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The Continuing Presence of Dred Scott

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THE CONTINUING PRESENCE OF *DRED SCOTT*

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Professor Burt says, and correctly so, that *Dred Scott v. Sandford*[1] is the most reviled[2] case in all of constitutional law; but then he also says that the decision in that case is all too typical. There is a tension between these two statements. If it is so typical, why do we revile it? We revile it because we are appalled by Taney's racism, and we have the comfortable feeling of being superior to Taney on that point. (Perhaps we are.) Nevertheless, Burt asks us to look beyond that to the "jurisprudence" of the opinion. His claim is that Chief Justice Taney's jurisprudence resembles the sort of logic and rhetoric that is present in many of the highly praised decisions of the Supreme Court.[3] If this is true, then there is a continuity between *Dred Scott* and ourselves that we have not thought about.

If there is a continuity, we should investigate it. Burt has done so by asking about the jurisprudence of our constitutional law. I would like to take a slightly different, yet compatible, approach to the question of the continuing presence of *Dred Scott* among us; I would like to focus on its legal validity among us. Burt's argument about jurisprudential continuity is sound, but I wish to supplement it by focusing on the issue of legal continuity. Prima facie, there ought to be a connection; if there is a jurisprudential continuity, then it is plausible that there is some continuity in the law of the case, in the more purely legal issues that were decided therein.

The legal question I would consider is the question of citizenship. Everyone knows that *Dred Scott* held that Negroes could not be citizens of the United States, that "no blacks, white only" was the rule. It is less well known that a key move in the argument was the bifurcation of citizenship into two kinds of citizenship: state citizenship and national citizenship. This dichotomy was absolutely essential, from Taney's point of view. After all, Taney was an adherent of the state's rights theory of constitutional law, and so he did not claim the power to say whom the states could declare to be citizens. Taney did not declare that Massachusetts could not recognize free blacks as citizens of Massachusetts; he did not care about that. There was, however, something that he did care about, and rather strongly so. The real issue (and I agree with Burt on this) is whether Massachusetts's action would have any national relevance. In particular, if a free black citizen of Massachusetts were to travel to Virginia or South Carolina, would those Southern

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1. 60 U.S. (19 How.) 393 (1857).

2. Burt, *What Was Wrong with* Dred Scott, *What's Right about* Brown, 42 WASH. & LEE L. REV. 1, 1 (1985).

3. *Id.* at 3.

states have to recognize the soujourner as the as the sort of citizen who is entitled to the protection of the privileges and immunities clause of article IV?

What many have failed to bear in mind is that this part of *Dred Scott*, the dichotomy of state and national citizenship, is still part of our law to this day; a fortiori, there has been all too little thought directed toward this matter, for we cannot think about that which we will not bring to mind. Therefore, let me start by giving a modern example of the continuing relevance of the dichotomy. The question will be: Is this particular continuity with *Dred Scott* something that is bad or good?

My example is a case titled *Sadat v. Mertes*.[4] It is an appropriate example for several reasons: it is recent enough to be called "modern", and so it can not be shrugged off as being a relic of the past; the plaintiff in the case, Moheb Sadat, was like Dred Scott in that he wanted to sue in federal court via the diversity jurisdiction route,[5] which was the route to federal jurisdiction that Scott tried to use;[6] and finally, *Dred Scott* was cited by the Seventh Circuit as a precedent and as grounds for excluding Sadat from federal court.[7]

The case is an automobile accident suit, and so it is not what we call a "great" case; there is little about it that would lead most readers to imagine that great social issues were at stake. Sadat was naturalized in 1973, at which time he was domiciled in Pennsylvania.[8] (By the way, a natural-born citizen could have the same kind of problem, but more about that later.) In the same year, he accepted a job with the Kohler Company in its overseas operations in Beirut.[9] He trained in Kohler's Wisconsin office, and then, while driving to O'Hare Airport en route to Beirut, he had an accident; the other party involved was domiciled in Wisconsin (and was insured by a Connecticut insurance company).[10]

Sadat took up his job in Beirut, but the well-known troubles in Lebanon had their impact; Kohler eliminated his job and he was stranded in the Mideast.[11] He moved to Cairo to live with relatives, and while domiciled in Cairo, he filed suit in federal district court in Wisconsin, alleging diversity from the Wisconsin and Connecticut defendants.[12] According to the judge-made rules that are part of the gloss on the diversity jurisdiction statute, one is to determine whether or not the parties are of diverse citizenship as of the time the lawsuit if filed.[13] Somewhat later, Sadat returned to the United

4. 615 F.2d 1176 (7th Cir. 1980).
5. *See id.* at 1178.
6. 60 U.S. at 396-7, 400.
7. 615 F.2d at 1180.
8. *See id.* at 1178-79.
9. *See id.* at 1179.
10. *See id.* at 1178.
11. *See id* at 1179.
12. *See id.* at 1178.
13. *See* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3608 (1984), at 448.

States,[14] but the facts as to his domicile after his return are irrelevant; the relevant time is the time of the suit. As of that time, according to the Seventh Circuit's per curiam opinion, there was no diversity.[15]

The rationale of the *Sadat* court's opinion is as follows: The statute requires that the plaintiff and the defendant be citizens of different states; even though Sadat was a citizen of the United States, he was not a citizen of any one of the several states; consequently, the requisite diversity was lacking.[16] There is much respectable authority for this result; the per curiam opinion cited a line of eight cases, from 1912 to 1978, for the proposition that someone who was a citizen of the United States without being a citizen of one of the several states cannot sue in diversity.[17] (Furthermore, these cases are clear on the proposition that this rule applies to both natural-born and naturalized citizens.)[18] The key step in this logic is the second step: Sadat could be a citizen of the United States without being a citizen of one of the several states. The Seventh Circuit cited *Dred Scott* for the proposition that there is a dichotomy between state and national citizenship, and it followed precedent in saying that Sadat was not, according to law, a citizen of any state.[19] The problem is supposed to be linked to the language of the fourteenth amendment, which states that citizens of the United States are citizens "of the State wherein they reside."[20] This is interpreted as stating a federal rule about the prerequisites of state citizenship: one must reside in a state to be a citizen of it, a prerequisite that Sadat failed to meet.[21]

The question is whether *Sadat v. Mertes* is marginal in our law. The case is an example, and there are many, of cases in which it is asserted that state and national citizenship are separate and distinct (separate but equal?) concepts. But what turns on the distinction? For Sadat, federal court jurisdiction; but is there more? Should we find some great significance in the fact that the *Sadat* court cited *Dred Scott* as authority for the proposition that there is a disjunction between state and national citizenship? I am intrigued by the fact that the actual pages of 19 Howard that are cited are 405-06, which are the same pages that Professor Burt has identified as the core of *Dred Scott*,[22] the pages in which Taney denies that a single state can grant citizenship so as to require other states to extend comity. Perhaps one should not make too much of this, but it is a lead that is worth exploring.

To me, this citation identifies a continuity between *Dred Scott* and the two leading cases on the fourteenth amendment: the *Slaughterhouse Cases*[23]

14. *See* 615 F.2d at 1180.
15. *See id.*
16. *See id.*
17. *Id.*
18. *See id.* (cases cited therein).
19. *See id.*
20. U.S. CONST. amend. XIV, § 1.
21. 615 F.2d at 1180.
22. Burt, *supra* note 2, at 5-8.
23. 16 Wall. 36 (1873).

and the *Civil Rights Cases*.[24] Both of these cases have their critics, but the more routine scholarship of our time treats these cases as having at least recognized that *Dred Scott* was overruled by the fourteenth amendment. Nevertheless, such cases as *Hammerstein v. Lyne*,[25] which is one of the eight cases relied upon by *Sadat v. Mertes*, cite the *Slaughterhouse Cases* for the proposition that national and state citizenship are two separate things;[26] *Sadat v. Mertes* cites *Dred Scott* for the same proposition;[27] and so one can sum this up by saying the *Sadat* case recognizes a clear continuity, on a question of citizenship, between *Dred Scott* and the *Slaughterhouse Cases*.

The *Slaughterhouse Cases* passed on the constitutionality of a Louisiana statute that gave a monopoly to the Crescent City Live-Stock Landing and Slaughter-House Company over all of the slaughtering to be done in the parishes of Orleans, Jefferson, and St. Bernard.[28] This monopoly was softened somewhat by imposing upon the company the duty to permit other butchers to use its facilities, and by regulating the fees that it could charge the other butchers.[29] In his opinion for the Court, Justice Miller first summarized the facts,[30] and then turned to the legal issue of whether the statute in question was within the police power of the state.[31] He did not explain exactly why the police power question is a question of federal constitutional law, but he disposed of it in favor of the validity of the statute.[32] Only then did he proceed to a discussion of the Civil War amendments, the thirteenth through the fifteenth. The discussion of these matters constitute the bulk of the opinion (sixteen pages),[33] but I am interested in the eight pages[34] that he devotes to the question of citizenship.

Justice Miller began his discussion of this issue by stating that the fourteenth amendment "opens with a definition of citizenship."[35] He recognized that it was something new for our Constitution and that it was passed to overrule Taney's holding excluding blacks from citizenship.[36] He immediately went on to assert, however, that "the distinction between citizenship of the United States and citizenship of a State is clearly recognized" by the fourteenth amendment.[37] What is truly remarkable about this conclusion is that it was reached in the most innocent way, as though it were a simple and elementary deduction from the language of the text. Justice

24. 109 U.S. 3 (1883).
25. 200 F. 165 (W.D. Mo., 1912).
26. *See id.* at 168.
27. *See* 615 F.2d at 1180.
28. *See* 16 Wall. at 39-41, 59.
29. *See id.* at 41-42, 60.
30. 16 Wall. at 57-60.
31. *Id.* at 60-66.
32. *Id.* at 66.
33. *Id.* at 66-83.
34. *Id.* at 72-80.
35. *Id.* at 72.
36. *See id.* at 72-73.
37. *Id.* at 73.

Miller failed to ask any questions of policy or history; he did not ask whether his ruling helped or hindered the overruling of *Dred Scott*, but the answer to this unasked question is rather obvious: Miller preserved one of the most important features of that opinion.

Justice Miller then added injury to the insult by holding that the privileges and immunities of the two types of citizenship are different, and that the United States Constitution protects only the national privileges.[38] Having done all of this, he then went on to trivialize the national set: state privileges and immunities were said to be those "civil right[s] for the establishment and protection of which organized government is instituted," to be "those rights which are fundamental."[39] The national privileges and immunities were described by way of a motley list, and included such matters as free access to seaports and the right to have the protection of the national government "when on the high seas or within the jurisdiction of a foreign government."[40] Since the national government is empowered to protect only the national privileges and immunities, according to Miller's reading of the text, the true import of the bifurcation is that all of the important rights are left to the protection of the state governments. (And those who are familiar with the *Civil Rights Cases* know how this is to work out.)

At this point the *Slaughterhouse Cases* begin to look like the deep mirror image of *Dred Scott*. Taney declared that blacks could not be citizens; and as Burt has emphasized,[41] the fundamental purpose behind this move was to prevent blacks from claiming the privileges and immunities of citizenship. With the adoption of the fourteenth amendment, blacks become citizens, but Miller gutted the meaning of that by stripping citizenship of any important legal consequences. So long as blacks cannot be citizens, enormous importance is attached to the concept; as soon as blacks can become citizens, the concept is drained of all meaning. (It is this sort of thing that gives paranoia a good name.)

One can know all of this and dismiss it as unimportant, in that one can argue that it is no longer historically relevant. One could say: "It is true that our fundamental rights, whether we be black or white, are not protected via the privileges and immunities clause, but they are protected nowadays via the due process clause and the equal protection clause. The point that you make has been mooted. And the rather odd problem of Moheb Sadat is not worth worrying about." Indeed, one can go further and argue, as Alexander Bickel once did,[42] that it is preferable to have our fundamental rights linked to our being persons, not citizens, for in this way aliens can also enjoy fundamental rights.

I disagree. First of all, it seems to me that Bickel overstates the legal

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38. *Id.* at 74.
39. *Id.* at 76.
40. *Id.* at 79.
41. Burt, *supra* note 2, at 5-8.
42. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

equality of aliens and citizens.[43] Furthermore, it does not seem true to say that aliens could not enjoy the protection of fundamental rights if such rights had been brought within the content of the privileges and immunities clause. Bickel's error on this point, or so it seems to me, is caused by a hasty generalization and by his lack of care in examining the historical precedents and materials that are relevant to the question. Competent lawyers had offered a sound solution to the difficulty that obsessed Bickel, and yet he did not respond to these venerable arguments.

The first case in which the question of the relationship of the Bill of Rights and the fourteenth amendment was clearly raised is *Spies v. Illinois*.[44] The case was popularly known as the Chicago Anarchist's Case, and involved the so-called Haymarket Riot, in which a policeman was killed by a bomb.[45] Members of the Anarchist Party, who had organized a mass meeting in Haymarket Square, were charged with responsibility for the murder-by-bomb, and convicted.[46] On writ of error to the United States Supreme Court, the legal issue was whether the anarchist had had an "impartial jury."[47] John Randolph Tucker, who handled the appeal, argued that the jury trial provisions of the Bill of Rights were "privileges and immunities,"[48] and thus Tucker holds the distinction of being the first lawyer to argue that the fourteenth amendment "incorporates" the Bill of Rights. In the course of his argument, he had to face Bickel's problem, for many of his clients were aliens.

Tucker's solution was straightforward. He summed up his position in a single sentence: "If the State cannot abridge the privilege of a citizen of the United States, the same limitation applies to an alien, for *no person* shall be denied the equal protection of the laws."[49] It seems to me that Tucker offered a simple and elegant solution to Bickel's problem; Tucker's solution is not compelled by the force of deductive logic, but it is consistent with the language and history of the fourteenth amendment. Tucker assembled a list of fundamental rights from various provisions of the Constitution, including the Bill of Rights.[50] He then asserted that these rights comprise the privileges and immunities of citizenship and that they are protected from state abridgment by the fourteenth.[51] Moreover, since the fourteenth extends to aliens as well as to citizens the guarantee of equal protection of the laws, then it

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43. Bickel was relying on *Graham v. Richardson*, 403 U.S. 365 (1971). However, the Supreme Court has reversed its position in more recent cases, subsequent to Bickel's article. *See* Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978).

44. 123 U.S. 131 (1887).

45. H. DAVID, THE HISTORY OF THE HAYMARKET AFFAIR (1937).

46. Spies v. People, 122 Ill. 1, 12 N.E. 865 (1887).

47. *See* 123 U.S. at 133-34, 165.

48. *Id.* at 151 (Tucker's argument for petitioners).

49. *Id.* at 153.

50. *Id.* at 150-52.

51. *Id.* at 152.

follows, according to Tucker's reading of the text, that aliens are entitled to enjoy these very same rights.

Nevertheless, this debate between Tucker and Bickel has to do with a technical question that is not the main point on which I would rest my critique. I think that *Sadat v. Mertes* is evidence that the dichotomy of state and national citizenship is alive and well, and it is clear enough that this dichotomy has gone together with other things, such as the trivializing of the privileges and immunities of national citizenship. The long term consequence of this has been that the concept of citizenship has had no importance in our law. My critique rests on my view that this void in our law is unfortunate.

This void in our law is bad because it has driven a wedge between popular talk and legal talk. For many of us, the word "citizen" is a badge of honor and pride; for the immigrant, to achieve this status is to gain something wonderful. Furthermore, in political debate, the word "citizen" is a word that carries weight. In the arena of public opinion, whenever someone advances a claim based upon his citizenship, he has made a powerful rhetorical claim. Such a claim, however, means nothing in court, and so judges have not been able to contribute to this debate, nor to participate in it. This seems to me to be profoundly important, since it means that our constitutional law is not able to do something that it customarily does,[52] for it is a significant fact about our constitutional law that it has had its most powerful effects by binding together law and politics; and yet this binding has been lacking with reference to citizenship. In other systems of constitutional law, this would be no great problem, but it is important to us. Among us, constitutional law is one of the ways in which law and politics are integrated, and yet this is not true for the concept of citizenship. Speaking only for myself, this seems to be very bad.

Fortunately, this question of the interplay of law and politics, of the way in which they define each other, is the question on which Professor Burt is hard at work. His forthcoming book, of which his contribution here will be the opening chapter, promises to have many worthwhile things to say about these matters. I hope that he will take on the task of showing how important it has been to our polity that the concept of citizenship has been legally vacuous and yet politically significant. If he does, I hope that I will be vindicated in my judgments about what is good and what is bad in what has happened.

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52. For a thoughtful discussion of the issues that this assertion raises, see J. WHITE, WHEN WORDS LOST THEIR MEANING 192-274 (1984). The same point is made in a different context in Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L. J. 913, 968 (1983).