

MEMO

Date: 3/21/07

Subject: *Dred Scott* and the Scope and Significance of the Fourteenth Amendment

I. Introduction

In his Pulitzer Prize winning opus on *Dred Scott*, Don Fehrenbacher wrote that Dred Scott is “a point of illumination, casting light upon more than a century of American” law and politics.¹ Today, I will suggest that *Dred Scott* is also a point of illumination that explodes our understanding of the Fourteenth Amendment in at least two respects. First, *Dred Scott* is explosive in the destructive sense of revealing just how wrong we have gotten much of it, from our construction of the Privileges and Immunities Clause and Enforcement Provisions to the foundation of our Incorporation doctrine. Second, *Dred Scott* is explosive to our understanding of the significance of Fourteenth Amendment in the sense of creative destruction; it reveals just how narrow our view of the Fourteenth Amendment is both when viewed as a whole and within the Constitution itself. The Fourteenth Amendment was a new act of Constituting – it was a revised compact between the states and the federal government that redefined the relationship between the two. As a point of illumination, Dred Scott casts a light upon the darkened shadows of the Fourteenth Amendment and demands that we reclaim our Constitutional legacy and revise our understanding of who we are as citizens and what that means for us.

II. Who is a Citizen?

In the course of delivering his momentous opinion, Chief Justice Taney proclaimed that a black man – even if born free in a state that treated him as a full and equal citizen –

¹ DON FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 7 (1978).

was not and could never become a citizen of the United States.² In Chief Justice Taney's view, the language of the Declaration of Independence and the Constitution of the United States could not have intended to include the enslaved African race.³ Both instruments were formed for the benefit and protection of the people of the United States, those who were "members of the political communities in the several states."⁴ Thus, because the "enslaved African race... formed no part of the people who framed and adopted this declaration" they could not enjoy the benefit or protection of it.⁵ As law, the opinion established the Constitutional principle that slavery could not be prohibited in the territories while denying the freedom of slaves who had been manumitted. In doing so, the Court intervened in a sectional dispute that spanned a generation by unmistakably deciding in favor of the South, bringing the nation closer to civil war.

Although slavery was ended as a practical effect of the civil war, the legal precedent and Taney theory of citizenship remained undisturbed. The first post-war Congress took aim at *Dred Scott* by directly legislating the principle of birthright citizenship in the Civil Rights Act of 1866:

Be it enacted, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude.⁶

And although, for the first time in history, on April 9, 1866 Congress overrode President Johnson's veto, doubts over the Civil Rights Act Constitutionality spurred the

² *Dred Scott v. Sanford*, 60 U.S. 393, 404 (1857)

³ *Id.* at 410.

⁴ *Id.* at 411.

⁵ *Id.* at 410.

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two-thirds majority in Congress to provide an incontrovertible Constitutional foundation.⁷ Two months later, Congress opened its proposed Fourteenth Amendment with unmistakable anti-Taney language: “All persons born of naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State in which they reside.”⁸ It was now absolutely clear that anyone born in the United States was a citizen thereof. Thus, the Fourteenth Amendment overruled *Dred Scott* and left no Constitutional doubt about it.

III. The Theory of Citizenship

The precise character of national Citizenship and the relationship between state and federal citizenship was a debate whose terms were cast against a backdrop of growing sectional crises in the middle decades of the 19th Century. “The nature of citizenship, state and national, and whether it included free negroes, remained unsettled issues when the Dred Scott case reached the Supreme Court [in *Dred Scott*]. ... The general tendency was to regard state citizenship as primary, with United States citizenship deriving from it.”⁹ Southern spokesmen, often responding to the assertion that blacks were entitled the Privileges and Immunities of citizenship provided by Article IV of the Constitution, developed and advanced a theory of citizenship in which national citizenship depended upon state citizenship. Under this theory, since blacks were not citizens of these southern states, they could not claim national citizenship. Many Southerners further asserted that blacks were not citizens at all, as understood by the U.S. Constitution, since they were not part of the sovereign people who founded the nation, and therefore could claim no

⁷ AKHIL REED AMAR, AMERICA’S CONSTITUTION, 381

⁸ US CONSTITUTION AMENDMENT XIV, SECTION 1

⁹ Fehrenbacher 71

protection as such under the Constitution. This theory blossomed into legal doctrine under *Dred Scott* and was directly repudiated by the Fourteenth Amendment.

The Fourteenth Amendment not only granted and defined national citizenship, but it also defined state citizenship. In that way, the Fourteenth Amendment reversed the theory of citizenship espoused in *Dred Scott*. National citizenship was no longer derivative and states were no longer capable of defining citizenship for themselves. “A state would no longer enjoy carte blanche to designate some [persons born on its own soil] as citizens and to treat others (free blacks) as lesser ‘inhabitants.’ Likewise, no state could henceforth bar any American citizen from choosing to become a state citizen.”¹⁰ Whether the Fourteenth Amendment reverses or clearly orders citizenship for the first time, it implies a restructuring of the relationship between the states and the federal government. In this sense, the Fourteenth Amendment does far more than simply amend the Constitution, it is a new act of Constituting by redefining the meaning of “We the People” in the preamble in expansive national terms and inclusively without regard to race. The Constitution, fastened with the Fourteenth Amendment, does more than strengthen the national hand vis-à-vis the states, it is a new Constitution for a new people. It is *Dred Scott* and the repudiated theory of citizenship found in Chief Justice Taney’s opinion that makes this fully evident.

IV. The Privileges or Immunities of Citizenship

In our jurisprudence, the Fourteenth Amendment is better known for its prohibitory language targeting the actions of states, which provides for equal protection and due process. However, lost in our construction of the Fourteenth Amendment is the import of the Privileges or Immunities Clause. Prior in place and importance, the Privileges or

¹⁰ *Id.*

Immunities Clause has been relegated to Constitutional history, eviscerated in 1877 by the Supreme Court in the *Slaughterhouse Cases*.¹¹

Section 1 of the Fourteenth Amendment reads: “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. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹² As explained above in section III, the Privileges and Immunities Clause of Article IV of the Constitution provided a focal point for debating the meaning of citizenship. If it were a matter of state law and state citizenship only, the debate could have been little more than terminology. However, Article IV afforded national citizens the privileges and immunities of citizens in the other states. Thus, the meaning of national citizenship was a contested matter as blacks brought suits claiming the benefits of national citizenship. This debate reached its climax in *Dred Scott* and the Fourteenth Amendment, with the latter reversing the former.

Dred Scott draws our attention to this history and illustrates why the Privileges or Immunities Clause of the Fourteenth Amendment is an essential corollary to the citizenship clause. In *Slaughterhouse*, the Supreme Court first took up the task of interpreting these words. The plaintiffs claimed that the *Slaughterhouse* statute violated the Privileges or Immunities of national citizenship. The Court reasoned as follows: Section 1 distinguishes between national and state citizenship. The Privileges or Immunities clause only protects the privileges and immunities of national citizenship. The court then examined case law which previously defined the privileges and

¹¹ 83 U.S. 36 (1873).

¹² U.S. CONSTITUTION, XIV AMENDMENT.

immunities of state citizenship. The court finds these to be basically civil rights of free men. The court then concludes that the Privileges or Immunities clause was not intended to transfer protection of these rights to the federal government because it would be “radical and so great a departure from the spirit and structure of the institutions.” To assuage fears that in doing so the Court would then find the clause to be meaningless, the Court went onto to enumerate those things that the clause did protect. In sum, the court listed those things that were already protected by the constitution before the 14th Amendment or those things that were necessary to national citizenship. Thus, the Court obliterated the substantive content of the Privileges or Immunities of national citizenship and ignored the radical transfer that the Fourteenth Amendment undertook. In doing so, the Court not only rendered the Privileges or Immunities clause dead Constitutional writ, but it also understated the significance of the Fourteenth Amendment as a whole and its importance within the Constitution, in effect reversing much of what the Fourteenth Amendment had attempted to do. It is through the lens of Dred Scott that we come to understand that the reordering of national identity and citizenship had an important corollary in drawing those privileges and immunities that had previously been the domain state citizenship into the sphere of national citizenship.

V. A Robust Citizenship Clause and Section Five Enforcement Power

Section 5 of the Fourteenth Amendment provides the Congress with broad enforcement power to ensure that the provisions of the Amendment have force. When viewed through the lens of Dred Scott, this enforcement provision becomes Constitutional writ imbued with affirmative power.

As Prof. Akhil Amar writes:

Taney's backdrop *Dred Scott* opinion had located citizenship in a broad context of social meaning and practice above and beyond state action. Blacks, said Taney in notorious language, could not be citizens because they were regarded by the white race – and not merely by white governments – as 'beings of an inferior order, and altogether unfit to associate with the white race,' with 'no rights which the white man is bound to respect.'

Thus, when the Fourteenth Amendment overturned Taney, it did so with words suggesting that Congress could use its sweeping *McCulloch*-like enforcement power [necessary and appropriate] to enact statutes affirming that blacks were in fact and in law equal citizens worthy of respect and dignity.¹³

In short, the reasoning of Chief Justice Taney's opinion in *Dred Scott* implicating the philosophical and social dimensions of citizenship. If Congress were to reverse this opinion, it would require more than simply providing national citizenship in law, it would require the power to intervene in the social structures and institutions that shape the meaning of that *citizenship in fact*.¹⁴ The Citizenship Clause is affirmatively declared. It is not limited to protecting national citizenship against state abridgement. As noted by one commentator, "[i]n addition to securing a legal status, the grant of national citizenship is rightly understood as a font of substantive guarantees" which Congress has authority to directly enforce.¹⁵ Thus, the citizenship clause confers a status that Congress has authority to guarantee through section five.

¹³ AKHIL REED AMAR, AMERICA'S CONSTITUTION, 381 citing *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857).

¹⁴ Justice Harlan elaborated this view in his lone dissent in the *Civil Rights Cases*, describing the fundamental transformation of nationhood wrought by the Citizenship Clause.

¹⁵ Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale Law Journal 330, 340 (2006).