

### Discussion 4: Dred Scott & Federalism

---

Three cases that are among the most important in the Supreme Court's history:

- Marbury vs. Madison (1803)
- McCulloch vs. Maryland (1819)
- Dred Scott vs. Sandford (1857)—one of the triggering events of the Civil War, and again has major implications for judicial review

These cases are not simply historic, but continue to have major implications for constitutional law, providing metaphors and arguments for litigants to use in debating current hot-button issues

#### Discussion of Dred Scott vs. Sandford, 1857

Dred Scott was held as a slave in a slave state, moved and held as a slave in a free state, then sold back into a slave state. He sues for his freedom, alleging that he is not a slave after having lived in a free state.

What made a Black person free during this time?

A child born of free parents is typically considered free. The definition of free varies depending on where a person is. There are certain jurisdictions under which a person might technically be free, but can be held as a slave if someone claims ownership.

Dred Scott cites a case in English law called the Somerset Case. In Somerset, a slave that had been brought to England was declared free the moment he arrived in England. Dred Scott claims that he is a free person because he had been in free territory, and asks the Court to free him.

The Missouri Compromise (1820) divided the Louisiana Territory into free and slave territory. Dred Scott was brought into the free part of the territory, thus claimed he was free. Sandford bought Dred Scott from Dr. Emerson, thus Scott sued Sandford.

Originally, Dred Scott sues in the circuit court of Missouri. Supreme Court decides that because he is an African American, he cannot bring a lawsuit.

*"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, guaranteed, 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."* (Taney, majority opinion in Dred Scott v. Sandford, Course Reading pg. 185)

Framers at the time of the framing of the Constitution did not consider African Americans citizens of the United States. (This is an important nineteenth-century instance of the original intent argument still used in legal reasoning today)

Taney says we should not confuse the meaning of state citizenship with citizenship under the Union. The constitutional basis for this is Congress' power to naturalize people.

What are other justifications that Blacks cannot be citizens, even if they were free when the Constitution was founded?

- Constitution was only meant to make people citizens who were already recognized as citizens by the sovereign states. African Americans were not treated as citizens.
- Clauses in the Constitution that point to Blacks as a separate class of persons:
  - States sanction the right to import slaves until 1808, which acknowledges slaves as property
  - States must return fugitive slaves
  - 3/5 Compromise

What does the word “persons” mean?

The Constitution references slaves and Blacks as persons, but Taney says that the term “People” is synonymous with “citizens”. However, there were free blacks when the Constitution was founded.

Taney makes a number of arguments as to why Blacks are not citizens:

- No interracial marriage
- Illegal to educate Blacks in some states
- They cannot exercise civil and political rights in many free states

Taney strikes down the Missouri Compromise because he claims the Congress has no right to adopt this legislation.

Notes on the issue of federalism

- In Dred Scott, the Court says that the ability to decide who is and is not a citizen of that state is a power of the state government
- Other cases have brought the court back to federalism recently (US vs. Morrison, US vs. Lopez).

### **Discussion of Katzenbach vs. McClung, 1964**

An Alabama restaurant owner refuses to allow African Americans to dine in his restaurant. Katzenbach, attorney general, sues to enforce the Civil Rights Act of 1964, which prohibits discrimination in places of “public accommodation.” A public accommodation is defined as a place that “serves or offers to serve interstate travelers or a substantial portion of the food which it serves...has moved in commerce.”

The Civil Rights Act of 1964 relies on Article 1, Section 8—the commerce clause, for its constitutionality. The Act is worded to specifically prevent discrimination in places that might be influenced by inter-state commerce, though the general goal of the Act was not actually to regulate commerce, but to provide blanket federal protection of minorities from racial discrimination in places of public accommodation.

Supreme Court says racial discrimination in service affects interstate commerce. Citing the “necessary and proper” clause (Article I, Section 8, Clause 18), the Court says Congress can do whatever it needs to ensure free flow of interstate commerce. This provision gives Congress broad authority to regulate commerce within the states. The Court has been very lenient until recently in the interpretation of this clause, allowing Congress almost unlimited regulatory authority. In US v. Lopez and US v. Morrison the Court struck down federal statutes that, in the Court’s view, bore no real relationship to inter-state commerce.

Here the Court uses the rational basis test for determining whether a provision affects inter-state commerce.

*“Here, as there, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be*

*deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in [379 U.S. 294, 304] light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.” (Clark, majority opinion in Katzenbach v. McClung, www.findlaw.com)*