Supreme Blunders: Thirteen of the High Court's Low Points on Civil Rights

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Supreme Blunders:

Thirteen of the High Court’s

Low Points on Civil Rights

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Supreme Blunders: Thirteen of the High Court's

Low Points on Civil Rights

Introduction: It all goes back to Marbury v. Madison

The premise behind this book is that the U.S. Supreme Court has made major blunders during the course of its history–blunders that have had major negative impacts on the country's inhabitants. Some cases are controversial but not clearly mistaken.

For example, one of the most controversial decisions the Court has ever made is Bush v. Gore (2000). Arguably, if the Court blundered, it did so not by the decision itself but by the fact that the Court accepted the case at all. In accepting Bush v. Gore for review, the Court placed itself in a no-win, untenable situation. The Court would look like it was engaging in politics no matter what it did. Even if the Court were acting to uphold the principle of treating all voters equally, its decision would not be viewed positively by many liberals. Even if it helped the more conservative candidate secure his victory, the decision would be viewed as anti-conservative insofar as it meddled in a state's right to conduct and review its own election.

This political taint then carried over to the Court's decision in Citizens United v. FEC (2010). The decision is undoubtedly a glowing endorsement of the First Amendment right of free speech. Further, the speech involved is political speech. What could be more important in a democracy than freedom of political speech? On the other hand, the decision could be viewed as playing into the hands of the big-moneyed few: the high-rolling corporations that were out to buy elections. This is a case designed to land near the top of the list for both the worst decisions ever made and the best decisions ever made.

If this were a book about the most controversial decisions ever made by the Court, then clearly Bush v. Gore, 531 U.S. 98 (2000), and Citizens United 558, U.S. 310 (2010), would both be on the list. The cases are exceptionally interesting and polarizing. What follows is a brief rundown on both of these cases, but they do not qualify for this "worst blunders" list.

Bush v. Gore (decided on December 8, 2000): The high Court, in a 5-4 decision, stopped the vote recounting in Florida, where "hanging chads" had left the 2000 presidential election hanging in the balance. The high Court stepped into the political arena, a place that had seemed forbidden territory for this putatively nonpolitical group of jurists. Forbidden no more. Justices stepped into the middle of the fray, knowing they were treading on shaky ground. In the Court's words: "None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere." But the Court continued: "When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."

Of course, if "contending parties" ask the Court to hear something it should not hear, it could simply say "No" and explain that courts do not become embroiled in political controversies even if asked to do so. The courts should not be embroiled in purely religious controversies, such as whether Jesus Christ is truly the son of God, even if the courts are asked to do so. Courts should not be embroiled in purely aesthetic questions, such as which architectural design of the public library should be built, even if asked to do so. Courts should not deign to decide many other controversial issues, such as who should have won the Heisman Trophy or the Oscar for best

actress, even if disgruntled players or actresses ask the courts to do so. The "unsought responsibility" the Court speaks of could also be characterized as an "inappropriate request," and to say that the "judicial system has been forced to confront" the issues could be viewed as disingenuous, at best.

The facts of the case were indisputable. As the Court said: "This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter." The notorious "hanging chad" became a part of the American lexicon.

The basic question confronting the Court in Bush v. Gore was actually a narrow one: "whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses" of the Fourteenth Amendment. The Court expounded:

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

So the state court, namely the Florida Supreme Court, had ordered the recount to proceed but had not given enough guidelines so that the recount would be done fairly. How hanging did a hanging chad have to be in order to be counted as a vote? Recounters were willy nilly coming up with different standards, which meant that voters were not being treated equally. Equally hanging chads might be counted or might be tossed, depending on the individuals inspecting them. But did this less-than-perfect recount demand halting the process?

The U.S. Supreme Court halted the recount, concluding that Florida's recount, without better standards for what constituted a vote, was violating "equal protection" demands. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."

The Court also, of course, recognized the great difficulties in conducting a recount:

...it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.

Another difficulty loomed: Florida statutory law required that the state decide who won the presidential election by December 12. "That date is upon us," the Court declared on December 8, "and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards."

The bottom line: "Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional, ... we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed." In short, halt the recount!

Yes, the recount posed difficulties, and the high Court stepped into the fray.

But four Justices–Stevens, Ginsburg, Breyer, and Souter–would have let the decision of the Florida State Supreme Court stand, and the recounting would have continued. They thought, in Stevens' words, that the deficiencies in standards did not rise to the level of a constitutional violation, opining: "On rare occasions ... either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion." It was purely a state matter, and Florida could handle its selection of presidential electors. Or the high Court could intervene but let the recount proceed with instructions to the state to set stricter standards for judging when a hanging chad constituted a vote. Souter said he saw "no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the [national] meeting of electors, December 18," which was 10 days away.

The recounting stopped. George W. Bush became president, even though he lost the popular vote nationally to Al Gore by over half a million votes. But it is the electoral votes that determine who wins. The final tally: Bush 271, and Gore 266. Florida's 25 electoral votes were crucial, and they went to Bush by a whisker. Would he have become president regardless of the halting of the recount in Florida? That debate continues....

In April 2013, in an interview with the Chicago Tribune editorial board, retired Supreme Court Justice Sandra Day O'Connor expressed doubts that the Supreme Court should have accepted the Bush v. Gore case. She was one of five justices voting in favor of the Court's decision that favored Bush, he said, "It turned out the election authorities in Florida hadn't done a real good job .... And probably the Supreme Court added to the problem at the end of the day." She said of the case, "Maybe the Court should have said, 'We're not going to take it, goodbye.'"

Citizens United, decided on January 21, 2010: This 5-4 decision overturned past decisions and unleashed corporations to use their general treasury funds to run political ads. Federal law prohibited corporations, including nonprofit corporations, from using their general treasury funds to campaign for or against political candidates within 30 days of a primary or 60 days of a general election. Nonprofit corporation Citizens United released a documentary called Hillary that was quite critical of presidential candidate Hillary Clinton. The documentary was available in theaters and on DVD, but Citizens United also wanted to make Hillary available on cable TV and video-on-demand within 30 days of the primary elections. However, Citizens United did not want to commit a felony by violating federal law.

During his 2010 State of the Union address, President Obama said that the Supreme Court's decision in Citizens United would "open the floodgates for special interests, including foreign corporations, to spend without limit in our elections." Justice Alito mouthed "not true." (Was Alito referring to the president's statement on "special interests" or only to the words "foreign corporations"? The case itself says: "We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.")

The Court in Citizens United made clear that it does not want a chilling of political speech. Corporations, the high Court opined, were people, and corporations had First Amendment rights. "Political speech is 'indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual,'" the Court declared. But the Court also noted that "federal law prohibited -- and still does prohibit -- corporations and unions from using general treasury funds to make direct contributions to candidates."

Citizens United is undoubtedly a glowing endorsement of free speech. The Court said:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

And the Court also said:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. ... The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. ... The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." ...

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." (Citations omitted.)

But will Citizens United also, as President Obama said, “open the floodgates” and drown the political process in corporate contributions and thus further corrupt elections in the United States?

The $6 billion spent during the 2012 presidential election shows at least an unleashing of unprecedented amounts of money. If money can be equated with speech, should this record expenditure be viewed as a victory for free speech? Or if money can be equated with corruption, should this expenditure be viewed as a loss for America’s political system? Or could this expenditure be both a victory for speech and a sign of further corruption of the election process? Concerning the wisdom of the Citizens United decision, perhaps the old cliche pertains here: Time will tell.

While many cases such as Bush v. Gore and Citizens United v. FEC are arguably good candidates for bad decisions, this book will focus on blunders concerning civil rights–the rights of individuals that lie at the core of human dignity.

Marbury v. Madison: A Blockbuster Constitutional Law Case

On what basis did the Supreme Court gain such amazing power to make decisions? The answer is perhaps that the Court picked itself up by its own bootstraps, so to speak, asserting its power in Marbury v. Madison, 5 U.S. 137 (1803). This bootstrapping view is not held universally.

Some would argue that the United States Constitution gave the Court its power and that the Court was only assuming its rightful place at the heart of decision-making in this country. But whether it was bootstrapping or a rightful assertion of constitutional power, the Marbury v. Madison decision has withstood the test of time. For better or for worse, the Supreme Court is the undisputed, final arbiter of legal disputes in the United States involving constitutional issues.

Marbury v. Madison (1803) is the most important decision ever made by the Court, or at least the most far-reaching. It set the course for a few individuals–five in the beginning and nine currently–to set the course of American history. So before looking at 13 of the Court's major civil rights blunders, pausing to look at the decision that made these far-reaching blunders possible seems in order. Marbury v. Madison is the backbone of the American legal system. If that decision collapsed, the legal system itself would collapse into chaos, with nothing to support its current structure. Or perhaps Congress would step in and fill the void to make final decisions--Congress, with its political infighting and seeming inability to agree on much of anything? Or maybe the president–a dictator-like leader–could wield that power? No, in our current legal system, the Supreme Court makes the final decision on constitutional questions. Period.

The case was decided when John Marshall was the fourth chief justice of the United States and certainly one of the greatest. The principle for which Marbury v. Madison is remembered is judicial review—that the Supreme Court of the United States has the power to review a law passed by Congress and determine whether the law is constitutional. In Marbury v. Madison, the Court declares: "A law repugnant to the constitution is void."

As for the facts of the case, Marbury v. Madison was a squabble over who would be the justice of the peace for Washington, D.C., as well as some other judgeships. President John Adams had nominated William Marbury as justice of the peace in an 11th-hour appointment before Thomas Jefferson took over as president. The Senate approved the appointment, and President Adams signed his formal commission, the piece of paper showing that Marbury was the justice of the peace of Washington, D.C., and the seal of the United States had already been affixed by President Adams' secretary of state, who, ironically enough, was John Marshall, who also became Chief Justice John Marshall in time to write this opinion.

So Marbury's commission was signed and sealed, but it had not been delivered to him yet. (Did this case perhaps originate the phrase, "signed, sealed, and delivered"?) Since it had not been delivered, Jefferson chose to disregard Marbury's appointment. He wanted to appoint his own justice of the peace. Several other judicial appointees were in the same boat as Marbury—signed, sealed, but not delivered. Marbury and some of the others took the matter to the U.S. Supreme Court. They wanted the Court to compel President Jefferson's secretary of state, James Madison, to deliver their commissions to them. Thus we get the name Marbury v. Madison.

The Court, through dicta, said that Marbury was entitled to his commission. But to compel Secretary of State Madison to deliver the commission to Marbury, the Court would have to issue a "writ of mandamus," which is a writ that commands a public official to do his or her job, to perform a duty.

The question then was this: Did the U.S. Supreme Court have the power to issue the writ?

In answering this question about the Supreme Court's power, the Court looked to the U.S. Constitution. Article III of the Constitution says, "The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." But Article III also limits the Supreme Court's original jurisdiction to two

types of cases: 1) "cases affecting ambassadors" and "other public Ministers and Consuls" and 2) “those in which a State shall be a Party.” The Constitution says explicitly, "In all other cases, the Supreme Court shall have appellate jurisdiction." In short, the U.S. Supreme Court, according to the Constitution, cannot be the first court to hear a case unless the case affects an ambassador, or a state is a party.

The notion of "jurisdiction" is crucial in law: If a court has jurisdiction over a case, it simply means the court has power to hear the case. If the court does not have jurisdiction, the court does not have power to hear the case. A court must have two kinds of jurisdiction. First, a court must have jurisdiction over the subject matter. Some subject matter the court should not touch (purely political or religious or aesthetic controversies). Second, a court must have jurisdiction over the person. For instance, diplomatic immunity deprives courts of jurisdiction over some people. And states can have problems trying to assert jurisdiction over citizens of other states; thus, extradition becomes necessary.

In Marbury, the problem was one of subject-matter jurisdiction.

Here is another factor the Court had to consider in Marbury v. Madison: Congress had passed an Act establishing federal courts, which President George Washington signed. Congress was expressly allowed to establish courts by the Constitution. But the Act also authorized the U.S. Supreme Court "to issue writs of mandamus" to "persons holding office under the authority of the United States."Secretary of State Madison fit that description. He was an officer of the United States.

Remember, the question which the Court was considering was: Did the U.S. Supreme Court have the power to issue a writ of mandamus to Madison to compel Madison to deliver the commission to Marbury? And an Act of Congress, signed by the president, said the Court had that power. And the Court thought Marbury was entitled to the job of justice of the peace. But, on the other hand, there stood the U.S. Constitution, Article III, denying the Supreme Court original jurisdiction to issue writs of mandamus. What could the Court do? The Act of Congress and the Constitution could not both be followed. They were mutually exclusive in this case. In short, the Act in conflicted with the Constitution

Marbury v. Madison decided that the Act passed by Congress, which said the Supreme Court could issue a writ of mandamus, was not law. So the Court answered "no" to the question it said the case presented—the question whether the court had the power to issue the writ.

The Court here also made one of the most important declarations, if not the most important declaration, it has ever made. The Court declared, "It is emphatically the province and duty of the judicial department to say what the law is." The Court could have just said, we do not have jurisdiction to hear this case. We do not have the power to hear it, because it is not an appellate case (no other court has made a prior decision on it for us to review), and this case does not fall within our narrow scope of original jurisdiction. Marbury was not an ambassador, and he surely was not a state. But, instead, the Court declared that "a law repugnant to the Constitution is void" and declared for itself a vast power of judicial review. The Court said that it could review Acts passed by Congress and declare them unconstitutional and therefore void.

Marshall and his successors on the Supreme Court took the view that if the Supreme Court could declare acts of the U.S. Congress unconstitutional, then the Supreme Court could certainly declare acts of state legislators unconstitutional. Then in Martin v. Hunter's Lessee (1816), a property law casing involving ejectment, the Court declared that it can determine whether a decision of a state's highest court is constitutional.

So by 1816, the Court had declared that it could review and strike down Acts of Congress and of state legislatures, and that it could overturn decisions of states' highest courts. In short, the Court had declared that it was truly SUPREME!

Now the Court was unleashed to wield its power, for good or ill. Many of the Court's decisions have been triumphs of the human spirit, with ennobling statements to inspire a nation to reach for the greater good. But, unfortunately, the Court has not always wielded the sword of power with grace or dignity. Sometimes it has cut down the rightful aspirations of those asking the Court to do justice. The Court has, on occasion, demeaned those who appeared before it, dashing their final hopes–and ultimately lowering the Court's own stature in the process.

This book presents 13 of the worst decisions made by the Court concerning civil rights. There are many more bad decisions, of course, besides these derelicts. These are 13 cases fit for the dust bin of history to be sure, but yet they should not be forgotten. They are a reminder that the high Court does make mistakes and that we must always be vigilant to look out for ourselves and for others. Because the Court does not always get it right, we must be willing to place pressure where it will do the most good. Sometimes Congress can help by changing statutes, such as in changing naturalization law. Some errors in law ultimately require constitutional change for their correction Perhaps correcting errors will require a shift in the way Americans think, a sea change of values that washes over the justices of the Supreme Court as well as everyday people. Yes, perhaps it will take time to rectify mistakes.

Looking at the bad cases, however, can also give hope for change because these cases have not prevailed over the long haul. These cases are, in the current vernacular, losers. Whether it took an amendment to the U.S. Constitution or an adjustment to the American psyche, the voices of the losing parties have been heard and have ultimately won. But subsequent corrections have not erased the harm done to individuals in the meantime.

Dred Scott and Beyond

Here is a brief rundown on arguably the most notorious of the terrible 13, the case of Dred Scott. On the basis of illustrating human misery and need for a change in law, perhaps no other decision is as poignant as Dred Scott v. Sandford (1857), an infamous decision that is antithetical not only to principles of democracy but also to any notion of human decency. The Court said, in part:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities guarantied by that instrument to the citizen?

Justice Taney said "no." He continued:

It is very clear ... that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of

the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The decision stained the Court and the very soul of the country.

Passage of the Fourteenth Amendment to the Constitution, in effect, overturned the Dred Scott decision. The Court's decision, however, will forever live in infamy. The Court went on record as being willing to deny African-Americans the most basic right, that of U.S. citizenship.

While the Fourteenth Amendment abolished the Dred Scott decision, it did not help a lot of people who relied on that amendment for legal vindication of the rights they desired. For example, in Plessy v. Ferguson (1896), the Supreme Court upheld separate railway cars for African-Americans, despite the abolition of slavery and passage of the Fourteenth Amendment.

In Bradwell v. Illinois (1873), the Court upheld Illinois' denial of a license to practice law to Myra Bradwell solely because she was a woman, despite the Fourteenth Amendment. Likewise, that amendment did not help Virginia Minor in the case of Minor v. Happersett (1875) when she wanted to vote; that right would not come to women until the Nineteenth Amendment was ratified in 1920.

American Indians, of course, have faced problems in front of the high Court, as have persons of Japanese ancestry and nonwhites in general. Johnson v. McIntosh (1823) made clear that Indians did not own their land. The New Rider v. Board of Education case (1973) denied Pawnee Indian students their opportunity to even argue the case for keeping their braids in front of the high Court. In Ozawa v. United States (1922), the Court said that because of his race, Takao Ozawa, a man of Japanese descent, could not become a naturalized citizen. The Court applied Ozawa's reasoning to a man from the country of India in United States v. Thind (1923) and to a man of Japanese descent who served in the military in Toyota v. United States (1925). The trilogy of Ozawa, Thind and Toyota are covered together as "Ozawa ... and Progeny."

In Korematsu v. United States (1944) the Court held that Japanese could be interred during World War II, with no violation to their rights based on race.

The Court also rejected challenges to involuntary sterilization for the mentally handicapped in Buck v. Bell (1927) and to enhanced punishment for interracial sexual relations in Pace v. Alabama (1883).

The Court decided against limiting the length of the work week in Lochner v. New York (1905) and against a minimum wage for women in Adkins v. Children's Hospital (1923).

In Bowers v Hardwick (1986), the Fourteenth Amendment did not help a gay man charged with violating a Georgia law in the privacy of his home. A change in attitude toward privacy and homosexuality led the Court to later abandon that decision.

Changes in laws and attitudes have overtaken these terrible, unlucky 13 cases.

To qualify for this worst-blunders list, cases had to involve denials of fundamental human rights. "Fundamental rights" include the trilogy of rights contained in the Fifth and Fourteenth Amendments, rights that the federal government (Fifth Amendment) and the states (Fourteenth Amendment) cannot deprive one of without "due process of the law." Those three rights are life, liberty and property.

The Fifth Amendment, ratified in 1791, and the Fourteenth Amendment, ratified in 1868, echo in some respects the "unalienable Rights" language of the Declaration of Independence, signed on July 4, 1776. The Declaration says: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." But the Declaration applies to "all men," leaving out roughly half of the population. The Fifth and Fourteenth Amendments do not use the term "men" but instead use the term "person." The Fifth Amendment says: "No personal shall be ...deprived of life, liberty, or property without due process of law...." The Fourteenth Amendment says, "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."

The cases presented use the language of the Court itself, edited to strip out some footnotes, citations, and issues involving things such as procedure that are not pertinent to the discussion of rights.

Wood engraving from “Century Magazine” (1887)

Case 1: The Dreadful Dred Scott Decision (1857)

The facts:

Here is the background of the case, as presented by the U.S. Supreme Court: In 1834, a slave named Dred Scott belonged to Dr. Emerson, a U.S. Army surgeon, who took Scott to a military post in Rock Island, Illinois. In 1836, the doctor took Scott to Fort Snelling, a military base north of Missouri in part of the Louisiana Purchase territory that had not yet achieved statehood [but later would become part of Iowa]. There the doctor bought another slave, named Harriet, from U.S. Army Major Taliaferro. With the doctor’s consent, the two slaves married, and their daughter Eliza was born on a steamboat on the Mississippi River north of Missouri. In 1838, the doctor took his three slaves from Fort Snelling to Missouri, and Dred and Harriet Scott’s daughter Lizzie was born later at the Jefferson Barracks military post in St. Louis, Missouri. The two girls were seven years apart.

In Missouri, the doctor sold the four slaves to John Sandford, who imprisoned them.

Dred Scott wanted to sue John Sandford for assaulting him, his wife and his two daughters. Sandford maintained that he “gently laid his hands upon” and “had only restrained” the four and that he “had a right to do so” because they were his slaves.

The issue:

But was Dred Scott still a slave, or was he a free citizen of the United States? Did the Declaration of Independence or United States Constitution help him? He had been taken from Missouri, a slave state, to Illinois, a free state, and then taken back to Missouri again. Had he gained his freedom because of the time spent in free-state Illinois? Only if he were a citizen could

Dred Scott avail himself of the U.S. court system and sue Sandford.

Ultimately, the Supreme Court of the United States decided Dred Scott's fate. Justice Taney wrote the opinion for the Court. Dred Scott lost in a 7-2 decision.

As for the history of Dred Scott's case, the state circuit court in St. Louis allowed Scott to sue Sandford. The jury returned a verdict in favor of the defendant Sandford, finding that "Dred Scott was a negro slave, the lawful property of the defendant." So Dred Scott lost his case in front of the jury. But, more important, he then lost his case in front of the U.S. Supreme Court, which, in effect, said that Dred Scott had no right to sue in the first place because he was not a U.S. citizen.

The question, as framed by the U.S. Supreme Court: Was Dred Scott "entitled to sue as a citizen in a court of the United States"?

The high Court's answer: Dred Scott was Sandford's property, not a citizen who could sue.

DRED SCOTT v. JOHN F. A. SANDFORD

SUPREME COURT OF THE UNITED STATES

60 U.S. 393

Decided on March 5, 1857

OPINION by CHIEF JUSTICE TANEY

...

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they though proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and

a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can be naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately cloth him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration

of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They 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.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, ... passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a salve during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the

justices as aforesaid, and be applied to the uses aforesaid."

[T]he other colonial law to which we refer was passed by Massachusetts in 1705.... It is entitled "An act for the better preventing of a spurious and mixed issue," &c.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted."

And "that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information."

We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally Conclusive:

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should

declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed." *

Over the years, the U.S. Supreme Court has made MAJOR civil rights blunders. This book includes the author's commentary and the Court’s own words as the majority UPHOLDS slavery and racially segregated railway cars, Japanese interment during World War II, involuntary sterilization, and sodomy laws; DENIES that American Indians ever owned their land; and SAYS NO to the rights of women to

practice law or vote, SAYS NO to citizenship for Asian immigrants, and SAYS NO to minimum wages and limiting the length of the work week. For anyone who wonders if this country is making progress, this book should provide some comfort: Yes, the country is progressing–but maybe not fast enough.

For anyone who thinks that constitutional guarantees of rights are really guarantees, this book should be a reality check. Our freedoms are what the Supreme Court says we have, not what the U.S. Constitution promises us. The Court has sometimes trampled on rights and on human dignity, as the cases in this book will demonstrate. But the Court has also sometimes later seen the light. Sometimes Congress steps in and, in effect, overrules the Court. Sometimes brave people sue and give the Court the opportunity to correct past blunders. Sometimes, it is time itself that heals old wounds.

Perhaps recognizing past blunders can help the healing process, or at least prevent a repeat of past mistakes, or maybe even inspire people to work toward and DEMAND change....

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