd, to wit, that it is
possible for the United States to own vast tracts of land but have no means of governing them. Surely any ambiguity in the constitution ought not be construed to suggest that the framers intended anarchy and chaos. "No principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government." [John Marshall in McCulloch v. Maryland]

4. **The Constitutionality of the Missouri Compromise -- Argument #2 (Why the Congress Can Act):** The Property Clause [Art. IV, §3, ¶2] is one of Congress’s delegated powers, and it is more than sufficient. It provides Congress with the power “to make all needful rules and regulations respecting the territory or other property belonging to the United States.” The plain language of this grant is broad indeed. It is in no way limited to property owned at the time the Constitution came into being. Furthermore, it is reinforced by the Necessary and Proper Clause [Art. I, §8, ¶18]: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” And let’s not forget that the Court gave sweeping interpretation to this language in McCulloch v. Maryland: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

5. **The Constitutionality of the Missouri Compromise -- Argument #3 (Another Reason Why Congress Can Act):** The federal government would have all the power needed to govern the territories even without the Property Clause. This territory passed to the United States from France by Treaty. The territory had been governed by France in its capacity as a sovereign nation, and the treaty passed sovereign authority to the United States. The power to make treaties is also a delegated power of the national government, and the constitution places treaties on the same status as the constitution itself as the supreme law of the land. **ARTICLE VI:** [2] “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

6. **The Constitutionality of the Missouri Compromise — Argument #4 (The Argument from History):** Congress has forbid slavery in federal territories since the Northwest Ordinance of 1787. The Missouri Compromise itself was passed in 1820. Thus, for 70 years Congress’s right to ban slavery from federal territories had been either uncontested or accepted by the courts. Any practice accepted since the earliest days of the Constitution was obviously understood to be constitutional at the time the constitution was adopted, and that understanding, supplemented by 80 years of precedents, should prevail in the present controversy.