

Montage of justices taking oath

John: This is Bound by Oath, a new podcast series from the Institute for Justice's Center for Judicial Engagement. I'm John Ross. I host our other podcast, Short Circuit, where we do brief, off-the-cuff analysis of federal appeals court decisions as they come down. We're going to try something a little different here. We're going to really dig into the history and meaning of one piece of the Constitution, the Fourteenth Amendment, which was ratified 150 years ago this year at the close of the Civil War.

Kurt Lash: The story of the Fourteenth Amendment is one of the most dramatic stories in American constitutional history. The amendment was born of political desperation. It almost caused a second Civil War and it was only passed after the impeachment of an American president.

John: That was Kurt Lash, a professor at the University of Richmond School of Law, one of the preeminent scholars of how the Constitution changed in the years after the Civil War. And now here's Aderson Francois of Georgetown Law, who's an expert on the history of slavery and reconstruction:

Aderson Francois: In many ways the 14th Amendment at least in my view was the first time we truly attempted to write into the Constitution the fundamental principles that we

claim to abide by in the Declaration of Independence the idea that all men are born in created equal and invested with certain inalienable rights.

John: We'll hear more from both of them and many others later. If you're not a lawyer, the text of Section One of the Fourteenth Amendment probably doesn't spring to mind. But it's a pivotal Amendment that goes right to the heart of the country's founding values. At IJ, we assert 14th Amendment claims time and again in our litigation. So do many other civil rights organizations.

John: Those are all Fourteenth Amendment cases. And so are some of the most contentious historic cases. Plessy v. Ferguson, the 1896 case that gave us the doctrine of separate but equal, was a Fourteenth Amendment case. And of course so was the case that finally overruled that doctrine in 1954, Brown v. Board of Education. And that's not even the half of it.

John: Free speech, free association, the right to bear arms, and protections against unreasonable searches and seizures, all of these rights that we associate with the Founding Era that are in the Bill of Rights only applied to the federal government before the 14th Amendment. If a state or local gov't punished you for your speech or for your religion, you couldn't say hey that violates the First Amendment because it wasn't the federal government that was mistreating you. If a state gov't violated your rights, your only recourse was under state constitutions. And that turned out to be an enormous problem and one the 14th Amendment was intended to rectify. So today, if you're suing

a state or local government under the federal Constitution, you're usually also making a claim under the 14th Amendment.

John: Rather than jumping right into the fight to ratify the 14th or parsing the Amendment's key clauses, we're going to start before the Civil War with a story that should be more famous than it is--one that shows what the world was like before the 14th Amendment. This is the story of John Rock, the first African-American to be admitted to the Supreme Court bar.

Cheryl Contee: He was a leading activist as well as abolitionist. Can you imagine today someone deciding like well teaching I like teaching but instead I'll become a dentist, you know or instead I'll become a doctor. Oh. I'll become a lawyer. I mean his story, you know, I mean, even then, you know, it was incredible. Today, it's hard to imagine having successfully entering, you know four very difficult and challenging professions, but he was able to do it. I mean he was just that kind of superstar.

John: That's Cheryl Contee. She's an entrepreneur and civil rights activist. Her father was a history professor who sort of rediscovered Rock and wrote a series of articles on him in the 1970s.

Cheryl Contee: I first learned the story of John Rock. Probably, you know, I was the kind of kid who would just reach for books around the house and my parents philosophy

was if you can reach the book you can read it. So they kept some books a little higher than we could reach but that was one I could reach. But yeah, I was just really interested in inspiring stories about people like me who were experiencing both what's awesome about being an American and what if you're a black American what can be challenging.

John: Rock was born in New Jersey in 1825. His mother was a freed slave. His father was born free and worked in construction, and they weren't well off by any means. But through a series of remarkable feats he goes on to become the first African-American Supreme Court lawyer in history. And he does it on the very same day that President Lincoln signs the 13th Amendment, which banned slavery.

Sheldon: Umm we're at the Woodlawn Cemetery and we're looking for John Rock.

Chris Brooks: dates back to 1851. Uh, it is an absolutely gorgeous Cemetery. It's non-segregated. It is Boston.

John: That's Christopher Brooks, a professor of history at East Stroudsburg University in Pennsylvania. Dr. Brooks and my colleague Sheldon Gilbert went to Boston, where they visited John Rock's home and they went to look for his grave.

Sheldon: Remind me...so he's buried with his wife....

Chris Brooks: 1866 and he's buried with his wife

Chris Brooks: When I first started teaching at East Stroudsburg University, one of the courses I created was called African Americans in the courts and in a footnote reference about him being the first African-American attorney to be admitted to the Supreme Court bar to the permission to practice before the US Supreme Court, but he ended up dying before he had the opportunity to do so.

Chris Brooks (in cemetery): Found it.

Sheldon: Oh, you did.

Chris Brooks: Yeah, it's this one right here.

Sheldon: Oh, wow.

John: Rock's parents were free, but they didn't have the opportunity to be educated themselves.

Cheryl Contee: But they didn't have a lot of money.

John: They see that their son is very intelligent.

Cheryl: It was clear early on that he was precocious, that he was super smart.

John: So they sacrificed so that he could stay in school until he was 17 or 18 at a time when most young African-American men would be working.

Cheryl: They really had to work hard and find ways to get him the books and the education that he needed.

John: By the time he's 19, he's become a teacher at a local school in Salem, NJ.

Cheryl: It was you clear that he was a really good teacher and he really aspired to even more.

John: He finds mentors who are doctors and who give him access to their libraries of medical books. But

Cheryl: because of the discrimination of at the time he wasn't able to actually study formally

John: when he applies to medical school, he's rejected because of his race. But he's a determined guy.

Cheryl Contee: He said well I'll become a dentist instead. That's a form of being a doctor.

John: He finds a dentist who takes him on as an apprentice and eventually he's able to start his own practice in Philadelphia. Unfortunately, there's no Yelp reviews back then but we know he entered a competition and created a set of dentures and he won second place. He also meets his wife.

Chris Brooks: It's in Philadelphia where he met his wife Katherine Bowers who was from a pretty prominent African-American family. They were actually undertakers. They did pretty well for themselves.

John: And then eventually a new medical school called the Eclectic Medical College opens. It's defunct now. But John Rock is allowed to attend lectures, and he gets his medical degree in 1852. He's 27.

Chris Brooks (in Beacon Hill): We are in Boston just off Beacon near Beacon Hill an area of Boston, which used to be historically where I'll say the

African-American intelligentsia lived. In fact, there was a reference to the African Americans who live there in the 19th century who referred to as the black brahmins.

John: John and Katherine move to Beacon Hill in Boston, which has a vibrant community of African-American professionals and intellectuals. He opens up a medical practice there.

Chris Brooks: Exactly who he treated again there is very little record of we only going to assume because there were so few African-American physicians that would have been other African-Americans

John: In addition to being a doctor, John Rock also becomes a prominent abolitionist.

Chris Brooks: But the other remarkable thing about Rock is that he is going out and just giving so many speeches. I lost count um in the latter part of the 1850s in particular into the 1860s traveling all over the place. The energy...I kind of asked myself when the man slept.

John Rock: Now, I belong to that class of fanatics who believ[e] that every man has the same inalienable rights; that any distinctions founded upon color are unjust; and that every man should be judged by his merits; that the black man is not as good as the white man, unless he does as good; if he acts as good, he is

as good; if he conducts himself better, he is better. I believe that the outraged slave has not only the same rights as others, but a heavy claim upon you. If there is any human being whose cup of misery is full, it is his.

John: His speeches, which were transcribed and published in the anti-slavery press, are not just erudite and eloquent. He's also pretty funny.

John Rock: Every man has a right to choose his company, or to fancy this color more than that. If any man is not pleased with my color, that is his business; and I do not think I have a right to meddle with it. I have neither the time nor the disposition to trouble myself because he lacks good taste. (Laughter.)

John: That laughter is in the transcription by the way.

John Rock: The prejudice that I complain of, is that which robs me of my inalienable rights; and which not only closes against me every avenue to wealth and position, but which refuses me even the common facilities for gaining an honest livelihood.

John: He also takes aim at the common claim that if the slaves are freed, white women will marry black men, and the races are going to mix. And he's like come on, that's already happening.

John Rock: One million of mulattoes in the South, where neither the colored girl, wife, nor mother, dare say her soul is her own, is an unanswerable argument to the men who charge amalgamation to abolitionists. (Applause.)

John: Rock shares the stage with some of the most famous abolitionists of the day, people like William Lloyd Garrison. He also writes for Frederick Douglass's newspaper, The North Star. Unfortunately, he also gets sick with some illness. It's not clear what it was, but it was serious. He becomes convinced his only option is to travel to France where they're doing a novel kind of surgery or medical procedure that he thought would help him.

Chris Brooks: French physicians and surgeons really were at the time world-renowned and um for one thing they took into consideration the patient which uh was something at that time apparently wasn't all that common.

John: And then as now, if you want to travel abroad, you need a passport. But in 1858, when John Rock needs a passport, the federal government isn't issuing passports to blacks. Because of Dred Scott.

Chris Brooks: Due to the decision in 1857 getting that passport was a bit of a challenge because if you're familiar with that case Chief Justice Taney declared that well

African-Americans or blacks were not citizens. I'm hesitant to use the term African-American considering, well, they weren't considered Americans.

John: John Rock isn't the kind of person who backs down from a challenge or an injustice. He's had to fight for everything he's achieved. Still, he faces enormous legal and social obstacles. And we can't even call him an American at this point. Coming up after the break: We'll explore some of the specific restrictions and pressures that free black people faced before the civil war and go into the details of the Dred Scott decision, which rocked the nation and led the way to the 14th Amendment.

Break

John: And we're back! We've been talking about John Rock's struggles and triumphs and his need to go abroad. But for now, we're going to pause our story of John Rock and focus on the specific laws and constraints imposed on free blacks before the civil war. To tell us more about this is Martha Jones, a historian at Johns Hopkins University.

Martha Jones: By the 18 teens a few things have happened one is that we have now in the United States growing communities of former slaves. These are in places like Boston and New York and Philadelphia, but also Baltimore and Charleston, Norfolk, New Orleans, and there is a question about who those people are with respect to legal culture and political culture.

John: And according to Dr. Jones, African-Americans are kind of being squeezed by these two big forces. And the effect is to encourage them to, in her words “self-deport.”

Martha Jones: Two things that they are subject to by the 1810s. One, are what come to be called Black Laws. These are laws that restrict their daily lives from their work to their leisure to their associational lives we call those Black Laws.

John: States in both the North and the South banned African Americans from owning property or from working in some skilled occupations. Travel and voting was severely restricted. There were limitations on blacks giving testimony in court. Many states barred free blacks from moving into the state. In Maryland, for instance, free blacks could be enslaved if they tried to move there.

Martha Jones: So the black laws have been used to restrict African American economic mobility and opportunity in very deliberate ways as they are perceived to be a threat or a competition with white Americans. So when it comes to sale particularly two things one is staple crops. So that should help us appreciate the way in which lots of this logic is linked to the political economy of slavery. So African Americans are not permitted for example to bring tobacco or cotton or other staple crops into local markets in the state like Maryland.

John: Which is kind of a big deal. Many freed slaves would have been farm laborers. These laws essentially say that they are not allowed to earn a living doing what they know how to do, growing crops like tobacco and cotton. Or at least they aren't allowed to go into business for themselves.

Martha: This is in part to keep them economically restricted. It is in part a vestige of slavery; it is to keep them closer to slavery and away from the profit right and the wealth that slavery is still generating in a state like Maryland. The other important restriction in a particularly in an urban environment I think is liquor or alcohol, and African Americans are prohibited from purchasing, trading in, selling, serving alcohol. You can imagine the way in which a subset of commerce, saloons and boarding houses and other coffee shops, are all turning in part on the sale of alcohol and black Americans are precluded from those kinds of enterprises.

John: Blacks laws are one of two things that are pressuring free blacks to self-deport. The other is the colonization movement.

Martha Jones: And we have the emergence in the 1810s of a movement called colonization. And this is a movement that proposes to by voluntary means by and large but proposes to remove former slaves from the United States to Western Africa to the

Caribbean to Canada -- a vision that says the future of the United States is a white Republic and there is no long-term place for former slaves in the US.

John: These days when you think of pre-Civil War social movements, the abolitionist, anti-slavery movement is probably what comes to mind. But, according to Dr. Jones, colonization was a much larger, better funded movement in the early 1800s. Founding fathers like James Madison, Thomas Jefferson, and James Monroe supported colonization. As did Abraham Lincoln as late as 1864, which is after the Emancipation Proclamation. Some African-Americans, like the famous abolitionist Martin Delany, supported colonization. John Rock's first mentor, a professor at what's now called Cheyney University, the nation's oldest historically black university, moved to Liberia, believing he had a better shot at a brighter future there.

Martha Jones: Liberia was a terrible place. It was like it was a terrible place um so much so that people come back or they try but most people perish, you know, Liberia's a terrible place.

John: Though many free blacks surely considered leaving not many actually did. John Rock incidentally was not a proponent of colonization.

John Rock: Many of those who advocate emancipation as a military necessity seem puzzled to know what is best to be done with the slave, if he is set at liberty. Colonization in Africa, Haiti, Florida and South America are favorite

theories with many well-informed persons. This is really interesting! ...If you find that you cannot rob the negro of his labor and of himself, you will banish him! What a sublime idea! You are certainly a great people!

Martha Jones: Perhaps the most Draconian of the black laws that is proposed again, and again and again in the state of Maryland is one that would provide for their forced wholesale removal from the state. This begins in the 1820s and it will continue until the eve of the Civil War periodically. Those who, as I see it espouse a radical colonization view recognize that black Americans don't seem to be leaving Maryland or Baltimore. Certainly not in the numbers that colonizationists would hope for in the Antebellum decades. And so there are those who proposed the forced removal and this might sound to us today like a far-fetched or naive or unrealistic scheme, but black Americans have watched for example, the removal of Native Americans from the southeast of the United States West to Indian Territory and so they have that example in mind and the threat that they too might be subject to that sort of wholesale removal appears very real to them.

John: So to push back against black laws and colonization, African-Americans are going to strategize.

Martha Jones: by the 1820s African-Americans are organizing in what comes to be called the black convention movement. And in those meetings they're not only going to assess their circumstances. They're going to begin to not only assess their

circumstances; they're going to strategize. How can we make the case that we are citizens of the United States? They're going to look to their labor. They're going to recognize that for decades if not centuries black Americans had contributed to the nation's development and prosperity through their labor.

John Rock: Within the last six months, certain pro-slavery and Republican newspapers have been discussing the question, 'What shall be done with the free colored people?' You know too well that much of the wealth and prosperity of this country has been extracted from the sweat and life-blood of the black man. Now, when his intelligence teaches him to refuse to labor without compensation, you seriously entertain a proposition for removing him from the country! Have you overlooked the fact, that this country is ours as well as yours—that we have won our rights here, not only by incessant toil, but by shedding our blood in its defence?

Martha Jones: that might be an avenue toward citizenship might be an argument for citizenship. They will assess their history of military service going back certainly to the American Revolution and the War of 1812 and propose that perhaps a record of military service should be the basis for citizenship and ultimately they will turn to Birthright.

John: Birthright citizenship. If you're born on American soil, you're an American and a fully fledged citizen of the United States.

Martha Jones: citizenship is not defined either by the Federal Constitution or most state constitutions in this period so there are some references in the US Constitution the president must be a natural born citizen. So perhaps there's something like a natural born citizen, but it isn't spelled out. The Constitution purports to protect the privileges and immunities of citizenship, but it never tells us who citizens are. So it's to say it's been an ill-defined or under defined category until African Americans pick it up and try and pour some content into it in order to resist black laws and the threat of removal that colonization proposes.

John: But in 1857 the Supreme Court hands down its ruling in Dred Scott and says that blacks can never be citizens.

John: That's a massive setback for the anti-slavery movement. It's a life-threatening personal crisis for someone like John Rock who needs a passport to go abroad and get medical treatment. And it also pushes the country even closer to civil war. Let's talk about Dred Scott.

Anne Twitty: So Dred Scott is an enslaved man who sues for his freedom and the case that we all know is the case that's ultimately decided by the United States Supreme Court in 1857, but it turns out that Dred Scott had sued on many previous occasions. He first files his suits in the St. Louis Circuit Court starting in 1846. It is only Dred Scott's

name that appears on that case, but Dred Scott, Case um has subsumed the cases of his wife a woman named Harriet, uh, and the fate of his two daughters Eliza and Lizzie.

John: That's Anne Twitty, a professor of history at the University of Mississippi. Dr. Twitty looked at hundreds of lawsuits filed over a 70 year period before the Civil War called freedom suits.

Anne Twitty: There are 241 plaintiffs in freedom suits filed in the St. Louis Circuit Court the first Court the Dred Scott files his freedom suit in. And these 241 individuals often display this sort of remarkable knowledge of legal processes.

John: In the antebellum period, there was a special kind of lawsuit called a freedom suit where people who were held in bondage sued in order to persuade the courts that they were not lawfully held in bondage.

Anne Twitty: freedom suits are a variety of lawsuits that in a lot of ways don't really resemble any other kind of case they are they are lawsuits that are attempting to determine the status of a particular individual specifically whether or not an individual is in fact a slave or is on the other hand of free person.

John: Dr. Twitty found that plaintiffs in freedom suits won more often than you might think; slave owners had to take these suits seriously. The courts certainly did, which might seem surprising for a slave state. But, historians say, Missouri courts did indeed

take seriously the role assigned to them by Congress in the Missouri Compromise of 1820, which was meant to defuse national tensions over the future of slavery.

Anne Twitty: So an enslaved man has filed a freedom suit in the St. Louis circuit court and his master has paddled out into the Mississippi River because he doesn't want to be served with paperwork that's related to this enslaved man's Freedom suit and he's convinced that that because he's in the middle of the Mississippi River he essentially isn't in St. Louis Circuit Court's Jurisdiction and he can't be served, he can't be taken into the custody of the sheriff.

John: He's worried he'll be arrested because his purported slave has essentially accused him of kidnapping and falsely imprisoning him. It turns out he's wrong on the law; he's not going to be arrested. But the lesson is clear. It shows that freedom suits were not toothless. People held in bondage did have some recourse in the courts. And there were a variety of legal theories they could pursue.

Sheldon: One of those arguments is that they have Native American ancestry, right?

John: That's my colleague, Sheldon again. You heard him earlier in the podcast visiting John Rock's gravesite with Professor Brooks.

Sheldon: So during this time as today Native Americans have a different type of citizenship status and relationship with the national government. They're considered, you know dependent sovereigns and so slaves could argue that they had, you know,

some sort of Native American ancestry and by virtue of that ancestry, they could not be slaves. So that's one theory. Another theory is that is the manumission theory, which is the fancy term to say that a slave owner has taken the legal steps necessary to free a slave to manumit a slave right and most frequently this would happen in a will. Right? Family members of the slave owner say wait a second. We kind of don't want that to happen. Right? We still want this person to be a slave. We want them to be our property or we or the estate is in debt, and we want to sell off these individuals to pay for the debts of the estate. There's all sorts of different ways that even if a slave owner says in his or her will that this person is free when I die that the people who are still alive don't want to respect that right? So these slaves will say like look my master died. He freed me in his will he promised he was going to free me in his will I know that he did and so, you know, I'm basically contesting, you know, the his his widow's claim that she still can keep me as property. That's a common common type of claim. And then there are these claims that are the once free always free type of claims.

John: That's the type of claim Dred Scott made. Once free always free. If your owner brought you onto free soil, you're free, and even if you're returned to a slave state, the courts in that slave state where you file your freedom suit are going to enforce the laws of the free soil jurisdiction you were taken to--at least sometimes.

Anne Twitty: For most of the first part of the 19th century the boundaries of the United States are shifting almost every year. A lot of enslaved people who during the first half of the 19th century are making their way from these sort of Old South States across the

Nation. They're traversing a decent portion of the country making their way from east to what would have then been considered the west. Uh, and as they make their way from east to west it's relatively common that they at some point in their journey set foot on the supposedly Free Soil states that come out of the Northwest Territory. So States like, Ohio and Indiana and Illinois.

John: Dred Scott's owner took him to Illinois and what's now St. Paul, Minnesota, both of which were free soil jurisdictions at the time. When they got back to Missouri, Dred Scott files his freedom suit and he does it to stop his family from being separated.

Anne Twitty: the thing that most often leads to an enslaved individual deciding, uh to seek their freedom in the courts is the threat of the disruption of their family or their sale to another jurisdiction. So very often, uh, these these cases will indicate in the petitions. My master has threatened me with sale and and therefore I have decided to begin this process.

John: And as you can imagine, suing your owner or purported owner can backfire.

Anne Twitty: Once you begin the process, not only are you exposing yourself to all kinds of threats, intimidation, actual physical, uh, beatings, whippings, um punishments, uh for for seeking your freedom in the courts. You're also exposing other family members to a variety of punishments.

John: Slave owners also had many plenty of ways to stall court proceedings.

Anne Twitty: Um, so it's possible that a master might decide that he was going to try to remove you from the jurisdiction, in which case your case would be dismissed. End of story right? So they might try to sell you um, literally down the Mississippi River so that you can no longer meet with your attorney so that the next time your case is called you simply won't be able to appear.

John: Which isn't to say there's nothing the court could to try and protect people pursuing freedom suits. But even with the legal mechanisms at the court's disposal, this is risky stuff.

Anne Twitty: When these cases are initiated, um a master in order to keep one of these enslaved plaintiffs within their care custody has to enter into recognizance. Well some Masters refused to put up these bonds and if a master refuses to put up a recognizance bond at that point that enslaved person is taken into the custody of the sheriff. The sheriff will make all attempts to ensure that that enslaved person is hired out to someone uh for the duration of the pendency of their suit, but in some cases you simply can't find anyone to hire those enslaved individuals, in which case you sit in jail. And 19th century jails are very injurious to one's Health, you know your ability to get adequate food your ability to stay healthy while in jail is always in jeopardy. So you're

running tremendous risks during the pendency of the suit and the case can go awry at a huge number of different points in the case.

John: And not only that but over time, freedom suits are getting harder and harder to win. In 1852, Dred and Harriet Scott lose their case before the Missouri Supreme Court, which reverses decades old precedent and declares that it will no longer honor once free always free.

John: So Dred and Harriet try something else.

Sheldon: well the US Constitution creates a federal court system, right? And in fact one part of the constitution in article 3 of The Constitution says the federal courts will be open to a number of very specific types of lawsuits. One of the types of lawsuits that you can bring in federal court is a lawsuit between citizens of different states, right?

John: And that's because...

Sheldon: There are significant tensions among the different states and there's there's a sense that you know, if a New Yorker goes to Virginia. Um and and you know gets beat up or whatever and needs to bring a tort lawsuit against a Virginian that that New Yorker is not going to get a fair hearing from a Virginia state court, right? You can't trust a Virginia State Court just like a Virginian wouldn't be able to trust a New York state court.

And so there's a there's this provision in article 3 of the Constitution that creates a way for citizens of different states to have federal courts that can hear their claims to provide what they hope will be a more neutral venue and really, you know a fairer venue for settling disputes between citizens of different states, right.

John: Dred Scott sues John Sandford, a resident of New York, in federal court.

Sandford is the brother of Dred's owner's widow. He's also an extraordinarily wealthy businessman who had married into a prominent St. Louis family who themselves repeatedly been defendants in freedom suits and had had their slaves freed by Missouri courts. And in 1857, the case makes it all the way to the U.S. Supreme Court. By then, Harriet and Dred have sent their daughters to live in hiding.

Anne Twitty: The really narrow question that the Supreme Court has to decide is simply whether or not Dred Scott is actually entitled to his freedom his case is based upon his residence on a portion of a Free Soil territory.

John: But the Supreme Court doesn't just decide that narrow question. The Supreme Court, in an opinion by Chief Justice Roger Taney of Maryland, goes much further.

Sheldon: Chief Justice Taney is the guy who wrote the Dred Scott decision. Right. He is an irascible pro-slavery Democrat from Maryland who is just very very hostile to anyone of African descent. He looks at looks like he stepped out of central casting from like a

1930s Dracula horror movie like, You know from from Transylvania, this kind of this long hair and these big jowls and and not only does he look the part but you when you read what he wrote in Dred Scott, he sounds like the most villainous Justice that you could possibly ever put on the Supreme Court right. Again, you know, if you read the words of the Dred Scott Decision Chief Justice Taney's words, and these are words that he was proud of right

John: Taney says that under American law and English law before that, blacks had always had inferior status and could not be citizens. Blacks

Dred Scott decision: “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.”

Anne Twitty: the Court decides that no black person has ever been considered a United States citizen nor can ever be considered a United States citizen. That essentially means that no black person can ever file suit for any purpose in any federal

district court um, so that definitely forecloses sort of the possibility of any kind of litigation by black people at the federal level.

John: Which is monumental. If blacks can't sue in federal court, if they can never be citizens, one of the best tools for opposing the black laws and colonization is swept aside. For John Rock, the decision means he can't get a passport and he can't travel to France for what he thinks will be life saving surgery. If that were all the opinion did, it would be bad enough. But Taney goes even further

Anne Twitty: and suggests that it is unconstitutional for Congress to prohibit the introduction of slavery into the territories and that had been a long-standing political issue. This has been a political issue that um has been ongoing since at least the 1820s.

Sheldon: The Supreme Court has ruled that Congress cannot stop the spread of slavery beyond states that are already slave states, and this is an explosive decision. For many years kind of the the strategy for many Northerners who are concerned with slavery to at least some degree is a strategy of more or less kind of appeasement and containment right. And the theory is more or less this: Slavery is an institution that will die out on its own if given enough time and if it's not allowed to spread, right? This this fiction has been blown apart by the Dred Scott Decision, right?

John: And now it's clear that to stop slavery containment is no longer going work.

Sheldon: The abolitionists are saying we told you so right. This decision is an abominable decision, but it is exactly what we told you the world was like already, right. Now you know what's really going on right: that slavery needs to be it needs to not just be stopped from spreading but it needs to be torn out root and branch. And the 1857 Supreme Court decision really galvanizes a lot of support for that position in a way that hadn't existed before right because the the threat of the expansion of slavery now seems much more serious and likely and real.

John: Ironically, Taney thought the decision would reduce tension.

Sheldon: His argument is historians think that Chief Justice Taney is thinking I'm taking Congress out of the equation right. Now it is going to be a decision that's going to be decided at a local level. Right? Isn't that great, you know every new territory or state will decide for itself whether or not to be a slave territory or slave state right? I'm returning this issue to local decision makers, so I'm defusing this national political bomb and maybe it will be, you know an issue at at just the local state level, right? Chief Justice Taney's thinking is essentially doubling down on what I think is the great moral stain of the Constitution, the original 1787 Constitution, which is a masterful document. It is brilliant in many ways. But the largest gaping moral hole in the document is first and foremost its countenance of slavery and then second its refusal to provide suffrage to voting rights to women as well. Right? So you have you know, kind of these two huge problems with the original Constitution that really hold the original Constitution back from fulfilling kind of the vision in the first line of the Declaration of Independence that

everybody knows it from elementary school and up is we hold these truths to truths to be self-evident that all men are created equal.

John: The country is about to plunge into Civil War ... in no small part because of the Dred Scott decision. Coming up after the break: We'll pick up the story of John Rock, who is about to make history.

Break

Sheldon (in Boston) All right. So where we headed?

Chris Brooks: we're actually heading up Garden Street. Welcome to Beacon Hill. We are heading towards the house where Rock lived I'm not sure exactly how long or briefly after he returned from France where he had had medical treatment.

John: So despite Dred Scott and despite not being able to get a passport, John Rock makes it to France. And he's able to do that because the Massachusetts state government steps in and starts issuing passports when the federal government stops. John Rock gets one and apparently it's acceptable to the French.

Sheldon (live in Boston): So where are we?

Chris Brooks: We are in the front of 34 Garden Street, Boston Beacon Hill. This was the house where Rock had lived immediately after his return from France. He had traveled to France and had multiple surgeries over the 8 month period he was in France.

John: He's in France eight months. And remarkably, he comes home speaking both French and German and his linguistic abilities really impress some Germans immigrants in Boston.

Chris Brooks: In fact in the German language newspaper der Pioneer, The Pioneer, there was a pretty lengthy article about Rock by a guy named Karl Heinson. He wrote an article about one of Rock's speeches really praising Rock for his intelligence, saying that all of you white abolitionist pumpkin heads...[Kürbisköpfe] ... are not nearly as intelligent as John Rock and he goes on and on.

John: And he picks up right where he left off on the speaking circuit.

John Rock: I am here not so much to make a speech as to add a little more color to this occasion. (Laughter.) I do not know that it is right that I should

speaking, at this time, for it is being continually thundered in our ears that the time for speech-making has ended, and the time for action has arrived. Perhaps this is so. While Mr. Lincoln has been more conservative than I had hoped to find him, I recognize in him an honest man, striving to redeem the country from the degradation and shame into which Mr. Buchanan and his predecessors have plunged it. (Applause.)

John: Unfortunately, the procedure is not entirely successful. It's a success in that he doesn't die. But he can't be a doctor anymore.

Chris Brooks: he's better but he's told he can't practice medicine anymore. We assume since he died of tuberculosis in 1866 that it's something related to the tuberculosis,

Sheldon (live in Boston): Okay, so where are we at now?

Chris Brooks: We're gonna go to 83 Phillips Street where John Rock lived. I think he moved in there probably during the Civil War. So basically his last four to five years of life,

Sheldon: Yeah. Can you tell me what the plaque says?

Chris Brooks: sure says the home of John's Rock. 1825 to 1866 a free black man physician dentist lawyer and abolitionist distinguished from his professional and civic contributions to the Boston community.

Sheldon: What's it missing? Let's see is it

Chris Brooks: Well, they mentioned he was a lawyer but it wasn't just any lawyer. He ends up being the first African admitted to argue before the US Supreme Court which you know was a very very big deal.

John: Though he is too sick to be a doctor, incredibly he begins studying the law. Once again he finds a mentor, Robert Morris, who is a prominent African American lawyer and who is famous for trying to desegregate Boston's schools. And eventually John Rock becomes one of the first African American lawyers in the country.

Chris Brooks: He's number four in the country.

John: Or at least to the best of our knowledge, says Dr. Brooks.

Sheldon: What do we know about his law practice?

Chris Brooks: Honestly very little. The records of his actual practice are scarce.

John: But one thing we do know is that he wanted to be a lawyer at the Supreme Court.

Sheldon: Probably two reasons right number one is very clear that he's very upset with the Dred Scott ruling that the Supreme Court has issued this explosive ruling that has you know set back the anti-slavery movement and that has personally, you know endangered his life, right? So there's a sense that he wants to go back to the Supreme Court and say to the same justices who ruled in Dred Scott kind of look them in the eye and say, you know, you told me that I can't be a citizen of the United States because of the color of my skin. I want to stand before you and say I am a lawyer practicing before you. I can't I can't come into court as a litigant, you know as a plaintiff right like Dred Scott, but I can come into court as a lawyer.

Sheldon: But you know, I the other thing is you have to have somebody who's already a member of the bar move your admission, right?

Chris Brooks: Yeah

Sheldon: you have to have someone who's already like in good standing with the bar say I want in my case I want Sheldon Gilbert to be a member of the bar. Will you supreme court justices allow me to do that?

Sheldon: I've had the privilege in the past of like moving the admission of other people to the Supreme Court bar and it's a really cool experience to kind of stand up there. And you know, you have to give some pause right because you're putting your weight of authority behind somebody else and you're saying, you know you go up there and you say chief justice and may it please the court, you know, I Sheldon Gilbert move the admission of so-and-so and I'm satisfied that he possesses the necessary qualifications, right your guys sticking your reputation on the line. And so in order to practice before The Supreme Court, John Rock-needs somebody who will you know, go to the Supreme Court and do something that's never been done before which is ask the US Supreme Court remember. The court that just a few years ago said that that people of African descent have no rights which the white man is bound to respect that Court. He needs somebody to go to that court and those justices and say I think you should do something you've never done before which is allow a person of color to practice before the court.

Chris Brooks: Charles Sumner the senator was the one who presented him...

John: Charles Sumner. If you remember only one thing about him from history class it's that he's the senator who is nearly beaten to death with a cane by a pro-slavery politician on the Senate floor in 1856.

Chris Brooks: ...before the US Supreme Court, and there was a series of letters 12 that I that I could find that Rock had written to Sumner.

John: Sumner is willing to speak on John Rock's behalf, but there's a problem. Chief Justice Taney is still on the bench. John Rock has been a lawyer in good standing for three years at this point, which is how long it takes to be admitted to the Supreme Court bar, but Sumner says sorry. You're eligible under the Court's rules, but I am not going to move for your admission yet. Taney would never accept it.

John: Finally, Taney, dies in October 1864 at the age of 87 after being on the bench for 28 years. In December, Abraham Lincoln appoints Salmon P. Chase, an abolitionist who helped formulate constitutional arguments against slavery, to replace Taney, and the Senate confirms Chase on the very same day. Soon after, Sumner sends Chase a letter.

Chris Brooks: January 15th of 1865 was a letter between Sumner and Salmon Chase, and it's very short. It says in "re John S Rock counselor at law, Massachusetts. What

say you?" Real short sweet to the point. And on the same slip of paper Chase sends back a note saying "nothing at present except not forgotten." You kind of have to ask yourself. Well what's going on that would allow this to happen, right? What's so significant about the beginning of 1865.

John: the Civil War is still going on. The other major event that's happening at this time is Congress is in the process of passing the 13th Amendment to abolish slavery.

Chris Brooks: President Lincoln had already made it pretty clear that he was going to sign off on the Thirteenth Amendment.

Chris Brooks: ...and that's what led to a real flurry of activity

John: John Rock writes to Sumner. Sumner writes to Chase. Rock comes to D.C.

Chris Brooks: because he knew this is going to happen.

John: Chief Justice Chase has a meeting with all of the other justices on the court. And we have Chase's notes about that meeting from his diary.

Chris Brooks: From Chase's notes in January of 1865:

Salmon Chase: "I mentioned that I was informed that motion for admission to the bar of a colored lawyer from Massachusetts would be made and asked advice. No one inclining to speak, I said I would take silence as indicating willingness to leave the matter to my discretion as chief justice, intimating that I should admit without hesitation--then one after another nearly all expressed the opinion that the rule must govern and that in it there was no disqualification on the ground of color."

Sheldon: the Supreme Court rules don't say anything about being a citizen as a requirement for practicing before the Supreme Court. There's nothing in the rules that says you have to be a citizen. So fine. He's not a citizen. Tell me where it says you can't be a Supreme Court lawyer. Sounds like the you know, the justices kind of grumbled and backed down.

Salmon Chase: one queried

Sheldon: Another Justice apparently piped up and said wait a second. He's not a citizen, right because of course Dred Scott,

Salmon Chase: and I said I would direct the motion to be made for admission and have it argued but this not being insisted on we adjourned with the understanding that colored men qualified, could be admitted without regard to complexion progress!

Chris Brooks: exclamation point. And eight days later Chase writes to Sumner.

Salmon Chase: You can make your motion for Mr. Rocks admission at any time which suits your convenience.

John: So John Rock goes to D.C. and he stands before some of the very same judges who ruled that blacks can never be citizens and he gets sworn in to practice before the U.S. Supreme Court.

Chris Brooks: In Charles Sumner's words as soon as the judges had taken their seats, mr. Sumner rose and with Mr. Rock standing by his side said "may it please the court. I asked leave to present John S Rock Esquire, a counsel at law of the Supreme Court of Massachusetts. And now move that he be admitted as a counselor of this court. The Chief Justice bowed and said let him come forward and take the oath. The oath was then administered by Mr. Middleton, Clerk of the Court." Awesome fun fact. Mr. Middleton was a slave owner from Maryland.

John: And in that moment John Rock makes history and the fact that this is a historic moment is not lost on anyone. Reporters are in the audience, and they spread the news far and wide. Here's one account of the event from Harper's Weekly. I asked Cheryl Contee, whose father originally unearthed the report, to read it:

Cheryl Contee (reading Harper's Weekly): the slave power which received its constitutional deathblow yesterday in Congress writhes this morning on account of the admission of a colored lawyer John S. Rock of Boston as a member of the bar of the Supreme Court of the United. The rage depicted in the countenance of some of the old hunkers present at this invasion of their citadel beggars description. May it please the court, I move the John S Rock a member of the Supreme Court of the state of Massachusetts be admitted to practice as a member of this court. The grave to bury the Dred Scott decision was in that sentence dug and it yawned there wide open under the very eyes of some of the judges who had participated in the crime against democracy and humanity. The assenting nod of the great head of the Chief Justice tumbled in course and filled up the pit and the black counselor of the Supreme Court got on to it and stamped it down and smoothed the earth to his walk to his roles of the Court.

Sheldon: So it's historic. Not only because John Rock is you know as the reporter and Harper's Weekly says, you know digging the grave to bury the Dred Scott decision but

it's also the same day that President Lincoln is signing the 13th Amendment which abolishes slavery. So this is an important moment in history.

Cheryl: I can only imagine John Rock's pride in that moment and the hope that he felt for a brighter day. There are just some moments in your life that just take your breath away. Even though the road ahead was still very hard for blacks in America that moment that particular moment was a sign of the progress and breakthroughs yet to come.

Sheldon: Why does it matter to you?

Chris Brooks: I personally decided long ago I didn't want to practice law but I was fascinated with those who did practice it because of its significance to society and I when reading about somebody like Rock and all of the hurdles he had to leap in order to attain what he did. I don't know. I'm enthralled. I'm thinking this is somebody who you know, I want my children to look up to to as an example.

Cheryl: It seems impossible like Harriet Tubman's story sounds impossible, right. John Rock's story sounds impossible. He just found ways to navigate around and just never gave up and that's really what I took and I never give up.

John: Unfortunately, John Rock doesn't live to argue a case before the Supreme Court. He dies of tuberculosis in 1866. He was only 41 years old.

Sheldon: So even though he becomes a supreme court lawyer, he is not a citizen of the United States. John Rock cannot step foot into a federal court as a plaintiff because he's not a citizen. John Rock Esquire as a member of the Supreme Court bar cans can go into this, you know federal court as a lawyer right? Dred Scott decision is still alive and well. Harper's Weekly Magazine says that in that, you know sentence of being admitted to the Supreme Court, the Dred Scott decision was buried in its grave. That's great prose. It's very dramatic. It's absolutely unequivocally wrong. This is the question that remains open. John Rock is not a citizen. No person of African descent in America is a citizen at this point and something needs to be done to fix that.

John: Which brings us to the 14th Amendment. At the close of the Civil War, the country is broken in any number of ways. The human cost of the war was staggering. Around 800,000 soldiers died or would die from their wounds--more than, by some estimates, every other American war in history combined. The economy is in tatters, and the government is in debt. The terms under which the South will rejoin the Union are unclear. Slavery has been abolished but by the end of 1865, the former Confederate states have passed a series of Black Codes that have reinstated slavery in all but name. Armed, organized groups are terrorizing the South killing freedmen and their white allies for daring to exercise their rights. Can you fix all of that with a constitutional

amendment? Well--they tried. Next time, on Bound by Oath, the story of the real people behind the Fourteenth Amendment and the fight over its ratification, which almost broke the country in half -- again.

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