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Jennifer M. Chacón
University of California, Davis

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Jennifer M. Chacón*

At its core, the case of *Dred Scott v. Sandford*[1] was a case about family. The case was a tort claim filed by Dred Scott in response to an assault upon him and his family members.[2] His citizenship claim was instrumental to the tort action, because his ability to sue the defendant, John Sanford, on a diversity jurisdiction theory required that the court acknowledge Dred Scott to be a "citizen" of a different state than the defendant.[3]

The centrality of the issue of family, however, went well beyond the technical. One of the greatest evils of the institution of slavery was that it denied a group of human beings, legally defined as slaves, from keeping their families together.[4] The historical record establishes that family unity was an important consideration in the *Dred Scott* case. Dred Scott's desire to protect the integrity of his family unit served as a critical motivation behind his suit for freedom.[5] Indeed, in their historical account of the case, Lea VanderVelde and Sandhya Subramanian have persuasively theorized that Harriet Scott—the "Mrs. Dred Scott" of the title of their article—was the driving force behind her husband's suit for freedom, and that

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* Acting Professor, University of California, Davis, School of Law. jmchacon@ucdavis.edu. J.D., Yale Law School, 1998; A.B., Stanford University, 1994. This Article was originally presented at the Twelfth Annual LatCrit Conference in Miami, Florida, on October 5, 2007. I would like to thank Rose Cuison Villazor for inviting me to participate on the panel, and to Kevin Maillard and George Martínez for enriching the discussion. I am also extremely grateful for the thought-provoking comments of Hiroshi Motomura on a later draft. I am indebted to Chanin Changtor for his research assistance, to the staff of the U.C. Davis Law Library for their assistance, and to outgoing Dean Rex Perschbacher for his constant support.

1. 60 U.S. (19 How.) 393 (1856). Defendant John Sanford's name is misspelled in the U.S. Reports as "John Sandford." In this Article, the author will use the correct spelling of the Defendant's name, John Sanford.
2. *Id*. at 393.
3. *Id*. at 394.
4. *See* discussion *infra* at notes 37–41 and accompanying text.
5. *See* discussion *infra* at notes 27–36 and accompanying text.

her primary motivation to pursue their legal claim was her desire to keep their family together.[6]

Regardless of the motivation, the outcome of the lawsuit is a well-known historical fact. The Supreme Court rejected Dred Scott's claim, first and foremost, on jurisdictional grounds.[7] The Supreme Court concluded that a federal court lacked jurisdiction to hear Dred Scott's claims because he was not a "citizen" and therefore could not sue in federal court under a theory of diversity jurisdiction.[8] Justice Taney infamously reached his conclusion with the sweeping explanation that, at the time of the enactment of the Constitution, Black people had "no rights which the white man was bound to respect."[9] The *Dred Scott* decision, issued by a divided Supreme Court, with a lengthy and sweeping opinion by Justice Taney, has come to stand with a small handful of cases as a low point of American constitutional jurisprudence.[10]

In spite of the unsuccessful lawsuit, however, the Scott family ultimately was successful in their underlying quest. They obtained their freedom,[11] and thereby kept their family intact.[12] In this regard, the Scott family's story demonstrates that one's ability to keep a family unified has not, and should not, turn on formal citizenship. Once the Scott family was able to escape the bonds of slavery, the most significant legal threat to their familial unity dissolved, even though they were still denied their citizenship by the Supreme Court's *Dred Scott* opinion.

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6. Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

7. Scott v. Sandford, 60 U.S. (19 How.) 393, 394 (1865).

8. *Id*.

9. *Id*. at 407.

10. In this regard, the decision is often grouped alongside *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation in public accommodations); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans).

11. WALTER EHRLICH, THEY HAVE NO RIGHTS: Dred SCOTT'S STRUGGLE FOR FREEDOM 182 (1979) ("[O]n May 26, 1857, Dred and Harriet Scott appeared in the Circuit Court of St. Louis County with Taylor Blow, who formally freed them.")

12. The family was together in 1857, when a photographer approached the family. Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1074 (1997). Famous photographs of the family were taken by St. Louis photographer J.H. Fitzgibbons, and these portraits appeared in an issue of Frank Leslie's Illustrated Newspaper on June 27, 1857. WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM 183 (1979).

This Article explores the implications of the *Dred Scott* case for modern questions about family unity as it is affected by U.S. immigration law and policy. Part I elaborates on Dred Scott's story, illustrating the central role that family unity played in the case. Part II focuses on the arc of history as it extends from *Dred Scott* to the present, demonstrating that the historical narrative of the *Dred Scott* case has often been used as a rallying cry for thicker, more robust conceptions of citizenship and for "equal citizenship." Part III argues that, when it comes to the right to family integrity, a contemporary re-reading of the story of the Dred Scott family and a reexamination of the legacy of the *Dred Scott* decision might actually favor a decoupling of the right to family integrity and the rights associated with formal citizenship. In lieu of a more robust definition of citizenship that encompasses the right to family integrity, perhaps the *Dred Scott* case and its aftermath counsel us to move toward a more human-rights centered definition of the right to family integrity, applicable to all persons subject to the jurisdiction of U.S. laws. Part IV concludes that a broader understanding of the right to family would require revisions to certain components of U.S. immigration laws that pose clear, and sometimes unnecessary, barriers to family integrity.

I. *DRED SCOTT*: A CASE ABOUT FAMILY

In a recent article entitled *Thirteen Ways of Looking at Dred Scott*, Jack Balkin and Sanford Levinson provide thirteen reasons why the *Dred Scott* case "continues to deserve a central place in the cannon of American constitutional law."[13] The rich facts of the *Dred Scott* case provide Professors Balkin and Levinson with their first reason for according the case canonical status.[14] Focusing on those facts provides a starting point for understanding the concerns at the heart of the case.

The detailed facts that preface Justice Taney's opinion in the case provide a great deal of information about the family whose claim

13. Jack M. Balkin & Sandford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 50 (2007).

14. *Id*. at 50.

hung in the balance in the matter of *Dred Scott v. Sandford*.[15] The reader learns that in 1834, Dred Scott traveled with his legal owner, Dr. Emerson, from the slave state of Missouri to a military post at Rock Island, in the free state of Illinois.[16] Mr. Scott remained there with Dr. Emerson until April or May of 1836.[17] From there, Mr. Scott traveled with Dr. Emerson to Fort Snelling, described in the opinion as "situate[d] on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate[d] north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri."[18] In other words, Dred Scott remained in free territory.[19] The reader also learns that in 1835, Harriet was brought to Fort Snelling by her legal owner, Major Taliaferro, and that in 1836, Major Taliaferro sold and delivered her to Dr. Emerson.[20] Moreover, the opinion tells the reader about the marriage of Dred Scott and Harriet: they were married in 1836, "with the consent of said Dr. Emerson."[21] The reader learns that the couple had two children, Eliza and Lizzie. Eliza was born on the steamboat Gipsey on the north side of the State of Missouri (bounded by free country) and Lizzie was born in the State of Missouri at a military

15. The facts set forth in the opinion have been supplemented in numerous detailed historical and legal accounts of the Dred Scott case. *See, e.g.*, AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857 (2006); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Dennis K. Boman, *The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri*, 44 AM. J. LEGAL HIST. 405 (2000); David Skillen Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks, 1776–1810*, 34 AM. J. LEGAL HIST. 381 (1990); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997); John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373 (1988); WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM (1979); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

16. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 397 (1856).

17. *Id*.

18. *Id*.

19. *See, e.g.*, PAUL FINKELMAN, DRED SCOTT V. SANFORD: A BRIEF HISTORY WITH DOCUMENTS 8 (1997) (describing the free territory carved out to the north of thirty-six degrees and thirty minutes north latitude established by the Missouri Compromise).

20. *Scott*, 60 U.S. (19 How.) at 398.

21. *Id*.

post called Jefferson Barracks.[22] At the time of the *Dred Scott* decision, Eliza was fourteen and Lizzie was seven.[23]

Reviewing the case, the reader can follow the progress of the growing family, as Dred and Harriet Scott moved with Eliza from Fort Snelling to the State of Missouri in 1938. The statement of facts also explains that before the commencement of the lawsuit in question, "Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza and Lizzie, to the defendant [Sanford], as slaves, and the defendant ha[d] ever since claimed to hold . . . each of them as slaves."[24] Much more rich and detailed accounts of the Scott family history are available to the interested reader,[25] but as Professors Balkin and Levinson observed, from the "relatively lengthy 'agreed statement of facts,'. . . we can glean a fair amount about the actual people at the heart of the case."[26]

We also learn that the incident upon which Dred Scott based his suit involved an assault on his family. The case was, after all, an action of trespass *vi et armis*, in which Dred Scott claimed that Sanford had assaulted him, his wife, Harriet, and his daughters, Eliza Scott and Lizzie Scott.[27] Sanford was alleged to have "laid his hands upon"[28] them, and in the language of the Court, "imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times."[29] Thus, Sanford's response to the trespass action was not to deny his actions, but to respond that the plaintiff, along with Harriet, Eliza, and Lizzie Scott, were his slaves, which gave him the legal right to restrain them as he had.[30]

The account of Sanford's acts of violence in the text of the Dred Scott decision is mundane and dry. Much like the words "*Terry* frisk" in the constitutional criminal procedural context,[31] the Court's

22. *Id*.
23. *Id*.
24. *Id*.
25. *See supra* note 15.
26. *See supra* note 13, at 50.
27. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 397 (1856).
28. *Id*. at 398.
29. *Id*. at 397.
30. *Id*.
31. The term "*Terry* frisk" is used to describe a pat down of the outer clothing of a person

description fails to convey the indignity and intrusiveness of Sanford's actions.[32] Other narratives clarify that on January 1, 1853, Sanford confronted the Scotts over their suit for freedom in state court.[33] Accusing them of being "worthless and insolent," Sanford whipped Dred and Harriet Scott and locked them in a barn, and then whipped Eliza and Lizzie.[34] Dred Scott's federal suit for freedom was, in significant part, a means to protect himself and his family from these sorts of acts of violence and containment.

Of course, the theme of family integrity in the *Dred Scott* story runs much deeper than the incident that gave rise to the federal lawsuit. Obviously, Dred Scott had sued for freedom in state court before these events had even unfolded.[35] But the concerns about family that drove the Scotts to seek freedom pre-dated the 1853 incident, and were rooted in more general concerns regarding the vulnerability of slave families. Recent historiography of the Dred Scott case has highlighted the centrality of family integrity to the Dred Scott claim.[36]

One of the most pernicious effects of the slave system was the denial of the rights of enslaved individuals to protect the integrity of their families. Peggy Cooper Davis has noted that the denial of family bonds was a "hallmark of slave status."[37] The process of breaking up

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upon reasonable suspicion that the person poses a threat to officer safety. Terry v. Ohio, 392 U.S. 1, 30 (1968).

32. Even in its decision to allow the "frisks," the Court acknowledged that they constituted a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id.* at 17.

33. Barbara B. Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 686 (2000) (citing CHARLES MORROW WILSON, THE DRED SCOTT DECISION 21–22 (1973)).

34. *Id*.

35. *See* VanderVelde & Subramanian *supra* note 6, at 1059 n.111.

36. *See generally supra* note 15 (listing several sources of the historical account of the Scott story).

37. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 30 (1997); *see also* James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 179 (2006) ("[O]ne of the most oppressive powers held by slave owners was the power to legally control families by dividing families at the sole will of the slave owner."); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, *1619–1860*, at 96–99 (1996). Historians and social scientists of the twentieth century developed various theories concerning the impact this had upon the social structure of African American communities.

families was not merely an incidental means of maximizing the economic utility of each individual slave. During the period of slavery, this process was used as a systematic means of dehumanizing Blacks and destabilizing the social institutions from which they drew strength.[38] The disruption of familial bonds was a way slaveholding societies attempted to "usurp[ ] the political and moral autonomy of the enslaved . . . " through the "elimination of all possible sources of social value other than the slavemaster."[39] Contemporary historians have taken important steps to document and chronicle the amazing resilience demonstrated by slaves in preserving their social networks and institutions—including the family—during this period.[40] Nevertheless, this literature also makes clear how truly oppressive the institution of slavery was, and how much perseverance was required to survive and thrive in the face of such systematic dehumanization.[41]

Concerns regarding family disruption were certainly a factor that the Scott family had to be contemplating when Dred and Harriet Scott brought their suit for freedom.[42] Prior to Dr. Emerson's death, Dred and Harriet Scott had little reason to fear that their family would be separated.[43] Although they were Dr. Emerson's slaves, it is quite possible that they felt secure enough about their family integrity that they undertook "a willing subordination to one coercive institution—slavery—in exchange for another range of freedom."[44] It is possible

38. *See* Fox *supra* note 37, at 179.

39. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1362 (1994).

40. David Brion Davis, *A Review of the Conflicting Theories on the Slave Family*, J. BLACKS HIGHER EDUC. Summer 1997, at 100–03.

41. *Id. See also* HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 257–327 (1976); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1972).

42. Initially, Harriet Scott filed her own suit for freedom, but the lawyers who brought the case eventually sublimated her claim to Dred Scott's. *See* VanderVelde & Subramanian, *supra* note 6, at 1059–60. VanderVelde and Subramanian argue that this decision might have been a fatal blow to the claim as Harriet Scott had a stronger claim to freedom than Dred Scott. *Id*. at 1060.

43. *See generally* VanderVelde & Subramanian, *supra* note 6, at 1069–72.

44. *See* VanderVelde & Subramanian, *supra* note 6, at 1069.

that they hoped to be freed by Dr. Emerson or that they simply did not realize they had a legal right to sue for their freedom.[45]

Regardless of their motivations for remaining with Dr. Emerson, the Scott family was clearly more fortunate than many other slave families as they were able to stay together in the period prior to Dred Scott's suit for freedom.[46] However, Dr. Emerson's death raised the serious possibility that the Scott family would be divided.[47] This may have prompted the Scotts to begin their suit for freedom against Irene Emerson, the wife of the deceased Dr. Emerson, in the 1840s.[48] When the claim in Missouri courts ultimately proved unsuccessful, Dred Scott brought his diversity action against John Sanford, who was, by that time, the legal owner of every member of the Scott family.[49] The fact that the Scotts' daughters were placed in a secure, undisclosed location while this lawsuit was pending, demonstrates the degree to which the family feared the possibility of dissolution and the sale of individual members.[50]

Ultimately, although the Scotts were notoriously unable to secure their citizenship or their freedom through the courts, they were successful in holding their family together. After the case was lost, Dred, Harriet, Eliza and Lizzie Scott were freed.[51] Dred Scott worked as a porter in a St. Louis Hotel until his death in 1958.[52] Harriet Scott was retained as a washerwoman to the Blow family, who also hired the two Scott daughters.[53] In other words, although they were denied not only freedom but also citizenship by the United States Supreme Court, after obtaining their freedom directly from their owner, the Scotts confronted no laws that called into question their cohabitation as a unified family even though they lacked citizenship. Their ability

45. FINKELMAN, *supra* note 19, at 19.
46. Balkin & Levinson, *supra* note 13, at 53.
47. VanderVelde & Subramanian, *supra* note 6, at 1071.
48. Austin Allen, *Rethinking Dred Scott: New Context for an Old Case*, 82 CHI.-KENT L. REV. 141, 165 (2007) (citing WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM 41–46 (1979) for an account of the trial-level proceedings).
49. Allen, *supra* note 48, at 165.
50. VanderVelde & Subramanian, *supra* note 6, at 1074.
51. WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM, at 181, 182 (1979).
52. EHRLICH, *supra* note 51, at 182.
53. EHRLICH, *supra* note 51, at 182.

to remain together in this country was never questioned. Thus, while freedom from slavery was central to the Scott family's ability to preserve its unity, citizenship was not.

Threats to family integrity in the contemporary United States are no longer posed by laws sanctioning the institution of slavery, but these threats have not been entirely dissipated. One notable example is U.S. immigration and naturalization law, which sometimes operates to bar family unification in the United States and sometimes results in the removal of family members from the United States.[54] As a result of these laws, citizenship rights have come to play an important role in determining the extent to which many families are entitled to remain unified in the United States. In the next section, this Article explores how the right to family integrity has become linked to citizenship in the period following the *Dred Scott* decision.

II. RECONSTRUCTION THROUGH THE MODERN ERA: CITIZENSHIP AND FAMILY

The Reconstruction Amendments, which were drafted as a means of constitutionalizing the emancipation of slaves and the end of slavery, offered a direct response to the jurisprudence of the *Dred Scott* case. The Thirteenth Amendment abolished the institution of slavery endorsed by the Court in *Dred Scott*.[55] The citizenship clause of the Fourteenth Amendment[56] rebuts Justice Taney's notion (later echoed in the so-called Black Codes enacted in southern states in the aftermath of the Civil War) that Black people—even free Black people—could never be citizens.[57] The citizenship clause affirms the fact that all people born "subject to the jurisdiction of the United States," regardless of race, are U.S. citizens.[58] Although the Court later limited application of this principle, denying its applicability to the members of American Indian tribes[59] and residents of the

54. *See* discussion *infra* at Section III.
55. U.S. CONST. amend. XIII.
56. U.S. CONST. amend. XIV, § 1.
57. Scott v. Sandford, 60 U.S. (19 How.) 393, 426–27 (1856).
58. U.S. CONST. amend. XIV, § 1.
59. Elk v. Wilkins, 112 U.S. 94 (1884). The right of citizenship for these tribal members is provided by statute. 8 U.S.C. § 1401(b) (2000) (declaring a citizen and national at birth "a

territories,[60] thus far, the proposition actually has managed to withstand challenges based on claims of racial ineligibility for citizenship.[61] Thus, in the case of *Wong Kim Ark*, the Supreme Court affirmed the notion of birthright citizenship for a Chinese-American man, born on U.S. soil, even during a period when racist laws prohibited the naturalization of Chinese people born abroad.[62]

The citizenship clause does not expressly enumerate the rights to which these newly-defined "citizens" were entitled. Even read in conjunction with the Fifteenth Amendment, which prohibited the denial or abridgement of citizens' right to vote "on account of race, color, or previous condition of servitude,"[63] the "citizenship" guarantee of the Fourteenth Amendment did not bestow full political citizenship on all of its members. Obviously, at the time of its enactment, it did not bestow full political citizenship on women, regardless of race.[64] Thus, even as a guarantor of a very narrow

person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property").

60. There are about thirty-five *Insular Cases*, dealing with issues relating to the governance of the territories of Cuba, Guam, the Philippines, and Puerto Rico. These cases established a separate constitutional status for people residing in those territories; ultimately, they did not accord them citizenship status. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 978 (1991); *see also* Rose Villazor, *Birthright Citizenship in the U.S. Territories* (2008) (unpublished manuscript, on file with author) (discussing the history of the *Insular Cases* and their current application); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 585–89 (2006).

61. Mae Ngai has noted that "access to citizenship, including birthright citizenship in the United States, is not fixed but politically contingent." Mae Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2526 (2007). In the 1980s, Peter H. Schuck and Rogers M. Smith argued that the denial of birthright citizenship to the children of undocumented immigrants would be constitutionally permissible. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 118 (1985). More recently, John Eastman has argued for a reinterpretation of the Fourteenth Amendment that would exclude children of undocumented workers from citizenship because they are not "subject to the jurisdiction" of the United States. Ngai, *supra*, at 2524 (citing John Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over* Bush v. Gore*?* 94 GEO. L.J. 1475, 1484 (2006)). Several members of Congress have introduced legislation to amend the constitution to exclude such children from citizenship. *Id*. at 2524 n.19.

62. United States v. Wong Kim Ark, 169 U.S. 649 (1898); *see also* Lucy E. Salyer, *Wong Kim Ark*: *The Contest Over Birthright Citizenship*, *in* IMMIGRATION STORIES 51, 51–86 (Martin & Schuck eds., 2005) (discussing the case and its significance).

63. U.S. CONST. amend. XV, § 1.

64. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (upholding statute denying

conception of citizenship—where citizenship is viewed as a right to formal political participation—the Fourteenth Amendment was incomplete.

The "privileges or immunities" clause of the Fourteenth Amendment had the potential—ultimately unfulfilled—to imbue the citizenship clause with a concrete social, if not political, meaning.[65] At a minimum, the historical evidence suggests that the architects of the privileges or immunities clause intended to guarantee to citizens certain fundamental and traditional common law liberties from state control.[66] Some scholars have argued that the framers of the Fourteenth Amendment intended a broader interpretation of the clause, and would read the clause to achieve a "refined incorporation" of particular constitutional rights and freedoms to the states.[67] Many scholars have commented on the difficulties of establishing the appropriate scope of the clause,[68] which has slipped into near total disuse.

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women the right to vote). For a discussion of the significance of this denial of the right to vote see JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991). The denial of the franchise was remedied with the enactment of the Nineteenth Amendment. U.S. CONST. amend XIX.

65. *See infra* notes 75–76 and accompanying discussion.

66. Richard A. Epstein has theorized:

> First . . . a fair reading of the evolution of privileges and immunities clearly implies that it is only traditional liberties, with equal weight on both terms, that are protected. Second, it seems clear that privileges and immunities cover only what are commonly called negative liberties, or claims of independence from state control. They do not cover the wide variety of claims for positive benefits or services from the state which are covered by standard interpretations of the Due Process and Equal Protection Clause.

Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 334 (2005) (internal citations omitted).

67. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

68. *See* Epstein, *supra* note 64 (characterizing the scope of the privileges or immunities clause as a "mystery, " and resolving the issue with a narrow interpretation); Charles Fairman, *Does The Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 138–39 (1949) (examining the historical record and noting that "[t]he debates never established what was to be the basis or measure of the privileges and immunities of citizens of the United States. Congress . . . undoubtedly purposed . . . to establish a federal standard below which state action must not fall. At this point thinking became hazy."); Kenneth L. Karst, *The Supreme Court 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 12 (1977) (concluding that "*[w]hatever else they may have sought to do*, the framers of the

In addition to its citizenship guarantees, the Fourteenth Amendment also provides a floor of rights protection to all persons, whether or not those persons are citizens. Through the passage of the Fourteenth Amendment, the Reconstruction Congress took aim at the restrictive notion of citizenship encountered in the *Dred Scott* case, as well as its broader claim that noncitizens have no rights under the U.S. Constitution.[69] In addition to mandating the bestowal of formal citizenship on all persons encompassed by the citizenship clause, the Fourteenth Amendment secures to all persons subject to the jurisdiction of the United States "due process of law" and "equal protection of the laws."[70] Congress easily could have limited the due process and equal protection guarantees to citizens.[71] Instead, they made a critical distinction between those guarantees and the citizenship clause by making the subsequent clauses applicable to "any *person* within [U.S.] jurisdiction."[72] Scholars and jurists continue to contest the scope of substantive rights carried in the Fourteenth Amendment's due process clause,[73] as well as the meaning.

The four guarantees of the Fourteenth Amendment—birthright citizenship, protection from the abridgement of a citizen's privileges and immunities, due process, and equal protection guarantees for all persons subject to the jurisdiction of the United States—each respond to certain aspects of the *Dred Scott* decision. The citizenship clause and the privileges or immunities clause addressed the Supreme

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fourteenth amendment intended to validate the Civil Rights Act of 1866 and to write its main provisions into the Constitution.") (emphasis added).

69. Because the *Dred Scott* court denied the applicability of basic legal protections to noncitizens, one scholar recently noted that the decision "recognized and tacitly endorsed . . . tiered personhood." Henry L. Chambers, Jr., Dred Scott: *Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 211 (2007).

70. *Id*.

71. U.S. CONST. amend. XIV, § I.

72. U.S. CONST. amend. XIV, § I (emphasis added).

73. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, n.6 (1989) (taking issue with Justice Brennan's dissent as to the appropriate level of generality upon which to assess whether a right has traditionally received protection under the due process clause); *compare* John Ely, Democracy and Distrust 18 (1980) (arguing that "substantive due process" is an inherently nonsensical concept, lacking textual basis); *with* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 10 (198_) (critiquing Ely's own process-based theory as "determin[ing] almost nothing unless its presuppositions are specified, and its content supplemented by a full theory of substantive rights and values.").

Court's racial limitations on citizenship, and also sought to imbue citizens with certain basic rights against the state governments. The due process and equal protection clauses sought to provide certain process guarantees whenever the United States exercised jurisdiction over any person. In other words, after the ratification of the Fourteenth Amendment, no person subject to the jurisdiction of the United States could be said to have "no rights that the white man was bound to respect."[74]

In the post-Reconstruction Era, restrictive judicial interpretations undercut some of the promises of the Fourteenth Amendment and distorted Fourteenth Amendment jurisprudence in a way that reverberates even today. Only five years after its enactment, the privileges or immunities clause of the Fourteenth Amendment was rendered all but a dead letter by the Supreme Court's restrictive interpretation of the clause in the *Slaughter-House Cases*.[75] Later, courts, concerned with giving substance to the rights of citizenship, relied instead on the due process clause of the Fourteenth Amendment, giving rise to the development of substantive due process rights. Thus, one long-term distortion of post-Reconstruction Era limitations on the privileges or immunities clause is that "substantive due process" is doing constitutional work that, at least arguably, may be more properly addressed in the (citizenship-based) privileges or immunities clause.[76] It is perhaps an ironic, and certainly an unintended, byproduct of the *Slaughter-House Cases*, which all but eliminated the clause as a rights-protective doctrine, that many of the privileges and immunities of citizenship are now protected through the application of the due process clause, which applies to all persons.

Often, one distortion leads to another. Just as the demise of the privileges or immunities clause led later justices of the Supreme

74. Scott v. Sanford, 60 U.S. (How. 19) 393, 407 (1856).

75. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). *But see* Kevin C. Newsome, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000) (arguing that the case has been interpreted over-broadly in intervening years by the Court and commentators); Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourth Amendment*, 1984 U. ILL. L. REV. 739 (same).

76. *See* Balkin & Levinson, *supra* note 13, at 57.

Court to search for another vehicle to lend substance to the rights of citizens, efforts to cabin citizenship rights from procedural due process and equal protection have spurred judicial decisions in which due process and equal protection rights are discussed as a right of citizens.[77] This approach was invoked by the Warren Court even in its efforts to strike down laws that reinforced racial hierarchies.[78] Interestingly, even when the Court applies due process and equal protection norms, which apply to all people, the Court discusses the underlying rights at issue as "citizenship rights".[79]

Citizenship, in this conception, is not simply concerned with formal political rights, but instead encompasses a bundle of social and economic rights. The classic formulation of this position was laid out by T.H. Marshall, who argued that political notions of citizenship were incomplete, and that full citizenship required formal social, economic, and cultural equality.[80] Such an interpretation of "citizenship" would justifiably place the Fourteenth Amendment's citizenship clause and privileges or immunities clause at the center of efforts to eradicate forms of "second class citizenship" for racial minorities embodied in cases like *Plessy v. Ferguson*.[81] Citizenship is still invoked by scholars as the basis for claims regarding social goods such as education.[82]

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77. T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1691–94 (2001); *see also* M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 INDIANA L. J. (2008) (forthcoming) (draft on file with author) (noting the frequency with which federal courts erroneously discuss Fourth Amendment rights, including those incorporated to the states through the Fourteenth Amendment's due process clause, as a citizenship right).

78. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down Virginia's anti-miscegenation laws on due process and equal protection grounds, but discussing the right to marry as a right of citizens); *cf.* Aleinikoff, *supra* note 77, at 1692 ("significantly, the Warren court's equality campaign was not waged on behalf of aliens.").

79. *See, e.g.*, *Loving*, 388 U.S. at 12.

80. T. H. MARSHALL, *Citizenship and Social Class*, *in* SOCIOLOGY AT THE CROSSROADS 67 (1963); *but see* Peter H. Schuck, *Citizenship in a Post-9/11 World*, 75 FORDHAM L. REV. 2531, 2535 (2007) (positing that such discussions are "not really about citizenship, but about equality. It is a debate about the appropriate scope and content and normative justifications for the welfare state.") For a discussion of the various meanings of citizenship, see LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 17–20 (Princeton University Press) (2006).

81. 163 U.S. 537 (1896) (rejecting a challenge to a law requiring racial segregation in public railway cars on both Thirteenth and Fourteenth Amendment grounds).

82. *See, e.g.*, Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J.

The problem with centering on citizenship as a means of achieving formal equality or due process protections is that citizenship is a bounded and exclusionary concept.[83] Alexander Aleinikoff has pointed out that expanding rights through an expansive notion of citizenship necessarily comes at the expense of those who lay outside of the citizenship framework.[84] As a matter of constitutional law, it excludes many people who might also be viewed as the subject of the Constitutional's rights and protections: the immigrant (or "alien"), tribal members and people in the territories.[85] In short, centering on citizenship as the vehicle for the delivery of rights can have the effect of presumptively excluding noncitizens not only from political, but also economic and social rights and liberties.[86]

The erroneous judicial construction of due process protection as a right of citizenship inadvertently fuels the dangerous possibility of the reemergence of a domestic caste structure, which is fundamentally at odds with the intent of the Reconstruction Amendments.[87] Indeed, after the Warren Court's efforts to enhance rights through a robust understanding of the rights of citizens, later

330, 335 (2006) ("Before the Fourteenth Amendment mandates equal protection of the laws, it guarantees national citizenship. This guarantee is affirmatively declared; it is not merely protected against state abridgment. Moreover, the guarantee does more than designate a legal status. Together with Section 5, it obligates the national government to secure the full membership, effective participation, and equal dignity of all *citizens* in the national community. This obligation, I argue, encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.") (emphasis added). *See also* Webcast: Panel 2 comments of John A. Powell at the 150th Anniversary of *Dred Scott v.* Sandford: Race, Citizenship & Justice, held by Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (Apr. 6, 2006), *available at* http://www.charleshamiltonhouston.org/Events/Event.aspx?id=100027.

83. Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2450 (2007).

84. Aleinikoff, *supra* note 77, at 1692 ("By defining insiders, the concept of citizenship necessarily defines outsiders; and by guaranteeing full and equal rights for those within the charmed circle, it supports fewer rights—or at least less attention—for those outside the circle.").

85. Aleinikoff, *supra* note 77, at 1692.

86. Bosniak, *supra* note 83, at 2449–50.

87. For a discussion of *Dred Scott* as caste-based and the anti-precedent for anti-caste principles, see Webcast: Panel 4 comments of Cass R. Sunstein at the 150th Anniversary of *Dred Scott v. Sandford*: Race, Citizenship & Justice, held by Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (Apr. 6, 2006), http://www.charleshamiltonhouston.org/events/event.aspx?id=100027 (then follow "Webcast—Panel 4" hyperlink under "Links").

courts were able to leverage this reasoning as a means for limiting due process and equal protection for noncitizens.[88]

The Reconstruction Amendments, read as a reaction to constitutional slavery and the Dred Scott decision, point toward a different understanding of the relationship between rights and citizenship—one which guarantees full political participation to citizens, and which also provides some level of basic rights protection to all persons within the jurisdiction of the United States, whether citizens or not. The story of the Dred Scott family counsels against the use of "citizenship" as an absolute dividing line between those who possess rights and liberties and those who do not.[89]

Of course, such a statement raises some very basic questions. Most important among these questions is: What rights and liberties, if any, are guaranteed to both noncitizens and citizens by the post-Reconstruction Constitution? What are the "due process" guarantees provided to all persons subject to U.S. jurisdiction? Answering these questions requires the identification of rights and liberties so fundamental that neither citizens nor noncitizens can be denied these rights. In answering these questions, it is useful to focus on the ways in which the Reconstruction Amendments can be read to redress the denial of rights achieved by the Supreme Court in *Dred Scott*.

III. BUILDING THE FLOOR: FREE PEOPLE AND CITIZENS IN THE POST-RECONSTRUCTION ERA

Unlike the voting guarantees of the later-enacted Fifteenth Amendment, which are limited in scope to citizens,[90] the anti-slavery

88. Aleinikoff, *supra* note 77, at 1693 (arguing that the Rehnquist Court "used citizenship as a sword, wielded on behalf of individuals to cut down government actions on behalf of groups" while "upholding government action against aliens that would not be tolerated if imposed on citizens."); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (discussing the ways in which post-September 11, 2001 security measures, including those upheld by the courts, have eroded further the due process protections of noncitizens).

89. *See* Balkin & Levinson, *supra* note 13, at 56. Professors Balkin and Levinson also remind the reader of Alexander Bickel's suspicion of using citizenship "as a gatekeeper for whether people could possess basic rights and liberties against the state." *Id*. at 56; *see also* (ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 52–54 (1975).

90. U.S. CONST. amend. XV ("The right of *citizens* of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" (emphasis added)).

guarantees of the Thirteenth Amendment are generally applicable. No person can be enslaved within the jurisdiction of the United States by the State or by a private actor.[91] The Reconstruction Congress' understanding of the Thirteenth Amendment provides important insights into the later enactments of the Civil Rights Act of 1866 and the Fourteenth Amendment's due process and equal protection clauses.

The Thirteenth Amendment prohibited both slavery and involuntary servitude within the jurisdiction of the United States, and empowered Congress to enact laws to achieve this end.[92] One might view this right narrowly—that is, one might read it as simply compelling the cessation of the practice of compelling another person to labor without pay. But, while Congress debated this Amendment, many members discussed the right in much broader terms. The Amendment was not simply about eradicating the unpaid labor structure, but about eradicating the many social institutions that gave rise to and reinforced the system of slavery.[93]

Alexander Tsesis has noted that one of the primary social issues addressed as an "incident of slavery" was the mechanism of familial disruption.[94] As previously noted, family disruption was central to the system of slavery.[95] Therefore, it is not surprising that a discussion of the rights of families were an important part of Congressional debates over the Thirteenth Amendment.[96]

Professor Tsesis has notes that during an 1864 Senate debate of the Thirteenth Amendment, Senator James Harlan of Iowa urged that "interference with parental and marital relationships" constituted an

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91. U.S. CONST. amend. XIII.

92. U.S. CONST. amend. XIII. Other scholars have previously noted the difficulties of interpreting the meaning of this Amendment in modern times and the crabbed evolution of interpretations of the Amendment. *See, e.g.*, Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 974–79 (2002); Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2063–64 (1996).

93. The discussion in the following two paragraphs is drawn from a brief discussion in footnote 188 of an article that I recently published in the Wisconsin Law Review. *See* Jennifer M. Chacón, *Loving Across Borders*, 2007 WISC. L. REV. 345, 375–76 & n.188 (2007).

94. *See supra* text accompanying notes 37–41; ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 37–48, 121–27 (2004).

95. *See supra* text accompanying notes 37–41.

96. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 37–48, 121–27 (2004).

example of "the incidents of servitude" that the Thirteenth Amendment was designed to preclude.[97] Senator Henry Wilson stated that, were the Amendment to pass, "[i]n place of slavery's chains, federal law would respect natural rights by protecting family interests."[98] Ebson Ingersoll, a Representative from Illinois and advocate of the Thirteenth Amendment, noted that one of the most problematic aspects of slavery was the fact that it separated families, leaving whole segments of society without the "right to the endearments and enjoyment of family ties."[99]

These comments suggest that, in the view of at least some Members of Congress, the Thirteenth Amendment was concerned with more than just ending the labor arrangements that defined enslavement: it was concerned with eradicating the system of slavery, which necessarily included the disregard for familial integrity that stood at the center of that institution. The Thirteenth Amendment performs an important anti-caste function in protecting the basic right of familial integrity, and this anti-caste function is a direct response to Justice Taney's notion of the existence of subordinate and inferior beings who had "no rights" to protect their families, whether as slaves or free persons.

Later cases have emphasized the link between family unity and personhood. These discussions have been rooted in the due process clause of the Fourteenth Amendment.[100] As Peggy Cooper Davis has observed, in cases like *Meyers v. Nebraska*[101] and *Pierce v. Society of Sisters*,[102] "the Court recognized the rights of individual and family autonomy and used language that evokes, but does not make explicit,

97. Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS J. REV. 1773, 1813–14 (2006).

98. *Id*.

99. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864), reprinted in STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 53 (Bernard Schwartz ed., 1970); *see also* NATHAN I. HUGGINS, BLACK ODYSSEY 154–82 (2d ed. 1990).

100. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1369 (1994).

101. Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state statute prohibiting German language instruction in the home as a violation of the Fourteenth Amendment due process clause).

102. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down on Fourteenth Amendment due process grounds a state statute prohibiting students from attending private, religious schools).

the antislavery sensibilities favoring intellectual and moral independence."[103] The Court rooted its analysis in these and other cases concerning family,[104] in the Fourteenth Amendment due process clause. But the guarantee of family unity or "family liberty"[105] also clearly sounds in the Thirteenth Amendment. Understanding the centrality of family unity to the Thirteenth Amendment's anti-slavery promise provides further constitutional grounding for Davis' conclusion that "the idea of civil freedom that grows out of the history of slavery, antislavery, and Reconstruction entails . . . a right of family that derives from the *human right* of intellectual and moral autonomy."[106]

In sum, reading the Reconstruction Amendments together, as a response to *Dred Scott*, it is reasonable to conclude that the right to family unity is neither a citizenship right nor a privilege or immunity of citizenship. The history of the Thirteenth Amendment suggests that the right to family unity can be seen a part of the Thirteenth Amendment's anti-slavery right.[107] The Fourteenth Amendment assures that it is a right to which persons "subject to the jurisdiction" of the United States cannot be deprived of without "due process" of law.[108] Thus, while there is no express constitutional guarantee of family unity, we can understand the Constitution to provide a guarantee that a deprivation of family unity will be imposed with appropriate due process considerations. "To think of family liberty as a guarantee offered in response to slavery's denials of natal connection is to understand it, not as an end in itself, but as a means to full personhood."[109]

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103. Davis, *supra* note 39, at 1369.

104. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down a state law requiring sterilization of certain three-time felons); Moore v. East Cleveland, 431 U.S. 494 (1977) (striking down ordinance that barred extended family members from living together in public housing unit).

105. Davis, *supra* note 39, at 1371. Davis, like the Court itself, locates this notion of family liberty in the Fourteenth Amendment due process clause. Davis, *supra* note 39, at 1369.

106. Davis, *supra* note 39, at 1371.

107. U.S. CONST. amend. XIII.

108. U.S. CONST. amend. XIV.

109. Davis, *supra* note 39, a 1371.

IV. RESPECTING THE FLOOR: FAMILY UNITY AND IMMIGRATION LAW

At present, one of the most important sites for the denial personhood through the abridgement of family liberty occurs in the regulation of immigration. In 2005, more than thirty-five million residents of the United States, or about twelve percent of the population, were immigrants.[110] A significant sub-set of these immigrants are present without legal authorization. One estimate placed the number of undocumented migrants at 12 million as of March 2006.[111] Millions of people in the United States live in mixed-status families, in which one more members of the family are undocumented noncitizens. One out of every ten children in the United States is part of a mixed-status family.[112] The practical consequence of the immigrant-heavy composition of the U.S. population is that laws regulating immigration and naturalization have a significant impact upon a substantial percentage of the population as a whole.

In many cases, families with noncitizen members encounter significant challenges as a consequence of U.S. immigration laws. These challenges can take many forms. Immigration laws impose heightened state intrusions into marriages involving noncitizens,[113]

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110. Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, 2005 CENTER FOR IMMIGR. STUD. BACKGROUNDER, 1, http://www.cis.org/articles/2005/back1405.pdf.

111. *Estimates of the Unauthorized Migrant Population for States based on the March 2005 CPS*, (Pew Hispanic Center Fact Sheet), Apr. 26, 2006, at 2 http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=25.

112. Michael F. Fix, Wendy Zimmerman & Jeffrey S. Passel, *The Integration of Immigrant Families in the United States*, IMMIGRATION STUDIES (The Urban Institute), July 2001, at 15, http://www.urban.org/UploadedPDF/immig_integration.pdf. For a discussion of the implications of mixed-family status in family law, see David B. Thornson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Migrants in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL'Y 45 (2005).

113. *See, e.g.*, Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1682–94 (2007) (discussing the Immigration Marriage Fraud Amendment (IMFA)); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 697–718 (1997) (contesting the validity of the IMFA provisions that render marriage fraud a federal crime); Jesse I. Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986*, 25 CAL. W. L. REV. 1 (1988) (arguing that the IMFA violates the Fourteenth Amendment); Eileen P. Lynskey, Comment, *Immigration Marriage Fraud*

prevent certain categories of workers from bringing family members with them,[114] impede efficient family reunification,[115] or foreclose reunification altogether.[116] It can result in the deportation of noncitizen family members, whether those family members are lawful permanent residents or undocumented migrants.[117] This is true even if the deportation of a parent results in the constructive deportation of citizen children.[118] In short, regardless of the nature of their immigration status, noncitizens (and their citizen relatives) can encounter a variety of obstacles to family integrity as a consequence of immigration law.

Of course, immigration law is not the only area of law that impedes family integrity. A wide array of civil laws allow for state intervention in private family arrangements.[119] The criminal law also imposes many disruptions to the integrity of families.[120] Most notably, when one family member is sentenced to prison, the entire family is deeply affected.[121] In this sense, immigration law cannot be

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Amendments of 1986: Till Congress Do Us Part, 41 U. MIAMI L. REV. 1087 (1987) (making similar constitutional arguments against the IMFA).

114. 8 U.S.C.A. § 1101(H)(2)(b) (West 2005); *see also* Benjamin P. Quest, Comment, *Process Theory and Emerging Thirteenth Amendment Jurisprudence: The Case of Agricultural Guestworkers*, 41 U.S.F. L. REV. 233, 258 (2006).

115. Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WISC. L. REV. 345, 357–58 (2007).

116. *Id.* at 357–63 (discussing bars to same-sex partner unification and other limits on the nature of the relationships that entitle a family member to visa preferences).

117. *Id.* at 359–68.

118. *Id*. at 364–66; *see also* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006) (discussing the dilemma of noncitizen parents with citizen children).

119. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways"); *see also* Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 403–14 (2000) (discussing increasing state interference in the raising of children).

120. *See, e.g.*, Turner v. Safly, 482 U.S. 78, 96 (1987) (upholding a prisoner's right to marry but implying that consummation may not take place until the end of the prison sentence). For a discussion of the ways that states should and should not take family ties into account in meting out criminal justice, see Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147 (2007).

121. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); Marc Mauer, *Thinking About Prison and Its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 611–12 (2005).

said to be the only area of the law that imposes significant interventions in family integrity. Moreover, U.S. immigration law actually privileges family ties in the ordering of immigration priorities.[122]

Nevertheless, immigration law provides an interesting lens through which to evaluate the nature of the right to family integrity. As a doctrinal matter, when the rights of family intimacy collide with the government's authority to regulate immigration, Congress' plenary power to regulate immigration routinely trumps all other considerations. Taking the reconstructed Constitution seriously does not require a determination that the needs of family will always trump the prerogative of the state to regulate immigration. On the other hand, it might suggest the need to accord family interests more weight in immigration law and policy.

At least five examples come to mind where the right of family integrity could easily be accorded greater status in immigration regulations without jeopardizing the government's ability to meaningfully regulate immigration. First, spousal reunification provisions in the family-based immigration law categories can and should be expanded to take into account same-sex partners. [123] Second, the serious backlogs for immediate family members of citizens and lawful permanent residents should be eliminated immediately, and steps should be taken to ensure that such backlogs do not develop again.[124] Third, a small number of family reunification

122. Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP L. 511 (1995) (comparing the ways in which U.S. and German immigration law define, accommodate and fail to accommodate family ties, and noting numerous provisions in U.S. law concerned with family reunification); Chacón, *supra* note 115, at 356–57 (explaining the family-based preference system that gives rise to the bulk of legal immigration into the U.S.).

123. *See*, *e.g.*, Matthew Lister, *A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same Sex Couples*, 37 U. MEMPHIS L. REV. 745, 760–63 (2007) (discussing the current situation of same-sex couples under U.S. law); Christopher A. Dueñas, Note, *Coming to America: The Immigration Obstacles Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 821–23 (2000) (arguing that immigration laws should recognize same-sex marriages); Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the "Rara Avis,"* 56 U. MIAMI L. REV. 537 (2002).

124. *See Promoting Family Values and Immigration: Hearing on the role of Family-Based Immigration in the U.S. Immigration System Before the Subcomm. on Immigration of the H. Comm. on the Judiciary* (May 8, 2007) (testimony of Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis); *Oversight Hearing on the Shortfalls*

visas should be allocated to individuals who do not fit traditional categories of "family," but who can demonstrate status relationships with U.S. citizens or lawful permanent residents that are akin to the family-based categories that already exist.[125] Fourth, family ties ought to be accorded greater weight in removal proceedings. Immigration judges should have the discretion—as they once did—to grant cancellation of removal to a removable noncitizen who can demonstrate that her continued presence in the United States poses no threat, and that her removal will negatively impact U.S. citizen or lawful permanent resident family members.[126] This list is not exhaustive,[127] but it points to some of the most obvious areas where immigration law substantially interferes with family integrity .

All of these policy changes could and should be made by Congress as part of any package of comprehensive immigration

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of the 1986 Immigration Reform Legislation Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary (Apr. 19, 2007) (testimony of Stephen Legomsky, Professor of law, Washington University).

125. *But cf.* Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of Family*, 11 LEWIS & CLARK L. REV. 809, 827–29 (2007) (arguing that the United States should aim to adopt a more flexible statutory definitions of "family," similar to that used in Canada).

126. This sort of discretion was routinely exercised under Section 212(c) of the Immigration and Nationality Act as it existed prior to 1996. Scholars have called for its reinstatement or even broader forms of relief. *See, e.g.*, BILL ONG HING, DEPORTING OUR SOULS: VALUES MORALITY AND IMMIGRATION POLICY 58–64 (2006) (discussing the "rise and fall" of the 212(c) waiver). See also Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 110–11 (1998) stating:

> (This [212(c)] waiver process protected the interests of the immigrant who may have built a life of work, family, and community based on the understanding that his or her past conviction would not lead to deportation. It also protected the interests of all of those whose lives were intertwined with that of the immigrant, including family members, employers, and the employees of immigrants who operated businesses. In practice, approximately half of the long time permanent residents who sought relief from deportation were granted such relief. *Id*.

Admittedly, such discretionary relief presents problems of its own. *See, e.g.*, Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 767–807 (1997) (outlining problems of judicial deference to improper exercises of discretion and recommending new standards).

127. For example, one scholar has suggested that the Thirteenth Amendment prohibition on slavery should be read as a bar to the familial separation required under the current H-2A agricultural guestworker visa program, which does not permit the visa holder to be accompanied by family members. Benjamin P. Quest, *Process Theory and Emerging Thirteenth Amendment Jurisprudence: The Case of Agricultural Guestworkers*, 41 U.S.F. L. REV. 233, 238–39, 252–54, 258 (2006).

reform. Ironically, Congress gives every indication that it plans to move in precisely the opposite direction. The 2007 proposal for comprehensive immigration reform would have moved away from a family-centered immigration policy, and decreased the number of family-based immigrants visas issued each year.[128] Overall, the bill would have substantially altered the admissions process to favor immigrants with special talents and skills.[129] The bill also would have increased the categories of lawful permanent residents subject to removal.[130] In exchange, a path to citizenship would have been established for some of the noncitizens currently present without authorization.[131] Significantly, however, the bill left quite unclear whether and when anyone would actually have their status normalized, since the legalization was predicated upon certain difficult conditions involving the "securing" of the border.[132]

Noncitizens and lawful permanent residents cannot vote. Their voices are not represented in majoritarian lawmaking schemes. It is therefore highly possible that Congress will act to limit, rather than to extend greater protection to, the family integrity of noncitizens.

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128. The bill would have reduced the number of family-based visas from 480,000 to 127,000. Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348 110th Congress (2007) § 501. This reduction is all the more significant because the Senate bill would have subjected the parents of adult citizens to this numerical cap. S. 1348 § 502 (subjecting parents to the cap and limiting their numbers to 40,000 a year). At present, such parents are not subject to a numeric cap. INA § 201(b)(2)(A)(i)). The number of visas available for other kinds of family members would also shrink. S. 1348 § 502.

129. *See* Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348 110th Congress (2007) § 502. In contrast, the current law assesses skill for employment visas, (INA § 203(b)), but not for family-based visas (INA §§ 201(b)(2)(A)(i), 203(a)).

130. For example, Senate 1348 § 503 expands the definition of "aggravated felony." Lawful permanent residents who commit aggravated felonies are deportable. INA § 237(a)(2)(A)(iii). The bill also would have made deportable "members" of "criminal street gangs" regardless of whether or not they have criminal convictions. Senate 1348 § 204. The bill would not have restored judicial discretion in cases involving aggravated felons. This discretion was eliminated in 1996 with the passage of IIRIRA, with harsh consequences for many lawful permanent residents and their family members. *See* BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY 58–64 (comparing former INA § 212(c), which offered some discretionary relief from removal, with cancellation of removal under current law, which sharply limits relief from removal); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 107–14 (same).

131. S. 1348 at Title VI.

132. *Id*. § 2.

CONCLUSIONS

To date, the courts have rejected attempts to challenge Congress' plenary power in the area of immigration, even where core familial rights are at stake. Reconsidering the Dred Scott story, and reflecting on the centrality of the *Dred Scott* decision to the Reconstruction Amendments, suggests that perhaps courts are not striking the right balance in this regard. Noncitizens subject to the jurisdiction of the United States, along with their citizen relatives, are entitled to due process of law. These due process protections must extend to the protection of the family integrity that the Reconstruction Congress—reacting to the institution of slavery—viewed as a basic right of all persons.

Recognition of the rights of the noncitizens residing in the United States to assert claims of family integrity is not the same as guaranteeing all persons with family connections in the United States to enter and remain. Such recognition does, however, require treating close family bonds with a certain legal seriousness that is currently nonexistent in cases involving, for example, the removal of rehabilitated noncitizens with old convictions for crimes that have been reclassified as "aggravated felonies." Due process demands that the life-long breakup of a family unit that is predicated on an old offense should require an evaluation of the facts of the case.

The recognition that due process demands the consideration of certain basic rights such as family integrity is also not inconsistent with bounded conceptions of citizenship. It does not require the conferral of political membership on noncitizens. It does not even deny that certain social welfare benefits might be legitimately limited to citizens. But it does suggest that there ought to be a baseline of rights protections below which we cannot go with regard to any person subject to the jurisdiction of the United States. Current doctrinal approaches to the rights of noncitizens lack such a baseline.

In the absence of a baseline, some families are as vulnerable now to being broken apart as the Scotts were over 150 years ago. Now, it is the U.S. government itself that not only enforces, but also enacts, the separation. In certain circumstances, the government should have that power. But to routinely read Congress' ability to break up families as plenary is to ignore the social meaning of the

Reconstruction Amendments and to disregard the caste-enforcing character of such regulations.