LITTLE ROCK AND THE LEGACY OF *DRED SCOTT*

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INTRODUCTION

In 1954, the Supreme Court of the United States issued its celebrated decision in *Brown v. Board of Education* declaring that the doctrine of "separate but equal" announced in *Plessy v. Ferguson*[1] was thereafter unconstitutional.[2] In spite of this ringing pronouncement, Southern school boards were slow to take up the task of disestablishing state mandated racial segregation. Little Rock, Arkansas, was no exception.

In 1957, the Little Rock School District announced a gradual plan of integration.[3] Integration was to begin in the 1957–1958 school year at the senior high school level and trickle downward, although no target dates were set for further integration.[4] Most critically, the plan allowed only a handful of Black students to attend White schools.[5] When local leaders and representatives of the NAACP were unable to convince the school district to implement a more expansive integration plan, they filed a lawsuit in U.S. district court styled *Aaron v. Cooper* on behalf of the parents of thirty-three Black children.[6] The district court and the Eighth Circuit Court of Appeals found that the integration plan devised by the school board was reasonable.[7] Rather than pursue further appeals, the plaintiffs began to work with the school

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1. 163 U.S. 537 (1896).

2. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

3. Judge Wiley Branton, Jr., *A Date with History: Wiley A. Branton and the Path to* Cooper v. Aaron, 42 ARK. LAW. 20, 22 (2007).

4. *Id.*

5. *Id*.

6. *Id*. at 22–24.

7. Aaron v. Cooper, 143 F. Supp. 855, 866 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

district to identify Black students who could enter Central High at the start of the school year.[8]

Out of two hundred initially eligible candidates, only nine Black students, with the consent of their parents, were willing to integrate Central High.[9] These nine brave children were harassed, threatened, and subjected to various reprisals.[10] On September 2, 1957, Governor Orval Faubus dispatched the Arkansas National Guard to surround Central High to prevent the Little Rock Nine from entering the school.[11] Two days later, the Little Rock Nine were barred from entering Central High School.[12] After a request from the U.S. Justice Department, the district court enjoined the governor and the Guard from "preventing the attendance of Negro children at Central High School."[13] Although the governor withdrew the National Guard, he had successfully moved the public to join in defiance.[14] Hundreds of protestors, mostly White parents, stood in front of the schools screaming and yelling epithets.[15]

On September 25, 1957, President Eisenhower dispatched federal troops to ensure compliance with the federal court order.[16] The plaintiffs and the school board ratcheted up the legal battle until the Supreme Court issued its ruling, *Cooper v. Aaron*, on September 12, 1958.[17] In its decision, the Supreme Court unanimously reaffirmed *Brown* and declared that the U.S. Constitution was absolutely controlling and binding on state officials in spite of any state law or state action to the contrary.[18]

This symposium on *Cooper v. Aaron*[19] commemorates the fiftieth anniversary of the Supreme Court's intervention in the Little Rock crisis. The symposium speakers, including the keynote speaker, underscored the ways in which the Little Rock crisis formed a critical juncture on the path to fulfilling the promise of *Brown*.[20] Little Rock was a turning point in public support for integration, exposing through the malevolence and terror, threatened and

8. Branton, *supra* note 3, at 24.

9. *Id*.

10. *Id.*

11. *Id*.

12. *Id.*

13. Branton, *supra* note 3, at 24 (citing Aaron v. Cooper, 156 F. Supp. 220 (1957)).

14. *Id.*

15. *See* Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1, 237 F. Supp. 2d 988, 998 (E.D.Ark. 2002) (noting that the nine students entered Central High School despite "the threatening mob of whites").

16. *Id*.

17. *See* Branton, *supra* note 3, at 24–25 (discussing the school district's request for a delay in further implementation of the plan on account of the preceding events).

18. *Id*. at 25 (citing Cooper v. Aaron, 358 U.S. 1, 17–18 (1958)).

19. 358 U.S. 1 (1958).

20. David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065 (2008).

exacted, on nine teenagers the severity of Jim Crow segregation. As important as *Cooper* may be on the path from *Brown*, the stream of law that flows out of *Brown* did not originate there. Nor does the exercise of judicial authority in *Cooper* pertain solely to the issues raised in *Brown*. Viewing *Cooper* from the trajectory of *Brown* conveys an incomplete picture of the Supreme Court's intervention in Little Rock. *Brown* is but one element of a greater jurisprudential whole, of which *Cooper* speaks directly upon.

In this Article we suggest that understanding the full significance of the Supreme Court's intervention in *Cooper* requires us to go back further than *Brown* or even *Plessy*. We must situate *Cooper v. Aaron* in the context of another constitutional crisis and its ultimate resolution. As we reflect upon the fiftieth anniversary of the Little Rock Nine and the subsequent Supreme Court decision, we must also reflect upon another anniversary, the one hundred and fiftieth anniversary of the notorious *Dred Scott* [21] decision. Many of the fundamental issues raised in *Cooper* hark back to the Civil War. In some ways we are still negotiating the outcome, at least the outcome of the resolution, of that great conflict. The principal recognition accorded the *Dred Scott* case in the American mythos is its role in "precipitating" the Civil War.[22] Undoubtedly, the decision aggravated a bitter, long-standing sectional conflict. In order to fully understand the transformation wrought by the Civil War and its aftermath, we must return to *Dred Scott*. The *Dred Scott* case serves as a focal point, speaking to the elemental questions of citizenship, membership, and American identity and community that frame the contested resolution of the Civil War through the Reconstruction Amendments. In *Cooper*, even more so than *Brown*, we reach a judicial apogee, with the Court striving to reclaim the slumbering spiritual commitments of the Reconstruction Amendments.

In Part I, we sketch the contours of the *Dred Scott* opinion and examine the race line Chief Justice Taney inscribed into the definition of American citizenship by announcing that persons of African descent, regardless of their status, could never become American citizens. In a modern democratic state, citizenship is the fundamental form of membership in society. As the expositor of the Constitution, the Supreme Court played a symbolic role in shaping American identity by helping constitute and reaffirm a racialized understanding of American citizenship.

21. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

22. For a thoughtful discussion on whether *Dred Scott* helped "precipitate" the Civil War, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 561–67 (1978). Fehrenbacher concludes that the *Dred Scott* decision is better understood as a "conspicuous and perhaps an integral part of a configuration of events and conditions that did produce enough changes of allegiance to make a political revolution and enough intensity of feeling to make that revolution violent." *Id.* at 561.

Part II examines the work of the Reconstruction Amendments and their relationship to *Dred Scott*. The Reconstruction Amendments were a sustained attempt to reverse *Dred Scott* and sweep former slaves into the political community, both as a matter of law, but also as a matter of social and political fact. In the process, the Reconstruction Amendments redefined and reordered the relationship between the national government and the states, with implications for the meaning of national citizenship. The post-Reconstruction Supreme Court systematically reversed much of this work in a trio of decisions that hollowed out the Fourteenth Amendment, with practical and jurisprudential consequences that are evident today.

Part III ties the debate over the meaning of the Reconstruction Amendments to the symbolic impact of the Supreme Court's intervention in *Cooper* and beyond. *Cooper* is more than a reaffirmation of the principles in *Brown*, it is also a statement about the limits of individual choice in a democratic community. The Reconstruction Amendments and the Civil War itself rejected the claim by the White community of a right to secede from communal relations. The continuing struggle over voluntary school integration plans and the *de jure*/*de facto* divide is the most recent iteration of this debate.

Part IV describes the resegregation trends in American society and will pick up the thread of integration and citizenship in the debate in *Parents Involved*. Five decades after *Brown*, schools are resegregating along racial lines. At a time of growing international dependence when the United States is increasingly multi-racial, our society is fragmenting. There is a revived debate over the importance of integration, with many feeling integration exhaustion. Integration, as we have known it, has been misconceived. It is not about how well students learn or test scores, it is primarily about citizenship and how students perceive themselves and their community and the values that an integrated education fosters.

I. SHADOW OF *DRED SCOTT*

There are perhaps few, if any, Supreme Court cases in American constitutional history that have the scope of purview and breadth of implication as Chief Justice Taney's opinion in *Dred Scott*. Substantively, the opinion of the Chief Justice addresses issues as wide-ranging and important as the relationship between the Constitution and the Articles of Confederation, the geographic extent of the Bill of Rights, the limit of congressional power, the constitutional basis for territorial expansion, comity between the states, the nature of the Federal Union, and the rights of private property.[23] The opinion of the Chief Justice also defined the legal status of Indian tribes, the power of naturalization, and clarified the meaning and criteria of citizenship both state

23. FEHRENBACHER, *supra* note 22, at 6.

and national.[24] The *Dred Scott* opinions themselves add up to nearly 240 pages.[25] To say that this case is long and complex is a hyperbolic understatement. It was only the second case in American history to overturn an act of Congress and the first to overturn a major congressional act.[26] In some respects, its zealous assertion of judicial review is as important as *Marbury v. Madison*.[27]

Although there remain lingering questions about their historical accuracy,[28] the facts can be summarized as follows: Peter Blow, a native of Virginia, gave up farming in Alabama and moved his family and six slaves to St. Louis in 1830 to operate a boarding house known as the Jefferson Hotel.[29] The boarding house was unsuccessful and his health and the health of his family deteriorated with his business.[30] Some time between 1830 and 1833, the estate of Peter Blow sold Dred Scott to Dr. John Emerson, a medical officer at the nearby barracks. [31] In December 1833, Emerson was appointed assistant surgeon in the U.S. Army and commissioned at Fort Armstrong in Illinois, a free state.[32] Emerson took Dred Scott with him as a personal servant at the Army post.[33] Three years later, the Army vacated Fort Armstrong and Emerson was transferred to Fort Snelling, near the eventual location of St. Paul, Minnesota, then a part of the Wisconsin territory.[34] Slavery was forbidden in the territory by the Missouri Compromise.[35]

Contrary to the facts stipulated in *Dred Scott v. Sandford*, Emerson was transferred back to St. Louis in October, 1837, and then again to Fort Jesup in western Louisiana a month later.[36] Although Dred Scott and his wife Harriet remained at Fort Snelling in the employ of one or more of its officers, they later made the journey to Louisiana in the spring of 1838.[37] After a few

24. *Id.*

25. *See Dred Scott*, 60 U.S. at 393–633.

26. FEHRENBACHER, *supra* note 22, at 4 ("The Dred Scott decision . . . was the Supreme Court's first invalidation of a major federal law.").

27. 5 U.S. (1 Cranch.) 137 (1803). Under U.S. law, courts not only apply law, but also play a role in interpreting law both as a matter of the judicial function and as a matter of judicial review. *Id* at 177.

28. There is some debate over whether the facts may have been glossed over or even fabricated to make a model test case. *See Dred Scott*, 60 U.S. at 269–76.

29. *Id*. at 239.

30. *Id.*

31. FEHRENBACHER, *supra* note 22, at 239–40.

32. *Id*. at 240.

33. *Id*.

34. *Id*. at 244.

35. *Id*.

36. FEHRENBACHER, *supra* note 22, at 244–45.

37. *Id*. at 245.

months in Louisiana, Emerson requested a transfer to return to Fort Snelling.[38] The Surgeon General granted his request, and that fall Emerson traveled with his new wife, Eliza Irene Sanford, and the Scotts to the Wisconsin Territory.[39] In the spring of 1840, Emerson was transferred to Florida where the Seminole War was still in progress.[40] Mrs. Emerson and the Scotts remained behind in St. Louis.[41] After honorable discharge, Emerson returned to St. Louis and then later to Davenport, a new town in the Iowa territory, where he began to build a house.[42] Soon thereafter, Emerson's health began to deteriorate.[43] Dr. Emerson died in late December of 1843, leaving behind a wife and infant daughter.[44] Thus began a decade of litigation.[45]

In 1846, the Scotts filed petitions in the Missouri circuit court in St. Louis, "summarizing the circumstances of their residence on free soil" and seeking permission to bring suit against Mrs. Emerson to establish their freedom.[46] The case worked its way up and down the state courts. By the early 1850s, the Scotts' attorneys were informed that Mrs. Emerson had sold the Scotts to her brother, John F.A. Sanford, who was then a resident of New York.[47]

Dred Scott sued Sanford in federal court, asserting his freedom in the form of an "action of trespass."[48] The federalist framework accounted for the possibility that citizens of a state may wish to pursue cases in federal court rather than in the courts of their home state. In order to ensure the primacy of state courts in cases most relevant to state law or state matters, the Constitution limited federal jurisdiction to those circumstances where federal resolution of a case was either necessary or consistent with state comity.[49] One such

38. *Id.*

39. *Id*. at 245–46.

40. *Id*. at 247.

41. FEHRENBACHER, *supra* note 22, at 247.

42. *Id.* at 247–48.

43. *Id*. at 248.

44. *Id.*

45. Dr. Emerson left a life estate to his wife and the remainder to his daughter. *Id.* Although Emerson had appointed two executors for his will, including Mrs. Emerson's brother John F.A. Sanford, the administrator appointed by the court was Alexander Sanford, Mrs. Emerson's father. *Id.* at 248. It is unclear what happened to the Scotts during the next few years, but it is doubtful that Dr. Emerson conveyed them to John Sanford as stipulated in the facts before the Supreme Court. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 398 (1856). It seems that the Scotts were in the service of Mrs. Emerson's brother-in-law, Captain Bainbridge, until 1846. FEHRENBACHER, *supra* note 22, at 249.

46. FEHRENBACHER, *supra* note 22, at 250.

47. *Id.* at 270.

48. *Id.* at 276.

49. *See* U.S. CONST. art. III, § 2, cl. 1:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and

circumstance is known as "diversity jurisdiction," where the parties are citizens of different states.[50] The Framers recognized that in a case or controversy between citizens of different states, the state forum of a party's citizenship might be a more receptive and favorable tribunal. Since both parties would presumably wish to try the case in their own state courts, diversity jurisdiction allows diverse citizens to remove their case to federal court, an ostensiby neutral forum.

The question before the Supreme Court on appeal was whether Dred Scott was a citizen of the State of Missouri.[51] If he was a citizen of Missouri, then the federal court would have diversity jurisdiction to hear his case against Sanford, a citizen of New York.[52] If Dred Scott was a slave, then he was not a citizen and the Court would be unable to hear his case.[53] If the federal courts lacked jurisdiction, the decision of the Missouri Supreme Court would be left standing, which had decided against the Scotts.[54]

The precise character of national citizenship and the relationship between state and national citizenship was an ongoing debate whose terms were cast against a backdrop of growing sectional crises in the middle decades of the nineteenth century. [55] Southern spokesmen, often responding to the assertion that Blacks were entitled the privileges and immunities of citizenship provided by Article IV of the Constitution, one of the few places where the word "citizen" was written into the Constitution, developed and advanced a theory of citizenship in which national citizenship was conditioned upon state citizenship.[56] The implication of this theory was that Blacks in the South could not claim national citizenship since they were not citizens in those states. Many Southerners went even further and claimed that Blacks could not be 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

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Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

50. *Id*.

51. Scott v. Sanford, 60 U.S. (19 How.) 393, 400 (1856).

52. *See id*.

53. *See id*.

54. FEHRENBACHER, *supra* note 22, at 264.

55. "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. . . . the general tendency was to regard state citizenship as primary, with United States citizenship deriving from it." *Id.* at 71 (internal citation omitted).

56. U.S. CONST., art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

protection as such under the Constitution.[57] This theory blossomed into legal doctrine under *Dred Scott.*

In the course of delivering his momentous opinion, Chief Justice Taney proclaimed that a person of African descent—even if born free in a state that treated him as a full and equal citizen—was not and could never become a citizen of the United States.[58] In Chief Justice Taney's opinion, the language of the Declaration of Independence and the Constitution of the United States could not have intended to include the enslaved African race.[59] 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."[60] 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.[61]

Many scholars and commentators express puzzling confusion in their analysis of what the *Dred Scott* case means with respect to race. Part of the confusion stems from the fact that too often this question is framed in terms of the personal views or moral character of the Chief Justice and his associates.[62] The implication seems to be that if we could discover whether Chief Justice Taney was a racist, then we could know whether or not *Dred Scott* decision was an expression of racial bigotry or simply the faithful application of precedent by an honest jurist. This curious impulse to locate the racial implications of *Dred Scott* in the personal beliefs of one man, or even a few, or in the consequence of the decision for Dred Scott and his family misses the larger racial context.

There were numerous ways that the Court could have decided *Dred Scott* differently on the basis of precedent or finer legal distinctions, under many of which the *Dred Scott* decision would have been little more than a forgotten footnote in history. On the citizenship question, the Court could have decided that all free Blacks were citizens of the United States, that free Blacks were citizens of the United States in states that recognized Black citizenship, or that free born, free Blacks were citizens while slave born, free Blacks were not.[63]

57. FEHRENBACHER, *supra* note 22, at 72.

58. *Dred Scott*, 60 U.S. at 404.

59. *Id.* at 410.

60. *Id.* at 410–11.

61. *Id.* at 410.

62. *See* FEHRENBACHER, *supra* note 22, at 560. This impulse is consistent with the dominant understanding of racism as an individualistic phenomenon. *See* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008).

63. A variation of the latter formulation underpins one of the major holdings of the much praised dissenting opinion of Justice Curtis. Justice Curtis's much praised dissent would have freed the Scotts solely on the technical legal ground that the Court could only review the facts in the plea of abatement in determining the jurisdictional question of Dred Scott's citizenship.

In each case the consequence for the Scotts would have been the same: slavery.[64] The Court could have even avoided the citizenship question altogether by extending and applying the *Strader* doctrine,[65] which would have deferred to the state courts to decide the Scotts' status.[66] This, too, would have left the Scotts in slavery.[67]

Chief Justice Taney opinion ultimately turns less on the territory question that enflamed the sectional crisis, questions of interstate comity or even the heated issue of slavery itself. Chief Justice Taney's opinion, above all, turned on race. It inscribed a hard race line into the definition of American citizenship. Whether born free in a state where Blacks enjoyed state

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FEHRENBACHER, *supra* note 22, at 405–07. Since the plea itself established no facts inconsistent with Dred Scott being a United States citizen, he was entitled to bring suit in federal court. *Id.* at 407. For Justice Curtis, only free Blacks born in states recognizing them as citizens were also citizens of the United States. *Id*. at 407–08. Had the fact that Dred Scott was born in Virginia been included in the plea of abatement, then Justice Curtis's reasoning would have left the Scotts in slavery.

64. During oral argument before the Supreme Court, Sanford's attorney, Henry Geyer, carved a subtle distinction between free-born Blacks and slave-born Blacks. He argued that "citizens of the United States" as understood in Article Three, Section Two (the diverse-citizenship clause), of the Constitution were either born to that status (having been born in a free state) or acquired it by naturalization under federal law or treaty. Slaves who were later manumitted or discharged from bondage could not, therefore, acquire that status. *Id.* at 296.

65. Strader v. Graham, 51 U.S. (10 How.) 82 (1850). The Supreme Court dismissed a claim for freedom by slave musicians who had been taken into a free state for a brief trip. *Id* at 93. The jurisdictional question was basically whether the forum state had the right to apply its own law or whether it could be compelled to apply the law of another state. *Id*. at 94. The specific issue presented was whether the emancipatory effect of the free state's law would be enforced extraterritorially by federal power, or whether the slave in returning to the slaveholding state reverted totally to its jurisdiction. *Id.* at 93. Chief Justice Taney's opinion for the Court enshrined the principle of reversion, a jurisdictional principle which holds that upon return from a free state, the slave's status depends upon the law of the jurisdiction to which they returned. *See id*. at 94. The slaveholding state then has the option to decide whether slavery reattaches or not. The *Strader* decision of 1850 amounted to a form of judicial restraint. It would leave it to the individual states to determine whether return from a free state results in freedom or a return to slavery.

66. This seemed to be the initial formulation of the Court. Upon re-argument, however, the issues of territoriality and citizenship took additional significance, and the Justices felt compelled to rule on these issues based upon heightened public expectations. FEHRENBACHER, *supra* note 22, at 306.

67. Initially, the Missouri state courts had decided on behalf of the Scotts. By the time that the case had risen to the Missouri Supreme Court, the sectional discord had intensified, and the ideological and political composition of that tribunal abruptly shifted. In 1852, the Missouri Supreme Court issued a 2–1 opinion that Dred Scott was still a slave. Scott v. Emerson, 15 Mo. 576 (1852). Applying *Strader*, the decision of the state of Missouri would control. *Id.* at *5 (NEED PAGE NUMBER FROM HARD COPY). This was the substance of Justice Nelson's concurring opinion in *Dred Scott*. Scott v. Sandford, 60 U.S. (19 How.) 393, 457–68 (1856) (Nelson, J., concurring).

citizenship or under the whip of the plantation South, it made little difference. All Blacks, whether free or slave, stood on the same ground.[68] In short, *Dred Scott* is about whether Black people could ever become citizens and members of the political community.

Although the term "citizen" is Latin in origin,[69] the idea of citizenship first emerged in ancient Greece around 600–700 BCE.[70] The Greek conception of citizenship was understood as active membership of and participation in the body politic.[71] This conception of the citizen was preceded by and contingent upon the development of the *polis*, or the Greek city state's political community.[72] In every human society, people arrange themselves in groups organized by some common-unity, whether it is religious, ethnic, linguistic, geographic a combination thereof, or something else entirely. Athens was the first place that a *political* community emerged based on the principle of sharing in the operation of common affairs, as distinctive from other forms of community organization.[73]

Membership is the most important good that human beings distribute to one another in a community.[74] Communities of people extend rights and privileges to members that are not granted to non-members. In that way, membership informs all other distributive choices: "it determines with whom we make those choices, from whom we require obedience and collect taxes, [and] to whom we allocate goods and services."[75] It follows that membership is prior in importance even to freedom.[76] Without membership, no freedoms will be established, recognized, or protected.

To be part of a political community is not just a distributive matter, it is also a constitutive matter. The distribution of membership shapes *meaning* for both individuals and the community as a collective. The terms and boundaries of membership delimit how members mutually describe and perceive themselves and their community, an understanding that is shaped by those who are excluded. In that way, membership in a community distributes identity.

68. FEHRENBACHER, *supra* note 22, at 342.

69. PAUL BARRY CLARKE, CITIZENSHIP 4 (1994) (pointing out that the term *citizen* derives from the Latin word *civitas*).

70. *Id*. According to Clarke, the idea of the citizen was first expressed in Athens as a result of an economic crisis. Solon, the ruler of Athens, promulgated laws that expanded the political community as an answer to calls for land redistribution and an anti-aristocratic movement. *Id*. at 5–6. Orlando Patterson gives a much richer account, *see* ORLANDO PATTERSON, FREEDOM IN THE MAKING OF WESTERN CULTURE, 72–77 (1991).

71. CLARKE, *supra* note 69, at 4.

72. *Id*. at 4.

73. *See id*. at 5–6.

74. *Id*. at 6.

75. MICHAEL WALZER, SPHERES OF JUSTICE 31 (1983).

76. *See generally* john a. powell, *The Needs of Members in a Legitimate Democratic State*, 44 SANTA CLARA L. REV. 969 (2004).

To be denied membership in a community is to be denied personhood by the community. Even tribal societies have membership, and being an alien to that community is a dishonor associated with social death.[77] When faced with exile from the *polis* or death, Socrates took poison rather than be denied personhood.[78]

The rise of the nation-state created a new political space for personhood (and membership) rooted in citizenship. In modern nation-states, the principal way that the political community is constituted is through the nation unit. Members under this arrangement are given the status of "citizen."[79]

> When citizenship was granted universally, based upon liberal notions of the enlightenment, personhood became a presumption bestowed to all citizens at birth, and revoked when they failed to live up to that measure. Yet, for most of that time, personhood was bestowed to limited segments of the populace, those persons considered citizens.[80]

As the expositor of the Constitution, the Supreme Court plays a public and symbolic role in articulating and policing the meaning and content of citizenship. In *Dred Scott,* the Court was constituting or reaffirming a particular understanding of citizenship and Whiteness. By declaring that Black people could not be citizens of the United States, it constituted citizenship as a salient feature of Whiteness and vice versa. In a sense, Chief Justice Taney and his brethren were active participants in the social construction of White identity.[81] Being White meant that you could become part of the political community.

From the outset, American nationality contained a racial component. The Declaration of Independence's claim that "all men are created equal" was anything but self-evident.[82] The term "men" excluded women and slaves. The Naturalization Act of 1790 restricted U.S. citizenship to "free White

77. *See* PATTERSON, *supra* note 70, at 13 (discussing the Tupinamba of pre-European South America).

78. CLARKE, *supra* note 69, at 7.

79. As John Rawls describes: "Since ancient Greece, both in philosophy and in law, the concept of the person has been that of someone who can take part in, or play a role in, social life, and hence who can exercise and respect its various rights and duties." JOHN RAWLS, JUSTICE AS FAIRNESS 24 (Erin Kelly ed., 2001). This normative construction of personhood has been predominant in Western history for over two millennia.

80. john a. powell, *The Needs of Members in a Legitimate Democratic State*, 44 SANTA CLARA LAW REVIEW 969, 987 (2004).

81. Although we recognize that the categories "White" and "Black" are socially constructed, we pay little attention as to how they are constructed. The notion that we sort or distribute benefits and burdens according to natural categories is demonstrably false. We create and recreate those identities. Here, Chief Justice Taney was an active participant in the construction of Whiteness.

82. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

persons."[83] For eight decades, only persons that were White could be naturalized as American citizens. In the final decades of the nineteenth century and early decades of the twentieth century, there were many court cases moving the boundary of Whiteness with ramifications for the political community.[84]

One way to understand *Dred Scott* is that it is about membership in our imagined community.[85] More particularly, could free Blacks or slaves be considered part of this community? Slavery helped shape the identity and sense of self of all Americans by "render[ing] blacks all but invisible to those imagining the American community."[86] Segregation under Jim Crow and later embraced in *Plessy* was an extension of the same imagining. The division of membership, of structuring the national community along racial lines is a legacy we struggle with today. One only need reflect on our hyper-segregated and highly impoverished urban areas and coincident White suburban enclaves to see that there is a sense that these communities do not share a common unity. Residential segregation curtails the experience of community for people of different races, and is perhaps the most important factor contributing to racial inequality today. The Civil Rights Movement is essentially an effort to make a practical and legal claim about membership and the rights that attach to membership.

When Abraham Lincoln penned the famous words, "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal," [87]

83. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

84. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (affirming the "ancient and fundamental rule of citizenship by birth within the territory" as a constitutional mandate); Roff v. Burney, 168 U.S. 218, 223 (1897) (holding that federal jurisdiction was proper over a United States citizen's claims against an Indian tribal member when the member's nation refused to recognize him and declined jurisdiction); United States v. Balsara, 180 F. 694, 696 (2d Cir. 1910) (granting naturalization to national from India when the language of the statute referred to persons of the "White race," as distinguished from the "black, red, yellow, or brown races"); *In re* Mudarri, 176 F. 465, 466 (D. Mass. 1910) (ruling Syrian national was a member of the "White race" for naturalization purposes); *In re* Ellis, 179 F. 1002, 1004 (D. Or. 1910) (holding the same for Turkish national); *In re* Halladjian, 174 F. 834 (D. Mass. 1909) (holding the same for Armenian national); Jennings v. Webb, 8 App. D.C. 43, 53 (App. D.C. 1896) (finding that a son of a former slave was entitled to the rights of inheritance passing among citizens).

85. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). The idea of communities as imagined originates from Benedict Anderson's anthropological understanding of nationalism, where a nation "is an imagined community—and imagined as both inherently limited and sovereign." BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (1991).

86. ERIC FONER, THE STORY OF AMERICAN FREEDOM 38 (1998).

87. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863).

Lincoln was harkening back to ideals contained in the Declaration of Independence, not the Constitution. President Lincoln's Gettysburg Address implicitly criticized the Constitution because its incorporation of slavery contradicted the commitment to liberty and equality.[88] According to Chief Justice Taney, the terms "citizen" and "people" were interchangeable.[89] If Lincoln was to realize the claim to equality announced in the Declaration, it would mean nothing less than a reconstitution of the "people" in, "We The People."[90] The Civil War by itself could not accomplish this. Lincoln was calling for a new Constitution.

II. A NEW BIRTH OF FREEDOM

Although the events of the Civil War brought an end to slavery as a legalized, social relation, Taney's racial theory of citizenship remained undisturbed as legal precedent. The first post-war Congress took aim at *Dred Scott* by 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 . . . .[91]

88. It was not simply that the Constitution as expounded upon by Chief Justice Taney protected slavery and the slave interest in the sectional conflict; many provisions in the original document were pro-slavery.

> Although the word slavery does not appear in the Constitution, many provisions were included for the purpose of protecting it. The divide over slavery and the Constitution created a structure in which the states became the primary political units and retained wide authority over internal matters. As such, the federal structure, and the limited federal government erected by the Constitution, "insulated slavery in the states from outside interference . . . ." Article I temporarily barred Congress from acting to end the importation of slaves. Article IV, section 2 placed an affirmative duty on free states to return fugitive slaves to their place of service, drawing even those states that opposed slavery into the control stratum. Article V prohibited any Amendment seeking to reverse the bargain that protected the slave trade until 1808. Most importantly, the Constitution's Three-Fifth's Clause ensured that slaveholders led the process of nation building until the election of Lincoln.
>
> john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 363–64 (2007) (internal citations omitted).

89. *Id.* at 404.

90. CLARKE, *supra* note 69, at 20.

91. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1991)).

And although, for one of the first instances in U.S. history, on April 9, 1866, the United States Congress overrode President Johnson's veto, lingering doubts over the constitutionality of the Civil Rights Act spurred the two-thirds majority in Congress to provide an incontrovertible constitutional foundation.[92] Two months later, Congress opened its proposed Fourteenth Amendment with unmistakably anti-Taney language: "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."[93] It was now absolutely clear that anyone born in the United States was a citizen thereof. Thus, the Fourteenth Amendment overruled a key part of *Dred Scott* and left no constitutional doubt about it.

The Fourteenth Amendment did more than ensure that former slaves or descendants of slaves enjoyed the status of national citizenship; it unequivocally rejected the theory of national citizenship as derivative of state citizenship.[94] The Fourteenth Amendment not only granted and defined national citizenship, but it also defined state citizenship and the conditions under which it was acquired. The greatly diminished agency of states in deciding for themselves who is a citizen is significant. No state could henceforth bar any American citizen from choosing to become a state citizen.[95] A visitor from another state could become a citizen of another state by simply moving there, irrespective of what other residents of that state may think.

If citizenship is the primary unit of membership in a democratic political community and if states no longer have a say in deciding who is a member and who is not, then it is more than simply citizenship that is redefined by the Fourteenth Amendment; the relationship between the states and the federal government is restructured as well.[96] The following passage from the abstract

92. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 381 (2005).

93. U.S. CONST. amend. XIV, § 1.

94. It is critical that we not mislead here. The notion that state citizenship was primary and that national citizenship was derivative was not a doctrine advanced by Chief Justice Taney. According to Taney, national citizenship was created by the Constitution at the time of its framing. Although the definition of state and national citizenship and the relationship between the two had not come before the Court until *Dred Scott*, there was a tendency to regard state citizenship as primary, even in Northern circles. *See supra* note 56 and accompanying text. Even Justice Curtis, a son of New England, assumed this view in his often praised dissent. *See infra* note 136 and accompanying text. It was not simply that Justice Curtis's dissent was praised for its outcome, but it was lauded for the correctness of its legal determinations. This demonstrates, we think, that the view of states being primary was not a doctrine limited to the South, but with notable exceptions, generally assumed.

95. *Id.*

96. CHARLES L. BLACK JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 24 (1997).

> If, being such a citizen of the United States, you live in Texas, then the *national* law of this Amendment ordains that you are a citizen of Texas; Texas has nothing to say about

summarizing the argument of Mr. John A. Campbell, and Mr. J.Q.A. Fellows on behalf of the plaintiffs in error in the *Slaughterhouse Cases*, the first Supreme Court case to interpret the Fourteenth Amendment, describes the transformation with an eloquence that cannot be justly paraphrased:

> It had been maintained from the origin of the Constitution . . . that the State was the highest political organization in the United States; that through the consent of the separate States the Union had been formed for limited purposes; that there was no social union except by and through the States, and that in extreme cases the several States might cancel the obligations to the Federal government and reclaim the allegiance and fidelity of its members. Such were the doctrines of Mr. Calhoun, and of others; both those who preceded and those who have followed him.
>
> . . . .
>
> . . . The doctrine of the "States-Rights party," led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States, except *sub modo* and by the permission of the States. According to their theory the United States had no integral existence except as an incomplete combination among several integers. The fourteenth amendment struck at, and forever destroyed, all such doctrines. It seems to have been made under an apprehension of a destructive faculty in the State governments. It consolidated the several "integers" into a consistent whole. Were there Brahmans in Massachusetts, "the chief of all creatures, and with the universe held in charge for them," and Soudras in Pennsylvania, "who simply had life through the benevolence of the other," this amendment places them on the same footing. By it the national principle has received an indefinite enlargement. The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the confederate features of the government have been obliterated. The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority; that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all. Thus, as the great personal rights of each and every person were established and guarded, a

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> the matter. Not 10%, not 1%, just nothing. . . . [T]he right to be and to call yourself a citizen of any State is not a right conferred by that State, but a right bindingly ordained as a matter of *national* constitutional law. . . .
>
> This denial to each of the States of the right to choose its own citizens might be looked on now as just another nail in the coffin of the theory that our States are "sovereign."

Id.

> reasonable confidence that there would be good government might seem to be justified.[97]

The Post-Civil War Reconstruction Amendments reordered and remade our Constitution. To refer to this grand trilogy as "Amendments" may imply a change too modest to describe their function.[98] As Jefferson privately feared toward the end of his life, the experiment begun at the Constitutional Convention of 1786 came crashing down.[99] The Constitution of 1787 was a constitutional order of state primacy, derivative national citizenship and limited federal government. The Constitution of 1870 was a constitutional order of national primacy with derivative state citizenship and a greatly expanded role for the federal government, drawing into its protection fundamental liberties and immunities from state interference. The

97. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 51–53 (1872).

98. Professor Akhil Reed Amar reiterates this point:

> The naked constitutional text misleads: A casual reader encounters a Thirteenth Amendment whose words seem to follow smoothly after the first seven Articles and the first twelve amendments, in one continuous constitutional tradition linking the Founders to their twenty-first -century posterity. What the bare text does now show is the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders' Constitution *failed* in 1861–65.

AMAR, *supra* note 92, at 360.

> The first eleven amendments to the Constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the States, which existed when the Constitution was adopted. The first ten were proposed in 1789 by the first Congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the President and Vice-President. It neither increased nor diminished the power of the General Government, and may be said in that respect to occupy neutral ground. No further amendments were made until 1865, a period of more than 60 years. The thirteenth amendment was proposed by Congress on the 1st of February, 1865, the fourteenth on the 16th of June, 1866, and the fifteenth on the 27th of February, 1869. These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. Fairly construed amendments may be said to rise to the dignity of a new Magna Charta.

Slaughterhouse, 83 U.S. at 124 (Swayne, J., dissenting) (citations omitted).

99. Thomas Jefferson perhaps represents the sentiment of ambivalence that haunted Southern statesmen of the revolutionary generation. Jefferson despised the institution of slavery, but his livelihood depended upon its continuation. WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES 166 (1974). In his denunciation of slavery, Jefferson wrote "Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 163 (William Peden, ed., 1955). By the time of the Missouri Compromise, Jefferson had described the sectional crisis as a "fire bell in the night." FEHRENBACHER, *supra* note 22, at 111.

Reconstruction Amendments restructured and reconfigured both in fact and in spirit the relationship between the federal government and the states.

The Constitution, fastened with the Fourteenth Amendment, does more than strengthen the national hand vis-à-vis the states; it was framed for a new people. The Civil War and the Civil War Amendments gave birth to a new freedom but also a new political community. In this sense, the Fourteenth Amendment does far more than simply amend the Constitution; it is a new act of constituting by redefining the content of phrase "We The People" in the preamble in expansive national terms and inclusively without regard to race.[100]

But granting citizenship as a matter of law and bestowing it as a political fact is not necessarily the same thing. Indisputably, Blacks could no longer be denied access to federal courts under the Article III, section 2, diversity of citizenship clause. But to be free and Black in antebellum America had actually meant only enjoying a partial freedom by White standards.[101] Post-bellum declarations of personhood and formal, legal citizenship for freed slaves would ring false if they were not enforced as a matter of social and political practice.

According to Chief Justice Taney in *Dred Scott*, the reason that Blacks were not part of the political community was not simply a function of law, it was also a function of political culture and social norms. Chief Justice Taney reasoned that the terms "people of the United States" and "citizens," terms that he described as "synonymous," did not encompass persons of African descent because they were not members of the "political body" who formed the "sovereignty" at the moment of constitutional framing.[102] Justice Taney's legal conclusion turns upon an investigation into the social relations between the races at the time of the founding. Although he canvasses a raft of legal instruments, including a probing inquiry into the meaning of the Declaration of Independence's assertion that "All men are created equal,"[103] an inspection into the terms of colonial anti-miscegenation laws,[104] the language of the Constitution itself with respect to the enslaved race,[105] the laws of the states after the Revolution but before the framing of the Constitution,[106] and further

100. Both elements of are significant. "We The People" now clearly referred to more than the people of the various states, it unequivocally referred to the people of the United States as a single, political unit. "We The People" had also been purged, in law, of the race line, the contradiction between the founding ideals and the long-standing racial order. The national unity inspired by the war effort—Black soldiering and the moral imperatives that guided that war—undoubtedly made such an imagined community easier to fathom.

101. FEHRENBACHER, *supra* note 22, at 581.

102. Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).

103. *Id*. at 410.

104. *Id*. at 408–09.

105. *Id*. at 411.

106. *Id*. at 412–16.

congressional acts,[107] the meaning he imputes to these instruments depends upon their particular social context:

> [Persons of African descent] 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. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[108]

Ultimately, for Chief Justice Taney, persons of African descent 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."[109] Racial slavery imputed a stigma of "deepest degradation . . . fixed upon the whole race," free or slave.[110] In short, Taney argued that social norms themselves were a bar to becoming a part of the political community. The reasoning of Chief Justice Taney's opinion in *Dred Scott* is rooted in the philosophical and social dimensions of citizenship. If Congress were to reverse this opinion in a meaningful way, it would require more than a grant of 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*.[111]

And thus, with the substantive guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments and the enforcement provisions therein, Congress sought to overturn *Dred Scott* not just in law, but in fact.[112] The Civil Rights Acts of 1866[113] and 1875[114] were clear that Congress was creating

107. *Dred Scott*, 60 U.S. at 418–21.

108. *Id*. at 407

109. *Id.*

110. *Id*. at 409.

111. The Civil Rights Cases, 109 U.S. 3, 34–37 (1883) (Harlan, J., dissenting). 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. *Id.*

112. These Amendments not only prohibited slavery, but extended equal protection, due process, and a right to vote.

113. Indeed, the Civil Rights Act of 1866 protected the right to "enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. § 1982).

asymmetrical provisions, laws that would reach beyond a narrow view of public space. In fact, the President vetoed the former, in part, because he said it went too far, reaching private conduct as well as public action.[115] Eventually, the Supreme Court overturned the latter for the same reason.[116] The impetus behind these measures was that the restructuring of society was not simply to occur in the public space conceived narrowly, but that granting citizenship and membership in *fact* was to spur change in our social culture. Accordingly, the Reconstruction program was remarkable for its breadth, a "blueprint for a social revolution."[117] If there were doubts whether the Reconstruction Amendments extended only civil rights, those doubts evaporated with the passage of the Fifteenth Amendment.[118] Given the multiplicity of constitutional Amendments and congressional activity taking aim at Taney's opinion, it should not be surprising that *Dred Scott* has been called "the most frequently overturned decision in history."[119] Even today that work remains unfinished. In the 1870s, this project was stillborn.

The unfinished and abortive program of Reconstruction that ended with the Tilden Hayes compromise was a license for the Court to breathe "new life into Taney's racial doctrine."[120] A series of decisions in the 1870s Waite Court through the end of the century systematically reversed or undermined the Reconstruction program.[121] Three decisions in particular stand out as major reversals to the architecture of the Reconstruction Constitution. The most infamous of these judgments was the *Plessy v. Ferguson* holding that the doctrine of "separate but equal" protecting a racial caste system was consistent with Equal Protection Clause of the Fourteenth Amendment.[122] That decision, however, was the culmination of decades of retrogression. In 1883, the Court overturned the Civil Rights Act of 1875 for reaching into the public sphere,

114. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. § 1982); Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

115. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863–1877 113 (1990). "His veto message repudiated both the specific terms of the Civil Rights Bill and its underlying principle. The assertion of national power to protect blacks' civil rights, he insisted, 'violated our experience as a people.' . . . Johnson even invoked the specter of racial intermarriage as the logical consequence of Congressional policy." *Id.*

116. *See infra* note 124 and accompanying text.

117. FEHRENBACHER, *supra* note 22, at 581.

118. In 1869, Congress approved the Fifteenth Amendment protecting suffrage for Black men. U.S. CONST. amend. XV, § 1.

119. FEHRENBACHER, *supra* note 22, at 580 (quoting RACE, RACISM, AND AMERICAN LAW 21 (Derrick A. Bell, Jr., ed., 1973)).

120. *Id.* at 582.

121. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872); United States v. Harris, 106 U.S. 629 (1883); The Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896).

122. *See Plessy*, 163 U.S. at 544.

beyond the domain of state action.[123] The deep restructuring envisioned by the Radical Republicans of the Reconstruction Era was being undermined and systematically reversed. The grant of citizenship was being hollowed out. However, the arguably most destructive decision had come earlier still.

The overworked Equal Protection Clause dominates the jurisprudence of the Fourteenth Amendment, and yet, in view of the architects of the Amendment, it is arguably third in importance. The most important element of the Fourteenth Amendment was the grant of national citizenship. The second sentence then lays out substantive prohibitions on state action:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [124]

If the order of place signals relative importance, then the Privileges and Immunities Clause is the most important protection afforded under the Fourteenth Amendment. It is also the only protection that explicitly inheres to citizens and citizens alone—a fact that could not have escaped the Framers who bestowed birthright citizenship only a sentence beforehand. The reason this pivotal phrase escapes the notice of most lawyers and many law students is that the Privileges or Immunities Clause has been relegated to the constitutional dustbin, eviscerated in 1877 by the Supreme Court in the *Slaughterhouse Cases*.[125] Because of its far reaching implications *Slaughterhouse* has been described as the worst case in U.S. history. [126]

In *Slaughterhouse*, the Supreme Court first took up the task of interpreting these words. The plaintiffs claimed that a Louisiana statute regulating the operation of slaughterhouses violated the privileges or immunities of national citizenship.[127] In rejecting that claim, the Court set out the following analytical framework: Section 1 of the Fourteenth Amendment distinguishes between national and state citizenship.[128] The Privileges or Immunities Clause only protects the privileges and immunities that accrue to national citizenship.[129] The question then became: What might those privileges and immunities be?

123. *The Civil Rights Cases*, 109 U.S. at 14. Section 1 of the Civil Rights Act reads: "That all persons within the jurisidiction of the . . . ." Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by The Civil Rights Cases*, 109 U.S. at 3.

124. U.S. CONST. amend. XIV, § 1.

125. 83 U.S. at 51–55.

126. BLACK, *supra* note 96, at 55 (1997).

127. *Slaughterhouse*, 83 U.S. at 43–44.

128. *Id*. at 72, 74.

129. *Id*. at 74 (holding "it is only [the privileges and immunities of the citizen of the United States] which are placed . . . under the protection of the Federal Constitution, and [the privileges and immunities of the citizen of the State] are not intended to have any additional protection by . . . the amendment").

Since that question had not yet been determined, the Court began by examining antebellum case law which previously defined the privileges and immunities of *state* citizenship. The Court found these to be basically civil rights of free men.[130] The Court then concluded that the Privileges or Immunities Clause could not have been intended to transfer protection of these rights to the federal government because it would be "so great a departure from the spirit and structure of the institutions."[131] To assuage fears that in so holding the Court would render the clause meaningless, the Court went onto to enumerate those things that the clause did protect.[132] The Court listed those things that were already protected by the Constitution before the Fourteenth Amendment or that were necessary or incident to national citizenship.[133] Thus, the Court ignored the radical transfer that the Fourteenth Amendment undertook and obliterated the substantive content of the privileges or immunities of national citizenship. As Justice Field explained in dissent, "[i]f this inhibition . . . refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[134] The Court not only rendered the

130. *Id.* at 76.

> "The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Id. (citing Corfield v. Coryell, 4 Wash. Cir. Ct. 371 (1823)).

131. *Id.* at 78.

132. *Slaughterhouse*, 83 U.S. at 79–81.

133. Justice Miller lists: (1) the right to come to the seat of the U.S. government to assert any claim he may have upon that government; (2) the right of free access to its seaports, subtreasuries, land offices, and courts of justice of the United States; (3) the right to demand the care and protection of the federal government over his life, liberty and property when on high seas or within jurisdiction of a foreign government; (4) the right to peaceably assemble and petition for redress of grievances, the privilege of writ of habeas corpus; and (5) the right of a citizen of the United States to, by his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as any other citizens of that state.

Id. at 79–80. Even if those rights enumerated by Justice Miller are not exclusive or were not previously protected, they are certainly not of the character that would seem to excite such energy as to motivate the crafting and passage of such an important Amendment.

134. *Id*. at 96 (Field, J., dissenting).

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.

The notion, then, that the Equal Protection Clause was intended to perform most of the Reconstruction agenda of the Fourteenth Amendment is simply wrong. 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: It drew those privileges and immunities that had previously been the domain of state citizenship into the sphere of national citizenship.

It is not just Chief Justice Taney's racialist vision that was re-inscribed by the Court in reversing the work of Reconstruction, though this vision has now been partially repudiated as a consequence of *Brown*. Chief Justice Taney's understanding of dual citizenship was re-inscribed by Justice Miller in *Slaughterhouse,* and remains quite lively today.[135] It recognizes federal citizenship while rendering its content empty. Chief Justice Taney's concomitant constitutional *modus operandi*, protecting the worst in a nationalist model, has been revived as well: It deploys federal grounds to prevent state and local governments from addressing or remedying racial harms.

Justice Curtis, in his dissent in *Dred Scott*, was the constitutional conservative. In his view, national citizenship derived from state citizenship.[136] If a state recognized Black citizenship, then it followed that he or she was also a citizen of the United States. In contrast, Chief Justice Taney articulated a much broader view of national citizenship in *Dred Scott*, an understanding of the Constitution that was anything but deferential to local government. His ruling barred local governments in the territories from deciding for themselves whether slavery could be prohibited.[137] He also took away authority of states to make free Blacks citizens and thereby national citizens. A state, even a slave state, could not make a person of African descent into a citizen of the United States. To see the handiwork of this mode of constitutional operation today, one need look no further than the plurality opinion in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, in which the Court uses the Equal Protection Clause as a bar to efforts by local school boards to address racial isolation.[138]

In terms of our jurisprudence, in many respects we have reverted to a pre-Civil War constitutional understanding and selectively chosen elements of the

135. FEHRENBACHER, *supra* note 22, at 583.

136. Scott v. Sandford, 60 U.S. (19 How.) 393, 580–81 (1856) (Curtis, J., dissenting).

137. *See id.* at 452–53 (opinion of the Court).

138. *See* Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738, 2767 (2007); *infra* Part III.

Fourteenth Amendment for enforcement. With the exception of the reversal of *Plessy*, the conclusions of *Slaughterhouse* and the *Civil Rights Cases* remain substantially intact. As a consequence, our view of the Fourteenth Amendment remains unjustifiably narrow.[139] Americans of all political persuasions, and most critically legal advocates, have not fully grasped the fact that we have two imperfectly realized Constitutions: The pre-Civil War Constitution, where certainly among other things federalism is robustly embraced, and a post-Civil War Constitution that gives us, if anything, a different form of federalism and a different notion of citizenship. The Reconstruction Amendments sought to remake the Constitution into a new document for a new people. The slippage that followed the Reconstruction Amendments, especially following the end of Reconstruction and culminating in *Plessy*, systematically stripped their content and undermined their force. Americans inchoately recognize the tension—one that is often framed in terms of federalism concerns—and struggle to reconcile a strong, patriotic national identity with a politics that mythologizes states rights and a limited federal government.

III. NEUTRAL PRINCIPLES

The discordant voices on both sides of the voluntary integration cases in the Seattle and Jefferson County School Districts illustrate the division engendered by the post-Reconstruction Supreme Court's interpretive legacy of the Fourteenth Amendment set against the clear aspiration of its framers.[140] The Court struck down limited race-conscious integration plans as a violation of the Equal Protection Clause of the Fourteenth Amendment because of the explicit use of racial classifications in student assignment.[141] Chief Justice Roberts, writing for the plurality, distinguishes between segregation that is a product of state action and segregation that may be the product of residential housing patterns.[142] In the Chief Justice's view, it is only state-enforced segregation that triggers the constitutional injury that permits the use of racial classifications as a remedy.[143] Furthermore, Justice Thomas, in his concurring opinion, describes *de facto* segregation as being "natural,"[144] which can also result from any number of innocent private decisions, including voluntary

139. Although the Equal Protection Clause is one of the most litigated sections of the Constitution, it was used more frequently in the late nineteenth century to protect capital interests rather than descendants of slaves. The Section 2 apportionment provision of the Fifteenth Amendment has never seen use.

140. *See Parents Involved*, 127 S. Ct. at 2746–50.

141. *See id.*

142. *Id*. at 2761.

143. *Id*.

144. *Id.* at 2773.

housing choices.[145] Consider, in contrast, the language of Justice Breyer's impassioned dissent:

> [*Brown*] was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how *we actually live*.[146]

In *Dred Scott*, Chief Justice Taney reasoned that Blacks were not and could never be citizens because they were not considered worthy, even when free, by the dominant race. Overturning Chief Justice Taney's holding that Blacks were not citizens in law was not enough if the social relations that underpinned the lived experience of that legal status did not follow with it. Justice Breyer perceives this distinction when he writes that citizenship must be more than a matter of "legal principle"; it must speak to us in terms of how "we actually live."[147] Although the Reconstruction Congress attempted to enforce this vision with robust proposals reaching into social life, the Court issued a series of reversals, most prominently in the trio of cases described in Part II.[148] At the very moment that citizenship was now drawn into the federal sphere, it was suddenly vacuous.[149] The Court regarded congressional attempts to remake social relations as going beyond the bounds of congressional authority, reaching beyond state action and into the private sphere.[150]

This is also, therefore, a debate over the validity and limits of individual action and private choice. The plurality refuses to prioritize the interest in creating integrated living and educational environments over the right of White parents to segregate their children. The dissenting Justices, and Justice Kennedy in concurrence, would recognize this interest as sufficiently important to justify racial classifications, so long as they are narrowly tailored.[151] This debate over individual choice is not new. The legitimacy of *Brown* was interposed in precisely those terms.

Herbert Wechsler's famous article on "neutral principles" argued that the *Brown* decision could not be grounded in "neutral principles" because there

145. *Parents Involved*, 127 S. Ct. at 2769.

146. *Id.* at 2836 (Breyer, J., dissenting) (emphasis added).

147. *Id.*

148. *See supra* note 121 and accompanying text.

149. This was a consequence of the *Slaughterhouse* decision. *See supra* Part II, notes 74, 92–96, and accompanying text.

150. This is the message of the *Civil Rights Cases*. *See supra* note 116 and accompanying text.

151. *Parents Involved*, 127 S. Ct 2800 (Breyer, J., dissenting); *Id*. at 2794–97 (Kennedy, J., concurring).

was no principled basis for choosing African American associational rights to an integrated education over the right of Southern Whites to not associate with African Americans.[152] He framed the question in terms of two injuries: the forced segregation of Blacks and the forced integration of Whites. His critique of *Brown* went beyond a critique of the famous footnote 11 doll experiment, which demonstrated the psychological harms of segregation.[153] If you could prove to Wechsler that Blacks were injured by segregation, that evidence would not have changed his conclusion. Even if you could validate that injury, there remains another injury consequent from forced integration; and it is not clear how the Court may choose in a neutral way to prioritize, as a constitutional matter, one injury over another.

This is the wrong debate because it is the wrong question. The Reconstruction Amendments were not designed to be neutral. They were intended to carry certain values about citizenship, membership, and political identity in the republic. The question of neutral principles is also wrong as a strict jurisprudential matter. Herbert Wechsler's critique was framed as a First Amendment associational question.[154] That is a mischaracterization of *Brown*. *Brown* was part of the overthrow of an unequal caste system. The search for neutral principles assumes symmetry in the relations between Blacks and Whites. The violence in *Cooper* belies that notion. While equality as a principle may be value neutral, the Fourteenth Amendment is not.

The substantive core of the Fourteenth Amendment is a guarantee of equal citizenship to former slaves and the descendant's of slaves. The ancient Greeks understood that the political community was formed to share in the "good life."[155] Equality in the political community meant "the opportunity for full participation as a respected member of the community."[156] At least two forms of equality were necessary to achieve this end. Arithmetic equality, "that which is the same and equal in number or dimension," is context free, formal equality.[157] Arithmetic equality is recognizable in the principle, "one person, one vote." Geometric equality, "when the first stands in the same relation to the second as the second to the third," accounts for differing positions. Where people are differently situated, it would be unjust to treat them the same. Geometric equality is contextual and results in the greatest good. Aristotle, who discussed the two kinds of equality at greatest length,

152. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959).

153. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 n.11 (1954).

154. *See* Wechsler, *supra* note 152, at 29.

155. *See* Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 384 (1994).

156. *Id.*

157. *Id.* at 419–21.

emphasized the need for both.[158] However, when we talk about equality today, and certainly when the Roberts Court talks about equality, there is an implicit rejection of the principle of contextual equality, saying that context does not bear on the constitutional principle.[159] Thus, Chief Justice Roberts writes that "the way to stop discrimination . . . is to stop discriminating"[160] implying that the forced segregation of Linda Brown is equivalent to the forced integration of Joshua McDonald.

The Reconstruction Amendments were deeply contextual. They sought to bring those who had been slaves into the political community. The Civil Rights Act of 1866 speaks explicitly of extending the "same right[s] . . . as [are] enjoyed by white citizens."[161] The view in the Reconstruction Congress was that there was an asymmetry between Whites and non-Whites. Although only one of the three Reconstruction Amendments specifically references persons of African descent through the mention of race and condition of prior servitude, the Supreme Court in its earliest review of those Amendments recognized a "unity of purpose" behind them:[162]

> [I]n the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[163]

Under the light of the Fourteenth Amendment, the question of individual choice, of "innocent private decisions, including voluntary housing choices,"[164] may be best understood as a debate over the right to secede from communal arrangements. The "secessionist impulse" has considerable pedigree in our political tradition.[165] The founding act of the nation, in declaring independence

158. *Id*. at 421.

159. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738, 2767–68 (2007). The Court ignored at least *some* contextual differences, for example, the Chief Justice equated the assignment of school children here with the system of Jim Crow racial segregation.

160. *Id*. at 2768.

161. 42 U.S.C. § 1981(a) (1991).

162. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 67 (1872).

163. *Id*. at 71.

164. *Parents Involved*, 127 S. Ct. at 2769.

165. Robert A. Burt, *Constitutional Law and Teaching of the Parables*, 93 YALE L.J. 455, 458 (1984).

from Great Britain, endorsed this proposition with its opening volley.[166] The Civil War again posed the question of whether some members of a political community could free themselves from that arrangement by seceding. The outcome of the Civil War resolved this question in favor of President Lincoln's theory of national union and against the secessionists.[167] In that sense, the Civil War was a war to save the Union by denying the right to leave as an "act of autonomous choice."[168] The Civil War marked the repudiation of the secessionist principle, and the Civil War Amendments gave federal courts a central role in enforcing the terms of that repudiation.[169]

Plessy renounced that principle and permitted people who were supposed to be joined together in community to break those relations through a doctrine of "separate but equal."[170] It was then that Blacks and Whites ate at different restaurants, drank from different fountains, traveled in different ends of a bus, lived in different neighborhoods, were prohibited from marrying, and attended different schools. *Brown* re-imposed "communal bonds" between Whites and Blacks.[171] When Whites resisted this arrangement, they did so in primarily two ways. First, they sought to use freedom-of-choice remedies that would ostensibly remove the state actor from the equation. Secondly, they withdrew from the public sphere. Rather than integrate, many Southern school boards shuttered up. Public pools closed. Public space shrank. Finally, Southerners argued that the Supreme Court could not tell state actors what to do. In *Cooper*, the Supreme Court emphatically rejected both assertions.[172] It unequivocally stated that the supremacy of the Constitution over all state action was beyond question. But it demanded obedience not simply from the state, but also from the defiant White community,

De facto segregation is a continuation of the fight over claim for the right to secede. In *Cooper*, the Supreme Court rejected the right of the White community to secede from communal relationship with Blacks through freedom-of-choice plans. Since the early 1970s, the Supreme Court has moved away from that position. It has rejected the claim of integration over the right of Whites to be free from integration plans first in *Milliken* and up through

166. "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . . ." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

167. Burt, *supra* note 165, at 459 n.12.

168. *Id*. at 458–59.

169. *Id*. at 464.

170. *Id.* at 459.

171. *Id.* at 457.

172. Cooper v. Aaron, 358 U.S. 1, 18–19 (1958).

Parents Involved.[173] In *Milliken v. Bradley*, the Supreme Court reversed a ruling that had ordered cross-district busing with suburban schools to remedy proven racial discrimination by the Detroit public school district.[174] The lower court based its decision on the fact that Detroit could not desegregate without an inter-district remedy, and the fact that Whites were complicit in inner-city school segregation by moving to the suburbs mainly to avoid sending their children to Detroit schools.[175] The Supreme Court ruled that an inter-district remedy was improper in the absence of evidence of *de jure* segregation or a finding that the district boundaries were drawn with the purpose of fostering segregation.[176] Thus, the case became a political redline, slowing momentum toward school integration and sanctioning White flight, by putting suburbs on notice that they could develop local school systems with little fear that they would have to participate in integration plans. In *Parents Involved*, the Court raised the bar for school districts attempting to retain and foster integration within their district by holding that explicit racial classifications must be used only as a last resort in the absence of *de jure* segregation.[177] This decision further insulates *de facto* patterns of neighborhood segregation from the tampering of local government. The framing of the question as *de facto* segregation versus *de jure* segregation simply draws the line where the Court will side one way or another in a seemingly neutral way, perhaps in answer to Herbert Wechsler.

IV. WHAT DEMOCRACY REQUIRES

Five decades since *Brown* and *Cooper*, segregation and racial isolation remain pronounced throughout the country and in many instances are worsening. In most metropolitan regions, few truly integrated communities can be found.[178] In regions with large African American populations, segregation is even more extreme.[179] Residential segregation (as measured by the dissimilarity index) declined by more than twelve points between 1980 and 2000 in regions that were less than 5% African American, but this decline was only six points in regions that were more than 20% African American.[180]

173. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738, 2759 (2007) (citing Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971)).

174. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974).

175. *Id*. at 725.

176. *Id*. at 745.

177. *See Parents Involved*, 127 S. Ct. at 2773.

178. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 17–18 (2004).

179. *See id.*; *see also* JOHN LOGAN, ETHNIC DIVERSITY GROWS: NEIGHBORHOOD INTEGRATION LAGS BEHIND 4 (2001), http://mumford1.dyndns.org/cen2000/report.html.

180. LOGAN, *supra* note 179.

Although neighborhood segregation declined slightly in the 1990s, school segregation increased. More Black students attended segregated schools in 2003 than in 1988.[181] School resegregation for Blacks and Latinos has been a trend in nearly every large school district since the 1980s.[182] In some ways it is almost as high as apartheid in South Africa.[183] Almost 2.4 million students, or about one in six Black and Latino students, attend a school in which the student body is 99–100% students of color.[184] White students are the most isolated group of students in the United States.[185] White students, on average, attend a school in which only one in five students are of another race although they make up less than 60% of the school age population.[186] Following a series of court decisions between 1991 and 1995, school districts across the nation have been released from court-ordered desegregation mandates even when resegregation predictably follows.[187] Not only does the Fourteenth Amendment no longer compel integration, but it has been usurped to curtail voluntary efforts to maintain integrated schools.

In light of these setbacks, a question arises, often in the context of all Black or historically Black schools or all women's schools, about whether students might perform better in those schools. This question complicates the discussion and suggests that perhaps *de facto* segregation, under the right conditions and with proper support, is not such a harmful arrangement.[188]

181. ANURMINA BHARGAVA, ERICA FRANKENBERG & CHINH Q. LE, STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION, A MANUAL FOR PARENTS, EDUCATORS & ADVOCATES 12 (2008).

182. *Id.*

183. See the dissimilarity index values in A.J. Christopher, *Urban Segregation in Post-*apartheid *South Africa*, 38 URBAN STUDIES 449, 452 (2001). *See also* Barbara Reskin, *The Discrimination System: Race and Public Policy*, slide 4 (Jan. 3, 2004), http://faculty.washington.edu/reskin/; Initiative in Spatial Structures in the Social Sciences, Brown University & Lewis Mumford Center, University of Albany, American Communities Project, Metropolitan Racial and Ethnic Change—Census 2000, http://www.s4.brown.edu/cen2000/data.html (last visited Feb. 21, 2008).

184. BHARGAVA ET AL., *supra* note 181, at 11.

185. *Id.*

186. *Id.*.

187. *Id*. at 7.

188. Justice Thomas, in his concurrence in *Parents Involved*, made this point:

> Add to the inconclusive social science the fact of black achievement in "racially isolated" environments. *See* T. SOWELL, EDUCATION: ASSUMPTIONS VERSUS HISTORY 7–38 (1986). Before *Brown,* the most prominent example of an exemplary black school was Dunbar High School. *Id.* at 29 ("[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan"). Dunbar is by no means an isolated example. *See id.*, at 10–32 (discussing other successful black schools); WALKER, *Can Institutions Care? Evidence from the Segregated Schooling of African American Children*, in BEYOND DESEGREGATION 209–26 (M. Shujaa ed., 1996); *see also* T. SOWELL, AFFIRMATIVE ACTION AROUND THE

There is a growing belief that "integration is no longer a viable social policy, but rather a failed social experiment."[189] At the same time, there is a more vocal expression of "integration fatigue" among people of color. Many Black families indicate a preference for places that are recognized as being welcoming to Blacks and seem less willing than in the past to be integration pioneers and move into neighborhoods that might be hostile to their presence.[190] These arguments, however, confuse large legal principles with the question of the appropriate remedy to a legal injury.

There are a number of reasons why marginalized populations perform better in homogenous schools. In many institutions that are not all Black, there is a hostile environment or a stereotype threat.[191] There remain constant assaults, subtle and not so subtle, on women and Blacks in heterogeneous institutions.[192] Part of the problem is that what has been understood and sold as integration has not been genuine integration.[193] Even where Black and White students attend the same school, they are often tracked into separate classrooms.[194] Today, there is a gross overrepresentation of African American and Hispanic students in the lowest tracks, even after controlling for prior measured achievement.[195] Low-income students of color are seven times as

WORLD: AN EMPIRICAL STUDY 141–65 (2004). Even after *Brown,* some schools with predominantly black enrollments have achieved outstanding educational results. *See*, *e.g.*, S. CARTER, NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS 49–50, 53–56, 71–73, 81–84, 87–88 (2001); A. THERNSTROM & S. THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 43–64 (2003); *see also* L. IZUMI, THEY HAVE OVERCOME: HIGH-POVERTY, HIGH-PERFORMING SCHOOLS IN CALIFORNIA (2002) (chronicling exemplary achievement in predominantly Hispanic schools in California). There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly White colleges. Grutter v. Bollinger, 539 U.S. 306, 364–65 (2003) (Thomas, J., concurring in part and concurring in judgment (citing sources); *see also* United States v. Fordice, 505 U.S. 717, 748–49 (1992) (Thomas, J., concurring).

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct 2738, 2777 (2007) (Thomas, J., concurring).

189. Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 264 (2006).

190. *See* CASHIN, *supra* note 178, at 17–18.

191. *See, e.g.*, Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. & SOC. PSYCHOL. 797, 808 (1995) (finding that the existence of a stereotype can impair the intellectual test performance of black students).

192. *See, e.g.*, *id.*; Steven J. Spencer, Claude M. Steele & Diane M. Quinn, *Stereotype Threat and Women's Math Performance*, 35 J. OF EXPER. SOC. PSYCHOL. 4, 22 (1999) (finding that a stereotype threat hinders women's abilities in math classes).

193. For an overview of what genuine integration might look like, see Adams, *supra* note 189.

194. *See* Carol Corbett Burris & Kevin G. Welner, *Closing the Achievement Gap by Detracking*, 68 PHI DELTA KAPPAN 594, 595 (2005) (stating that many fear detracking and heterogenous grouping for fear of a "watered-down" curriculum).

195. *Id.*

likely to be in lower track classes as middle-income White students.[196] Using the justification of stereotype threats or unfair tracking as a justification to give up on integration is, in essence, the rationale of the lower court in *Cooper* that these students would just be better off under segregation.[197] It sends the message that Whites are going to behave badly, so we are better off just keeping Blacks out for their own good.

There remain a number of counter-examples. Even though integration has not been fully realized, there are many places where integration has succeeded in narrowing the achievement gap. In many of the Southern schools, certainly Wake County, Blacks perform extremely well. Under the Wake County integration plan, designed to reduce racial isolation,[198] Black passage of standardized test went from 40% to 80% in the last decade system-wide.[199] The only large school system, with a minor exception, that has completely eliminated the Black-White performance gap is the U.S. military.[200] It is one of our most integrated institutions.[201] However, to think of integrated education in those limited terms is already problematic.

One of the central purposes behind the creation of public schooling in the United States was to foster good citizenship.[202] John Dewey, the great educator from the early twentieth century, taught that education in a democracy must improve society, increasing opportunities for students to escape from the limitations of their socioeconomic environment and "come into living contact with a broader environment."[203] Because education is a primary vehicle for defining who we are, both individually and socially, it breaks down "those barriers of class, race, and national territory which [keep]

196. Rose Sanders & Wythe Holt, *Still Separate and Unequal: Public Education More Than Forty Years After* Brown, IN MOTION MAGAZINE, Oct. 20, 1997, http://www.inmotion magazine.com/forty.html (citing a Rand Corporation study's findings).

197. *See* Aaron v. Cooper, 143 F. Supp 855, 858, 866 (D.C. Ark. 1956) (agreeing with the defendant school district that a "hasty integration" would be "unwise, unworkable, and fraught with danger").

198. *See* Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDU. EVAL. & POLICY ANALYSIS 49, 51 (2006).

199. *Id.*; Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, N.Y. TIMES, Sept. 25, 2005, at 1 ("In Wake County, only 40 percent of black students in grades three through eight scored at grade level on state tests a decade ago. Last spring, 80 percent did.").

200. *See generally* Consolidated Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 18–27, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1787554 [hereinafter Brief for Becton et al. as Amici Curiae].

201. *Id.* at 12.

202. Matthew A. Crenson & Benjamin Ginsberg, *From Popular to Personal Democracy*, 92 NAT'L CIVIC REV. 173, 177 (2003).

203. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 24 (MacMillan Co. 1938) (1916) (emphasis added).

men from perceiving the full import of their activity." [204] Today, we think of education largely in terms of a private good, a service provided by government on behalf of taxpayers.[205]

The true underlying importance of equal and integrated education for all in our democracy received now waning support in *Brown v. Board of Education*, where Chief Justice Warren described public education as "the most important function of state and local governments," and "the very foundation of good citizenship," enhancing "the performance of our most basic public responsibilities."[206] The strong rationale for integration in *Brown* and later in *Grutter* was a particular conception of democracy and the role of citizenship in a democracy.[207] As Justice O'Connor wrote on behalf of the Court, "[w]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[208] This language is a shift in the Court's focus on the individual good education fulfills towards a conception of education deriving its fundamental importance from the fact that it serves the common good. Even Justice Thomas recognizes a connection between education and the civic purposes of the Fourteenth Amendment. In his view, education is a vital component in securing the "civic, political, and personal freedoms conferred by the Fourteenth Amendment."[209] The Court in *Grutter* wrote about "effective participation" and the legitimacy of our democracy.[210] This democratic element was picked up by Justice Breyer in his dissenting opinion in *Parents Involved*: "It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation."[211] The need for integration is greater than ever as we approach a school age population in the United States where students of color are 45%.[212] The military brief in *Grutter* discusses the need for diversity as a matter of national security.[213]

204. *Id*. at 101.

205. *See generally* john a. powell, "A New Theory," *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 281 (John Charles Boger & Gary Orfield, eds.).

206. 347 U.S. 468, 493 (1954).

207. *See id*.; *see also* Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (citing *Brown*, 347 U.S. at 493; Plyler v. Doe, 457 U.S. 202, 221 (1982)).

208. *Grutter*, 539 U.S. at 331 (citing *Plyler*, 457 U.S. at 221).

209. Zelman v. Simmons-Harris, 536 U.S. 639, 680 (2002) (Thomas, J.,concurring).

210. *Grutter*, 539 U.S. at 332.

211. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. ___, 127 S. Ct. 2738, 2821 (2007) (Breyer, J., dissenting).

212. *See generally* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES (April 1, 2000–July 1, 2005) (reporting that 45% of U.S. children younger than five years of age are children of color).

213. Brief for Becton et al. as Amici Curiae, *supra* note 200, at 13.

Martin Luther King, Jr., understood that segregation was evil not just because of what it did to Blacks, but what it did to Whites as well. It "scars the soul of both the segregated and the segregator. . . . It gives the segregated a false sense of inferiority, and it gives the segregator a false sense of superiority."[214] It is not enough that all children learn to read and write. The challenge we face is the challenge of becoming effective citizens in the most diverse country in human history. It is small wonder that Justice O'Connor reasserted the fundamental principle espoused in *Brown* that "education . . . is the very foundation of good citizenship."[215] Segregation makes it very difficult to develop good citizens, White or Black. If we fail at this, the country fails as a nation. It is an amazing thing that we now tell school districts in Seattle and Louisville, not only are you not required to integrate schools, you are not allowed to integrate schools.

As Dewey, *Brown*, and *Grutter* understood, education is fundamentally about citizenship and democracy. The prize at stake is not how well Black kids learn, but the constitution of White identity and membership. Segregation undermines the project of community building, and by extension, nation building. The racial isolation of Whites in separate schools, reinforced by the lived experience of segregated neighborhoods, creates a sense of separateness and difference from people of a different color, who do not seem to be a part of the same community or share the same values. It is not surprising, then, that Americans live in a cultural climate that emphasizes individual success and self-interest over the common good; where values such as civility and mutual respect are displaced by excessive individualism.

As Blacks in the United States increased their claims to citizenship and the rights of citizenships, the meaning and substance of citizenship has narrowed. The grant of national citizenship following the Civil War was a fixed legal status, but the Reconstruction Amendments gave Congress authority to pass laws to protect the substance of that status. No sooner had the ink dried on that document then the fullness of that promise proved illusory. The basic citizenship privileges and freedoms that were so richly conceived in the antebellum period evaporated in the wake of Reconstruction. When a second claim to those rights was advanced during the Civil Rights Movement a century later, federal courts proved more accommodating. This time public space itself dissipated as Whites fled, leaving little room for the exercise of those rights. Today, it is not simply that public space has been shriveling; it has been under a generation of sustained conservative attack, including calls to

214. Martin Luther King, Jr., "Desegregation and the Future," Address Delivered at the Annual Luncheon of the National Committee for Rural Schools (Dec. 15, 1956), *in* THE PAPERS OF MARTIN LUTHER KING, JR.: BIRTH OF A NEW AGE DECEMBER 1955–DECEMBER 1956 474 (Clayborne Carson et al. eds., Univ. of Cal. Press 1997).

215. *Grutter*, 539 U.S. at 331 (citing *Brown*, 347 U.S. at 493).

privatize education. Robert Putnam attributes a general decline in civic engagement from the 1960s, which he characterizes a nation in which its citizens are "increasingly solitary and mutually mistrustful," to television and generational change.[216] The more obvious explanation is the changing nature of the community to which Blacks have made a claim for full membership. Rather than accommodate those claims, Whites moved into exclusive suburbs in large numbers and retreated into private worlds.

The ancient Greek conception of citizenship as a way of life, as active participation in governance of common affairs, gave way in time to a very different concept of citizenship under Roman government.[217] This form of citizenship was a passive legal status, carrying a bundle of rights and imposing some duties.[218] This form of citizenship-as-status was partly a product of Roman imperial expansion, which was based less on the use of force and more on granting the status of Roman citizenship to conquered peoples.[219] Thus, dual citizenship emerged—citizenship to the city of birth and to the empire. However, Roman citizenship was not an empty gesture. Roman citizenship was a valuable protection that allowed free and unhindered movement across the empire, protection from foreign and local enemies, and stimulated peaceful trade.[220] Justice Miller's exposition of the rights and privileges that flow from national citizenship in *Slaughterhouse* marks a similar transition. When listing those privileges and immunities that accrue from the new grant of national citizenship he lists: "the right to come to the seat of government," "the right of free access to its seaport", "[the right] to demand care and protection of the Federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government," and "[t]he right to use the navigable waters of the United States."[221] No sooner had citizenship been nationalized and broadened than the content of that citizenship dramatically emptied.[222]

Citizenship is not simply a vertical relationship between individual citizens and the state. It is primarily a horizontal relationship of citizens to other citizens in the governance of common affairs. If membership in democracy, defined as citizenship, is merely a passive status, conferring rights and some duties, then the meaning of citizenship as active participation in common governance and membership in the American political community is lost.

216. Crenson & Ginsberg, *supra* note 202, at 180.

217. CLARKE, *supra* note 69, at 7.

218. *Id*. at 8.

219. *Id*. at 8.

220. *Id.*

221. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (internal quotations omitted).

222. *See supra* note 130.

Citizenship as the "mutual recognition of equals participating in a shared life and sharing in the operation of their own life" cannot work within the confines of an atomized, individualized mass society.[223] The citizen as a solitary consumer is a citizen without a civic context. Public education is the chief domain in which government may hope to instill civic virtues, including the sense of linked fate and interconnectedness across racial boundaries. In that context, it is inconceivable that as we move to a more pluralistic, diverse society that we can have the kind of society we want and need and that the Reconstruction Amendments and *Brown* prefigured while we remain separate and unequal.

CONCLUSION

Brown v. Board of Education has sometimes been referred to as a "Dred Scott decision in reverse" to connote disdain for activism in the judicial branch of government.[224] There is unintended wisdom in the notion that *Brown* was *Dred Scott* in reverse. *Dred Scott* transformed the uncertain, ambiguous character of American citizenship and inscribed in law a definite status of which persons of African descent could have no part. *Brown* and her progeny can be understood as part of the process of reversing that understanding.

In his Pulitzer Prize winning opus on *Dred Scott*, Don Fehrenbacher situates the case in the broadest possible American context. After meticulously tracing the interweaving flow of events, ideas, and actors that lead up to the infamous decision, he concludes that *Dred Scott* is "a point of illumination, casting light upon more than a century of American" law and politics.[225] Just as that history extends backward to the founding and beyond, so does it move forward, far beyond the confines of the nineteenth and even twentieth centuries.

From our vantage point, *Dred Scott* casts a light upon the darkened shadows of the Fourteenth Amendment and impels us to reclaim our constitutional legacy. *Dred Scott* illuminates our constitutional missteps, from the interpretation of the Privileges and Immunities Clause and Enforcement Provisions to the unjustifiably limited view of constitutional significance we accord the Reconstruction trilogy. The Fourteenth Amendment was more than a new amendment. It 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.

Brown is, if anything, the framers intended application of the Reconstruction provisions upon a caste system first instituted in law with

223. CLARKE, *supra* note 69, at 23.

224. FEHRENBACHER, *supra* note 22, at 593. *Dred Scott* is often understood as the height of dangerous judicial activism.

225. FEHRENBACHER, *supra* note 22, at 7.

slavery and reasserted with shocking vigor under Jim Crow. The promise of *Brown* is nothing if not the promise of the Fourteenth Amendment. Where the Court in *Brown* spoke in principle and acted sluggishly to enforce its verdict, *Cooper* marked an emphatic pronouncement about the supremacy of the communitarian arrangements and the limits of individual choice. *Cooper* most vividly represents the cluster of decisions which, even more than *Brown*, rejected the right of secession, the right of Whites to withdraw from communal relationship. *Brown* exposed the pernicious fiction of "separate but equal" and overturned state-sponsored segregation but said little about scheme that would replace it. It was *Cooper* and related cases that took a step further and required integration by denying Whites the freedom to opt out. While many would be quick to characterize *Cooper* as a case more about judicial supremacy or constitutional powers than a statement about the Fourteenth Amendment's vision of political community, this is a false dichotomy. It is the exercise of judicial power and symbolic authority as a response to a claim of a right of secession that gives full meaning to *Cooper*.

As the expositor of our Constitution, the Supreme Court is the voice of that instrument and speaks to a political community defined by that instrument. In turn, the Court is also a force for re-constituting that community, just as it was in *Dred Scott*. A year before the Court's decision in *Cooper*, the President had already sent federal troops into Little Rock to countermand Governor Faubus's action.[226] No court had ordered this action or had the authority to order the President to undertake this action.[227] Nonetheless, President Eisenhower clothed his decision in the authority of the Court's decision in *Brown*, even while he went so far as to imply that he personally may have disagreed with the decision.[228] As a practical matter, the Little Rock crisis had already been resolved. The Court could have simply declined to step in, relying on the Eighth Circuit decision below[229] and the presidential intervention to maintain the peace and uphold the rule of law. Instead, in a stunning rebuke, the Court spoke with a "declamatory rhetoric" that left little doubt about its message or its symbolism.[230] To emphasize its point, the Court abandoned the custom of labeling a single opinion which garners majority support of the Justices as "the opinion of the Court." Instead, in *Cooper*, the Court authored a single opinion which listed each of the individual Justices by name.[231] This served to underscore both the unanimity of the decision as well as the weight of each Justice's strength in support of the opinion. In truth, the Court has no

226. Burt, *supra* note 165, at 475.
227. *Id*.
228. *Id*.
229. *See* Aaron v. Cooper, 257 F.2d 33 (8th Cir. 1958).
230. Burt, *supra* note 165, at 475.
231. Cooper v. Aaron, 358 U.S. 1, 4 (1958).

mechanism for enforcing its decision. It must rely upon the executive branch to execute the law. Although neither the Justices nor the Court itself can command our devotion, they do command our attention. This is the most important aspect of the Court's decision in *Cooper*. The moral vision of communal membership reinforced by the boldness of the Court's action in responding to the crisis is the spiritual message of the Reconstruction Amendments. It is a message that we must heed in the turmoil over the debates over immigration, amidst a cultural climate that favors individualism and consumerism over mutual respect and civic engagement, at a time growing resegregation in our neighborhoods and urban areas, and as the United States moves to a "majority-minority" nation.[232] It is a legacy we can no longer ignore.

232. ANGELA BLACKWELL, SEARCHING FOR THE UNCOMMON COMMON GROUND: NEW DIMENSIONS ON RACE IN AMERICA 22 (2002) ("It is projected that by the year 2050, the United States will be nearly a 'majority-minority' country, and that the Latino population will exceed all other minority populations combined.").