

14th Amendment: Legacy of Dred Scott and reservoir of individual rights

President Trump's pre-election plan to reinterpret the 14th Amendment to eliminate birthright citizenship would weaken a part of the Constitution that has roots in St. Louis and that serves as the Constitution's deepest reservoir of individual rights.

That background, which didn't get much attention in the media, is important to understanding the danger of Trump's cavalier assertion that he could change the accepted meaning of the 14th Amendment with a stroke of his pen on an executive order or with the passage of law by a compliant Congress.

The St. Louis roots of the 14th Amendment are part of America's story of slavery and civil war. In the Dred Scott decision of 1857, the most ignominious decision in the history of the Supreme Court, Chief Justice Roger Taney wrote that Dred and Harriet Scott and all other African-Americans were not part of the We in We the People. The bluntness and racism of his words are shocking to read. He said blacks were of such 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 not rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."

That decision, denying citizenship to both enslaved and free blacks led to the Lincoln-Douglas debates of 1858 and provided a spark for the Civil War. The 14th Amendment was required to undo Dred Scott. Ratified 150 years ago, the amendment states:

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**.

In the 150 years since the 14th Amendment was ratified, its most powerful words – liberty, due process and equal protection – have become the constitutional foundation of more individual rights than the rest of the Constitution combined.

Within the past century, the U.S. Supreme Court decided that barring states from depriving people of “liberty...without due process of law” meant that most of the freedoms guaranteed by the Bill of Rights could not be violated by state governments.

This is often referred to as “incorporation” of the Bill of Rights against the states.

Before then, the Bill of Rights – including all of the freedoms of the First Amendment and the criminal procedural rights of the 4th, 5th and 8th Amendments – did not apply to the states. In other words states could establish one religion and tax people to support it. They could make it illegal to worship a disfavored religion. They could jail a person for unpopular speech. They could deny him or her a lawyer, the right to remain silent, the right to a jury, and the rights to be free from unreasonable searches and cruel punishments.

More recently, the liberty protected by the due process of law has formed the basis of rights of individual privacy and equal dignity involving some of the most important rights of personhood – the right to marry the person of one’s choice, to have sex with the person of one’s choice, to send children to parochial schools, to decide which family members may live in your house, to obtain contraceptives, to control one’s body.

This part of the 14th Amendment was the basis in the 1960s for *Loving v. Virginia*, knocking out state laws against interracial marriage and *Griswold v. Connecticut*, throwing out laws denying married women access to contraception. And it was the basis of *Roe v. Wade* in 1973, throwing out state criminal laws against abortion.

Recently retired Justice Anthony Kennedy located the right to same-sex marriage in both the liberty protected by due process and in the equal protection of the law. The liberty protected by due process includes the fundamental right to marry the person of one's choice. The equal dignity of the equal protection protects the equal humanity of all people, he said.

The equal protection guarantee of the 14th Amendment also has had broad impact in outlawing racial discrimination beginning in 1954 with *Brown v. Board of Education*. Soon, all forms of racial discrimination against blacks in the South became unconstitutional.

More recently, even as the Equal Rights Amendment went down to defeat, the equal protection of the 14th Amendment has become the constitutional tool for ending discrimination against women in the workplace and in education. It was the basis for Justice Ruth Bader Ginsburg's landmark decision ending the Virginia Military Academy's male only admission policy.

Trump's attack of birthright citizenship would undermine an individual 14th Amendment right that dates back 120 years, long before the court recognized that states had to follow the Bill of Rights and could not discriminate on the basis of race, sex and gender. In *Wong Kim Ark* in 1898 the court recognized birthright citizenship for the child of two Chinese citizens. That decision was a basis of a 1982 Supreme Court decision ordering Texas not to cut off state money for educating illegal immigrants.

Trump's notion that he could unilaterally nullify an important

source of individual rights demonstrates a lack of understanding about the important individual rights protected by the 14th Amendment and the deep pool of individual rights that was created from the blood of the Civil War and that protects the freedom and equality of millions of Americans today.