DRED SCOTT: TIERED CITIZENSHIP AND TIERED PERSONHOOD

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INTRODUCTION

Dred Scott v. Sandford[1] is one of the most troubling opinions ever issued by the United States Supreme Court.[2] Though its deficiencies are legion, the particular problem this brief essay focuses on is the opinion's acceptance and perpetuation of the notion that America affords multiple tiers of citizenship and multiple tiers of personhood. The tiered citizenship that *Dred Scott* accepted suggests that denying certain citizenship rights to specific groups of citizens is acceptable. Similarly, the tiered personhood that *Dred Scott* allowed suggests that rights ostensibly owed to all people by virtue of their personhood are not owed to certain groups of people. Rather than attempt to justify the differential treatment between groups of citizens and between groups of people, the *Dred Scott* opinion simply noted the differential treatment and accepted it. For these reasons alone, Chief Justice Taney's majority opinion deserves the opprobrium that has been heaped upon it.[3]

The twin ills of tiered citizenship and tiered personhood were largely eliminated, in theory and eventually in practice, by the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. Through their language and subsequent interpretation, those amendments introduced a formal equality that created a single

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

2. It was also a catalyst in causing untold pain. *See* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 2 (1997) ("It would be an exaggeration to say that the *Dred Scott* decision *caused* the Civil War. But it certainly pushed the nation far closer to that war.").

3. References to *Dred Scott* or the *Dred Scott* opinion are to Chief Justice Roger B. Taney's opinion. Though great debate remains regarding the issues on which Taney's opinion should be deemed authoritative, Taney's opinion has become the *Dred Scott* opinion such that the ideas found in it can be called the ideas of the *Dred Scott* Court. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 337 (1978) ("And yet the Taney opinion *is*, for all practical purposes, *the* Dred Scott decision and therefore a historical document of prime importance.").

tier of citizenship and a single tier of personhood by requiring that citizenship rights be provided equally to citizens and rights of personhood be provided to all people under U.S. jurisdiction. Certainly, under certain conditions, some citizens may be stripped of citizenship rights and some persons may be denied certain rights of life, liberty, or property. When a denial of rights is properly justified, the denial does no violence to the notion of a single tier of citizenship or a single tier of personhood. Conversely, when there is no proper justification for stripping such rights, such treatment may create tiers of citizenship and tiers of personhood.

Part I of this brief essay discusses *Dred Scott* and the Court's acceptance of tiered citizenship and tiered personhood. Part II discusses the Reconstruction Amendments as a response to tiered citizenship and tiered personhood. Part III notes two issues—felon disfranchisement and the treatment of detainees in the War on Terror—that help illuminate tiered citizenship and tiered personhood and help us evaluate the conditions under which citizenship and personhood rights may be restricted without creating tiers of citizenship and tiers of personhood.[4]

I. *DRED SCOTT*'S TAXONOMY OF CITIZENSHIP AND PERSONHOOD

Though the facts of *Dred Scott v. Sandford* are known to most, its most basic facts bear repeating. In the case, plaintiff Dred Scott claimed that he became a free man during his travels with his master through Illinois, a free state, and Fort Snelling in the Wisconsin territory, near modern-day St. Paul, Minnesota, where slavery had been banned by the Missouri Compromise.[5] If Scott were a free man, neither he nor his family, whose cases had been consolidated with his, could be held in servitude. However, intertwined with the issue of Scott's freedom was whether Scott could sue in federal court. The Supreme Court, in an opinion written by Chief Justice Roger B. Taney, decided, in ruling against Scott, that Scott was not and could not be a citizen of Missouri for the purposes of the diversity jurisdiction that was necessary to allow the federal courts to hear Scott's case.[6]

4. Of course, this brief essay is meant merely to raise issues rather than resolve them and is not intended to be a full treatment of any of the issues raised herein. For a fuller treatment of some of the issues raised, see Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002) [hereinafter Chambers, *Colorblindness*]; Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 611 (2004) [hereinafter Chambers, *Retooling*].

5. *See Dred Scott*, 60 U.S. (19 How.) at 431–32; FEHRENBACHER, *supra* note 3, at 244; FINKELMAN, *supra* note 2, at 2.

6. *See Dred Scott*, 60 U.S. (19 How.) at 454 ("[T]he plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it."). In addition,

Though that ruling arguably resolved the case, Taney analyzed Scott's substantive claim to freedom and rejected it, leaving Scott and his family enslaved.[7]

The Court's ruling, that Scott was not a citizen, was not particularly shocking. However, the language Chief Justice Taney used to discuss Scott's citizenship and personhood, or lack thereof, is breathtaking. Taney indicated not only that Scott was not a citizen, but also declared that under no circumstances could Scott or any black person—whether born free, formerly enslaved, or then still enslaved—be a citizen of the United States under the Constitution and laws as they then stood.[8] Taney not only noted that Scott was not a citizen of the United States, but that even if Scott had been a free black person, he might not have been entitled to the rights that other non-U.S. citizen residents in the United States could exercise.[9] The structure of Taney's argument, with its clear delineations that treated some groups of citizens differently than other groups of citizens and that treated some groups of persons differently than other groups of persons, recognized and tacitly endorsed tiered citizenship and tiered personhood.

A. Citizenship

Before deciding whether Dred Scott was a citizen of a state and of the United States, Chief Justice Taney had to determine what a citizen is. The *Dred Scott* Court's vision of who was a citizen was simple. Citizens were members of the sovereign people for whom the Republic was founded and by whom the Republic was run (through their representatives).[10] The re-

the Court ruled the Missouri Compromise invalid to the extent that it banned slavery in the Upper Louisiana territory, though that issue is not a core concern of this essay. *See id.* at 432–52.

7. *See id.* at 452 ("[T]he act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.").

8. *See id.* at 404 ("We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.").

9. *See id.* at 403–04 (noting that Indians retained the possibility of becoming citizens while black persons did not).

10. *See id.* at 404 ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.").

mainder of Taney's discussion of Dred Scott's claims of citizenship flowed from this understanding of citizenship.[11]

The citizens of the several states at the time of the adoption of the Constitution became citizens of the United States and no one else.[12] Those descended from that group of people also became citizens of the United States, as it was for the posterity of the citizens of the several states that the states created the United States.[13] Those not descended from the original citizens of the United States had to become citizens of the United States through other birthright means or through naturalization controlled by the federal government.[14] Upon ratification of the Constitution, the right to create U.S. citizens was given solely to the federal government.[15] States retained the right to create state citizens who could exercise state citizenship rights.[16] However, states lost the ability to create state citizens who would automatically become U.S. citizens and could exercise the rights of U.S. citizenship, including the right to enjoy the rights and immunities of the citizens of other states when traveling in those other states.[17]

Given its vision of citizen creation, the *Dred Scott* Court had to examine how slaves and their descendants were regarded at the time the United States was created to determine if any had been citizens or had been capa-

11. Determining what citizenship entails, and even asserting what citizenship is, is far more difficult than Chief Justice Taney suggested. *See* FEHRENBACHER, *supra* note 3, at 64–66 (discussing difficulties in defining and explaining what citizenship entailed in the context of free black persons before *Dred Scott*).

12. *See Dred Scott*, 60 U.S. (19 How.) at 406 ("It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else.").

13. *See* U.S. CONST. pmbl. (noting that the Constitution was formed for the benefit of the people of the United States and their posterity).

14. *See Dred Scott*, 60 U.S. (19 How.) at 406 (limiting rights of U.S. citizenship "to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded").

15. *See id.* at 418 ("The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.").

16. *See id.* at 405–06 (noting that a State can grant a person state citizenship with the result that "so far as the State alone was concerned, [the person] would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character").

17. *See id.* at 405 ("Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government . . . ."); *see also* JAMES G. WILSON, THE IMPERIAL REPUBLIC 215–16 (2002) (discussing the implications of not allowing free black persons to exercise the rights and immunities of citizens of the U.S.).

ble of becoming citizens at that time. If slaves or former slaves were eligible for citizenship at the Founding, Scott may have had a legitimate claim that if he had become free, he had become a citizen of a state and of the United States at the moment of his freedom. However, if slaves and former slaves were not citizens—were not part of the sovereign people who formed the people of the United States when the Constitution was ratified—then even if Scott had become free during his travels, he could not be treated as a citizen of any state or as a citizen of the United States for the purpose of suing under the diversity jurisdiction of the federal court. Ultimately, Chief Justice Taney found that the whole Negro race had been so poorly regarded at the time of the ratification of the Constitution that none—free or slave—could have been citizens of the United States at that time.

According to Taney, black persons simply had not been part of the polity when the nation was founded and would not become so absent congressional action or constitutional amendment.[18] Taney's claim that black persons had not been a part of the polity in the late 1700s meant that black persons could not be a part of the polity in the mid-1850s either. Basing his analysis of black citizenship at the Founding on race and ancestry rather than status, Taney merged race and slavery, asserting that all black persons had come to America as slaves.[19] Consequently, all black people, whether free or slave, were descendants of slaves and were in the same class of people, for citizenship purposes, as slaves, and thus were unable to be or become citizens of the United States.[20]

The impossibility of black citizenship fit with Taney's view on how citizens were made, i.e., by being descended from the group of state citi-

18. *See Dred Scott*, 60 U.S. (19 How.) at 407 ("In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."). Justice Curtis, in dissent, argued that Taney was palpably wrong. *See id.* at 572–73 (Curtis, J., dissenting) ("At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.").

19. *See id.* at 411 (opinion of the Court) ("No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise.").

20. *See id.* at 403 ("It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.").

zens who became U.S. citizens at the Founding, through birthright citizenship or through naturalization. Taney asserted that black persons were not descended from the citizenship group, not surprisingly ignoring the special case of mixed-race people.[21] Taney also noted that at least one state appeared to reject birthright citizenship for black people.[22] Lastly, Taney noted that naturalization had never been used to make black people citizens.[23]

Taney's discussion suggested more than that no black persons had been citizens at the time of the Founding through the 1850s. It suggested that black persons—whether free or enslaved—were incapable of becoming citizens, a position not held with respect to other non-citizens. After discussing statutes from various colonies suggesting the degradation suffered by black persons, Taney concluded not that the laws were unjust or inconsistent with the U.S. Constitution or general notions of liberty, but that the legal wall between black persons (including those of mixed race) and white persons was so high and thick that it made no sense to think that black persons were potential equals capable of citizenship at the time of the Founding.[24] Indeed, Taney noted that Southern states never would have ratified the Constitution had they believed that black persons could be citizens whose rights of citizenship would have to be protected as they traveled from state to state.[25] Taney appears to have been incorrect in

21. *But see id.* at 582 (Curtis, J., dissenting) ("And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.").

22. *See id.* at 415 (opinion of the Court) (noting a New Hampshire law restricting the militia to free white persons and suggesting that even black people born in New Hampshire could not serve because they made up no part of the people and had no duty to defend the state).

23. *See id.* at 418–20 (discussing the naturalization process and indicating that it had never covered black people). Of course, the naturalization power is left to Congress. *See id.* at 582 (Curtis, J., dissenting) ("The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.").

24. *See id.* at 409 (opinion of the Court) ("[The laws cited] show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race."). Although Taney also quotes statutes that would seem to put Indians in the same category of degradation, *see id.* at 413–14, he treats Indians as a separate class of people who are capable of citizenship. *See id.* at 403–04.

25. However, some Southern states may not have been as hostile to the possibility of black citizenship as Taney suggests. *See id.* at 573 (Curtis, J., dissenting) (discussing a North Carolina case indicating that free black persons could become citizens of North Carolina and vote in North Carolina before those rights were eventually eliminated by the North Carolina Constitution).

identifying a specific monolithic view of black persons at the time of the Founding. However, Taney's discussion of citizenship in general and black citizenship in particular relates to the *Dred Scott* Court's acceptance of tiered citizenship.[26]

B. Tiered Citizenship

Tiered citizenship results from the provision of different citizenship rights to different groups of citizens. Citizenship rights are those rights that are closely related to citizenship or are historically granted to citizens because of their status as citizens. Citizens who are provided all citizenship rights are treated as first-tier citizens. Citizens who are not provided all citizenship rights are treated as second-tier citizens or worse. Given that the *Dred Scott* Court declined to treat black persons as citizens at all, the issue of tiered citizenship does not flow directly from the Court's discussion of black citizenship. However, the Court's discussion of citizenship in the context of discussing black citizenship indicates that it embraced tiered citizenship. For example, the Court noted that women are citizens, but defined citizenship rights and responsibilities in ways that allowed the possibility of second-tier citizenship for women.

Identifying rights of citizenship that are not being provided equally to all citizens is the first step in identifying tiered citizenship. The most sensible way to identify a citizenship right is to take the definition of a citizen and determine what rights have attached or should attach to that status. For example, in defining those to be considered citizens at the time of the Founding, Chief Justice Taney noted that citizens are part of the sovereign people and are the ultimate holders of power—exercised through representatives—in a republic. Given that vision of citizenship, voting should be considered a citizenship right and defending one's state or country should be considered a right or duty of a citizen.[27] Indeed, both were analyzed as possible citizenship rights by the Court. However, voting and defending

26. Eventually, the decision triggered a positive. *See* FINKELMAN, *supra* note 2, at 4 ("*Dred Scott* came to symbolize the high point of racism in American law, but it also helped lead to the adoption of the Fourteenth Amendment, which has been the fountainhead of racial equality in the twentieth century.").

27. Historically, some considered the right to hold office a citizenship right. *See, e.g.*, FEHRENBACHER, *supra* note 3, at 64–65 (counting eligibility to hold office as a right that sometimes went with the right to vote). However, some U.S. citizens are restricted from holding certain jobs, such as President of the United States. *See* U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen . . . shall be eligible to the Office of President . . . ."). Determining what rights are citizenship rights and what rights are super-citizenship rights can be difficult. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 48 (1998) (discussing rights historically held by all citizens and rights held by "first-class" citizens).

one's country were treated quite differently by the *Dred Scott* Court in the course of assessing the possibility of black citizenship.

In discussing black citizenship, the Court noted that New Hampshire did not allow black men, even those born in New Hampshire, to join the militia. Given that defending one's state was considered a duty of the citizen, that black men were not allowed to defend their state suggested to Taney that black persons were not considered citizens.[28] However, New Hampshire treated white women citizens the same as black free men with respect to militia service during the post-Constitution, pre-*Dred Scott* era.[29] That would suggest that women were not considered citizens either, though the *Dred Scott* Court clearly noted that women were citizens.[30]

Conversely, voting might appear to be even more tightly bound to citizenship than being a part of the militia given that the citizenry was supposed to exercise its power through its elected representatives. However, although Taney recognized the power of voting, he did not deem it to be a right of citizenship to be exercised by all adult citizens.[31] Certainly, many of that time conceived of the right to vote as a political right that could be rationed, not a right of citizenship that had to be provided.[32] Of course, Taney also had to deem the right to vote a non-citizenship right because the right to vote both was restricted to men and had been given to black persons and other non-citizens in the country's history.[33] Rather than treat

28. *See Dred Scott*, 60 U.S. (19 How.) at 415.

29. *See* The Militia Law of the State of New Hampshire § 4 (Peirce & Gardner 1808) ("*And be it further enacted*, That each and every free able bodied white male citizen of this State, resident therein, who is or shall be of the age of sixteen years, and under the age of forty years, (except such as are herein after excused,) shall severally and respectively be enrolled in the Militia . . . .").

30. *See Dred Scott*, 60 U.S. (19 How.) at 422.

31. *See id.* ("Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens."). Even Justice Curtis, in dissent, recognized that with respect to voting rights, some citizens could exercise the right and others could not. *See id.* at 581 (Curtis, J., dissenting) (". . . I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitutions . . . .").

32. Even Justice Curtis treated it in this way. *See id.* at 583 ("One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States.").

33. *See id.* at 416 (opinion of the Court) ("[I]n no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights."). *But see id.* at 575 (Curtis, J., dissenting) (noting that the constitutions of various states indicate "that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States").

voting as a citizenship right that had been unevenly granted, the Court declined to treat it as a citizenship right. Therefore, proof that black persons had been given the right to vote in some states did not prove they were citizens or capable of citizenship.[34]

The *Dred Scott* Court notwithstanding, voting is an exercise so tied to the notion of citizenship and belonging that it ought to have been deemed a citizenship right that had often been provided in a discriminatory fashion rather than a non-citizenship right.[35] The restrictions on the right to vote could be read, as Taney did, to suggest that the right to vote could not be a citizenship right precisely because it had been denied to groups of people who clearly were citizens.[36] A different analysis would suggest that the right to vote was merely structured capriciously and treated improperly as a privilege to be extended to some citizens and some non-citizens. However, entrenchment of discrimination should not work a redefinition of a citizenship right. That is, a citizenship right should not cease to be a citizenship right just because the government grants the right in a discriminatory fashion. This would lead to the oddly circular argument that the rights of citizenship are defined only as those given to all citizens by the government, meaning that the restriction of a right would end its status as a right of citizenship. Based on this reasoning, it would be almost impossible to provide a citizenship right in a discriminatory manner, as the citizenship right would cease to be one once it was provided in a discriminatory manner.[37] Instead, it is more sensible to define what citizenship rights are in the abstract, then ask whether they have been provided in a discriminatory fashion. Citizens who are restricted from exercising rights of citizenship have been treated as second-tier citizens.[38]

If voting is considered a citizenship right that has been provided in an uneven or discriminatory fashion, the *Dred Scott* Court's willingness to

34. *See id.* at 422 (opinion of the Court) ("So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them."). *But see id.* at 581 (Curtis, J., dissenting) (noting "the just and constitutional possession of this right [to vote] is decisive evidence of citizenship").

35. The history of the United States is filled with restrictions on the right to vote, including property qualifications, gender limitations, and racial restrictions. *See* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 123 (2003).

36. *See Dred Scott*, 60 U.S. (19 How.) at 422.

37. The one exception might be a situation where a citizenship right was explicitly defined as a citizenship right. The discriminatory provision of that right might not be deemed to change the character of the right.

38. *See* AMAR, *supra* note 27, at 48 (noting that "First-Class" citizens were considered able to exercise political rights such as voting).

allow second-tier citizenship becomes clear. With respect to women, voting was a citizenship right that was not extended to them. In addition, voting was a citizenship right that was extended to some non-citizens. Both facts strengthen the case that the Court, with all of its Justices, accepted tiered citizenship. Simply, the *Dred Scott* Court (taking the positions of all of the Justices into account) suggested the existence of four groups: citizens who could vote, citizens who could not vote, non-citizens who could vote, and non-citizens who could not vote. Given this landscape, those adult citizens who were not allowed to vote were a lesser form of citizen—a second-tier citizen.

C. Personhood and Tiered Personhood

Not surprisingly, in the context of *Dred Scott*, tiered personhood is a simpler issue to explain and understand than tiered citizenship. By positing black people as true outsiders who were incapable of being or becoming a part of the citizenry, the *Dred Scott* Court delineated a tier of personhood for black people that was well below that of other non-citizens. All black persons, whether free or enslaved, were considered inferior to everyone else and were subject to being given fewer rights than others.[39] The Court's argument was simple and simplistic. Because African slaves had been treated as property when brought to the United States, the Negro race was a degraded one whose degradation was passed on to each of its members.[40] Given that supposed history, free black people were to be treated as free slaves rather than free people with slave ancestors. Indeed, Taney suggested that free black people were regulated more like slaves than like other non-citizens.[41]

Rather than treat all non-citizens alike, the opinion considered other non-citizens living in the United States to be potential citizens-in-waiting or simply citizens of other nations.[42] Particularly striking was how Taney compared the state of black people to that of Indians, another historically

39. *See Dred Scott*, 60 U.S. (19 How.) at 404–05 ("[T]hey were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.").

40. *See id.* at 408 ("[A] negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.").

41. *See id.* at 421.

42. This reminds one of the notion that all U.S. territories were thought to be states-in-waiting rather than permanent colonies or territories. *See id.* at 447.

disfavored group.[43] Portrayed as noble savages, Indians were deemed a free people who could become United States citizens if they left their tribes, whereas black persons could never be citizens.[44] Taney failed to explain fully why Indians were to be considered superior to black people given that some of the statutes he cited as treating free black persons as akin to slaves provided the same treatment for Indians.[45]

That Taney's analysis was inconsistent is no surprise. However, it is secondary to the broader concern that the opinion accepted and perpetuated the notion of tiered personhood. Of that there is no doubt. The opinion quite clearly distinguished between the relative position of black persons to other non-citizens. Even casual observers of American history understand this, as possibly the most famous sentence from *Dred Scott* rather starkly illustrates the point:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[46]

That describes tiered personhood. The Reconstruction Amendments answered tiered personhood and tiered citizenship.

II. THE RECONSTRUCTION AMENDMENTS

The Reconstruction Amendments were a collective, if somewhat incomplete, reply to the *Dred Scott* decision. The Thirteenth Amendment banned slavery.[47] The Fourteenth Amendment made former slaves and their progeny citizens.[48] The Fifteenth Amendment guaranteed that states

43. I use the term Indian because the opinion uses it. As importantly, calling Indians "Native Americans" while discussing *Dred Scott* would be as ironic as calling black people "African Americans" in the same context.

44. Taney specifically distinguished Indians from black people, treating Indians as members of a different nation akin to non-citizen foreigners. *See id.* at 403–04.

45. *See, e.g.*, *id.* at 416 (citing law forbidding people from performing ceremonies intermarrying white persons with Indians, black persons, or mulattoes).

46. *Id.* at 407.

47. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

48. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

could not provide the right to vote in a racially discriminatory manner.[49] Though each of the Reconstruction Amendments served a specific purpose, the amendments as a whole invited former (male) slaves and their progeny into the polity as full participants, and created both a single class of citizens and a single class of persons.[50] Though the Reconstruction Amendments primarily affect states, they remind both state and federal governments that government should treat all citizens equally with respect to certain rights and should treat all people equally with respect to certain rights.

A. Thirteenth Amendment

The Thirteenth Amendment abolished slavery and other forms of involuntary servitude, except as punishment for crime, thus freeing former slaves. The freedom the Thirteenth Amendment provided arguably should have created a single class of citizens that included all those born in the United States, including former slaves.[51] However, it did not, as freedom did not necessarily guarantee equal rights and equal treatment. That the Thirteenth Amendment did not make citizens out of former slaves was not surprising given that the *Dred Scott* decision had noted that free black people were not citizens. Rather than grant citizenship to newly-freed former slaves, the Thirteenth Amendment arguably merely elevated former slaves to the level of free black persons.[52] More would be required to provide citizenship and equality to former slaves and it came in the form of the Fourteenth Amendment.[53]

49. *See* U.S. CONST. amend. XV, § 1 ("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.").

50. *See* Chambers, *Colorblindness*, *supra* note 4, at 1400; Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. l347, 1398–99 (2005) ("The Reconstruction Era amendments . . . were intended to constitutionalize the package of rights necessary to expand the national community to include formerly enslaved African Americans and facilitate their equal membership in that community.").

51. *See* Chambers, *Colorblindness*, *supra* note 4, at 1401–04.

52. *See* Garrett Epps, *The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 411, 422 (2004) ("Southerners 'accepted' that Lincoln had freed the slaves—at least for the time being—but mere legal freedom did not make them citizens, it made them 'free blacks,' a tightly restricted legal status that had existed before the Civil War.").

53. Of course, the Civil Rights Act of 1866 was an attempt to secure some of the rights the Thirteenth Amendment was to provide or protect by virtue of abolishing slavery, but which Southern states had declined to provide or affirmatively infringed. *See* AMAR, *supra* note 27, at 162.

B. Fourteenth Amendment

In direct response to the *Dred Scott* decision, the Fourteenth Amendment provided citizenship to former slaves and their progeny.[54] In addition to making former slaves citizens, the Amendment required that all citizens be provided citizenship rights on equal grounds. Though states were not allowed to pick and choose the citizens who would enjoy the rights of citizenship, the Fourteenth Amendment's procedural equality provision did not dictate the substantive rights that states had to provide to citizens.[55] Rather, it regulated how the rights that states granted to citizens were to be distributed. Nonetheless, the amendment implicitly created a single class of citizen by demanding that whatever citizenship rights are provided to some citizens must be provided to all citizens.

By declining to define or name any rights of citizenship, the Fourteenth Amendment provided states with the latitude to continue to define important rights, such as voting, as something other than citizenship rights, i.e., rights that had to be provided equally to all citizens. Indeed, the Fourteenth Amendment, as originally written, appeared to allow states to decline to provide a right to vote to black male citizens on the basis of their race, if those states were willing to lose some proportional amount of congressional representation.[56] Of course, if one presumed that no state was willing to pay for its voting restriction by losing congressional seats, the Fourteenth Amendment indirectly protected a right to vote. Nonetheless, how voting rights were treated illuminates the fact that, at the time of its passage, the Fourteenth Amendment demanded equality only with respect to a narrow set of rights defined as legal and civil rights, not wholesale equality with respect to social and political rights.[57] This does not suggest that *Dred Scott* was anything other than odious, just that the Fourteenth

54. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); AMAR, *supra* note 27, at 170–71.

55. *See* Chambers, *Colorblindness*, *supra* note 4, at 1406 n.33.

56. *See* U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

57. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36; Chambers, *Colorblindness*, *supra* note 4, at 1416 & n.75.

Amendment imperfectly defined and protected some rights, such as voting rights, that should have been considered rights of citizenship.[58]

In addition to providing equal rights for citizens, the Fourteenth Amendment provided a basic level of rights to all persons, whether citizens or not, under the United States' jurisdiction. All persons were to enjoy due process rights with respect to their rights to life, liberty, and property, as well as equal protection rights. These protections created a single class of personhood with respect to a basic level of rights. The Fourteenth Amendment's explicit recognition that citizens must be treated as equals with respect to citizenship rights and that persons must be treated as equals with respect to rights of personhood was an implicit rejection of the tiers of citizenship and tiers of personhood that the *Dred Scott* Court accepted.

C. Fifteenth Amendment

The Fifteenth Amendment completed the task of formally integrating former male slaves into the polity by guaranteeing that the right to vote would not be abridged on the basis of race, color, or previous condition of servitude. The Fifteenth Amendment provided protection for the right to vote that buttressed the protection the Fourteenth Amendment provided indirectly. However, that protection was provided in a procedural manner reminiscent of the Fourteenth Amendment's protection of rights. Rather than provide the right to vote, the Fifteenth Amendment required that whatever right to vote the state grants must be provided in a racially nondiscriminatory manner.[59] This distinction between providing a right to vote and protecting voting from discriminatory distribution arguably no longer matters as the Fourteenth Amendment now treats voting essentially as a fundamental right.[60] However, at the time, the Fifteenth Amendment protected the right to vote of former slaves as powerfully as could be expected and indicated a desire to treat former slaves as full members of society. In addition, it suggested that the right to vote was tied more closely to citizenship than the *Dred Scott* decision suggested.

58. The Fourteenth Amendment's treatment of voting suggests the dual nature of the right to vote as both a political and citizenship right. How voting was addressed arguably suggests that voting was not a citizenship right covered by the Fourteenth Amendment. However, the fact that voting was specifically mentioned in the Fourteenth Amendment suggests that voting is intimately related to citizenship or representation, the means through which Chief Justice Taney suggested that citizens exercised power in a republic.

59. *See* Chambers, *Colorblindness*, *supra* note 4, at 1419 ("To be clear, the Fifteenth Amendment does not provide the right to vote; it limits how the right to vote generally provided by the state government may be restricted." (footnotes omitted)).

60. *See* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

D. Government Prerogative

The Reconstruction Amendments provide a different way of structuring governmental prerogative. Rather than accept governmental prerogative that allows governments to choose favorites among groups of citizens or groups of people, thereby creating tiers of citizenship and tiers of personhood, the Reconstruction Amendments demand equality with respect to rights. Certainly, occasions may arise when citizens have not yet gained some rights of citizenship or when they lose some rights of citizenship. However, the differential provision of rights must be based on some justification, not governmental fiat that categorizes certain groups of citizens as second-tier citizens and categorizes groups of persons as unworthy of the most basic rights of personhood.

III. TIERS AND JUSTIFIED RIGHTS RESTRICTION

The Reconstruction Amendments write equality into the fabric of the Constitution and eliminate tiered citizenship and tiered personhood by requiring the provision of equal rights under most circumstances. However, tiered citizenship or tiered personhood does not result every time a right is withheld or affirmatively taken away from certain citizens, persons, or groups of citizens or persons. Citizenship rights and personhood rights may be restricted or taken away from citizens and people consistent with the spirit of a single tier of citizenship and a single tier of personhood when the restriction of the right is actually justified. Conversely, if the restriction of the right is merely explained, but not actually justified, a de facto tier may have been created.

A. Justifying the Restriction of Rights

Though rights are supposed to be enjoyed by all under most circumstances, they must be restricted on some occasions. A justified restriction of rights does not create the specter of tiering; an unjustified restriction of rights does create the specter of tiering. Though determining whether a restriction of rights is justified is difficult, justifying a restriction of rights is critically important in determining whether the restriction represents a principled limitation on the exercise of rights or merely reflects a government's choice to favor or disfavor a citizen vis-à-vis other citizens. This essay will not attempt to assess whether any particular restriction of rights is or is not justified. Rather, it merely highlights the need to justify restrictions on rights lest those restrictions appear to flow from a *Dred Scott* mindset that embraces unjustified differential treatment.

Justifying a restriction of rights is a two-step process. The first step requires determining why the right at issue exists. For example, in determining whether a restriction of a state-based right to bear arms is justified, one would need to determine precisely why the right to bear arms was provided by the state.[61] The difficulty in determining the answer comes from the need to answer the question in the abstract, without reference to how the right has been shaped by the very limitation one seeks to justify. That is, if one defines the scope of the right to bear arms solely based on the manner in which the right has been restricted, the restriction becomes a description of the contours of the right rather than a justification for the restriction of the right.

The second step requires comparing the basis for the restriction to the purpose of the right restricted. Relevant questions include the following: Is this restriction of the right necessary to preserve the value of the right for others? Would continued use of the right by the restricted person harm the exercise of the right by all others? Has the restricted person demonstrated an inability to use the restricted right properly? These questions help determine whether there is a relationship between the basis of the restriction and the right itself. If there is little or no relationship between the right's utilization and the restriction of the right, the restriction may be an exercise of the raw power to restrict rights rather than a justification for the restriction of the right.

The analysis must occur against the backdrop of the fact that the right in question is generally given to all citizens or all people. Consequently, the right should or must be provided unless there is a true justification for restricting it. Some might suggest that justification is merely a substitute for strict scrutiny; it is not.[62] Certainly, the concepts are related, but the tiers of scrutiny in constitutional law are structured differently. This is not surprising, as the tiers of scrutiny aim to determine whether a law or action is constitutional. Consequently, the tiers of scrutiny merely require that governmental restrictions that appear more troubling under the Constitution be more convincingly explained than governmental restrictions that appear less troubling under the Constitution.[63] Conversely, the concept of justifica-

61. This question is difficult enough to answer at the federal level. Scholars have been debating the issue for years. *See* Symposium, *The Second Amendement: Fresh Looks*, 76 CHI.-KENT L. REV. 1 (2000). Answering the question at the state level may be even more difficult depending on the process by which the right was generated at the state level.

62. *See* Chambers, *Retooling*, *supra* note 4, at 613 (noting the content of the strict scrutiny test).

63. *See id.* at 612–13 & nn.7–14 (noting that the strength of the explanation necessary to deem a governmental action constitutional is lowest under the rational basis test applied to state action with modest equal protection implications, and highest under the strict scrutiny test applied to state action

tion suggested in this essay is structured on determining whether there is a real relationship between the restriction and the right itself. The concept of justification aims to determine if citizens are being treated as second-tier citizens as a way to identify *Dred Scott*-style thinking. The question remains, have tiered citizenship and tiered personhood been successfully abolished by the Reconstruction Amendments?

B. Tiered Citizenship and Felon Disfranchisement

Tiered citizenship entails the denial of a right of citizenship to a citizen or some group of citizens without justification. Regardless of how it may have been viewed when the Fourteenth Amendment was ratified, voting is now considered a fundamental right of citizenship, the abridgment of which must withstand exacting scrutiny.[64] If the denial of the right to vote is actually justified, such denial does not trigger concerns of second-tier citizenship whether its denial passes the required constitutional scrutiny or not. Conversely, if the denial of rights is not actually justified, it triggers second-tier citizenship concerns whether it passes the required constitutional scrutiny or not. Just such an issue arises with felon disfranchisement.

Felon disfranchisement may take a number of forms, but eventually yields a felon-citizen who cannot vote. Felon disfranchisement has not always been strict and arguably did not flower fully until after the Reconstruction Amendments required that black men be provided the right to vote.[65] Consequently, felon disfranchisement has been more of a process of picking and choosing ways to restrict voting rights rather than a universal command suggesting that felonious behavior should always trigger the loss of the franchise.[66] This should trigger tiered citizenship concerns. In determining whether felon disfranchisement is justified, the question becomes, is a restriction on the right to vote related to a prior felony conviction?

with crucial equal protection implications, such as those creating racial classifications or affecting fundamental rights).

64. *See* Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

65. Indeed, some of the disfranchisement laws of the post-Reconstruction era were aimed specifically at disfranchising black citizens. *See* Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1608 (2004); *see also* Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559 (2003) (discussing links between racial composition of prison populations and adoption of felon disfranchisement laws).

66. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 305 (2004) (discussing Mississippi's choice of crimes to which felon disfranchisement would apply based on beliefs regarding the characteristics of crimes that black people would commit).

One claimed justification for restricting felon voting rights has been that such restrictions have always been allowed and still appear to be allowed under the Fourteenth Amendment.[67] At least two responses exist. First, though the Fourteenth Amendment appears to contemplate or allow felon disfranchisement, it may do so based on the belief prevailing at the time of the amendment's passage that voting was not a fundamental right. Now that voting is treated as a fundamental right, the Fourteenth Amendment arguably protects the distribution of the right to all citizens.[68] Second, that felon disfranchisement may be facially constitutional does not actually justify the practice. If the practice is not consistent with democracy and the notion of a single tier of citizenship, it is problematic. The text of the Constitution arguably afforded the *Dred Scott* majority the latitude to write the opinion it wrote. However, the substance of the opinion still created a tiered citizenship. Indeed, the *Dred Scott* Court made clear that the Constitution allowed the tiered citizenship of women.[69] The allowance of a second tier of citizenship hardly made such treatment appropriate, it just made it constitutional at the time. Of course, the second tier of citizenship for women was not justified; it was simply explained, asserted, and allowed. Allowing felon disfranchisement to be merely explained, asserted, and allowed would likewise be problematic.

Felon disfranchisement is practiced differently throughout the United States with some states having an almost total ban on voting by those who have been convicted of certain felonies, others allowing felons to vote after they have completed various parts of their sentences, and yet others having no felony-based restrictions at all.[70] That states apply a patchwork of felon disfranchisement laws does not necessarily mean that felon disfranchisement is not justified or justifiable.[71] However, it suggests that different

67. *See* Richardson v. Ramirez, 418 U.S. 24 (1974); Chambers, *Colorblindness*, *supra* note 4, at 1436 n.163.

68. *See* Chambers, *Colorblindness*, *supra* note 4, at 1425 n.116.

69. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422 (1857).

70. *See* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), *available at* http://www.sentencingproject.org/pdfs/1046.pdf (providing state-by-state felon disfranchisement laws); Right to Vote: Campaign to End Felony Disfranchisement, http://www.righttovote.org/state.asp (last visited Sep. 7, 2006) (same). Of course, disfranchisement has been a punishment for bad behavior, such as taking up arms against one's country. However, voting rights were restored to most Confederates fairly soon after the Civil War. *See* General Amnesty Act, ch. 193, 17 Stat. 142 (1872); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1104–05.

71. However, wide differences in the severity of felon disfranchisement laws suggest that continuing to disfranchise felons after they are no longer under the supervision of the criminal justice system does not reflect a nationwide consensus. The lack of consensus on whether the right to vote must be denied to felons suggests that there may not be a justification for the lifetime bans on felon voting that some states have. Indeed, many scholars have questioned the justifications generally provided for felon

states may have quite different reasons for their felon disfranchisement laws. Some of those reasons may be true justifications while others may merely be explanations for treating felons poorly. For example, a state that views the right to vote as a core citizenship right but which bans felons from voting because the state believes that withholding a core right is fair punishment for a felony may have an explanation for their felon disfranchisement law, but may not have a justification for it.

However, the power to restrict felons in some ways does not automatically justify the restriction of felons with respect to citizenship rights. A justification would come in the form of an argument that the felony conviction that triggered the disfranchisement suggests that the felon should not be allowed to exercise the franchise in order to protect the right to vote for those who can properly exercise it. If felon disfranchisement is fully justified in all states that practice it in whatever form the states practice it, concerns regarding tiered citizenship vanish. However, in the absence of a justification for felon disfranchisement, the restriction of voting rights simply helps to create a second-tier citizenship for felons. Some may desire just such a second-tier citizenship for felons. However, this recalls the thinking underlying *Dred Scott*.

C. Tiered Personhood and War on Terror Detainees

The tiered personhood issue has two components. The first component focuses on guaranteeing that all persons are given the same set of rights that other persons receive. The second component focuses on ensuring that no set of persons is given a set of rights below the minimum rights guaranteed to all persons in all circumstances.[72] Our country's commitment to both of these principles is being tested with respect to how we treat detainees in the War on Terror (WOT).[73] Two questions arise. First, under what circumstances are WOT detainees being given fewer rights than non-WOT

disfranchisement. *See* KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA 41–45 (2005) (discussing scholarly critique of felony disfranchisement). *See generally* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006); Ewald, *supra* note 70.

72. Certainly, actions, such as criminal action, can trigger the loss of rights. However, all elements of the crime charged must be proven beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970). Nonetheless, once the proof has been provided, the loss of liberty or life can occur. *See* Roper v. Simmons, 543 U.S. 551 (2005) (discussing the application of the death penalty, but not questioning its general legality).

73. Of course, War on Terror detainees are not the only non-citizens who may have to worry about second-tier personhood in the post-9/11 world. *See* Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683 (2005) (book review).

detainees? Second, under what circumstances, if any, are WOT detainees being provided fewer rights than all persons are to be provided under the Constitution under all circumstances? Depending on the answers to these questions, the government may be in the process of creating a different tier of personhood for WOT detainees.

The question regarding second-tier personhood must be asked in part because it appears that WOT detainees are provided fewer rights than non-WOT detainees.[74] For example, WOT detainees appear to receive less access to counsel and the courts than other detainees receive.[75] Similarly, WOT detainees appear to receive harsher physical treatment than other detainees receive.[76] In addition, WOT detainees appear to have been subject to the possibility of extraordinary rendition—a practice in which the U.S. delivers a detainee to another country that has fewer concerns about using certain particularly stressful interrogation techniques than the U.S. does—whereas other detainees are not.[77] If there is legitimate justification for this differential treatment, there is no second-tier personhood problem; if there is no legitimate justification for such treatment, the WOT detainees arguably are being treated as second-tier persons.

The implications flowing from the treatment of WOT detainees is particularly interesting in that the law relating to that issue is somewhat in flux.[78] Certainly, some of the laws and practices that govern detainee

74. *See* Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32 (reporting on interrogation techniques that had been authorized specifically for War on Terror detainees).

75. Congress has stripped statutory habeas corpus jurisdiction from the federal courts in many War on Terror detainee cases. *See* Detainee Treatment Act of 2005 § 1005(e), 28 U.S.C.A. § 2241(e) (West Supp. 2006); *see also* JENNIFER K. ELSEA & KENNETH THOMAS, CONG. RESEARCH SERV., GUANTANAMO DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT 11 (2005), *available at* http://www.opencrs.com/rpts/RL33180_20051207.pdf; Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 748–52 (2006) (discussing the stripping of habeas corpus jurisdiction under the Detainee Treatment Act of 2005).

76. Claims of torture or other cruel, inhuman, and degrading treatment of War on Terror detainees exist. *See, e.g.*, Chesney, *supra* note 75, at 696; Mayer, *supra* note 74, at 34, 37 (discussing brutal treatment of detainee Mohammed al-Qahtani). The recently passed Detainee Treatment Act of 2005 outlaws cruel, inhuman or degrading treatment of persons under custody or control of the United States government and defines such treatment to include any treatment barred by the Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution. *See* Detainee Treatment Act of 2005 § 1003, 42 U.S.C.A. § 2000dd (West Supp. 2006). What effect it may have is unclear.

77. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (discussing the case of a Canadian-Syrian citizen who was rendered through Jordan to Syria, where he was tortured); Chesney, *supra* note 75, at 665–69 (discussing rendition and the law of detainee transfer when there is risk of torture from receiving country).

78. This is not to say that there are no laws on the issue, just that what law the United States will follow when analyzing specific questions regarding the treatment of WOT detainees is somewhat unclear. Unfortunately, even the Government's most recent attempt to clarify issues, The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10 U.S.C.), may fail to do so.

treatment may allow WOT detainees to be treated differently than other detainees of the U.S. government, such as unremarkable violators of federal law. Differential treatment that comports with the law obviously would be legal. However, the differential treatment, even if it comports with the law, must be justified if it is to avoid the creation of second-tier personhood. Without justification, those laws are simply the vehicles used to treat WOT detainees as second-tier persons. Indeed, vigilance may be particularly necessary in areas where the relevant written law allows for differential treatment. The existence of statutes allowing differential treatment may cause many to be complacent about the possibility of seemingly legal, second-tier treatment. In addition, vigilance may be particularly necessary in circumstances where some forms of differential treatment may have little, if any, opportunity to be addressed through the courts.[79]

However, most important in considering the treatment of WOT detainees may be the fact that President George W. Bush has suggested that he may exercise his Commander-in-Chief powers independent of the written law.[80] Asserting this power literally gives the President the power to pick and choose who will be treated poorly and who will be treated well. With this power comes the obligation to justify the choices, at least in a broad sense. Given the possibility of the use of presidential fiat, it is particularly important to develop and consider possible justifications that could support allowing the President to provide fewer rights or poorer treatment to WOT detainees than to other detainees in U.S. custody. This is not an argument against the exercise of extraordinary Commander-in-Chief powers. It is a recognition that even if the Commander-in-Chief's power in fact supersedes the written law in certain circumstances, not only must the required circumstances that would trigger the use of the extraordinary power actually exist, but the exercise of the power still should be analyzed to determine if it would create second-tier personhood for the WOT detain-

79. *See* Josh White & Carol D. Leonnig, *U.S. Cites Exception in Torture Ban*, WASH. POST, Mar. 3, 2006, at A4 (noting that the Bush administration has argued that "the Detainee Treatment Act of 2005, removes general access to U.S. courts for all Guantanamo Bay captives"). Even after the passage of the Military Commissions Act of 2006, it is unclear precisely how much practical access the WOT detainees will have to federal courts.

80. *See* George W. Bush, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WKLY. COMP. PRES. DOCS. 1918, 1919 (2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html ("The executive branch shall construe Title X in Division A of the Act [also called the Detainee Treatment Act of 2005], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.").

ees. The justification for whatever treatment a President may allow would determine whether the treatment created a second tier of personhood for any particular WOT detainee or WOT detainees as a class.

For example, assume that the United States government contemplated engaging in the practice of extraordinary rendition. Depending on the circumstances, the procedure may be legal under our written law, or, even if it is not explicitly legal, it may be acceptable under law if the President is legally allowed to exercise the Commander-in-Chief powers he claims to possess.[81] Certainly, the law itself and the President will rely on reasons for allowing or ordering the extraordinary rendition. However, the issue is whether the reason is merely an explanation for the extraordinary rendition or an actual justification. An actual justification for the rendition decision might make the decision an appropriate one under Reconstruction Amendments (specifically Fourteenth Amendment) principles; a mere explanation for the decision would make the decision an acceptable one under *Dred Scott*'s principles.

A recitation of reasons does not equal justification. The *Dred Scott* Court merely recited the facts that free black persons and slaves were treated badly under the laws of various states and allowed the inhuman treatment of slaves and free black persons to continue, making them second-tier persons. The Court's allowance of such poor treatment did not justify it; the allowance merely made it constitutional at the time. Detainees in the WOT may deserve different treatment that non-WOT detainees and may deserve treatment previously thought to be less generous than all persons deserve. As long as such treatment is actually justified, it does not trigger second-tier personhood concerns. With justification, the treatment becomes a legitimate manner of distinguishing those who can be treated particularly harshly because of what they have done from those who cannot be treated so harshly. Without justification, the treatment is the mechanism for removing the personhood status of the WOT detainees. If that is what is to be done, it should be done in clear recognition that similar treatment has been allowed by the U.S. Supreme Court, but has been rejected by the people through the spirit of the Reconstruction Amendments.

81. Some believe that the Commander-in-Chief powers are quite broad. *See* Daniel Levin, Acting Assistant Attorney Gen., Memorandum for James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/dagmemo.pdf (superseding previous August 1, 2002 memo opining on very broad Commander-in-Chief power, but not contradicting the analysis on that issue); Jay S. Bybee, Assistant Attorney Gen., Memorandum for Alberto R. Gonzales, Counsel to the President, (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/ dojinterrogationmemo20020801.pdf (arguing for extremely broad vision of Commander-in-Chief power).

As with the discussion of felon disfranchisement, the point of this essay is not to argue for or against the existence of a justification or lack thereof for the treatment of War on Terror detainees. The point is to provide the ground rules for the discussion of whether restrictions on personhood rights are justified or unjustified for purposes of deciding whether multiple tiers of personhood or citizenship have been created. Indeed, if this essay spurs people merely to think about the notion and necessity of justifying governmental action as required by fealty to the spirit of the Reconstruction Amendments, it will have served an important purpose.

CONCLUSION

The *Dred Scott* Court allowed tiers of citizenship and tiers of personhood to exist, with various groups of citizens favored over others and various groups of persons favored over others. Simply, that Court allowed governments to pick and choose who was allowed to exercise citizenship rights and rights of personhood with little or any justification for the choices.[82] Some may argue that *Dred Scott* was a sign of the times, and indeed it was. In response, the Reconstruction Amendments were passed to write into the law a single tier of citizenship and a single tier of personhood. Nonetheless, the danger of creating tiers of citizenship and tiers of personhood is ever present.

Concerns about tiers of citizenship and tiers of personhood do not mean that individual citizens and persons, or even groups of them, will never forfeit rights. Certainly, there are and will be occasions when specific citizens or groups of citizens will lose some rights of citizenship without tiers of citizenship being created, and some persons or groups of persons will lose some rights generally enjoyed by all persons without tiers of personhood being created. However, why the citizen is denied the citizenship right or why the person is denied the personhood right is critical. If the denial of rights is actually justified, the denial does not create second-tier citizenship or personhood, but instead creates a legitimate limitation on the exercise of the citizenship or personhood right. However, the mere adher-

82. This is not to say that the *Dred Scott* Court gave governments complete discretion to select winners and losers. Chief Justice Taney vigorously protected the rights of some citizens against government intrusion using the Due Process Clause of the Fifth Amendment. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857) ("Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.").

ence to written law in taking such rights does not indicate adequate justification, as the written law itself may not provide actual justification for the denial of rights. If the denial of the right is not actually justified, the reason given for the denial is merely an explanation or excuse to deny a right of citizenship to a citizen or a right of personhood to a person. An unjustified denial of such rights can create tiers of citizenship and personhood.

It would be easy to argue that we are in a post-*Dred Scott* world in which tiers of citizenship and tiers of personhood have been abolished. Though we are in a post-*Dred Scott* world, we must always be vigilant that we think with a post-*Dred Scott* mindset. *Dred Scott* afforded and blessed a world in which different sets of citizens were provided different sets of rights for no good reason, and different groups of people were provided different sets of rights for no good reason. The temptation to follow the same path exists today, even in our post-*Dred Scott* world. Rather than adhere to the requirement that a single class of citizen be allowed to exercise all rights of citizenship and that a single class of person be treated with basic dignity, governments may explain differential treatment of groups of citizens or persons with rationalizations rather than real justifications for such treatment. Vigilance and reason are necessary to ensure that the temptation to treat groups of people in unjustifiable manners does not overwhelm us and the constitutional amendments our country put in place to squelch such temptation. It will take continued vigilance to keep *Dred Scott*-era thinking out of our post-*Dred Scott* world.[83]

83. A commitment to an inclusive America may require rethinking the basket of rights that all Americans and all persons in the United States are supposed to share. *See generally* Morgan & Zietlow, *supra* note 50.