

ORIGINALISM AND THE OTHER DESEGREGATION DECISION

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INTRODUCTION

A persistent challenge to originalist theories of constitutional interpretation is the claim that originalism, if faithfully and consistently applied, would lead to results that modern Americans would find “intolerable.”¹ While originalists have adopted a number of strategies in responding to such criticisms, one particularly common approach has been to deny the underlying factual premise by seeking to demonstrate that originalism would not, in fact, lead to intolerable consequences.²

An important focus of this debate has been the question of whether originalism is capable of justifying the Supreme Court’s landmark decision in *Brown v. Board of Education*.³ From an early date, certain originalists attempted to defend the holding of *Brown*, if not necessarily its reasoning, as consistent with originalism notwithstanding the widespread belief that the Fourteenth Amendment’s framers and ratifiers did

¹ See, e.g., David A. Strauss, *The Living Constitution* 12–18 (2010) (identifying the constitutionality of sex discrimination, the inapplicability of the Bill of Rights to the states, and the unconstitutionality of many federal labor, environmental, and consumer protection laws as examples “of what the law would be if originalism were to prevail”); Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* 76 (2005) (asserting that if “taken seriously,” originalism “would lead in intolerable directions”); cf. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 *Nw. U. L. Rev.* 857, 898 (2009) (describing and responding to criticisms of originalism grounded in the “argument from bad results”).

² See, e.g., Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 *Nw. U. L. Rev.* 663, 686 (2009) (arguing that “incorporation” of the Bill of Rights and “the extension of the Constitution’s equality command to sex discrimination” are “correct on originalist grounds”); Paulsen, *supra* note 1, at 899 (asserting that “original meaning textualism does not yield bad outcomes” or at least “yields fewer than its critics imagine”).

³ 347 U.S. 483 (1954).

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not intend to prohibit racially segregated public schools.⁴ Given the central role *Brown* has assumed in modern constitutional theory, originalists' desire to reconcile the decision with their own methodology is unsurprising. As Professor Michael McConnell explains:

Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited. Thus, what once was seen as a weakness in the Supreme Court's decision in *Brown* [that is, the apparent inconsistency of the decision with the original understanding] is now a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it.⁵

Over time, the number of originalists willing to question *Brown*'s correctness has declined, such that the ability of originalism to justify the Court's decision is now a widely shared assumption of originalist scholarship.⁶

A similar story cannot be told, however, about *Brown*'s companion case, *Bolling v. Sharpe*,⁷ which invalidated a similar racial segregation

⁴ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 12–15 (1971) (contending that originalism could support a “plausible” resolution of *Brown* consistent with the Court's holding); Edwin Meese, III, *Construing the Constitution*, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in 19 *U.C. Davis L. Rev.* 22, 27 (1985) (contending that *Brown* did not involve “adapting a ‘living,’ ‘flexible’ Constitution to new reality,” but rather “restoring the original principle of the Constitution to constitutional law”). For the more conventional view, see, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 58 (1955) (deeming it an “obvious conclusion” from the historical evidence that the Fourteenth Amendment was not “meant to apply . . . to . . . segregation”); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 *Va. L. Rev.* 1881, 1881 (1995) (“[T]he overwhelming consensus among legal academics has been that *Brown* cannot be defended on originalist grounds.”).

⁵ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947, 952–53 (1995). This observation is hardly unique to Professor McConnell. See, e.g., Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 *Wm. & Mary L. Rev.* 997, 999 n.4 (1986) (“For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [*Brown*] was correct.”).

⁶ See, e.g., Calabresi & Fine, *supra* note 2, at 686 (“[W]e think *Brown v. Board of Education* is correct on originalist grounds.”); Paulsen, *supra* note 1, at 901 (arguing that *Brown* is “right on original-meaning textualist grounds that focus on the meaning of the words of the Equal Protection Clause rather than subjective specific intention or expectation”).

⁷ 347 U.S. 497 (1954).

policy applicable to public schools in the District of Columbia. Because the Fourteenth Amendment's Equal Protection Clause applies only to "state" governments,⁸ the holding in *Brown* did not control the resolution of *Bolling*, which presented the distinct question of whether the Constitution prohibits the federal government from discriminating on the basis of race. The Court answered that question in the affirmative and based its decision on the Fifth Amendment's Due Process Clause.⁹ The *Bolling* Court made no effort to ground its holding in the original meaning of the Fifth Amendment and only a cursory effort to reconcile its decision with either the text of the Due Process Clause or the Court's own earlier interpretations of that provision. Instead, the lynchpin of the Court's analysis was Chief Justice Warren's conclusory assertion that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."¹⁰

The considerable textual and historical difficulties presented by the *Bolling* opinion—which from start to finish, spans only three pages of the United States Reports¹¹—are well known.¹² The failure of the *Bolling* Court to support its decision with textual or historical analysis and the Court's decision to ground its holding in a provision that most scholars agree was originally understood to regulate only matters of procedure,¹³ has led most to conclude that the Court's holding was unsupported on originalist grounds.¹⁴

⁸ U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

⁹ *Bolling*, 347 U.S. at 499–500.

¹⁰ *Id.* at 500.

¹¹ *Id.* at 498–500.

¹² See, e.g., Kermit Roosevelt, III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. Pa. J. Const. L. 983, 997 (2006) (observing that "[t]he argumentation in *Bolling* . . . is somewhat less than satisfactory" and that "[this] fact has been widely noted").

¹³ See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 428–59 (2010) (examining evidence indicating that the public understanding of the Fifth Amendment's Due Process Clause in 1791 likely did not encompass substantive rights).

¹⁴ See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 32 (1980) (describing the proposition "that the Due Process Clause of the Fifth Amendment incorporates the Equal Protection Clause of the Fourteenth Amendment" as "gibberish both syntactically and historically"); Peter J. Rubin, *Taking its Proper Place in the Constitutional Canon: *Bolling v. Sharpe*, *Korematsu*, and the Equal Protection Component of Fifth Amendment Due Process*, 92 Va. L. Rev. 1879, 1880 (2006) ("[I]t is widely accepted, by

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Early originalists, such as Raoul Berger and Robert Bork, condemned the decision as “exemplif[ying]” the Warren Court’s “naked judicial revision of the Constitution.”¹⁵ Over time, such explicit originalist critiques have grown increasingly rare, as originalist theory has moved away from its early focus on criticizing the Warren Court and as *Bolling*’s core holding has become more firmly entrenched in modern constitutional law.¹⁶ But *Bolling* has not inspired the same vigorous efforts at originalist rehabilitation that have been offered in defense of *Brown*. For example, Professor McConnell, the leading academic originalist defender of *Brown*, did not even mention *Bolling* in his pathbreaking 1995 article *Originalism and the Desegregation Decisions*,¹⁷ which sought to justify *Brown* as consistent with the understandings of the Fourteenth Amendment’s framers.¹⁸ This relative inattention to *Bolling* is consistent with originalist scholarship more generally, which has devoted relatively little attention to either the decision itself or to the broader federal anti-discrimination norm for which the case has come to stand.¹⁹

those who defend the decision as well as those who attack it, that [*Bolling*’s] doctrinal innovation cannot be easily justified by the Fifth Amendment’s text or its history . . .”).

¹⁵ Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 Rutgers L. Rev. 951, 975 (1990); see also, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 83–84 (1990) (expressing sympathy for the result reached in *Bolling* “as a matter of morality and politics,” but nonetheless criticizing the decision as a “clear rewriting of the Constitution by the Warren Court”); Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 Ga. St. U. L. Rev. 767, 773–74 (1998) (citing *Bolling* as an example of “[t]he irrelevance of the Constitution to constitutional law”).

¹⁶ See, e.g., Richard Primus, *Constitutional Expectations*, 109 Mich. L. Rev. 91, 104 (2010) (observing that “as official racial discrimination became a consensus evil, *Bolling* ceased to have detractors”); cf. Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol’y 599, 599–601, 607–08 (2004) (observing that unlike early originalism, modern originalism “is no longer primarily a critique of the Warren Court’s rights jurisprudence”).

¹⁷ McConnell, *supra* note 5.

¹⁸ Professor McConnell did address *Bolling* in a subsequent work but did not attempt to defend the case’s constitutional holding, suggesting instead that the same result could have been reached by narrowly construing Congress’s statutory grant of authority to the District of Columbia’s local government. See Michael W. McConnell, *Michael W. McConnell (Concurring in the Judgment), in What Brown v. Board of Education Should Have Said* 158, 166–68 (Jack M. Balkin ed., 2001).

¹⁹ See, e.g., Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 480 (1998) (observing that *Bolling* “has not acquired the iconic status of *Brown*,” and thus “there are almost no originalist studies of the federal government’s power to enact race-conscious laws”). There have been occasional efforts to ground an originalist defense of *Bolling* in provisions other than the Fifth Amendment Due Process Clause. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 768–72 (1999) (arguing that *Bolling* could be justified by the original

The presumed inability of originalism to justify *Bolling* presents a continuing challenge to originalist methods of constitutional interpretation. Although *Bolling* has not attained *Brown*'s status as a touchstone of interpretive correctness, the decision itself is both reasonably well known and politically popular.²⁰ More significantly, *Bolling*'s core holding—that the federal government, like the states, is prohibited from engaging in racial discrimination—is an important part of modern constitutional doctrine that is embraced across a broad range of ideological and jurisprudential perspectives.²¹ Unsurprisingly, the assumed inability of originalism to justify the constitutional ban on federal discrimination is frequently invoked by critics as a principal example of the type of “intolerable” result that originalism requires.²²

But such uses of *Bolling* by originalism's critics tell only half the story. When discussed outside the specific context of the originalism debate, scholarly reaction to the Warren Court's rather cavalier treatment

meanings of, among other provisions, the Bill of Attainder and Titles of Nobility Clauses of Article I); Michael J. Perry, *Brown, Bolling, & Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. Ill. U. L.J. 53, 69–72 (1995) (suggesting the Ninth Amendment as “a much more plausible basis” for *Bolling*). But the dominant scholarly reaction has been to regard such arguments as “unpersuasive apologetics.” Richard A. Primus, *Bolling Alone*, 104 Colum. L. Rev. 975, 977 n.7 (2004); see also, e.g., Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 Harv. J.L. & Pub. Pol'y 351, 357 (1996) (referring to originalist defenses of both *Brown* and *Bolling* and observing that “at some point one wonders whether the revisionism is not motivated by the hope that the original meaning can be made to fit the preferred modern understanding”).

²⁰ A good indication of *Bolling*'s popularity is provided by the testimony of Judge Robert Bork during his Supreme Court nomination hearings in 1987. Although Judge Bork expressed a willingness during those hearings to revisit several cases he believed had been incorrectly decided, he refused to endorse a similar approach to *Bolling*, suggesting that the decision should be allowed to stand as a matter of stare decisis. See Primus, *supra* note 16, at 104 (observing that Bork “pronounced himself willing to hack away a good deal of modern constitutional law in the name of the integrity of the Constitution itself—but . . . would not dream . . . of overruling *Bolling*”).

²¹ See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1823 (2005) (“Justices of all substantive persuasions have felt entitled not only to uphold *Bolling* but also to expand upon its commitments.”).

²² See, e.g., Strauss, *supra* note 1, at 14 (observing that “[e]ven the originalists who think they can justify *Brown* find it difficult to escape th[e] conclusion” that “[t]he federal government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to”); Sunstein, *supra* note 1, at 63 (asserting that “[h]onest [originalists] have to admit that according to their method, the national government can segregate the armed forces, the public schools, or anything it chooses”); Paul Brest, *The Misconceived Quest for The Original Understanding*, 60 B.U. L. Rev. 204, 232–33 (1980) (“[A] moderate originalist cannot easily justify the incorporation of principles of equal treatment into the due process clause of the fifth amendment . . .”).

of text and history in *Bolling* is decidedly more ambivalent. Despite its firmly entrenched status in modern constitutional doctrine, *Bolling* has long occupied a somewhat “uncomfortable place in the constitutional cannon.”²³ The conventional academic narrative surrounding the decision views the Court’s holding as unsupportable on traditional interpretive grounds and as premised on considerations that were primarily political rather than legal in nature.²⁴ But even among scholars who embrace this “political” explanation and view the decision as normatively justified, there often remains a pervading sense of discomfort with the “controversial and even dangerous form of argument” such a justification requires.²⁵

This Article challenges the conventional wisdom regarding *Bolling*’s assumed originalist indefensibility. Although the specific rationale on which the Warren Court relied is difficult to defend on originalist grounds, it does not follow that the holding itself is similarly indefensible. In fact, a surprisingly strong originalist argument supporting both *Bolling*’s specific holding and the broader unconstitutionality of most forms of invidious federal racial discrimination²⁶ can be made by looking to the original public meaning of the Fourteenth Amendment’s Citizenship Clause, which provides that “[a]ll 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.”²⁷

²³ Rubin, *supra* note 14, at 1882.

²⁴ See, e.g., *id.* at 1880 (“The conventional account is that the decision was . . . essentially political rather than judicial.”).

²⁵ Fallon, *supra* note 21, at 1835; see also Rubin, *supra* note 14, at 1896 (observing that “even many supporters of the *Bolling* decision . . . readily accepted or internalized the criticism of the decision’s reasoning and accepted . . . that it represented a breathtaking (and, corollary, legally indefensible) innovation”); cf. David E. Bernstein, *Bolling*, Equal Protection, Due Process, and *Lochner*phobia, 93 *Geo. L.J.* 1253, 1256 (2005) (observing that many “scholars more sympathetic to Warren Court jurisprudence embrace the result in *Bolling*, but reject, or at least refuse to endorse, its reliance on the Fifth Amendment’s Due Process Clause”).

²⁶ I use the term “invidious” to bracket the important question of whether the Fourteenth Amendment prohibits only laws that burden minority groups or whether it also prohibits “benign” race-conscious enactments intended to benefit minorities, such as race-based affirmative action. Cf. Siegel, *supra* note 19, at 478 n.3 (drawing similar distinction between “invidious” and “benign” color-conscious laws). Though I do not take a position on that question here, I am reasonably confident that, whatever the correct answer to this question may be as a matter of the Fourteenth Amendment’s original meaning, that answer should be the same for both state and federal policies. See *infra* Section IV.B (discussing overlap between federal and state equality requirements under the Fourteenth Amendment).

²⁷ U.S. Const. amend. XIV, § 1.

This Article is not the first to suggest the Citizenship Clause, which, unlike the Equal Protection Clause, applies to the federal government as well as the states,²⁸ as a possible alternative basis for *Bolling*'s constitutional holding. A number of prominent constitutional scholars, including Professors Akhil Amar, Jack Balkin, Drew Days, and Bruce Ackerman, have suggested that the Citizenship Clause, rather than the Due Process Clause, might have provided a more textually defensible basis for the *Bolling* decision.²⁹ But existing scholarship drawing a connection between the Citizenship Clause and the prohibition of federal racial discrimination has been largely content to suggest the connection without engaging in the type of detailed historical analysis necessary to ground the connection firmly in the actual original meaning of the Fourteenth Amendment.³⁰ The relative paucity of supporting evidence identified in the most prominent scholarly discussions drawing a link between *Bolling* and the Citizenship Clause has contributed to the perception that the Citizenship Clause justification, like other attempted originalist defenses of *Bolling*, reflects nothing more than an effort by clever lawyers to find historical support for a result they favor on non-originalist grounds.³¹

²⁸ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 507–08 (1999) (“[T]he protection afforded to the citizen by the Citizenship Clause . . . is a limitation on the powers of the National Government as well as the States.”).

²⁹ See, e.g., Bruce Ackerman, Bruce Ackerman (Concurring), in *What Brown v. Board of Education Should Have Said*, supra note 18, at 100, 114–16; Amar, supra note 19, at 768–69; Jack M. Balkin, Jack M. Balkin (Judgment of the Court), in *What Brown v. Board of Education Should Have Said*, supra note 18, at 77, 87; Drew S. Days III, Drew S. Days III (Concurring), in *What Brown v. Board of Education Should Have Said*, supra note 18, at 92, 97–98; cf. Siegel, supra note 19, at 482, 584–86 (concluding that the Citizenship Clause was susceptible to an interpretation that “some originalists might accept as limiting federal power to enact laws invidiously burdening minorities”).

³⁰ For example, in a 1999 article, Professor Amar supported his suggestion that the Citizenship Clause might support the result in *Bolling* with a single sentence from Justice Harlan’s opinion in *Gibson v. Mississippi*, written nearly twenty-eight years after the Fourteenth Amendment’s ratification. See Amar, supra note 19, at 768–69 (pointing to Harlan’s statement that “[a]ll citizens are equal before the law” as support for reading the Citizenship Clause to include an equality component (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896))); see also, e.g., Akhil Reed Amar, *America’s Constitution: A Biography* 381–82 (2005) (citing negative public reaction to Chief Justice Taney’s decision in *Dred Scott* and Justice Harlan’s majority opinion in *Gibson* as support for an “equal citizenship” interpretation of the Citizenship Clause).

³¹ See, e.g., Martha Minow, “A Proper Objective”: Constitutional Commitment and Educational Opportunity after *Bolling v. Sharpe* and *Parents Involved in Community Schools*, 55 *How. L.J.* 575, 596–97 (2012) (referring to the Citizenship Clause and other alternative textual arguments for *Bolling* as “imaginative” but declaring that such “arguments can make no claim to discerning the original intent of the framers”).

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The Citizenship Clause argument, however, is not so easily dismissed. The Citizenship Clause was adopted in 1868—following a Civil War fought over the issue of slavery and the adoption of a constitutional amendment forbidding the practice. And while race-based discrimination had hardly been eradicated by the time of that provision’s adoption, protecting the civil rights of free African Americans was a principal goal of the Amendment and the Citizenship Clause itself was specifically aimed at repudiating the racist logic of Chief Justice Taney’s infamous *Dred Scott* decision.³² When considered in combination, these circumstances confer upon the Citizenship Clause argument an aura of historical plausibility that claims grounded in the original meaning of constitutional provisions adopted in the late eighteenth century cannot hope to match.

Moreover, as Part I of the Article explains, the Citizenship Clause was adopted against a longstanding political and legal tradition that closely associated the status of “citizenship” with the entitlement to legal equality. Although the precise contours of this equal citizenship principle were ill-defined—as were the mechanisms through which constitutional citizenship could be acquired—there was a strong presumption throughout the antebellum period that a person’s status as a “citizen” entitled that person to, at a minimum, full legal equality with respect to “fundamental” civil rights.³³ Part I also explores the challenges this egalitarian conception of citizenship created when applied to the rights and privileges of free African Americans and the legal theories through which free blacks’ claims to citizenship and legal equality were defended and denied.³⁴

Part II examines the political debates leading up to the Fourteenth Amendment’s adoption, focusing particularly on the debates surrounding the adoption of the Citizenship Clause’s predecessor provision in the Civil Rights Act of 1866, which attempted to extend citizenship to free blacks by statute, and the conceptions of “citizenship” reflected in the drafting and ratification history of the Fourteenth Amendment itself. These debates reflect the profound influence of the Civil War in shifting mainstream Republican thinking toward recognizing blacks’ status as United States citizens and linking that status with their claims to legal

³² Cf. *infra* Section I.C (discussing Taney’s *Dred Scott* opinion).

³³ See *infra* Section I.A.

³⁴ See *infra* Sections I.B and I.C.

equality.³⁵ Nor were Republicans alone in linking the status of citizenship with the entitlement to legal equality. During both the Civil Rights Act debates and the subsequent Fourteenth Amendment debates, opponents of black equality repeatedly asserted that extending citizenship to blacks would require not only that they be given equal civil rights, such as the right to contract and to own property, but full political rights and privileges as well.³⁶

Part III examines the persistence of these understandings in early interpretations of the Fourteenth Amendment, including in debates surrounding early congressional efforts to enforce the Amendment and in early judicial decisions examining its meaning. Part III also explores the shift away from the citizenship-focused account of the Amendment in the wake of the Supreme Court's notorious 1873 decision in the *Slaughter-House Cases*,³⁷ which imposed a narrow and constrained interpretation on the Amendment's Citizenship and Privileges or Immunities Clauses that effectively negated those Clauses' ability to provide meaningful protection to civil rights.

Part IV examines the evidence considered in Parts I through III of the Article in light of modern originalist theory. The diversity of originalist theories renders it difficult to make categorical claims about whether a particular outcome either is or is not reconcilable with "originalism" in the abstract. There is, however, a strong textual and historical argument for recognizing an equality component in the Fourteenth Amendment's Citizenship Clause under both original intent and original public meaning theories of originalism. This "equal citizenship" interpretation of the Citizenship Clause would require the federal government to extend to all citizens equality rights that are at least as broad as those that states are required to extend to all "persons" under the Equal Protection Clause.

Of course, any comprehensive originalist defense of *Bolling* would almost certainly require a defense of *Brown*'s interpretive correctness as well.³⁸ As noted above, the proposition that *Brown* can be reconciled

³⁵ See *infra* notes 168–76 and accompanying text.

³⁶ See *infra* notes 200, 261–74, 294 and accompanying text.

³⁷ 83 U.S. (16 Wall.) 36 (1873).

³⁸ Cf. Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 Chi.-Kent L. Rev. 291, 326–27 (2000) ("Clever lawyers can concoct all sorts of arguments for why *Bol-*

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with originalism has been embraced by many self-described originalist scholars. But this position remains deeply controversial.³⁹ The question of *Brown*'s consistency with the original understanding and/or meaning of the Fourteenth Amendment is among the most thoroughly examined questions in all of constitutional law, and attempting to engage this question adequately would take me far afield from the core focus of the present inquiry.⁴⁰ For purposes of this Article, I will therefore limit myself to the more modest objective of demonstrating that *Bolling* is no more problematic than *Brown* as a matter of constitutional text and original meaning. This proposition is sufficiently novel and controversial to merit sustained attention.⁴¹

I. CONSTITUTIONAL "CITIZENSHIP" BEFORE THE FOURTEENTH AMENDMENT

A. Republican "Citizenship" and Equality in Early America

The change in governmental form that accompanied the American Revolution resulted in a changed relationship between the people and their respective governments that was reflected in the terminological change from "subjects" to "citizens."⁴² As historian Gordon Wood observes, the very idea of "[r]epublican citizenship" during the Founding era "implied equality."⁴³

ling is no more problematic than *Brown*, but for an originalist, that still leaves the puzzle of *Brown* itself.") (footnote omitted).

³⁹ See supra notes 4, 6.

⁴⁰ See, e.g., Jamal Greene, Fourteenth Amendment Originalism, 71 Md. L. Rev. 978, 982 (2012) ("The original understanding of the Equal Protection Clause regarding racial segregation was debated extensively in the briefing to *Brown v. Board of Education* and has been a central concern of constitutional historians and theorists ever since.") (footnote omitted).

⁴¹ Even originalists who defend *Brown* as correctly decided often concede the unavailability of any similar defense of *Bolling*'s constitutional holding. See, e.g., Bork, supra note 15, at 83–84; McConnell, supra note 18, at 166–68; Paulsen, supra note 1, at 901.

⁴² See, e.g., Gordon Wood, *The Radicalism of the American Revolution* 169 (1991) (discussing relationship between citizenship and republicanism in Revolution-era American thought).

⁴³ *Id.* at 233; see also, e.g., Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union 1774–1804*, at 11 (2009) ("When dressed in the language of Revolution, subjecthood and citizenship were understood to be polar opposites, with subjecthood representing a feudal status of perpetual allegiance and inferiority, and citizenship representing a 'modern' status of equality and freedom . . ."). As Wood observes, the term "citizen" itself had etymological roots connecting the idea of "citizenship" with the inhabitants of a town or city, and thus stood in contradistinction to members of "the landed nobility or gentry." Wood, supra note 42, at 233; see also, e.g., Samuel Johnson, *A Dictionary of the*

The idea that American citizenship necessarily implied equal citizenship was commonplace in American political and legal writing of the late eighteenth and early nineteenth centuries. For example, in a 1784 pamphlet urging the adoption of a new constitution for his state, South Carolina politician Thomas Tudor Tucker described the constitution as “a social covenant entered into by express consent of the people, upon a footing of the most perfect equality with respect to every civil liberty.”⁴⁴ “No man,” according to Tucker, “has any privilege above his fellow-citizens, except whilst in office, and even then, none but what they have thought proper to vest in him, solely for the purpose of supporting him in the effectual performance of his duty to the public.”⁴⁵ A pamphlet discussing the nature of United States citizenship published in 1787 by Tucker’s fellow South Carolinian, David Ramsay, described American “citizens,” as distinguished from English “subjects,” as being “so far equal, that none have hereditary rights superior to others,” with each citizen possessing “as much of the common sovereignty as another.”⁴⁶ Chief Justice John Jay’s 1793 opinion in *Chisolm v. Georgia*⁴⁷ explained his rejection of state sovereign immunity by reference to the difference between the European systems, which regarded the person of the sovereign “as the object of allegiance, and exclude[d] the idea of his being on an equal footing with a subject,” and the American system, in which “the citizens . . . are equal as fellow citizens, and as joint tenants in the sovereignty.”⁴⁸

English Language (3d ed. 1768) (unpaginated) (defining “citizen” as “a townsman; not a gentleman”); see also *id.* (defining “gentleman” as “[a] man of birth; a man of extraction, though not noble”).

⁴⁴ Philodemus (Thomas Tudor Tucker), *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice* (Charleston, 1784), *reprinted in* 1 *American Political Writing During the Founding Era, 1760–1805*, at 606, 612 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

⁴⁵ *Id.* at 613.

⁴⁶ David Ramsay, *A Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States* 3 (n.p. 1789).

⁴⁷ 2 U.S. (2 Dall.) 419 (1793).

⁴⁸ *Id.* at 471–72 (opinion of Jay, C.J.); see also, e.g., *Wilkins’ Lessee v. Allenton*, 3 Yeates 273, 278 (Pa. 1801) (rejecting proposed construction of a land grant as “oppose[d]” to “that just equality, which ought to prevail amongst the citizens of a free government”); Benjamin L. Oliver, *The Rights of an American Citizen: With a Commentary on State Rights, and on the Constitution and Policy of the United States* 51 (Boston, Marsh, Capen & Lyon 1832) (observing that “[a]s men are naturally equal in their rights, there can be no doubt . . . that no individual would be willing to join in organizing a society, unless he were put on an equal footing with others, as to all the rights secured to him in the social compact, or constitution

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During the early and middle decades of the nineteenth century, this principle of citizen equality became a staple of American political rhetoric and was closely associated with the political ideology of the era's dominant Jeffersonian and Jacksonian political coalitions.⁴⁹ This principle also manifested itself in the era's legal doctrine, particularly in the substantial body of state court decisions prohibiting "special" or "class" legislation that imposed special burdens or accorded special benefits to particular "classes" of citizens.⁵⁰

B. *The Problem of Free Black Citizenship*

1. *The Uncertain Status of United States Citizenship Under the Constitution of 1787*

Though the original Constitution of 1787 presupposed a class of persons identified as "citizens of the United States," it said virtually nothing about the identities of such "citizens" or what rights or privileges attached to the status of citizenship.⁵¹ The Constitution explicitly conferred a handful of relatively narrow rights on United States "citizens," including eligibility for certain federal offices and the ability to maintain actions in the federal courts in certain categories of cases.⁵² The Privi-

of the society"); 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* app. at 28 (Philadelphia, William Young Birch & Abraham Small 1803) (describing the "perfect equality of rights among the citizens" as "indispensably necessary to the very existence of" the American species of democracy).

⁴⁹ On the role of civic equality in Jeffersonian and Jacksonian ideology, see, for example, Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 33–45 (1993); cf. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 36–39 (1988) (observing linkage between ideas of equality and "citizens' rights" rhetoric in antebellum political and legal arguments).

⁵⁰ See, e.g., *Ward v. Barnard*, 1 Aik. 121, 128 (Vt. 1825) ("An act conferring upon any one citizen, privileges to the prejudice of another, and which is not applicable to others, in like circumstances, . . . does not enter into the idea of municipal law, having no relation to the community in general."); Gillman, *supra* note 49, at 22–60 (describing public and judicial resistance to such "class legislation" during the antebellum period); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 251–68 (1997) (same).

⁵¹ Cf. William Rawle, *A View of the Constitution of the United States of America* 85 (Philadelphia, Philip H. Nicklin, 2d ed. 1829) ("It cannot escape notice, that no definition of the nature and rights of citizens appears in the Constitution. The descriptive term is used, with a plain indication that its meaning is understood by all . . .").

⁵² See U.S. Const. art. I, § 2 (eligibility for House of Representatives); id. art. I, § 3 (Senate eligibility); id. art. II, § 1 (presidential eligibility); id. art. III, § 2 (designating citizenship of the parties as a basis for jurisdiction for certain categories of suits).

leges and Immunities Clause of Article IV (also known as the Comity Clause) suggested the existence of a much broader and more amorphous category of “privileges and immunities” of citizenship that the Constitution itself did not define.⁵³

Although the plain language of the Comity Clause appeared to require that each state extend to citizens of other states literally “all” the privileges and immunities its own citizens possessed, this interpretation was almost uniformly rejected by antebellum courts, which instead embraced a narrower interpretation of the provision as extending only to “fundamental” state-law rights and privileges.⁵⁴ Justice Bushrod Washington’s circuit opinion in *Corfield v. Coryell*,⁵⁵ one of the leading antebellum authorities on the meaning of the provision, exemplified this approach. Washington identified the “privileges and immunities” protected by the Clause as “those . . . which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments” and “which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”⁵⁶ Washington also suggested an illustrative, though explicitly non-exhaustive list of the rights he viewed as falling within the scope of the provision’s protection.⁵⁷

⁵³ Id. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

⁵⁴ See, e.g., Earl M. Maltz, Fourteenth Amendment Concepts in the Antebellum Era, 32 Am. J. Legal Hist. 305, 336 (1988) (“Most courts concluded that the concept of privileges and immunities did not encompass all rights which were associated with citizenship in a particular state; rather, only those rights which were in some sense ‘fundamental’ were viewed as protected.”).

⁵⁵ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230); see also John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1398 (1992) (describing *Corfield* as “the most famous Comity Clause case of all”).

⁵⁶ *Corfield*, 6 F. Cas. at 551.

⁵⁷ Washington provided the following illustrative list of rights he viewed as falling within the scope of the provision’s protection:

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and

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The ambiguity surrounding the rights attaching to citizenship was matched by a similar ambiguity regarding the persons entitled to recognition as “citizens.” The Constitution gave Congress the power to prescribe a “uniform Rule of Naturalization”⁵⁸ but was otherwise silent on the question of how citizenship could be acquired. The dominant view during the antebellum period was that United States citizenship was derivative of state citizenship, with state citizenship generally viewed as following the English common law *jus soli* doctrine, which recognized birth within a nation’s territory as sufficient to establish citizenship.⁵⁹

While this *jus soli* principle worked tolerably well as applied to white Americans, it presented special problems as applied to other groups, particularly Native Americans, slaves, and free African Americans.⁶⁰ The denial of citizenship to Native Americans and African American slaves raised relatively few conceptual difficulties. Most American courts and legal commentators viewed the birthright citizenship principle as inapplicable to Native Americans due to the allegiance they owed to their quasi-sovereign tribal governments, which placed them in a position analogous to that of foreigners.⁶¹ The denial of citizenship to slaves was similarly easy to justify based on their legal status as property and a civil law tradition stretching back to ancient Rome, which recognized an explicit distinction between “slave” and “citizen.”⁶² The legal status of free

many others which might be mentioned, are, strictly speaking, privileges and immunities

Id. at 552.

⁵⁸ U.S. Const. art. I, § 8, cl. 4.

⁵⁹ See, e.g., James H. Kettner, *The Development of American Citizenship, 1608–1870*, at 287 (1978) (observing that “Americans” of the antebellum period “merely continued to assume that ‘birth within the allegiance’ conferred the status [of citizenship] and its accompanying rights”).

⁶⁰ See generally id. at 287–333 (discussing contested citizenship status of Native Americans and African Americans).

⁶¹ See, e.g., Kettner, *supra* note 59, at 287–300; Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 106–10, 181–85 (1997).

⁶² See, e.g., Kettner, *supra* note 59, at 311 (“Although it was impossible to avoid confronting problems of slave status . . . the debates could be argued in terms that did not raise the issue of citizenship explicitly.”); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 *San Diego L. Rev.* 681, 738–43 (1997) (discussing the influence of Roman law distinction between citizens and slaves on antebellum legal thought).

blacks, however, was not so easily assimilated to a pre-existing legal status that could be defined in contradistinction to the status of “citizen.”⁶³

Under English law, both free-born African Americans and emancipated slaves had been considered English subjects based on their birth within the territorial jurisdiction of the sovereign.⁶⁴ But this formal legal status was not viewed as implying legal equality with white subjects, and free blacks were widely subjected to various civil and political disabilities, including denial of the right to vote and hold office, the right to serve on juries, and the right to testify against whites.⁶⁵ Though the separation from England and the transition of former colonists from English “subjects” to American “citizens” highlighted the ambiguous legal status of free blacks in the newly independent states, the change in governmental form led to relatively few practical changes in their legal treatment. Both northern and southern states maintained a variety of race-based distinctions that had existed under Colonial-era laws and enacted new racially discriminatory legislation to address newly perceived problems.⁶⁶

2. The Missouri Controversy and the Emergence of Free Black Citizenship as a National Political Issue

Explicit consideration of the citizenship status of free blacks was relatively rare during the nation’s earliest years, and opinion among those who did address the issue was divided.⁶⁷ But in 1820, the question of free blacks’ citizenship emerged as a source of national political controversy when anti-slavery northern members of Congress sought to derail Missouri’s application for statehood under an aggressively pro-slavery constitution that would require the state’s legislature to “prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever.”⁶⁸ Anti-slavery forces contended that this proposed

⁶³ Kettner, *supra* note 59, at 311 (observing that “when free Negroes were considered within the context of the general assumptions governing the concept of citizenship, there seemed to be no theoretically consistent way to deny them the rights and privileges of citizens”).

⁶⁴ Smith, *supra* note 61, at 64–65.

⁶⁵ *Id.* at 65. Bans on interracial marriage and sexual relations also existed throughout the American colonies. *Id.*

⁶⁶ See, e.g., Siegel, *supra* note 19, at 494–513 (surveying race-based laws restricting legal rights of free blacks in both northern and southern states following the Revolution).

⁶⁷ Mark Graber, *Dred Scott and the Problem of Constitutional Evil* 52–53 (2006).

⁶⁸ 37 *Annals of Cong.* 47 (1820) (statement of Sen. Burrill). For useful discussions of the political background of the controversy over Missouri’s admission, see Robert Pierce Forbes, *The Missouri Compromise and Its Aftermath: Slavery and the Meaning of America*

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migration restriction would violate the rights of free black citizens under the Comity Clause.⁶⁹

Supporters of Missouri's admission responded to such arguments by denying that free blacks either were or could be "citizens" of any state within the meaning of the Constitution. The denial of free blacks' citizenship by supporters of Missouri's admission rested on a strongly egalitarian conception of citizenship that insisted on the full political and civil equality of all citizens. For example, Representative Louis McLane of Delaware declared his understanding "that a person, to be a 'citizen' under one Government, must be a member of the *civil community*, and entitled as [a] matter of right to equal advantages in that community."⁷⁰ Representative Philip Barbour of Virginia similarly contended that:

The term citizen . . . could not with propriety be applied to any one unless . . . he should be possessed of all at least of the civil rights, if not of the political, of every other person in the community, under like circumstances, of which he is not deprived for some cause personal to himself.⁷¹

The corollary of such claims was that the unequal treatment of free blacks under the existing laws of most states, including northern states where slavery was illegal, demonstrated that such individuals could not truly be considered "citizens" of any state.⁷² Those opposed to Mis-

33–141 (2007); Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 100–13 (1978).

⁶⁹ See, e.g., 37 *Annals of Cong.* 92 (1820) (statement of Sen. Otis) (contending that proposed restriction was in "palpable collision with" the Comity Clause); *id.* at 47 (statement of Sen. Burrill) (contending that proposed migration restriction was "entirely repugnant to the Constitution of the United States").

⁷⁰ *Id.* at 615.

⁷¹ *Id.* at 545; see also, e.g., *id.* at 585 (statement of Rep. Archer) (arguing that while "[c]itizens might be admitted in various degrees to the exercise of political rights" and "might even be admitted in various degrees to the enjoyment of civil rights, . . . those could not be considered as belonging to the rank of citizens, who, . . . by . . . the positive enactments of law, were every where excluded from an equality with even the lowest rank of citizens, as respected the ordinary and most essential relations of domestic and social life").

⁷² See, e.g., *id.* at 546 (statement of Rep. Barbour) (contending that free blacks could not be considered citizens of any state because such individuals were "in all the States deprived of many of the rights of white men"); *id.* at 87–88 (statement of Sen. Holmes) (pointing to denial of voting rights and the right to keep and bear arms as illustrating that free blacks were not citizens); *cf. id.* at 93–94 (statement of Sen. Otis) (observing that the arguments of nearly all proponents of Missouri's admission rested upon a "single foundation stone," namely the contention that free blacks "were not citizens . . . because . . . they are, or have been, made liable to certain disabilities not common to . . . free white citizens").

souri's admission countered such arguments by observing that many white citizens, including women, children and property-less white men, did not enjoy full civil and political privileges in many states but were nonetheless recognized as "citizens" of those states.⁷³

The controversy over Missouri's proposed exclusion of free blacks ended somewhat anticlimactically in a compromise that allowed the state's admission under its proposed constitution—including the provision restricting free blacks' migration—but premised admission on the state legislature's acknowledgement that the constitution would "never be construed to authorize the passage of any law . . . by which any citizen, of either of the States in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States."⁷⁴

The resolution of the Missouri controversy did not end the sectional debate over the citizenship of free blacks and their rights under the Comity Clause. In 1822—less than a year after the congressional debates over Missouri concluded—South Carolina enacted a law authorizing state officials to board any ship entering the state's harbors and arrest any African American crew members found on board.⁷⁵ The passage of this law, and similar "Negro Seamen's Acts" by other southern states,⁷⁶ prompted strenuous objections from New England states, led by Massachusetts, which charged that South Carolina's conduct violated the Article IV Comity Clause. In response to Massachusetts' objections, and its efforts to institute a legal challenge to the law's constitutionality,⁷⁷ the

⁷³ See, e.g., *id.* at 596 (statement of Rep. Hemphill) (observing that "[d]iscriminations are familiar to us, in the several States, both as to political and civil rights; but it never was believed that they effected a total extinguishment of citizenship"); *id.* at 93–94 (statement of Rep. Otis) (observing that "[i]n every country women and minors are subject to disqualifications" in the exercise of important civil and political rights).

⁷⁴ Philip Hamburger, *Privileges or Immunities*, 105 *Nw. U. L. Rev.* 61, 87 (2011).

⁷⁵ See generally W. Jeffrey Bolster, "To Feel Like a Man": Black Seamen in the Northern States, 1800–1860, 76 *J. Am. Hist.* 1173, 1192–93 (1990) (describing the Negro Seamen's Acts of South Carolina and other southern states).

⁷⁶ Similar laws were subsequently adopted by North Carolina, Georgia, Florida, Alabama, and Louisiana. *Id.* at 1192.

⁷⁷ In 1844, Massachusetts sent official delegations to South Carolina and Louisiana to protest those states' Negro Seamen's Acts and to institute legal challenges to the acts. Both delegations were forced to leave shortly after their arrival in the destination states after local officials made clear that they would not be protected against mob violence. Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 109 n.28 (1981); see also William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848*, at 139–40 (1977). The mistreatment of the Massachusetts delegation became a staple of antislavery po-

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South Carolina legislature issued a proclamation denying that “free negroes and persons of color” were “citizens of the United States” within the meaning of the Comity Clause and condemning Massachusetts for its attempted interference with the internal affairs of a sister state.⁷⁸

The antagonism between the southern states and the New England states regarding the constitutionality of the Negro Seamen’s Acts kept the question of free black citizenship alive as a national political issue throughout the antebellum period.⁷⁹

3. *Legal Theories of Free Black Citizenship*

The controversy over the citizenship of free blacks and their rights under the Comity Clause did not confine itself to the political arena. During the middle and later decades of the antebellum period, arguments concerning the citizenship of free blacks were frequently pressed upon courts and other legal officials, resulting in an extensive body of legal decisions and commentary addressing the issue. The legal theories developed in connection with such claims gave rise to at least three distinct theories of free blacks’ citizenship—(1) the pro-Southern, anti-citizenship position, which viewed the pervasive denial of legal equality to free blacks as conclusive evidence of their incapacity for citizenship; (2) the abolitionist position, which accepted the posited link between citizenship and equality suggested by the pro-Southern position but argued that free blacks were citizens and thus entitled to the same civil rights as white citizens; and (3) a more moderate pro-citizenship position, which attempted to steer a middle ground between these two extremes by defending the citizenship of free blacks while, at the same time, embracing an extremely narrow conception of what “citizenship” entailed.

a. *The Anti-Citizenship Position*

In 1822, less than a year after the issue of free black citizenship emerged as a point of national contention in the Missouri debates, Ken-

litical rhetoric that was repeatedly invoked throughout the antebellum period. See Maltz, *supra* note 54, at 340–41.

⁷⁸ State Documents on Federal Relations: The States and the United States 238 (Herman V. Ames ed., 1970). The legislatures of Alabama, Arkansas, Georgia, and Mississippi all issued proclamations endorsing the actions of South Carolina and condemning those of Massachusetts. *Id.* at 237.

⁷⁹ See, e.g., Maltz, *supra* note 54, at 340 (observing that the “Negro Seamen’s Acts were a more or less constant source of friction in the antebellum era”).

tucky's highest court decided *Amy v. Smith*—one of the earliest cases to address the question of whether free blacks could be considered “citizens” within the meaning of the Comity Clause.⁸⁰ The plaintiff, a purported “free woman of color” who alleged she was being unlawfully held as a slave, claimed citizenship under the laws of Pennsylvania and Virginia based on her temporary residence in those states, and contended that the refusal of Kentucky to recognize her claim to freedom violated her rights under the Comity Clause.⁸¹ Echoing the arguments offered by pro-slavery forces during the Missouri debates, the Kentucky court held that no one could, “in the correct sense of the term,” be considered “a citizen of a state, who is not entitled, upon the terms prescribed by the institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of society.”⁸² Because “[f]ree negroes and mulattoes” were “almost everywhere, considered and treated as a degraded race of people,” the court believed that “national sentiment upon the subject” warranted a “presumption that no state had made persons of colour citizens,” unless “positive evidence to the contrary” could be shown.⁸³

In dissent, Judge Benjamin Mills called attention to the many absurdities the majority's restrictive definition of “citizenship” would require, including denying citizenship to not only all women and children, but also to all white males who lacked the requisite age and residency requirements for the state's highest offices.⁸⁴ Mills identified the majority's “mistake” as arising from its failure to “attend[] to a sensible distinction between political and civil rights.”⁸⁵ According to Mills, civil rights, including “liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defense, and security in person, estate and reputation,” along “with some others which might be enumerated,” were what “constitute a

⁸⁰ 11 Ky. (1 Litt.) 326, 326 (1822).

⁸¹ Id. at 327.

⁸² Id. at 333.

⁸³ Id. at 334.

⁸⁴ Id. at 342 (Mills, J., dissenting). Two years earlier, Mills had authored an opinion rejecting an argument that free blacks were not protected by the bill of rights in the state's constitution, observing that although such individuals did not possess “every benefit or privilege which the constitution secures,” they were nonetheless “in some measure, parties” to the political compact and thus within the scope of many of the constitution's protections. *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 75 (1820).

⁸⁵ *Amy*, 11 Ky. (1 Litt.) at 342 (Mills, J., dissenting).

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citizen.”⁸⁶ Political rights, by contrast, were “not necessary ingredients” of citizenship and a state could thus “deny all her political rights to an individual” without depriving that person of citizenship.⁸⁷

The large majority of antebellum courts faced with claims regarding the citizenship of free blacks adopted the conception of citizenship endorsed by the majority in *Amy v. Smith* rather than the alternative view urged by Judge Mills.⁸⁸ Almost invariably, these courts premised their rejection of free blacks’ claims to citizenship on the unequal legal treatment of free blacks under existing state laws.⁸⁹

Though no federal case prior to *Dred Scott* “explicitly discussed who was eligible for American citizenship,”⁹⁰ the anti-citizenship position was endorsed by multiple officials in the federal executive branch. In 1821, U.S. Attorney General William Wirt, a Virginia slaveowner, issued a formal opinion denying that free blacks of his native state could be “citizens of the United States” within the meaning of the federal Constitution.⁹¹ Invoking the Comity Clause and the apparent absurdity of allowing “a person born and residing in Virginia, but possessing none of the high characteristic privileges of a citizen of the State” to nevertheless

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ See Graber, *supra* note 67, at 29 (observing that “[v]irtually every state court that ruled on black citizenship before 1857 concluded that free persons of color were neither state nor American citizens”).

⁸⁹ See, e.g., *Jackson v. Bulloch*, 12 Conn. 38, 42–43 (1837) (holding that exclusion of “all coloured persons” from the elective franchise indicated that “such persons were considered as excluded from the social compact” and thus could not claim protection under the equality provision in state’s bill of rights); *Cooper & Worsham v. Mayor of Savannah*, 4 Ga. 68, 72 (1848) (“Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office.”); *State v. Claiborne*, 19 Tenn. (Meigs) 331, 339 (1838) (“[F]ree negroes, by whatever appellation we call them, were never in any of the States, entitled to *all* the privileges and immunities of citizens, and consequently were not intended to be included, when this word [that is, the word “citizens” in the Comity Clause] was used in the Constitution.”); *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824) (holding that “[n]otwithstanding the general terms used” in the state’s bill of rights, free blacks could not claim protection under it because “[t]he numerous restrictions imposed on this class of people in our Statute Book . . . demonstrate, that [the constitution had] not been considered to extend equally to both classes of our population”).

⁹⁰ Graber, *supra* note 67, at 53.

⁹¹ *Rights of Free Va. Negroes*, 1 Op. Att’y Gen. 506 (1821). Although the opinion addressed the meaning of the phrase “citizens of the United States” in a federal statute, Wirt “presum[ed] that the description, ‘citizens of the United States,’ as used in the Constitution, has the same meaning that it has in the several acts of Congress” allowing the constitutional description to serve as the “standard of meaning” for interpreting the statute. Id. at 506–07.

acquire “all the immunities and privileges of a citizen” upon removing to a different state, Wirt declared his opinion that a “citizen[] of the United States,” within the meaning of the Constitution was limited to “those only who enjoyed the full and equal privileges of white citizens in the State of their residence.”⁹² Wirt’s decision that free blacks could not be “citizens” within the meaning of the Constitution was followed by his successors Caleb Cushing⁹³ and, in an unpublished opinion that foreshadowed the reasoning of his later *Dred Scott* opinion, future Chief Justice Roger Taney.⁹⁴

Although the citizenship question arose in a variety of contexts, the specter of the Comity Clause—and the rights that might be claimed by free blacks if they were recognized as “citizens” within the meaning of that Clause—permeated discussions of blacks’ citizenship, even when the Clause itself was not directly at issue.⁹⁵ A common assumption among those who espoused the anti-citizenship view was that if free blacks were recognized as “citizens” within the meaning of the Comity Clause, they would be entitled to claim an equality of rights when travelling in southern states with all citizens of the destination state—including rights that the destination state had reserved to its white citizens.⁹⁶ Implicit in

⁹² *Id.* at 507.

⁹³ See *Right of Expatriation*, 8 Op. Att’y Gen. 139, 142 (1856); see also *Relation of Indians to Citizenship*, 7 Op. Att’y Gen. 746, 751–52 (1856).

⁹⁴ Roger B. Taney, *The South Carolina Police Bill*, reprinted in H. Jefferson Powell, *Attorney General Taney & the South Carolina Police Bill*, 5 *Green Bag* 2d 75, 83–90 (2001). The only moderate dissent on this point issuing from the Attorney General’s office during the antebellum period came from Attorney General Hugh Legare, who, in a brief 1843 opinion, interpreted a federal statute restricting eligibility to purchase federal lands to “citizens of the United States” as having been intended to exclude only aliens and not native-born free blacks. *Pre-emption Rights of Colored Persons*, 4 Op. Att’y Gen. 147, 147 (1843). Legare made clear, however, that his opinion went solely to the legislative intent underlying the particular statute at issue and did not address the question of black citizenship more generally. *Id.*

⁹⁵ For example, in rejecting a claim that free blacks should be considered “freemen” within the meaning of a state constitutional voting rights provision, the Pennsylvania Supreme Court identified the federal Comity Clause as an “insuperable” obstacle to such an interpretation, suggesting that, if Pennsylvania conferred citizenship on its free blacks, such citizenship would “overbear the laws” of southern states imposing “countless disabilities” on free blacks in those states. *Hobbs v. Fogg*, 6 *Watts* 553, 559–60 (Pa. 1837).

⁹⁶ See, e.g., *Rights of Free Va. Negroes*, supra note 91, at 507 (assuming that “if a person born and residing in Virginia, but possessing none of the high characteristic privileges of a citizen of the State,” were recognized as a “citizen” under the federal Constitution, such person could “acquire[] all the immunities and privileges of a citizen” in a different state “although he possessed none of them in the State of his nativity”).

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this assumption was a conception of the Comity Clause as encompassing not only a bare protection against residency-based discrimination but rather a guarantee of substantive equality with respect to certain rights that inhered in the status of citizenship itself.⁹⁷ The anti-citizenship position thus implicitly rejected the proposition that individual states could limit the “privileges and immunities” to which free blacks from other states would be entitled by imposing similar restrictions on their own free black populations.⁹⁸

b. The Abolitionist Position

The origins of abolitionist theories of free black citizenship can be traced to the prosecution of Connecticut educator Prudence Crandall in the 1830s.⁹⁹ Crandall was prosecuted under an ordinance prohibiting the education of nonresident free blacks without the consent of local authorities.¹⁰⁰ Crandall’s attorneys, led by William W. Ellsworth and Calvin Goddard, constructed a defense based on the proposition that the Connecticut statute under which Crandall was prosecuted violated the Comity Clause by denying free blacks from other states the right to seek an education in the state. The judge presiding at Crandall’s trial—Chief Justice David Daggett of the Connecticut Supreme Court—rejected this

⁹⁷ As the Supreme Court of Tennessee explained in rejecting a claim to free black citizenship under the Comity Clause:

[I]n speaking of the rights, which a citizen of one State should enjoy in every other State, as applicable to white men, it is very properly said, that he should be entitled to all the “privileges and immunities” of citizens in such other State. The meaning of the language is, that no privilege enjoyed by, or immunity allowed to, the most favored class of citizens in said State, shall be withheld from a citizen of any other State. How can it be said, that he enjoys all the privileges of citizens, when he is scarcely allowed a single right in common with the mass of the citizens of the State?

It cannot be;—And, therefore, either the free negro is not a citizen in the sense of the Constitution; or, if a citizen, he is entitled to “all the privileges and immunities” of the most favored class of citizens.

State v. Claiborne, 19 Tenn. (Meigs) 331, 340 (1838) (emphasis omitted); cf. 2 John Codman Hurd, *The Law of Freedom and Bondage in the United States* 352–53, 376 (Boston, Little Brown & Co. 1862) (contending that the construction of the Comity Clause “which harmonizes best with the general character of the Constitution” was as a protection of individual rights that were national in character).

⁹⁸ Cf. *infra* Subsection I.B.3 (describing moderate pro-citizenship position).

⁹⁹ See, e.g., Wiecek, *supra* note 77, at 163–66; Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. Legal Analysis 165, 174–75 (2011).

¹⁰⁰ The background of Crandall’s prosecution and its influence on subsequent abolitionist theories of free black citizenship are discussed in Wiecek, *supra* note 77, at 163–64.

argument, instructing the jury that “it would be a perversion of terms” to say that free blacks were citizens within the meaning of that provision in the Comity Clause.¹⁰¹

In his argument before the Connecticut Supreme Court on appeal, Ellsworth insisted that “[a] distinction founded in color, in fundamental rights, is novel, inconvenient and impracticable.”¹⁰² Because free blacks, by virtue of their birth, owed allegiance to the government and were bound to follow its laws, Ellsworth argued that they were entitled to claim from the government the “correlative” obligation of “protection and equal laws.”¹⁰³ Ellsworth drew upon Justice Washington’s explication of the Comity Clause in *Corfield* as a guarantee of “fundamental rights” and insisted that education was such a fundamental right, describing it as the “fundamental pillar on which our free institutions rest.”¹⁰⁴ Citing the constitutional treatise of Justice Story, who had described the Comity Clause as having established a “general citizenship” among the citizens of the several states,¹⁰⁵ Ellsworth contended that the purpose of the Comity Clause had been “to declare a citizen of one state, to be a citizen of every state; and as such, to clothe him with the same fundamental rights, be he where he might, which he acquired by birth in a particular state.”¹⁰⁶

Though Ellsworth’s arguments were not embraced by the Connecticut Supreme Court, which overturned Crandall’s conviction on technical grounds,¹⁰⁷ they proved highly influential in the subsequent development of abolitionist theories of constitutional citizenship.¹⁰⁸ In 1835, New

¹⁰¹ *Crandall v. State*, 10 Conn. 339, 347 (1834) (quoting trial court’s jury instruction).

¹⁰² Transcript of Oral Argument at 6, *Crandall*, 10 Conn. 339, in Report of the Arguments of Counsel in the Case of Prudence Crandall Plff. in Error vs. State of Connecticut Before the Supreme Court of Errors at Their Session at Brooklyn, July Term 1834 (Boston, Garrison & Knapp 1834) (emphasis omitted).

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.* at 12.

¹⁰⁵ 3 Joseph Story, *Commentaries on the Constitution of the United States* 675 (Boston, Hilliard, Gray & Co. 1833) (“The intention of this clause was to confer on [the citizens of each state], if one may so say, a general citizenship; and to communicate all the privileges and immunities, which citizens of the same state would be entitled to under the like circumstances.”).

¹⁰⁶ Transcript of Oral Argument, *supra* note 102, at 8.

¹⁰⁷ *Crandall*, 10 Conn. at 372.

¹⁰⁸ See Wiecek, *supra* note 77, at 163–66; Howard Jay Graham, *The Early Antislavery Origins of the Fourteenth Amendment*, 1950 *Wis. L. Rev.* 479, 505 (1950) (describing Ellsworth and Goddard’s arguments as “the first comprehensive crystallization of abolitionist constitutional theory”).

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York abolitionist William Jay published a tract condemning the American Colonization Society, in which he devoted nineteen pages to contesting the constitutional theories underlying the trial court's controversial jury instruction denying that free blacks were citizens.¹⁰⁹ In that same year, the Ohio Antislavery Convention adopted arguments similar to those of Ellsworth and Goddard in condemning various "enactments, in the Ohio legislature, imposing disabilities upon the free blacks, emigrating from other states," as inconsistent with the Comity Clause and thus "entirely unconstitutional."¹¹⁰

Similar invocations of the Comity Clause in defense of the rights of free blacks recurred in abolitionist constitutional arguments throughout the middle decades of the nineteenth century. Leading abolitionists, including Charles Dexter Cleveland, Salmon P. Chase, Benjamin Shaw, and Byron Paine, all invoked the Comity Clause in condemning South Carolina and other southern states for imprisoning the "free citizens of Massachusetts" and other northern states pursuant to their infamous "Negro Seamen's Acts."¹¹¹ Certain "radical" abolitionists, including Lysander Spooner and Joel Tiffany, sought to demonstrate that not only free blacks but slaves as well were "citizens" of the United States by virtue of their birth on U.S. soil.¹¹² Spooner and Tiffany contended that the citizenship of free blacks, combined with the Comity Clause, provided

¹⁰⁹ William Jay, *An Inquiry into the Character and Tendency of the American Colonization and American Anti-Slavery Societies* 38–45 (New York, R.G. Williams 4th ed. 1837). Both the attorney who prosecuted the case and Chief Justice Daggett who presided over the trial were members of the American Colonization Society and Jay argued that the prosecution had been motivated by a desire to further the Society's goal of encouraging free blacks to migrate to American-established colonies in Africa. *Id.* at 38–39, 46.

¹¹⁰ Augustus Wattles et al., *Report on the Laws of Ohio*, in *Proceedings of the Ohio Anti-Slavery Convention: Held at Putnam, on the Twenty-Second, Twenty-Third, and Twenty-Fourth of April* 36–40 (n.p. Beaumont & Wallace 1835); see also Graham, *supra* note 108, at 494–98.

¹¹¹ See Charles Dexter Cleveland, *Address of the Liberty Party of Pennsylvania to the People of the State*, in *Salmon Portland Chase & Charles Dexter Cleveland, Anti-Slavery Addresses of 1844 and 1845*, at 45, 47 & n.* (Philadelphia, J.A. Bancroft & Co. 1867); see also Barnett, *supra* note 99, at 193–94, 213–15, 219, 241–42 (summarizing arguments of Cleveland, Chase, Shaw, and Paine regarding citizenship and privileges or immunities).

¹¹² See Lysander Spooner, *The Unconstitutionality of Slavery* 90–94 (Boston, Bela Marsh 1847); Joel Tiffany, *A Treatise on the Unconstitutionality of American Slavery: Together with the Powers and Duties of the Federal Government in Relation to that Subject* 84–97 (photo. reprint 1969) (1849)

the federal government with constitutional authority to abolish the slave laws of the southern states.¹¹³

Although more mainstream abolitionists generally rejected the argument that the federal government had constitutional authority to interfere with slavery in the states,¹¹⁴ both the nationalistic conception of “citizenship” embraced by the radicals and their vision of the Comity Clause as protecting equality with respect to a nationally determined baseline of “fundamental” rights were well within the mainstream of abolitionist political thought.¹¹⁵ Mainstream abolitionists rejected both the proposition that states were free to deny citizenship to their free, native-born inhabitants and the related claim that states were free to limit the rights of free black travelers from other states by denying similar rights to their own similarly situated black inhabitants.¹¹⁶

The mainstream abolitionist position thus shared a good deal in common with the theories underlying the denial of black citizenship. Like opponents of black citizenship, abolitionists viewed the Comity Clause as protecting rights that persons enjoyed by virtue of their status as United States citizens, rather than rights conferred by the local law of any particular state. And, like the opponents of black citizenship, abolitionists denied that the rights of sojourning citizens were limited by the destination state’s treatment of its own similarly situated inhabitants. The two sides obviously differed on the question of how citizenship was acquired and the consequent eligibility of free blacks to claim that status. But the logic of both the abolitionist and the anti-citizenship positions required that all those who *were* entitled to citizenship must be extended full equality with respect to all “fundamental” rights of citizenship.¹¹⁷

¹¹³ Spooner, *supra* note 112, at 93–94; Tiffany, *supra* note 112, at 95–97; see also Barnett, *supra* note 99, at 205–08, 224–28.

¹¹⁴ Barnett, *supra* note 99, at 191.

¹¹⁵ See *id.* at 254 (summarizing arguments of numerous abolitionist leaders that “equated the privileges and immunities of citizens of the United States with their fundamental rights, . . . rather than the privileges or benefits conferred by state law” and observing that these arguments “did not mention discrimination against out-of-staters” but rather “simply condemned the violations of the fundamental rights of persons from outside the state, regardless of how in-staters were treated”).

¹¹⁶ *Id.* at 253–54.

¹¹⁷ Cf. *supra* Subsection I.B.3.a (describing theories underlying the anti-citizenship position).

c. The Moderate Pro-Citizenship Position

The anti-citizenship position endorsed by the majority of southern courts and the pro-citizenship theories of abolitionists did not exhaust the conceptual possibilities regarding the citizenship of free blacks. A third view, embraced by certain moderate jurists, including Chancellor James Kent of New York, denied the strongly egalitarian premises underlying both the anti-citizenship and abolitionist positions by rejecting their common assumption that recognizing particular persons as “citizens” would necessarily entitle them to full legal equality.

In the initial edition of his highly influential treatise on American law, Kent obliquely suggested this position by using the example of “free persons of colour” to illustrate his understanding of the Comity Clause.¹¹⁸ According to Kent, that provision entitled citizens to only “the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other.”¹¹⁹ “[T]herefore,” according to Kent, if “free persons of colour are not entitled to vote in Carolina; free persons of colour emigrating there from a northern state, would” likewise “not be entitled to vote.”¹²⁰ Kent’s treatise rigidly adhered to the birthright citizenship rule and acknowledged no exception from that principle based on color.¹²¹

In subsequent editions, Kent and his son William, who assumed control of the treatise after his father’s death in 1847, continued to endorse the native-birth citizenship test notwithstanding the increasing strain placed on that position as applied to free blacks by the growing body of case law rejecting claims of black citizenship. While acknowledging that “[t]he African race, even when free, are essentially a degraded caste, of inferior rank and condition in society,” and pointing readers to several cases expressing the “judicial sense of their inferior condition,” Kent’s treatise nonetheless maintained that “[t]he better opinion” was that “[i]f a slave born in the United States be . . . lawfully discharged from bondage, or if a black man be born within the United States, and born free,” such a person would “become thenceforward a citizen,” though he would remain subject to “such disabilities as the laws of the states re-

¹¹⁸ See 2 James Kent, *Commentaries on American Law* 61–62 (New York, O. Halsted 1827).

¹¹⁹ *Id.* at 61.

¹²⁰ *Id.* at 61–62.

¹²¹ *Id.* at 33–36.

spectively may deem it expedient to prescribe to free persons of color.”¹²²

C. *The Dred Scott Decision and Its Aftermath*

By far the most salient judicial decision addressing the citizenship of free blacks at the time of the Fourteenth Amendment’s adoption was the United States Supreme Court’s 1857 decision in *Dred Scott v. Sandford*.¹²³ The *Dred Scott* decision is particularly relevant for purposes of understanding the Fourteenth Amendment’s Citizenship Clause as the majority’s holding—that free blacks could not be considered “citizens” within the meaning of the Constitution—provided the principal impetus for that Clause’s adoption.¹²⁴

The basic facts of the case are relatively straightforward—the plaintiff, an African American born into slavery, brought suit in a federal court in Missouri claiming that he and his family had gained their freedom when his former master had brought them to live temporarily in two jurisdictions where slavery was illegal—the state of Illinois and the federal territory of Wisconsin.¹²⁵ The defendant, Scott’s new owner, sought dismissal of the case arguing that the federal court lacked diversity jurisdiction under Article III because Scott was not a “citizen” of Missouri as he had alleged in his pleading.¹²⁶

1. *Chief Justice Taney’s Opinion*

At the outset of his opinion for the majority, Chief Justice Taney framed the question the case presented as being whether:

¹²² 2 James Kent, *Commentaries on American Law* 288 n.(b) (Boston, Little, Brown & Co. 9th ed. 1858). A similar position was embraced by the North Carolina Supreme Court in *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 20 (1838), a rare decision by a southern court acknowledging the citizenship of free blacks. While the North Carolina court declared that “slaves manumitted here become free-men—and therefore if born within North Carolina are citizens of North Carolina,” *id.* at 25, it made clear that the legislature could prescribe different punishments for different “classes” of citizens, including prescribing harsher punishments for free blacks than for similarly situated white citizens. *Id.* at 37.

¹²³ 60 U.S. (19 How.) 393 (1856).

¹²⁴ See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872) (noting that the Citizenship Clause was adopted primarily “[t]o remove th[e] difficulty” presented by the holding in *Dred Scott* concerning African-American citizenship).

¹²⁵ See *Dred Scott*, 60 U.S. (19 How.) at 397–99. Additional details regarding the background of the case and its complex procedural history are provided in Fehrenbacher, *supra* note 68, at 239–304.

¹²⁶ *Dred Scott*, 60 U.S. (19 How.) at 400.

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[a] negro, whose ancestors were imported into this country, and sold as slaves, [can] become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?¹²⁷

Taney's framing of the relevant inquiry as whether the Constitution authorized recognition of free blacks as "member[s] of the political community" brought into existence by the United States Constitution shifted attention away from the specific language of Article III, which focused solely on whether the parties to the case were "[c]itizens of different States,"¹²⁸ to the separate question of United States citizenship. Taney's decision to frame the question as one of United States citizenship, rather than state citizenship, was consistent with what had by then become the standard approach to framing questions of free black citizenship by both sides of the controversy.¹²⁹

Taney denied that there was any necessary connection between "the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union."¹³⁰ While each state had the right to "confer on whomsoever it pleased the character of citizen, and to endow him with all its rights," such rights were "confined to the boundaries of the State" and did not constitute the person so designated "a citizen in the sense in which that word is used in the Constitution of the United States."¹³¹ Congress's exclusive power over naturalization deprived the individual states of the power to "introduce a new member into the political community created by the Constitution."¹³²

Because the states could not unilaterally confer national citizenship, the key question, according to Taney, was whether members of the African race had been "citizens" of the original thirteen states at the time of the Constitution's adoption.¹³³ After surveying a variety of discriminato-

¹²⁷ Id. at 403.

¹²⁸ U.S. Const. art. III, § 2.

¹²⁹ See, e.g., Hamburger, *supra* note 74, at 93 (observing that "both sides in the Comity Clause controversies took for granted that the privileges and immunities guaranteed by the Comity Clause were rights secured to citizens of the United States").

¹³⁰ *Dred Scott*, 60 U.S. (19 How.) at 405.

¹³¹ Id.

¹³² Id. at 406.

¹³³ Id. at 406–07.

ry laws that had existed in the northern states at the time of the Constitution's adoption, Taney concluded that it would:

[h]ardly [be] consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized . . . and upon whom they had impressed such deep and enduring marks of inferiority and degradation.¹³⁴

“More especially,” Taney argued, it could not “be believed that the large slaveholding States regarded [free blacks] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State,” as doing so would necessarily “exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety.”¹³⁵

This reasoning was sufficient to support Taney's conclusion that Scott “was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts.”¹³⁶ But two additional aspects of his opinion, neither of which was strictly necessary to the case's outcome, warrant mention. First, although no federal statute had attempted to confer citizenship on former slaves or their descendants, Taney went out of his way to declare that any such law would be unconstitutional because Congress's naturalization power was “confined to persons born in a foreign country, under a foreign Government” and was “not a power to raise to the rank of a citizen any one born in the United States, who . . . belongs to an inferior and subordinate class.”¹³⁷

Second, Taney adopted a relatively expansive view of the “privileges and immunities” protected by the Comity Clause. Among other things, Taney insisted that if free blacks were recognized as “citizens” within the meaning of the Comity Clause, such persons would not only possess “the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction,” but also the rights to “full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they

¹³⁴ Id. at 416.

¹³⁵ Id. at 416–17.

¹³⁶ Id. at 427.

¹³⁷ Id. at 417.

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went.”¹³⁸ Taney rejected a contrary interpretation of the Comity Clause that would have allowed states to subject free black citizens of other states to the same police regulations applied to their own free black inhabitants, on the ground that such an interpretation would render the provision “unmeaning” and leave the sojourning citizen without any rights “but what the State itself chose to allow him.”¹³⁹

2. *Justice Curtis’s Dissent*

The principal dissent on the citizenship issue was authored by Justice Benjamin Curtis. Rather than disputing Taney’s reading of Article III, Curtis acquiesced in Taney’s framing of the relevant question as being one of Scott’s eligibility for United States citizenship rather than state citizenship.¹⁴⁰ Curtis observed that the “natural born citizen” qualification for presidential eligibility set forth in Article II presupposed the existence of “citizens of the United States” at the time of the Constitution’s adoption in 1787 and observed that “it may safely be said that the citizens of the several States” at that time were “citizens of the United States” within the meaning of the Constitution.¹⁴¹ Therefore, according to Curtis, “[t]o determine whether any free persons, descended from Africans held in slavery, were citizens of the United States” at the time of the Constitution’s adoption, it was “only necessary to know whether any such persons were citizens of either of the States” at that time.¹⁴²

“Of this,” Curtis asserted, “there can be no doubt,” pointing principally to the fact that free blacks were allowed to vote under the laws of at

¹³⁸ *Id.*

¹³⁹ *Id.* at 423. Justice Daniel’s concurring opinion was even more expansive on this point. See *id.* at 476 (Daniel, J., concurring) (“[T]here is not, it is believed, to be found . . . an exposition of the term *citizen*, which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.”).

¹⁴⁰ *Id.* at 571 (Curtis, J., dissenting) (“[U]nder the allegations contained in this plea, and admitted by the demurrer, the question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States.”). By contrast, Justice Curtis’s fellow dissenter, Justice McLean, emphasized the disconnect between Taney’s framing of the question and the plain language of Article III, which focused on state citizenship. *Id.* at 532–33 (McLean, J., dissenting).

¹⁴¹ *Id.* at 572 (Curtis, J., dissenting).

¹⁴² *Id.*

least five states at the time of the Constitution's adoption.¹⁴³ But while Curtis endorsed the proposition that "every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States,"¹⁴⁴ he premised this conclusion on a particularly narrow conception of what such "citizenship" entailed. Agreeing with Taney that "the enjoyment of the elective franchise" was not "essential to citizenship,"¹⁴⁵ Curtis went further, contending "that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights," claiming that "any attempt so to define it must lead to error."¹⁴⁶ Just as the question of "[t]o what citizens the elective franchise shall be confided" was "a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition," the question of "[w]hat civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost" was "to be determined in the same way."¹⁴⁷

Thus, according to Curtis, the Comity Clause did "not confer on . . . citizens . . . specific and enumerated privileges and immunities" and did not entitle them to "[p]rivileges and immunities which belong to certain citizens of a State, by reason of . . . causes other than mere citizenship."¹⁴⁸ Instead, each state was left free to "frame their Constitutions and laws" so as to prescribe additional limitations or qualifications on the exercise of particular privileges or immunities subject only to the restriction on overt residency-based discrimination.¹⁴⁹ Curtis's views thus appear to correspond reasonably closely to those of Chancellor Kent and other supporters of the moderate pro-citizenship position, who endorsed both an expansive view of the class of persons entitled to recognition as "citizens" and a narrow conception of what "citizenship" entailed.¹⁵⁰

¹⁴³ Id. at 572–73. Curtis also pointed to the drafting history of the Comity Clause's predecessor provision in the Articles of Confederation and, particularly, to the rejection of a proposal to limit that provision to "white" inhabitants. Id. at 575–76.

¹⁴⁴ Id. at 576.

¹⁴⁵ Id. at 581.

¹⁴⁶ Id. at 583.

¹⁴⁷ Id.

¹⁴⁸ Id. at 583–84.

¹⁴⁹ Id.

¹⁵⁰ See *supra* Subsection I.B.3.c. Kent and Curtis appear to have held similar views on the slavery question. See, e.g., John Theodore Horton, *James Kent: A Study in Conservatism, 1763–1847*, at 274–75, 309–10 (1939) (discussing Kent's "contemptuous" attitude toward abolitionism and other social reform movements); Paul Finkelman, *Scott v. Sandford: The*

3. *Aftermath of the Scott Decision*

The public reaction to the *Dred Scott* decision was both immediate and intense. Democrats in both the North and the South celebrated Taney's citizenship ruling as well as the majority's further holding that Congress lacked constitutional authority to prohibit slavery in the federal territories.¹⁵¹ Northern Republicans were equally united in condemning the Court's territorial ruling, which struck at one of the core unifying principles of the Republican coalition.¹⁵² Reaction to the Court's citizenship ruling among mainstream Republicans was somewhat more muted due to the greater diversity of Republican opinion on the question and the danger that focusing on that aspect of the Court's decision might associate the party too closely with the still unpopular cause of racial equality.¹⁵³

The most consequential challenge to Taney's citizenship ruling came in an official opinion from Attorney General Edward Bates in November 1862.¹⁵⁴ Bates, an "ultraconservative" Republican from Missouri,¹⁵⁵ was no enthusiast for black equality, having previously "advocated compulsory deportation of emancipated slaves."¹⁵⁶ But in response to a formal request from Treasury Secretary Salmon Chase—a leading abolitionist and one of the founders of the Republican Party—Bates issued an opinion concluding that a "*free man of color, . . . if born in the United States, is a citizen of the United States.*"¹⁵⁷ This opinion not only contradicted the *Scott* decision but also conflicted with opinions issued by Bates's own predecessors in office.¹⁵⁸

Court's Most Dreadful Case and How It Changed History, 82 Chi.-Kent L. Rev. 3, 30–31 (2007) (describing Curtis as a conservative Massachusetts Whig who "was not even moderately antislavery").

¹⁵¹ Graber, *supra* note 67, at 33.

¹⁵² Fehrenbacher, *supra* note 68, at 417–19.

¹⁵³ *Id.* at 428–30 (discussing the "dilemma confronting Republicans" when discussion of the decision shifted from slavery to race and citizenship).

¹⁵⁴ Citizenship, 10 Op. Att'y Gen. 382 (1862).

¹⁵⁵ Fehrenbacher, *supra* note 68, at 564–65.

¹⁵⁶ Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* 235 (2011).

¹⁵⁷ Citizenship, *supra* note 154, at 413. On the events leading up to the issuance of Bates's citizenship opinion, see generally James P. McClure, Leigh Johnsen, Kathleen Norman & Michael Vanderlan, *Circumventing the Dred Scott Decision: Edward Bates, Salmon P. Chase, and the Citizenship of African Americans*, 43 *Civil War Hist.* 279 (1997).

¹⁵⁸ See *supra* notes 91–93 and accompanying text (discussing opinions of William Wirt and Caleb Cushing).

Bates opened his opinion with a complaint that he had been unable to locate “in our law books and the records of our courts, . . . a clear and satisfactory definition of the phrase *citizen of the United States*” and that “[e]ighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word, or the constituent elements of the thing we prize so highly.”¹⁵⁹ According to Bates, “[t]he phrase, ‘a citizen of the United States,’ without addition or qualification, means neither more nor less than a member of the nation,” who was “bound to it by the reciprocal obligation of allegiance on the one side and protection on the other.”¹⁶⁰

In discussing citizenship, Bates cautioned, it was essential “to mark the natural and characteristic distinction between political *rights*,” which “belong to all citizens alike, and cohere in the very name and nature of citizenship,” and “political *powers*,” including the powers of “voting and exercising office,” which did “not belong to all citizens alike, nor to any citizen, merely in virtue of citizenship” but rather “depend[ed] upon extraneous facts and superadded qualifications.”¹⁶¹ Bates thus insisted that recognizing free blacks as “citizens” would not require that they be given the right to vote or hold office, just as white women and children could be acknowledged as “citizens” even though they did not possess such rights.¹⁶² But while Bates’s opinion was relatively clear in denying that citizenship alone conferred rights of political participation, it was decidedly less clear in specifying what rights and privileges did attach to that status. Indeed, the only right incident to citizenship that Bates specifically acknowledged was the citizen’s correlative claim to “protection” from the government in exchange for his or her reciprocal duty of “allegiance.”¹⁶³ Bates was clear, however, that whatever rights did attach to the status of citizenship were by their very nature equal, observing that all citizens “are, politically and legally, equal” and that “the child in the cradle and its father in the Senate, are equally citizens of the United States.”¹⁶⁴

¹⁵⁹ Citizenship, *supra* note 154, at 383.

¹⁶⁰ *Id.* at 388.

¹⁶¹ *Id.* at 399.

¹⁶² *Id.* at 387.

¹⁶³ *Id.* at 388.

¹⁶⁴ *Id.*

II. THE ADOPTION OF THE FOURTEENTH AMENDMENT

The Civil War forced many Americans to confront for the first time questions of citizenship that had been left unresolved during the antebellum period.¹⁶⁵ In many ways, the War itself could be viewed as a contest between competing conceptions of citizenship, with the Union committed to a theory of paramount national citizenship under which citizens owed principal allegiance to the federal government and the Confederacy committed to a state-centered theory under which citizens owed principal allegiance to their respective state governments with federal allegiance owed only derivatively and contingently so long as the state chose to continue its membership in the Union.¹⁶⁶ The Union ultimately prevailed in this contest by force of arms and imposed its vision of paramount national citizenship on the defeated Confederate states.¹⁶⁷

This newly nationalistic conception of citizenship was matched by a shift in mainstream Republican thinking regarding the citizenship of free blacks. From the outset of the War, abolitionist leaders had urged Congress to allow black soldiers to serve in the Union military, believing that such service would strengthen their claims to citizenship and full legal equality.¹⁶⁸ Though the eventual admission of black soldiers was driven more by considerations of military necessity than by racial egalitarianism, the participation of black military units had the anticipated effect of moving northern public opinion, and especially Republican opinion toward supporting black citizenship.¹⁶⁹ By the War's conclusion,

¹⁶⁵ See, e.g., Michael Vorenberg, *Reconstruction as a Constitutional Crisis*, in *Reconstructions: New Perspectives on the Postbellum United States* 141, 168–70 (Thomas J. Brown ed., 2008) (discussing the importance of “institutions such as prize courts, claims commissions, and pension bureaus,” established during the Civil War and Reconstruction in forcing Americans to “confront for themselves the ambiguity of their national identity”).

¹⁶⁶ See, e.g., Kettner, *supra* note 59, at 340 (characterizing the war as “a struggle over the nature of the community created in 1789”); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 *N.Y.U. L. Rev.* 863, 872–73 (1986) (describing resolution of questions regarding the nature of American citizenship as “a corollary of the more fundamental constitutional issue central to the Civil War, namely, whether ultimate sovereignty was constitutionally delegated to the national or to the state governments”).

¹⁶⁷ See, e.g., Smith, *supra* note 61, at 274–75 (describing Union policies requiring defeated or defecting Confederate troops to swear supreme loyalty to the national government).

¹⁶⁸ On the connection between black military service and blacks' claims to citizenship and to political and civil equality more generally, see, for example, Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861 to 1866*, at 19–35 (2000); James McPherson, *Battle Cry of Freedom* 562–67 (1988).

¹⁶⁹ See, e.g., Belz, *supra* note 168, at 25–35.

mainstream Republican opinion had shifted decisively toward recognizing freedom and native birth as the sole criteria of United States citizenship without regard to race or color.¹⁷⁰ Thus, Union General (and future Republican politician) Benjamin Butler could confidently predict in January 1865, shortly after the proposed Thirteenth Amendment had been approved by Congress, that upon that Amendment's ratification, "every negro slave" would be "made a citizen of the United States, entitled as of right to every political and legal immunity and privilege which belongs to that great franchise."¹⁷¹

But almost immediately after the War's conclusion, this expansive, nationalistic conception of citizenship was tested by the infamous "Black Codes" enacted by virtually all of the newly reconstructed southern state governments.¹⁷² These laws "restricted freed slaves' rights to make and enforce private contracts, to own and convey real and personal property, to hold certain jobs, to seek relief in court, and to participate in common life as ordinary citizens."¹⁷³ The Black Codes threatened to undermine the recently adopted Thirteenth Amendment by maintaining the free black populations of the southern states in a permanently subordinate condition and reducing substantial portions of the black population to slavery-like conditions. Reports of the Black Codes and of racial violence against former slaves "aroused an indignation" in the North "that spread far beyond Radical circles."¹⁷⁴ President Andrew Johnson's apparent acquiescence in the southern states' efforts to reestablish a labor system approximating slavery opened a rift between his administration and mainstream Republicans in Congress and impelled congressional Republicans to undertake their own efforts to ensure equality of civil rights for free blacks in the southern states.¹⁷⁵ From the outset, these efforts to secure legal equality for free blacks drew upon and were closely

¹⁷⁰ *Id.* at 25–27; Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–1869*, at 5–11 (1990).

¹⁷¹ Speech of Maj.-Gen. Benj. F. Butler, *Upon the Campaign Before Richmond, 1864*, Delivered at Lowell, Mass., January 29, 1865, at 82 (Boston, Wright & Potter 1865).

¹⁷² On the background of the Black Codes and the specific disabilities imposed on the freed slaves by such laws, see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 199–202 (1988).

¹⁷³ Harrison, *supra* note 55, at 1388.

¹⁷⁴ Foner, *supra* note 172, at 225.

¹⁷⁵ *Id.* at 225–27, 239–55.

intertwined with, the Republican vision of paramount national citizenship.¹⁷⁶

A. The Civil Rights Bill and the Attempt to Define Citizenship by Statute

Although the Fourteenth Amendment's Citizenship Clause is sometimes characterized as having been tacked on as a last-minute "afterthought" preceded by relatively little debate or deliberation,¹⁷⁷ the Amendment's definition of United States citizenship closely tracked a similar definition that had been included in the Civil Rights Act of 1866.¹⁷⁸ The citizenship provision in the 1866 Civil Rights Act was extensively debated in both the House and the Senate and twice approved by large majorities in both houses of Congress (the second time over President Johnson's veto) before the proposal to add a similar definition to the Fourteenth Amendment was first introduced in the Senate on May 30, 1866.¹⁷⁹ In view of this background, the debates surrounding the 1866 Civil Rights Act's citizenship declaration reflect an important source for understanding the Citizenship Clause's original meaning.¹⁸⁰

As originally proposed, the Civil Rights bill, like the original version of the Fourteenth Amendment, did not contain any declaration of citizenship.¹⁸¹ On January 29, 1866, Senator Lyman Trumbull of Illinois, the bill's principal sponsor in the Senate, introduced an amendment declaring "all persons of African descent born in the United States" to be citizens.¹⁸² The next day, Trumbull proposed a further revision removing

¹⁷⁶ See, e.g., Robert J. Kaczorowski, *The Nationalization of Civil Rights* 34 (1987) (observing that the "members of the [Republican] Party were virtually unanimous in the early months of 1866 in defining the freedom of the Negro in terms of United States citizenship").

¹⁷⁷ See, e.g., Alexander M. Bickel, *Citizenship in the American Constitution*, 15 *Ariz. L. Rev.* 369, 374 (1973) (asserting that the Citizenship Clause was added "[a]s an afterthought" to assuage uncertainty regarding the meaning of the Privileges or Immunities Clause); Siegel, *supra* note 19, at 580 (characterizing the Citizenship Clause as "something of an afterthought").

¹⁷⁸ Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 ("[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.").

¹⁷⁹ See *infra* Section II.C.

¹⁸⁰ See Mark Shawhan, "By Virtue of Being Born Here": Birthright Citizenship and the Civil Rights Act of 1866, 15 *Harv. Latino L. Rev.* 1, 2–3 (2012) (observing that "[p]revious scholarship on the [Citizenship] Clause" has "given only limited consideration to the debates over the [Civil Rights] Act").

¹⁸¹ For a concise summary of the bill's origins and early drafting history, see David P. Currie, *The Reconstruction Congress*, 75 *U. Chi. L. Rev.* 383, 394–97 (2008).

¹⁸² *Cong. Globe*, 39th Cong., 1st Sess. 474 (1866).

the reference to “African descent” and declaring “all persons born in the United States, and not subject to any foreign power” to be citizens of the United States.¹⁸³

In his speech introducing the bill—which, in addition to defining citizenship, prohibited “discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery” and specifically prohibited discrimination with respect to certain designated rights¹⁸⁴—Trumbull identified the legislation as a response to the Black Codes and other discriminatory legislation in the southern states targeted at the recently emancipated slaves.¹⁸⁵ Drawing upon Blackstone, Trumbull—who earlier in his career had served as a justice on the Illinois Supreme Court—declared that “[i]n this definition of civil liberty, it ought to be understood . . . that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.”¹⁸⁶ Therefore, “any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens,” was “an unjust encroachment upon his liberty” and a “badge of servitude” prohibited by the Constitution.¹⁸⁷

In an effort to “arrive at a more correct definition of the term ‘citizen of the United States,’” Trumbull surveyed several sources discussing the rights protected by the Article IV Comity Clause, focusing particularly

¹⁸³ *Id.* at 498.

¹⁸⁴ As originally proposed, the bill’s first section, which Trumbull identified as “the basis of the whole bill,” provided in full:

That all persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

Id. at 474.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* The definition of “civil liberty” quoted by Trumbull was not in Blackstone’s original eighteenth-century treatise but rather was added by a later editor and appeared in most early nineteenth-century American versions. Saunders, *supra* note 50, at 272 n.117.

¹⁸⁷ Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

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on Justice Washington's *Corfield* decision, which Trumbull described as "the decision most elaborate upon this clause of the Constitution" and as "enumerat[ing] the very rights belonging to a citizen of the United States which are set forth in the first section of this bill."¹⁸⁸ Though Trumbull recognized that the Comity Clause cases addressed only the rights that citizens enjoyed upon removing from their home state to a different state, he contended that "the native-born citizens of the State itself" should be even more entitled to the equal enjoyment of such rights.¹⁸⁹

Following the orthodox Republican position, Trumbull declared that "[i]n my judgment, persons of African descent, born in the United States, are as much citizens as white persons who are born in the country."¹⁹⁰ Trumbull acknowledged, however, that "in the slaveholding States, a different opinion has obtained" and identified the southern states' denial of blacks' citizenship as the "principle" upon which "many of their laws making discriminations between the whites and the colored people are based."¹⁹¹ Although Trumbull viewed the citizenship provision as merely "declaratory" of existing law, he argued that, even if this

¹⁸⁸ Id. at 474–75. Trumbull then quoted a lengthy portion of Justice Washington's *Corfield* opinion identifying the "privileges and immunities of citizens" protected by the Comity Clause. Id. at 475 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230)). Trumbull also cited and quoted from other Comity Clause cases, including *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797) and *Abbott v. Bayley*, 23 Mass. (6 Pick.) 89 (1827), as well as from Justice Story's constitutional treatise, as indicative of the rights belonging to citizens of the United States. Id. at 474.

¹⁸⁹ Id. at 475. When challenged by an opponent of the bill, Trumbull conceded that the Comity Clause cases he discussed in his opening speech "relate entirely to the rights which a citizen in one state has on going into another State, and not to the rights of the citizens belonging to the State," but explained that he had introduced the cases "for the purpose of ascertaining, if we could, by judicial decision[,] what was meant by the term 'citizen of the United States.'" Id. at 600. Trumbull further explained his purpose in discussing the cases as follows:

[I]nasmuch as there had been judicial decisions upon this clause of the Constitution, in which it had been held that the rights of a citizen of the United States were certain great fundamental rights[,] . . . I reasoned from that, that when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter of what color, born in the United States a citizen of the United States, the same rights would then appertain to all persons who were clothed with American citizenship. That was the object for which those cases were introduced.

Id.

¹⁹⁰ Id. at 475.

¹⁹¹ Id. Among supporters of the bill, the view that the citizenship provision was declaratory of existing law was nearly universal. See, e.g., id. at 1262 (statement of Rep. Broomall); id. at 1152 (statement of Rep. Thayer); id. at 1124 (statement of Rep. Cook); id. at 1115 (statement of Rep. Wilson).

position were incorrect, it was nonetheless “competent for Congress” to “settle[]” the citizenship question by passing a law “declaring all persons born in the United States to be citizens thereof.”¹⁹²

Trumbull and most of the bill’s other supporters identified the recently enacted Thirteenth Amendment as the principal source of constitutional authority for the bill’s nondiscrimination provisions.¹⁹³ Opponents, however, were quick to point out that this argument reflected a questionable reading of the Thirteenth Amendment’s text and found little support in the Amendment’s pre-enactment history.¹⁹⁴ Although most congressional Republicans adhered to the Thirteenth Amendment rationale, doubts about the constitutional authority conferred by that measure led supporters to supplement their Thirteenth Amendment arguments with other sources of constitutional authority, including Congress’s naturalization power. This line of argument was previewed in Senator Trumbull’s opening speech in support of the measure in which he asserted that a declaration of citizenship pursuant to Congress’s naturalization power would “entitle[]” the persons so declared to “the rights of citizens,” including “[t]he great fundamental rights set forth in this bill.”¹⁹⁵

Other members of Congress offered similar justifications for the proposed legislation grounded in either Congress’s naturalization power or the federal government’s inherent power to protect the rights of its citizens. For example, Representative Samuel Shellabarger of Ohio—who had entertained doubts about the measure’s constitutionality—explained his eventual decision to support the bill by observing that “the right of all citizens to be secured in the enjoyment of whatever privileges their citizenship does confer upon them” was “in its very nature equal” and that the federal government possessed both the power and the duty to protect the “fundamental” civil rights of its citizens against state infringement.¹⁹⁶ Similarly, Representative James Wilson of Iowa, the

¹⁹² *Id.* at 475.

¹⁹³ See, e.g., *id.* at 1151–52 (statement of Rep. Thayer); *id.* at 503–04 (statement of Sen. Howard); *id.* at 475 (statement of Sen. Trumbull).

¹⁹⁴ See generally Currie, *supra* note 181, at 395–97 (summarizing, and expressing sympathy with, the opponents’ objections to the Thirteenth Amendment rationale).

¹⁹⁵ Cong. Globe, 39th Cong., 1st Sess. 475 (1866).

¹⁹⁶ *Id.* at 1293. In explaining his support for the bill, Shellabarger placed great emphasis on the distinction between citizens’ substantive rights, which he viewed as beyond the power of Congress to define and regulate, and their equality rights, which he viewed as within the scope of Congress’s power to protect:

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Chairman of the House Judiciary Committee and the principal sponsor of the Civil Rights bill in the House, claimed that “so far as [the bill] declares the equality of all citizens . . . [it] merely affirms existing law,” and that Congress possessed the inherent authority to protect the rights of its citizens against state infringement.¹⁹⁷ Representative M. Russell Thayer of Pennsylvania likewise pointed to Congress’s naturalization power as support for both the citizenship declaration and the substantive provisions of the bill, arguing that under that power, Congress “has ample authority to confer the rights of citizenship upon this class of persons.”¹⁹⁸

Arguments such as these evince a commonly held view among congressional Republicans that the legal status of “citizenship” carried with it certain inherent rights, including, at a minimum, the right to equal treatment with respect to the “fundamental” rights specifically identified in the bill. For the most part, opponents of the measure did not contest the position that equality of “civil rights” inhered in the very nature of citizenship.¹⁹⁹ To the contrary, opponents embraced this definition as a

Now, Mr. Speaker, if this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and the people. But, sir, except so far as it confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.

Id.

¹⁹⁷ Id. at 1117–18. According to Wilson:

If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family.

Id. at 1118. He further explained that “the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them.” Id. at 1119.

¹⁹⁸ Id. at 1152. See also, e.g., id. at 1266 (statement of Rep. Raymond) (“I desire, as the next step in the process of elevating [the African] race, to give them the rights of citizenship, or to declare by solemn statute that they are citizens of the United States, and thus secure to them whatever rights, immunities, privileges, and powers belong as of right to all citizens of the United States. . . . I for one am not prepared or inclined to disparage American citizenship . . . [T]he right of citizenship involves everything else. Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States . . .”).

¹⁹⁹ See, e.g., id. at 1122 (statement of Rep. Rogers) (defining “civil rights” as the “privileges and immunities created and granted to citizens of a country by virtue of the sovereign

means of arguing that the bill's protection would extend beyond the rights specifically enumerated in the bill and would thus confer suffrage and other politically unpopular rights upon the newly freed slaves.²⁰⁰

While the bill's opponents did not contest the supporters' broad conception of citizenship, they did contest the authority of Congress to confer citizenship by statute. Relying heavily on Taney's *Dred Scott* opinion, opponents contended that African Americans were not citizens of the United States and that Congress lacked authority to confer citizenship upon anyone other than foreign-born aliens.²⁰¹ Among those expressing this view was Senator Peter Van Winkle, a conservative Republican from West Virginia.²⁰² Though Van Winkle opposed making blacks citizens as a matter of policy, he expressed a "willing[ness] to have the question submitted . . . to the people of the United States" in the form of a constitutional amendment.²⁰³ Van Winkle further declared that if such an amendment were adopted, he would "feel very different about the vote that I might give in relation to the subject in my own State," suggesting that if the Constitution were amended to confer citizenship on blacks, he would "feel that they [are] entitled to the right of suffrage" as a result.²⁰⁴ A similar sentiment was expressed by Indiana Democrat Thomas Hendricks, who criticized the bill's citizenship provision as reflecting the objectionable principle that "all persons living in this coun-

power under which the citizen lives"); *id.* at 477–78 (statement of Sen. Saulsbury) ("A civil right I define to be a right belonging to the citizen, and which he possesses only by virtue of citizenship. I know of no clearer definition of civil rights than that . . .").

²⁰⁰ See, e.g., *id.* at 1121 (statement of Rep. Rogers) (arguing that bill would confer voting rights and prohibit bans on intermarriage and segregated schools); *id.* at 505 (statement of Sen. Johnson) (contending that the law would "repeal all . . . legislation" barring intermarriage between blacks and whites); *id.* at 500 (statement of Sen. Cowan) (arguing that the bill would prohibit all discrimination based on race and would thus outlaw segregated schools); *id.* at 478 (statement of Sen. Saulsbury) (arguing that "civil rights" included the right to vote). In response to such criticisms, the bill's sponsors agreed to remove the bill's general prohibition on "discrimination in civil rights or immunities," thereby limiting the bill to prohibiting discrimination only insofar as it affected those rights specifically enumerated in the bill itself. Maltz, *supra* note 170, at 68–69.

²⁰¹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1155 (1866) (statement of Sen. Eldridge); *id.* at 523 (statement of Sen. Davis); *id.* at 504 (statement of Sen. Johnson).

²⁰² *Id.* at 497 (statement of Sen. Van Winkle) ("I think it needs a constitutional amendment to make these people citizens of the United States.").

²⁰³ *Id.* at 498.

²⁰⁴ *Id.* at 497. Van Winkle further pledged that if blacks were "admitted to the rights of citizenship" by a majority of the people through constitutional amendment, he would be "among the first to endeavor to do my whole duty toward them by recognizing them as citizens in every respect." *Id.* at 498.

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try are to be equal before the law without distinction of color,” but conceded that “if it is satisfactory to the white men of this country to admit into the political community Indians and other colored people, I shall no longer object.”²⁰⁵

As statements such as these suggest, the view that the status of citizenship conferred upon its recipients at least some minimal level of equality rights was widely shared among both supporters and opponents of the Civil Rights bill.²⁰⁶ The principal difference between the contending sides was not whether “citizenship” carried with it an entitlement to equal governmental treatment, but rather the scope of such equality rights and whether Congress possessed constitutional authority to confer such citizenship on native-born blacks.

Indeed, the view that citizenship did not carry with it an entitlement to equal civil rights and privileges, at least with respect to those rights specifically enumerated in the proposed Civil Rights bill, appears to have been expressly defended by only one member of Congress—Republican Senator John Henderson of Missouri. During an extended debate regarding various proposals to amend the citizenship declaration so as to exclude members of Indian tribes, Henderson questioned whether there would be any harm in extending citizenship to such individuals on the ground that an Indian “may be a citizen of the United States, and yet not have all the privileges and all the immunities of a citizen of the State in which he may be.”²⁰⁷ Henderson’s subsequent suggestion that the states would retain “a perfect right” to deny Indians “the right to make contracts” notwithstanding a law declaring them to be citizens drew an immediate and apparently spontaneous protest from Democratic Senator Reverdy Johnson of Maryland,²⁰⁸ and appears to have provoked genuine

²⁰⁵ Id. at 574.

²⁰⁶ Cf. Siegel, *supra* note 19, at 580–81 (observing that “Reconstruction era constitution makers inherited, accepted, and even celebrated the norm” of citizen equality).

²⁰⁷ Cong. Globe, 39th Cong., 1st Sess. 571 (1866).

²⁰⁸ The exchange between Henderson and Johnson was as follows:

Mr. HENDERSON. . . . Why, sir, I suppose that any State, even after we declared the Indians to be citizens of the United States would have the perfect right, if it saw fit, . . . to deny them the right to make contracts.

Mr. JOHNSON. Oh, no.

Id. at 572. Johnson, a prominent Supreme Court advocate and former Attorney General of the United States, was considered “the leading constitutional authority in the Senate during the Reconstruction era.” Kaczorowski, *supra* note 166, at 892 n.119.

puzzlement on the part of Republican supporters of the bill.²⁰⁹ Henderson's argument does not appear to have been accepted by any other member of Congress and the proposed revision to which he had objected—inserting language that specifically excluded “Indians not taxed” from the citizenship definition—passed by a three-to-one margin in the Senate and remained in the final version of the Civil Rights Act.²¹⁰

The final version of the Civil Rights bill passed in the House on March 13, 1866 and was approved two days later by the Senate, which had already given its assent to an earlier version of the bill.²¹¹ Although the bill passed by wide margins in both Houses, President Andrew Johnson nonetheless vetoed the bill on March 27, 1866.²¹² Johnson's veto marked the definitive break between his administration and congressional Republicans and set the stage for a dramatic override vote.²¹³

The congressional deliberations preceding the override vote consisted primarily of two speeches, one delivered by Trumbull in the Senate and the other by Representative William Lawrence of Ohio in the House.²¹⁴ Responding to the claim in Johnson's veto message that acknowledging Congress's authority to pass the bill would concede a similar authority to require black suffrage, Trumbull denied that citizenship carried with it “political privileges” but reiterated his earlier stated view that United States citizenship did entail equality with respect to certain rights, including the “fundamental” civil rights enumerated in the bill:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which be-

²⁰⁹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 574 (1866) (statement of Sen. Ramsey) (contending that “confer[ring] on all these Indians the rights of citizenship” would abolish the “many differences in State laws between these Indians and white men”); *id.* at 573 (statement of Sen. Williams) (“I do not exactly understand what the Senator means when he insists that Congress shall make them citizens and does not claim that any right attaches to that character.”). As noted below, Henderson may have subsequently changed his own view regarding the rights that attach to United States citizenship prior to the final vote on the Fourteenth Amendment. See *infra* note 276.

²¹⁰ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (“[A]ll persons born in the United States and not subject to any foreign power, *excluding Indians not taxed*, are hereby declared to be citizens of the United States . . .”) (emphasis added); Cong. Globe, 39th Cong., 1st Sess. 575 (1866) (recording vote on proposed amendment).

²¹¹ Shawhan, *supra* note 180, at 26.

²¹² *Id.* at 27.

²¹³ See Foner, *supra* note 172, at 250 (“For Republican moderates, the Civil Rights veto ended all hope of cooperation with the President.”).

²¹⁴ Shawhan, *supra* note 180, at 27.

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long to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something. It does not mean, in the case of a foreigner, that when he is naturalized he is to be left entirely to the mercy of State legislation. He has a right when duly naturalized to go into any State of the Union and to reside there, and the United States Government will protect him in that right.²¹⁵

In the House, the task of responding to Johnson's veto message fell to Representative Lawrence, who, like Trumbull, had served as a state court judge before his election to Congress.²¹⁶ After briefly surveying and summarizing the legal authorities that had been offered earlier in the debates in support of both the preexisting nature of the birthright citizenship rule and Congress's authority to declare such a rule by statute, Lawrence concluded that "[t]here is, then, a national citizenship" and that this "citizenship implies certain rights which are to be protected."²¹⁷ Like Trumbull, Lawrence pointed to the rights identified in Justice Washington's opinion in *Corfield v. Coryell*²¹⁸ and other Comity Clause cases as indicative of the rights belonging to all United States citizens.²¹⁹ These rights, according to Lawrence, were inherently equal in nature, being so "necessary and important to all citizens" that "to make inequalities in" them would be "rank injustice." Therefore, "[a]ny law that invades [this] fundamental equality is void."²²⁰ According to Lawrence, the rights protected by the bill inhered by their nature in "national citizenship" such that:

From the very nature of citizenship . . . it must be clear that this bill creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights [sic] of every citizen of every State, that equality of civil rights is the fundamental rule that pervades the Constitution and controls all State authority.²²¹

²¹⁵ Cong. Globe, 39th Cong., 1st Sess. 1757 (1866).

²¹⁶ McConnell, *supra* note 5, at 1003; cf. *id.* at 994 (describing Lawrence as "one of the most careful lawyers among the Republican proponents" of the subsequent Civil Rights Act of 1875).

²¹⁷ Cong. Globe, 39th Cong., 1st Sess. 1832 (1866).

²¹⁸ 6 F. Cas. 546.

²¹⁹ Cong. Globe, 39th Cong., 1st Sess. 1835–36 (1866).

²²⁰ *Id.* at 1836.

²²¹ *Id.*

Shortly after Trumbull and Lawrence delivered their respective speeches, the Senate (on April 6) and the House (on April 9) approved the bill by the requisite two-thirds majorities sufficient to enact the Civil Rights bill into law over the President's veto.²²²

B. The Privileges or Immunities "of Citizens of the United States"

The debates surrounding the proposed Civil Rights bill coincided with consideration of various proposals for constitutional amendments that eventually culminated in the Fourteenth Amendment.²²³ One such proposal, which provided an important template for the language that was eventually selected for inclusion in the Amendment's first section, was introduced by Representative John Bingham of Ohio on February 26, 1866. Bingham's proposal provided that:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.²²⁴

The "privileges and immunities" language of Bingham's proposal mirrored the language of the Comity Clause, and Bingham himself argued that the proposed amendment would "not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the [existing] Constitution."²²⁵ Rather, the sole effect of the amendment, according to Bingham, would be to confer upon Congress sufficient legislative power to ensure that the states complied with their preexisting duties.²²⁶

But Bingham's understanding of what the existing Article IV provision required differed from the orthodox understanding of that provision.²²⁷ In a January 1866 speech in support of an early version of his

²²² See *id.* at 1861 (Apr. 9, 1866) (House vote); *id.* at 1809 (Apr. 6, 1866) (Senate vote).

²²³ A useful timeline of the congressional deliberations concerning the proposed Civil Rights bill and the contemporaneous deliberations that eventually culminated in the proposed Fourteenth Amendment is provided in Maltz, *supra* note 170, at 44–45.

²²⁴ Cong. Globe, 39th Cong., 1st Sess. 1033–34 (1866).

²²⁵ *Id.* at 1034.

²²⁶ *Id.*

²²⁷ On Bingham's constitutional theories, which were heavily influenced by abolitionist constitutionalism, see, for example, Kurt T. Lash, *The Origins of the Privileges or Immuni-*

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proposal, Bingham explained his understanding that Article IV's "privileges and immunities" language contained an unstated "ellipsis" identifying the rights protected by the provision as rights citizens possessed by virtue of their United States citizenship:

When you come to weigh these words, "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis 'of the United States') in the several States." This guarantee is of the privileges and immunities of citizens of the United States in, not of, the several States.²²⁸

Although Bingham's "ellipsis" phrasing was unusual, his association of Article IV with rights of United States citizenship was hardly unheard of. Throughout the antebellum period, the Comity Clause was routinely paraphrased as protecting the "the privileges and immunities of citizens of the United States."²²⁹ Bingham's interpretation of the provision, however, diverged from the standard comity-based reading as a protection of travelers' interstate rights by reading it to protect citizens' *intrastate* rights against their own state governments as well.²³⁰

Other members of the Thirty-ninth Congress appear to have understood that Bingham's proposal would do more than authorize federal legislation to protect the rights of nonresidents under the traditional understanding of the Comity Clause. For example, Representative Giles Hotchkiss of New York declared his understanding that Bingham's pro-

ties Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment, 99 *Geo. L.J.* 329, 346–49 (2011).

²²⁸ Cong. Globe, 39th Cong., 1st Sess. 158 (1866).

²²⁹ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857) (Taney, C.J.) (interpreting term "citizens" as used in the Comity Clause and elsewhere in the Constitution to mean "citizens of the United States"); *id.* at 571–72 (Curtis, J., dissenting) (same); *Rights of Free Va. Negroes*, *supra* note 91, at 507 (same).

²³⁰ Cf. Maltz, *supra* note 54, at 341 ("Bingham's invocation of the comity clause as a limitation on the ability of a state to deal with its own citizenry was truly novel."). Bingham believed that the "privileges and immunities" referred to in Article IV included the substantive protections set forth in the first eight amendments to the Constitution and appears to have understood both his original proposal and the parallel "privileges or immunities" language that was ultimately included in § 1 as embodying that understanding. See Lash, *supra* note 227, at 348–55, 397–402. The extent to which this understanding was shared by other members of the Thirty-ninth Congress and the ratifying public more generally is a subject of longstanding academic debate. See generally Hamburger, *supra* note 74, at 64 nn.8–9 (collecting numerous sources on both sides of this debate).

posal was designed “to provide that no State shall discriminate *between its citizens* and give one class of citizens greater rights than it confers upon another.”²³¹ Though Hotchkiss supported the policy of this proposal, he opposed Bingham’s amendment based on his understanding that it would unduly broaden the powers of Congress while leaving the rights of citizens vulnerable to repeal “[s]hould the power of” the federal government “pass into the hands of the rebels.”²³² Hotchkiss opposed leaving the rights of citizens “to the caprice of Congress” and insisted that protection against discrimination “should be a constitutional right that cannot be wrested from any class of citizens . . . by mere legislation.”²³³

Immediately after Hotchkiss spoke, the House (Bingham included) voted to postpone consideration of the amendment indefinitely.²³⁴ Bingham thereafter persuaded the Joint Committee on Reconstruction, of which he was a member, to include a substantially revised version of his proposal as the first section of a new five-part amendment that formed the template for the Fourteenth Amendment.²³⁵ Bingham’s revised language, which tracks the language eventually included in Section 1’s second sentence, followed Hotchkiss’s suggestion by replacing the grant of power to Congress with a directly enforceable declaration of rights.²³⁶ Bingham’s revised version also departed from his original strategy of attempting to track the language of the Comity Clause verbatim and instead explicitly identified the “privileges or immunities” protected by the provision as “privileges or immunities of citizens of the United States.”

Bingham’s translation of the Comity Clause’s “privileges and immunities” language as a specific reference to privileges and immunities belonging to United States citizens provided further support to the inference that the provision would do more than protect nonresidents against state discrimination, which, as noted above, had been suitably clear to at least certain members of Congress under Bingham’s original lan-

²³¹ Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (emphasis added).

²³² Id.

²³³ Id.

²³⁴ Id.

²³⁵ Maltz, *supra* note 170, at 90.

²³⁶ A separate grant of enforcement power was provided by the Amendment’s fifth section. See U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

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guage.²³⁷ This inference is strengthened by reading Bingham's revised version in light of earlier discussions of the Comity Clause by Trumbull, Wilson, and other supporters of the Civil Rights Act who acknowledged the orthodox understanding of the provision as a protection against residency-based discrimination but insisted that the rights recognized by the provision inhered in the very nature of citizenship itself.²³⁸

Though a few Congressmen persisted in understanding Bingham's revised language as nothing more than a reiteration of the Comity Clause as traditionally understood,²³⁹ the more common understanding was that the provision operated as a more general protection of the rights pertaining to United States citizenship.²⁴⁰ This understanding is clearly reflected in the remarks of Senator Jacob Howard of Michigan when introducing the proposed amendment in the Senate.²⁴¹ Howard observed that "[t]he first clause of this section relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States."²⁴² While acknowledging the difficulty of "defin[ing] with accuracy what is meant by the expression, 'citizen of the United States,'" Howard observed that the phrase had been "held by the courts to [mean] a person who was born within

²³⁷ See supra notes 231–34 and accompanying text.

²³⁸ See supra notes 189, 197–98 and accompanying text.

²³⁹ The most prominent example is Senator Luke Poland of Vermont, who, in a speech delivered after Bingham's May 10 remarks, asserted that the "privileges or immunities" language in Bingham's revised proposal "secures nothing beyond what was intended by the original provision in the Constitution [that is, the Comity Clause]." Cong. Globe, 39th Cong., 1st Sess. 2961 (1866).

²⁴⁰ There is a vibrant academic debate regarding the original meaning of the Privileges or Immunities Clause, an important focus of which involves the question of whether the Clause is best understood as protecting antidiscrimination rights or substantive rights. See, e.g., Kermit Roosevelt III, *What If Slaughter-House Had Been Decided Differently?*, 45 Ind. L. Rev. 61, 67–70 (2011) (summarizing reasoning underlying both antidiscrimination and substantive rights interpretations). In my view, the evidence is quite strong that the Fourteenth Amendment's original meaning reflects an understanding of "citizenship" and of the "privileges or immunities" of United States citizens that supports at least an antidiscrimination reading of both the Citizenship and Privileges or Immunities Clauses. See *infra* Part IV. But this conclusion does not necessarily exclude the possibility that the latter provision might also be read to protect certain substantive rights against state infringement. See, e.g., Harrison, *supra* note 55, at 1424–25 (considering this possibility). The latter possibility involves questions that are beyond this Article's scope.

²⁴¹ Professor Lash describes Howard's speech as "[p]robably the most studied speech of the Thirty-ninth Congress regarding the Fourteenth Amendment." Lash, *supra* note 227, at 402.

²⁴² Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

the limits of the United States and subject to their laws.”²⁴³ Howard then turned to a discussion of the Comity Clause, observing that prior to the adoption of the federal Constitution, the citizens of each state had been “in a qualified sense at least, aliens to one another” and that the purpose of the Comity Clause had been “to prevent such confusion and disorder, and to put the citizens of the several States on an equality with each other as to all fundamental rights” by “constitut[ing] *ipso facto* the citizens of each one of the original States citizens of the United States.”²⁴⁴ Though Howard declined “to go at any length into th[e] question” of what “privileges and immunities” the citizens of the several states possessed under the Comity Clause, he referred to Justice Washington’s *Corfield* opinion as indicative “of what probably will be the opinion of the judiciary” regarding the meaning of that provision.²⁴⁵ Howard then pointed to the rights protected by the Comity Clause, “whatever they may be,” as well as “the personal rights guarantied and secured by the first eight amendments of the Constitution” as “a mass of privileges, immunities, and rights, . . . guarantied by the Constitution or recognized by it,” that were “secured to the citizen solely as a citizen of the United States and as a party in their courts.”²⁴⁶

Howard’s speech has been the subject of a great deal of modern commentary, most of which focuses on the extent to which his remarks support “incorporation” of the Bill of Rights against state governments or substantive protection of other “fundamental” rights through the Privileges or Immunities Clause.²⁴⁷ For purposes of the present inquiry,

²⁴³ Id. Howard’s speech was delivered before the addition of the Citizenship Clause, which was added by the Senate on May 30. See *infra* Section II.C.

²⁴⁴ Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

²⁴⁵ Id. Howard observed that the Supreme Court had not “undertaken to define either the nature or extent of the privileges and immunities” protected by the Comity Clause and alluded to a decision “not many years since” when the Court had “very modestly declined” to address the question. Id. Howard’s statement most likely referred to *Conner v. Elliott*, 59 U.S. (18 How.) 591 (1855), in which the Court declined “to attempt to define the meaning of the” provision, deeming it “safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein.” Id. at 593.

²⁴⁶ Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

²⁴⁷ For some of the representative positions scholars have taken regarding the meaning of Howard’s speech, see, for example, Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 65–66 (2004) (interpreting Howard as supporting a broad “natural rights” reading of the Privileges or Immunities Clause); Harrison, *supra* note 55, at 1410 n.87 (stating that “[i]t is not clear whether Howard meant that the Privileges or Immunities Clause would give the rights he listed substantive or antidiscrimination protection”); Lash,

however, two features of Howard's speech stand out as particularly significant. First, Howard identified the rights protected by the proposed Privileges or Immunities Clause as rights pertaining to United States citizenship "as such," distinguishing them from whatever rights may be possessed by persons who are not citizens.²⁴⁸ Second, Howard associated these rights of United States citizenship with the rights protected by the Article IV Comity Clause, which, under the orthodox understanding of that provision (including the understanding reflected in *Corfield*, Howard's principal illustrative source) were understood as antidiscrimination rights rather than as directly enforceable substantive rights.

Thus, whatever Howard's personal understanding of the Privileges or Immunities Clause, his speech seems to provide relatively strong evidence that at least one plausible way of understanding the Fourteenth Amendment's reference to the "privileges or immunities of citizens of the United States" would be as referring to a class of preexisting rights that individuals already possessed by virtue of their United States citizenship and that these rights included, at least, the types of nondiscrimination rights that were protected under the traditional *Corfield*-based interpretation of the Comity Clause.

C. *The Addition of the Citizenship Clause*

The initial version of the proposed Fourteenth Amendment that emerged from the Joint Committee and that was approved by the House on May 10, 1866, contained no citizenship declaration, beginning instead with what is now the second sentence of Section 1.²⁴⁹ When the Amendment was introduced in the Senate on May 23, Senator Benjamin Wade of Ohio proposed that the phrase "privileges or immunities of citizens of the United States" be replaced with a reference to "the privileges or immunities of persons born in the United States or naturalized by the laws thereof."²⁵⁰ In explaining his proposed revision, Wade cautioned that the word "citizen" was "a term about which there has been a good deal of uncertainty in our Government," that courts had "stumbled on the subject," and that even in the then-recent congressional debates, the

supra note 227, at 406 (interpreting Howard as identifying the "privileges or immunities" protected by § 1 as including "the equal protection rights [but not substantive rights] of Article IV and the substantive 'personal rights' of the first eight amendments").

²⁴⁸ Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

²⁴⁹ Maltz, supra note 170, at 44–45.

²⁵⁰ Cong. Globe, 39th Cong., 1st Sess. 2768 (1866).

question had still been “regarded by some as doubtful.”²⁵¹ Although he considered the question “settled by the civil rights bill,” Wade warned that, absent a “strong and clear” description of the persons protected by the Amendment, it might be “construe[d] . . . in such a way as we do not think it liable to construction.”²⁵²

Debate quickly turned to other provisions of the proposed amendment and no further action was taken on Wade’s proposal.²⁵³ But after that day’s adjournment, Senate Republicans caucused together and agreed upon an alternative revision that addressed Wade’s concerns.²⁵⁴ On May 30, Senator Howard proposed to add to the Amendment a new introductory sentence declaring “all persons born in the United States, and subject to the jurisdiction thereof” to be “citizens of the United States and of the States wherein they reside.”²⁵⁵ Howard’s proposal, which closely tracks the final language of the Citizenship Clause,²⁵⁶ was modeled upon, but did not perfectly mirror, the similar citizenship definition in the recently adopted Civil Rights Act.²⁵⁷ In introducing the proposed revision, Howard noted tersely that he did “not propose to say anything on that subject except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion.”²⁵⁸

²⁵¹ *Id.*

²⁵² *Id.* at 2768.

²⁵³ Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 *Am. U. L. Rev.* 331, 355 (2010).

²⁵⁴ *Id.*

²⁵⁵ *Cong. Globe*, 39th Cong., 1st Sess. 2890 (1866).

²⁵⁶ Howard recognized and corrected a typographical error in the printed version of the proposal, replacing the phrase “States wherein they reside” with “State wherein they reside.” *Id.* at 2892. A subsequent proposal by Senator William Fessenden to insert the phrase “or naturalized” after the phrase “all persons born” was accepted by unanimous consent. *Id.* at 3040.

²⁵⁷ Compare 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.”), with Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (amended 1991) (“[A]ll persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”).

²⁵⁸ *Cong. Globe*, 39th Cong., 1st Sess. 2890 (1866). Howard observed that while he viewed the proposed addition as “simply declaratory of what I regard as the law of the land already,” its inclusion in the proposed amendment would “settle[] the great question of citizenship and remove[] all doubt as to what persons are or are not citizens of the United States,” which had “long been a great desideratum in the jurisprudence and legislation of this country.” *Id.*

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Immediately after Howard proposed his revision, conservative Senator James Doolittle of Wisconsin, who opposed the Amendment, proposed to further revise the citizenship declaration by adding the phrase “excluding Indians not taxed,” which had appeared in the Civil Rights Act’s citizenship definition but not in Howard’s proposal.²⁵⁹ Not to be outdone, Senator Edgar Cowan of Pennsylvania, another opponent of the Amendment, made a lengthy speech questioning whether the proposed citizenship definition would extend to “the child of the Chinese immigrant in California” or the “child of a Gypsy born in Pennsylvania.”²⁶⁰

At the outset of his remarks, Cowan affected uncertainty regarding the “legal definition of ‘citizenship of the United States,’” observing:

So far as the courts and the administration of the laws are concerned, I have supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection; but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States. . . . I have supposed further, that it was essential to the existence of society itself, and particularly essential to the existence of a free State, that it should have the power, not only of declaring who should exercise political power within its boundaries, but that if it were overrun by another and a different race, it would have the right to absolutely expel them.²⁶¹

Cowan inquired, “Are those people [that is, gypsies], by a constitutional amendment, to be put out of the reach of the State in which they live? . . . If the mere fact of being born in the country confers that right, then they will have it; and I think it will be mischievous.”²⁶² Expressing similar concerns regarding the dangers of a future influx of Chinese immigrants, Cowan concluded that “before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen

²⁵⁹ Id. See supra text accompanying note 256.

²⁶⁰ Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). The issues raised by Senators Doolittle and Cowan regarding the possible inclusion of Indians and children of resident aliens reopened questions that had been thoroughly examined during the earlier debates over the proposed Civil Rights bill. See, e.g., id. at 571–72 (statement of Sen. Doolittle) (discussing the effect of limiting that bill’s citizenship definition to “Indians not taxed”); id. at 498 (statement of Sen. Cowan) (questioning whether the citizenship definition in the Civil Rights bill would encompass “the children of Chinese and Gypsies born in this country”).

²⁶¹ Id. at 2890.

²⁶² Id. at 2891.

of the United States, we ought to exclude others besides Indians not taxed” because other groups might be more dangerous if so recognized.²⁶³

The principal response to Cowan came from Senator John Conness of California. Conness dismissed Cowan’s stated concerns regarding the Chinese, insisting that “this portion of our population [that is, the children of Chinese immigrants] . . . is very small indeed, and never promises to be large.”²⁶⁴ As for the purported problem of gypsies in Pennsylvania, Conness observed that though he had “lived in the United States for now many a year,” he had “heard more about Gypsies within the last two or three months than I have heard before in my life.”²⁶⁵

Conness’s dismissive response avoided a direct engagement with Cowan’s professed uncertainty regarding the nature of United States citizenship. Notably, however, neither Conness nor any other senator provided what might have been the most natural response to Cowan’s stated concerns had it been thought applicable—that is, that recognition of a person as a “citizen of the United States” would not, as Cowan suggested “put him out of [the] reach of” state power but would merely confer a formal legal status entitling the person to, for example, sue in the federal courts and be elected to federal office. This narrow conception of citizenship had been urged on the Senate floor only a few months earlier by Senator Henderson of Missouri in connection with the Civil Rights Act debates.²⁶⁶ But as noted above, no other participant in those debates endorsed Henderson’s description of what citizenship entailed and nobody so much as mentioned such a possibility during the Senate debate on May 30.²⁶⁷

To the extent the remarks of participants in the May 30 debate touched on the legal rights corresponding to citizenship, such remarks (with the arguable exception of Cowan’s) uniformly endorsed a conception of “citizenship” that would encompass, at least, the equal enjoyment of basic civil rights to the same extent enjoyed by other citizens. For example, in his response to Cowan, Conness observed that the nation had already “declared . . . by law” in the Civil Rights Act that the U.S.-born children of Chinese immigrants would be citizens and that Conness him-

²⁶³ Id.

²⁶⁴ Id.

²⁶⁵ Id. at 2892.

²⁶⁶ See supra notes 207–10 and accompanying text.

²⁶⁷ See supra notes 209–10 and accompanying text.

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self had “voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.”²⁶⁸ Moments later, he described what he understood to be the effect of the proposed declaration of citizenship in the Fourteenth Amendment:

Here is a simple declaration that a score or a few score of human beings born in the United States shall be regarded as citizens of the United States, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens; and that such a provision should be deprecated by any person having or claiming to have a high humanity passes all my understanding and comprehension.²⁶⁹

To Conness at least, recognition as a “citizen” meant something more than having a formal legal status and entailed, at least, a “right of equal defense [and] of equal punishment for crime” to the same extent that other citizens were defended or punished in like circumstances.

A similar conception of citizenship was reflected in the parallel debate between Senators Doolittle and Howard regarding whether or not the Citizenship Clause should expressly exclude “Indians not taxed.” Notably, both Doolittle and Howard agreed that Native Americans who maintained their tribal relations should be excluded from citizenship but merely disagreed as to whether Doolittle’s “Indians not taxed” language or Howard’s “subject to the jurisdiction” alternative was better suited to achieving that end. After insisting that both the “wild Indians of the plains” and those confined to reservations were subject to the laws of the United States and thus “subject to” its jurisdiction, Doolittle remarked, “Mr. President, citizenship, if conferred, carries with it, as a matter of course, the *rights*, the responsibilities, the duties, the *immunities*, the *privileges of citizens*, for that is the very object of this constitutional amendment to extend.”²⁷⁰

In reply, Senator Howard argued that Native Americans who maintained their tribal relations were not “subject to the jurisdiction” of the United States within the meaning of his proposal and characterized Doolittle’s proposed alternative as “an unconscious attempt . . . to naturalize

²⁶⁸ Cong. Globe, 39th Cong., 1st Sess. 2891 (1866).

²⁶⁹ Id. at 2892.

²⁷⁰ Id. at 2893 (emphasis added).

all the Indians within the limits of the United States” because each state could extend citizenship to its Native American residents simply by taxing them.²⁷¹ Howard remarked that he was “not quite so liberal in” his views as to agree to such a proposal and observed that he was:

not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me and hold lands and deal in every other way that a citizen of the United States has a right to do.²⁷²

Though Howard’s suggestion that recognizing Indians as “citizen[s] of the United States” would confer upon them a “right” to “go to the polls and vote” might charitably be attributed to the type of hyperbole one might expect in an extemporaneous exchange,²⁷³ his suggestion is nonetheless clear evidence that citizenship was viewed by members of the Thirty-ninth Congress as anything but inconsequential and that such members fully expected that recognizing particular classes of persons as “citizens” would have significant practical and legal consequences.

Doolittle’s proposed revision was rejected by a vote of thirty to ten and debate quickly moved on to other sections of the Amendment.²⁷⁴ This marked the end of substantive debate on the proposed addition of the Citizenship Clause, which spans less than eight pages of the *Congressional Globe* and consumed, at most, a few hours of the Senate’s time.²⁷⁵ The House approved the final version of the Fourteenth Amendment on June 11, 1866 without substantive debate on the addition of the Citizenship Clause.²⁷⁶ After that, the focus of debate over the Amendment shifted from Congress to the states.

²⁷¹ Id. at 2895.

²⁷² Id.

²⁷³ In his earlier speech introducing the proposed amendment in the Senate, Howard had expressly denied that § 1 would “give . . . the right of voting,” a view he maintained after the Amendment’s ratification. Id. at 2766; see also Cong. Globe, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Jacob Howard) (denying that amendment conferred voting rights).

²⁷⁴ Cong. Globe, 39th Cong., 1st Sess. 2897 (1866).

²⁷⁵ See id. at 2890–97.

²⁷⁶ Discussion of the Citizenship Clause in the House was limited to the following brief statement by Representative Thaddeus Stevens summarizing the changes that had been made in the Senate:

The first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions

D. The Ratification Debate in the States

As noted above, the Senate's relatively abbreviated discussion of the Citizenship Clause prior to its inclusion in the Fourteenth Amendment has led many modern scholars to view the provision as an "afterthought" that added relatively little of substance to the proposed amendment.²⁷⁷ But if one looks instead to the debates surrounding ratification of the Amendment in the states, a much different picture emerges. Rather than being viewed as an inconsequential addition, the Amendment's declaration of constitutional citizenship was frequently treated in the ratification debates as a central focus, and, in some cases, *the* central focus, of the Amendment's first section.

For example, in August 1866, Senator Trumbull delivered a widely publicized speech in Chicago²⁷⁸ in which he characterized Section 1 as "declar[ing] the rights of the American citizen" and as a mere "reiteration of the rights as set forth in the Civil Rights Bill."²⁷⁹ The Civil Rights Bill, in turn, was described by Trumbull as having been "intended . . . to confer upon every person born upon American soil the right of American citizenship, and every thing belonging to the free citizen of the Re-

between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States.

Id. at 3148. On June 8, Senator Henderson of Missouri delivered a speech in which he argued that the proposed citizenship definition was merely declaratory of existing law. Id. at 3031–32. Henderson claimed that if he was right regarding the preexisting legal status of the birthright citizenship rule, then it would "be a loss of time to discuss the remaining provisions of" § 1 because "they merely secure the rights that attach to citizenship in all free Governments." Id. at 3031. As discussed above, Henderson was the lone member of Congress who had argued during the earlier Civil Rights Act debates that a conferral of citizenship would not necessarily carry with it an entitlement to equal civil rights. See *supra* notes 207–10 and accompanying text. His speech of June 8, which treated the specific requirements of the Amendment's Due Process, Privileges or Immunities, and Equal Protection Clauses as mere entailments of the citizenship recognized by the Amendment's first sentence, strongly suggests that he had been persuaded by the more expansive conception of citizenship defended by other members of the Thirty-ninth Congress.

²⁷⁷ See *supra* note 177.

²⁷⁸ Trumbull's speech originally appeared in the *Chicago Tribune* on August 4, 1866 and was subsequently republished in full the next day in the *Cincinnati Commercial*. The latter newspaper subsequently republished Trumbull's Chicago speech, along with a number of other prominent speeches by both advocates and opponents of the proposed amendment in book form shortly after the conclusion of the 1866 election. See *The Cincinnati Commercial, Speeches of the Campaign of 1866, in the States of Ohio, Indiana and Kentucky* 6 (n.p. 1866) [hereinafter *Speeches and Debates*].

²⁷⁹ Id.

public.”²⁸⁰ “In other words,” its purpose “was to make all persons equal before the law” with respect to rights of contract, property, and “every right which belongs to man as a man.”²⁸¹ Although Trumbull characterized Section 1 as “an unnecessary declaration, perhaps, because all the rights” identified in that provision already “belong to the citizen,” he noted that it was nonetheless:

thought proper to put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic . . . and that all who were born here, or who . . . were naturalized, were to be deemed citizens of the United States in every State where they might happen to dwell.²⁸²

These remarks, all of which focused on the constitutional declaration of citizenship and the concomitant entitlement of citizens to equal rights, reflected the entirety of Trumbull’s comments on Section 1.

To similar effect were the remarks of Senator Henry Lane of Indiana in a speech delivered a few weeks after Trumbull’s Chicago speech in which he characterized “[t]he first clause in that Constitutional Amendment” as “simply a re-affirmment [sic] of the first clause in the Civil Rights Bill, declaring the citizenship of all men born in the United States, without regard to race or color.”²⁸³ In September of the same year, the National Union Republican Committee issued a campaign address to the American people in which the “substance” of Section 1 was described as follows: “I. All persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens evermore; and no State shall have power to contravene this most righteous and necessary provision.”²⁸⁴ In a written message submitting the proposed amendment to the Illinois state legislature and urging its ratification, the state’s Republican governor limited his remarks regarding Section 1 to the following statement:

Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 13 (speech of Sen. Henry Lane).

²⁸⁴ Address of the National Union Republican Committee to the American People, *Chi. Trib.*, Sept. 22, 1866, at 2. The address was signed by New Jersey Governor Marcus L. Ward, the Committee’s chairman, and other party leaders, including Horace Greeley.

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State, and justly entitled to all the political and civil rights citizenship confers? and [sic] should any State possess the power to divest them of these great rights, except for treason or other infamous crime?²⁸⁵

These statements, and similar remarks by supporters emphasizing the citizenship declaration as the central focus of Section 1,²⁸⁶ are consistent with supporters' efforts to link Section 1 with the Civil Rights Act, which was widely perceived as a relatively moderate measure. Because the Citizenship Clause was the only portion of the Amendment that mimicked the language used in the Civil Rights Bill, it was natural for supporters to focus on that provision in support of their claim that Section 1 did little more than "embody" the more specifically worded protections of the Civil Rights Bill.²⁸⁷

The significance of the Citizenship Clause to supporters of the Amendment is also reflected in contemporaneous editorial commentary that appeared in the pro-ratification press. An October 1866 editorial in the strongly pro-Republican *Chicago Tribune* titled "American Citizenship" praised the proposed amendment for correcting the "anomaly" that had previously existed whereby "a citizen of the United States residing in Maine is not necessarily a citizen of Maine," nor a citizen of Maine moving to Virginia "necessarily a citizen of the State of Virginia" or even of the United States.²⁸⁸ Observing that this "anomalous condition of civil rights exists in no other civilized Government," the editorial praised the proposed amendment for "defin[ing] in the Constitution it-

²⁸⁵ Journal of the House of Representatives of the Twenty-fifth General Assembly of the State of Illinois, at Their Regular Session Begun and Held at Springfield, January 7, 1867, at 40 (Springfield, Ill., Baker, Bailhache & Co. 1867).

²⁸⁶ See, e.g., Speeches and Debates, supra note 278, at 20 (speech of Gen. Benjamin Butler) ("The first section [of the proposed amendment] . . . is that every citizen of every State shall have the right of every citizen of every State . . ."); id. at 23 (speech of Rep. Columbus Delano) (describing § 1 as "in substance a definition for citizenship"); The Pittsburgh Convention, N.Y. Times, Sept. 27, 1866, at 4 ("[The proposed amendment] clearly defines American citizenship and guarantees all his rights to every citizen.") (quoting resolutions adopted by Pittsburgh Convention of Union Soldiers and Sailors).

²⁸⁷ See, e.g., Speeches and Debates, supra note 278, at 39 (speech of Sen. John Sherman) (describing § 1 as the "embodiment of the Civil Rights Bill, namely: that every body—man, woman and child—without regard to color, should have equal rights before the law; . . . that every body born in this country or naturalized by our laws should stand equal before the laws"); supra text accompanying note 279 (quoting Trumbull's characterization of § 1 as a "reiteration" of the Civil Rights Bill); supra text accompanying note 283 (quoting Sen. Henry Lane's statement describing § 1 as "a re-affirmment [sic] of the first clause in the Civil Rights Bill").

²⁸⁸ Editorial, American Citizenship, Chi. Trib., Oct. 10, 1866, at 2.

self what constitutes a citizen, and . . . declar[ing] that a citizen of the whole Republic . . . shall also be a citizen of the State wherein he resides.”²⁸⁹ While the paper observed that the “proposed provision making citizenship uniform, carries with it no political rights,” it nonetheless insisted that the provision would “entitle[]” the persons so recognized “to civil rights on equal terms” with other citizens, including rights to enter into contracts, to buy, sell, devise, and inherit real and personal property and to bring actions in the courts.²⁹⁰ The author of the editorial appears to have assumed that all of these rights would follow as a result of the constitutional declaration of citizenship, which was the only provision of the proposed amendment mentioned in the editorial.

An anonymous editorial published a month later in the *New York Times* similarly praised the Amendment’s citizenship declaration as a much needed response to the problem of state discrimination and referred to Justice Washington’s opinion in *Corfield v. Coryell*²⁹¹ as indicative of “the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.”²⁹² An editorial in the *North American and United States Gazette* of Philadelphia during this same period declared “that the primary importance” of Section 1:

lies in the fact that it specifically places the citizenship of the republic above that of the State, and makes every man, native or naturalized, a citizen of the United States, so that hereafter there shall be no such excuse for rebels as that their paramount allegiance was due to their respective states.²⁹³

The Citizenship Clause also featured prominently in the arguments of those opposed to ratification. But whereas supporters of the Amendment invoked the provision to tie Section 1 to the relatively narrow and un-

²⁸⁹ Id.

²⁹⁰ Id.

²⁹¹ 6 F. Cas. 546.

²⁹² Letter to the Editor, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2. In a subsequent letter to the editor in the same series describing the Privileges or Immunities Clause, the same unidentified author referred to the catalogue of rights listed “in the first number” (that is, in the first unsigned letter to the editor) as indicative of “what privileges and immunities were intended” by that provision. Letter to the Editor, *The Proposed Constitutional Amendment—What it Provides*, N.Y. Times, Nov. 15, 1866, at 2. This latter letter to the editor also suggested that the Amendment would extend to citizens “protection . . . coextensive with the whole Bill of Rights” against the state governments. Id.

²⁹³ Editorial, *The Amendment Alone*, Phila. N. Am. & U.S. Gazette, Nov. 22, 1866, at 2.

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controversial rights enumerated in the Civil Rights bill, opponents emphasized the potential breadth of the Amendment, placing particular emphasis on the danger that recognizing blacks as “citizens” might require that they be admitted to suffrage on equal terms with white citizens.²⁹⁴ In response to such claims, many supporters of the Amendment vigorously denied that extending citizenship to free blacks would confer suffrage or other “political” rights. In a speech delivered in Indianapolis on August 7, 1866, Speaker of the House Schuyler Colfax ridiculed opponents’ reliance on the “chimera and hobgoblin of negro suffrage,” granting that

²⁹⁴ Such claims were pervasive among the Amendment’s opponents in both the North and the South. See, e.g., H.R. Journal, 45th Sess., at 102 (Ind. 1867) (minority report of Select Committee on Constitutional Amendment) (“The first section places all persons, without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them ‘citizens of the United States, and of the State wherein they reside,’ thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race . . . including . . . the right of suffrage.”); H.R. Journal, 11th Leg., at 578 (Tex. 1866) (report of Committee on Federal Relations) (objecting to § 1 on the ground that it “deprive[s] the States of the right . . . to determine what shall constitute citizenship of a State” and contending that its “object” was to declare “under the color of a generality” that “negroes [are] citizens of the United States, and therefore, citizens of the several States, and as such entitled to all ‘the privileges and immunities’ of white citizens,” including the right to vote, serve on juries, and to bear arms in the militia); S. Journal, 19th Sess., at 96 (Wis. 1867) (minority report of Committee on Foreign Relations) (“The apparent object of the proposed amendments [sic] is to declare the Africans lately in servitude . . . citizens, and to give to the Congress of the United States the power to make them citizens of the several states wherein they reside, and thereby to extend to them the right of suffrage . . .”); *Speeches and Debates*, supra note 278, at 9 (speech of Sen. Thomas Hendricks) (arguing that the Amendment would “confer[] citizenship . . . upon the negroes and the Indians” and suggesting that such citizenship would entitle blacks to “stand by your side at the polls—and claim to be voted for, to hold office, sit upon juries, to exercise all the rights and enjoy all the privileges which you now enjoy”).

These arguments found some support in leading dictionaries of the day, many of which defined the term “citizen” as a person who possessed political rights. See, e.g., 1 John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 265 (Philadelphia, T. & J. W. Johnson 2d ed. 1843) (defining “citizen” as “[o]ne who, under the constitution [sic] and laws of the United States, has a right to vote . . . and who is qualified to fill offices in the gift of the people”); Noah Webster, *An American Dictionary of the English Language* 208 (Springfield, Mass., George & Charles Merriam 1850) (defining “citizen,” as used in the United States, to mean “a person, native or naturalized, who has the privilege of exercising the elective franchise, or the qualifications which enable him to vote for rulers, and to purchase and hold real estate”). These definitions failed to account for the existence of non-voting citizens, including women and children, a fact supporters of the Amendment were quick to point out in criticizing arguments that relied on such definitions. See, e.g., *Speeches and Debates*, supra note 278, at 21 (speech of John Hannah) (criticizing opponents’ reliance on definitions from Bouvier and Webster and insisting that citizenship does not require suffrage).

“the man who votes has the right to be called a citizen,” but contending that “it don’t [sic] follow that every citizen has a right to vote.”²⁹⁵ Senator Lane of Indiana likewise dismissed the asserted connection between citizenship and voting rights claiming that “[t]here is no good lawyer who will contend that conferring citizenship alone implies the right to vote and hold office.”²⁹⁶ Representative Columbus Delano of Ohio went even further, asserting that there was “nobody in this community so illy informed as not to know that the privilege of voting does not follow citizenship.”²⁹⁷

But denying that citizenship necessarily entailed suffrage was as far as most supporters of the Amendment were willing to go in cabining the effects of Section 1. Even those who denied that the Amendment would confer voting rights generally assumed that citizenship would confer equality with respect to more basic “civil rights,” including, paradigmatically, those enumerated in the 1866 Civil Rights Act.²⁹⁸

III. EARLY INTERPRETATIONS OF THE FOURTEENTH AMENDMENT

A. *Early Congressional Interpretations of the Fourteenth Amendment*

On July 28, 1868, Secretary of State William Seward proclaimed the Fourteenth Amendment ratified.²⁹⁹ Even before that proclamation, members of the radical Republican faction in Congress had begun looking to the Amendment as a source of constitutional power to require states to allow black citizens to vote. In March 1868, Thaddeus Stevens, who had served on the Joint Committee on Reconstruction during the Thirty-ninth Congress, pointed to the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment as authority for such a bill:

If by the amended Constitution every American citizen is entitled to equal privileges with every other American citizen, and if every American citizen in any of the States should be found entitled to impartial and universal suffrage with every other American in any State,

²⁹⁵ Speeches and Debates, *supra* note 278, at 14 (speech of Speaker Schuyler Colfax).

²⁹⁶ *Id.* at 13 (speech of Sen. Henry Lane).

²⁹⁷ *Id.* at 23 (speech of Rep. Columbus Delano).

²⁹⁸ See, e.g., *id.* at 14 (speech of Speaker Schuyler Colfax) (denying citizenship confers suffrage but pointing to Civil Rights Act as indicative of “what the rights of a citizen of the United States are”).

²⁹⁹ 15 Stat. app. 708-10 (1869) (announcement of adoption of the amendment by William H. Seward).

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then it follows as an inevitable conclusion that suffrage throughout this nation is impartial and universal so far as every human being, without regard to race or color, shall be found concerned, and so far as it affects the whole nation.³⁰⁰

The most thorough explanation of the interpretation underlying the radicals' claim that the Fourteenth Amendment authorized federal legislation conferring voting rights was offered by Representative George Boutwell of Massachusetts, who, like Stevens, had been one of the fifteen members of the Joint Committee on Reconstruction.³⁰¹ After quoting both the Citizenship and Privileges or Immunities Clauses, Boutwell observed that "[o]ne of the . . . privileges of a citizen of the United States is that he shall be a citizen of the State where he resides."³⁰² This citizenship, according to Boutwell, was by its very nature equal.³⁰³ Boutwell then attempted to demonstrate that voting was "one of the privileges of the citizen" by invoking the Kentucky Supreme Court's 1822 decision in *Amy v. Smith*,³⁰⁴ which Boutwell described as "an authority . . . in which the characteristics of citizens are laid down . . . in most satisfactory and conclusive language."³⁰⁵ Boutwell quoted at length from the *Amy* decision, including the Kentucky court's declaration that one could not, "in the correct sense of the term, be a citizen of a State who is not entitled . . . to all the rights and privileges conferred . . . upon the highest class of society."³⁰⁶

Boutwell's invocation of *Amy v. Smith*, which was one of the earliest judicial decisions denying that free blacks were "citizens" within the meaning of the federal Constitution,³⁰⁷ as support for extending voting rights to blacks was more than a bit ironic. But his argument illustrates the way in which the political valence of the citizenship issue was changed by the Fourteenth Amendment's adoption. Before the Civil War, an expansive conception of citizenship such as the one reflected in

³⁰⁰ Cong. Globe, 40th Cong., 2d Sess. 1967 (1868).

³⁰¹ Maltz, *supra* note 170, at 81.

³⁰² Cong. Globe, 40th Cong., 3d Sess. 558 (1869).

³⁰³ *Id.* ("Under that Constitution . . . [w]e cannot say that a white citizen shall enjoy privileges which are denied to a black citizen or to a naturalized citizen, white or black.").

³⁰⁴ 11 Ky. (1 Litt.) 326 (1822).

³⁰⁵ Cong. Globe, 40th Cong., 3d Sess. 558 (1869).

³⁰⁶ *Id.* at 558–59 (quoting *Amy v. Smith*, 11 Ky. (1 Litt.) at 333). Boutwell's invocation of *Amy v. Smith* was echoed by his fellow radical, Senator George Edmunds of Vermont. See *id.* at 1000–01 (statement of Sen. George Edmunds).

³⁰⁷ See *supra* notes 80–87 and accompanying text.

Amy, had been used to deny that free blacks were eligible for citizenship.³⁰⁸ Proponents of black citizenship sometimes responded by embracing a narrower view of what citizenship entailed in order to demonstrate that recognizing such a status for free blacks was not necessarily inconsistent with denying them voting rights or even certain more basic civil rights.³⁰⁹ But after the Fourteenth Amendment's ratification, those seeking to further the goal of black equality no longer had reason to resist the expansive view of what "citizenship" entailed.

Of course, Boutwell's claim that the right to vote was one of the rights inhering in citizenship was hardly representative of the Republican mainstream. The repeated pre-enactment assurances from supporters that the Amendment would not require black suffrage were still fresh in the minds of all concerned.³¹⁰ The radicals' proposed interpretation also stood in arguable tension with the Amendment's second section, which appeared to recognize the right of states to regulate suffrage subject only to a proportionate reduction in congressional representation for those states that refused to extend voting rights to all of their adult male citizens.³¹¹ Though Boutwell and other radicals had responses to such objections,³¹² more moderate Republicans, including former members of the Thirty-ninth Congress who had supported the Amendment, rejected the radicals' claim that the Amendment authorized Congress to regulate suffrage in the states.³¹³ The proposed legislation attracted relatively little congressional support and was eventually abandoned in favor of an

³⁰⁸ See *supra* Subsection I.C.1.

³⁰⁹ See *supra* Subsection I.B.3.c (describing moderate pro-citizenship position); see also *supra* Subsection I.C.2 (discussing Justice Curtis's *Dred Scott* dissent).

³¹⁰ See *supra* notes 295–97 and accompanying text.

³¹¹ See U.S. Const. amend. XIV, § 2 (providing that "when the right to vote at any [federal] election" 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 as punishment for crime), "the basis of representation therein shall be" subject to a proportionate reduction); see also, e.g., Cong. Globe, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Howard) (contending that § 2 demonstrated that § 1 did not confer voting rights).

³¹² Boutwell acknowledged that "some persons" in the Thirty-ninth Congress may have conceded that the Amendment would not confer political rights but denied that he had ever made such a concession and contended that the provision in § 2 merely provided a "penalty" for a state's failure to extend voting rights to all citizens as § 1 required. Cong. Globe, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell).

³¹³ See, e.g., *id.* at 1003 (statement of Sen. Howard); *id.* at 1002 (statement of Sen. Drake); *id.* at 978–80 (statement of Sen. Frelinghuysen).

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alternative strategy of securing equal suffrage through constitutional amendment.³¹⁴

A decidedly less controversial vision of the rights corresponding to citizenship appeared in the subsequent debate over the proposed Civil Rights Act of 1871, which reflected one of the earliest legislative interpretations of the newly adopted Fourteenth Amendment. The 1871 Act (popularly known as the “Ku Klux Act”)³¹⁵ was motivated by the southern states’ failure to adequately protect their black populations against political violence perpetrated by the Ku Klux Klan and similar organizations and was targeted primarily at ensuring the protection of free blacks against private and official violence.³¹⁶

The law’s supporters naturally focused much of their constitutional argument on a straightforwardly literal interpretation of the term “protection” in the Equal Protection Clause.³¹⁷ But multiple supporters buttressed such arguments with the claim that the constitutional recognition of blacks’ citizenship provided the requisite federal authority to protect them from racially motivated violence. For example, Republican Senator John Pool of North Carolina, after quoting the Fourteenth Amendment’s Citizenship Clause asked “[w]hy this express declaration of citizenship” had been included in the Amendment “unless it implies some right or class of rights as incident thereto, which were meant to have thus thrown around them a national protection?”³¹⁸ Though Pool conceded that “[t]he full scope of the rights incident to citizenship may not be easy to define,” he insisted that such rights “[c]ertainly . . . cannot be less than the three absolute rights recognized by the common law,” namely, the rights to “personal liberty, personal security, and private property,” and contended that upon the failure of any state to protect “the rights incident to citizenship,” the “national Government must intervene.”³¹⁹

To similar effect were the remarks of Representative Samuel Shellabarger of Ohio, the principal sponsor of the proposed legislation in the House. Shellabarger began his argument in support of the 1871 Act’s constitutionality by referring to the constitutional theory underlying the

³¹⁴ Maltz, *supra* note 170, at 146–47.

³¹⁵ Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 *Geo. Mason U. C.R. L.J.* 219, 239 n.88 (2009).

³¹⁶ *Id.* at 224–25.

³¹⁷ See *id.* at 227–52 (collecting statements of supporters reflecting a “duty-to-protect” interpretation of the Equal Protection Clause).

³¹⁸ Cong. Globe, 42d Cong., 1st Sess. 607 (1871) (statement of Sen. Pool).

³¹⁹ *Id.*

Civil Rights Act of 1866, which Shellabarger described as having been passed “to enforce the rights of citizenship to which the slave was admitted by the act of his emancipation.”³²⁰ After observing that several courts had affirmed the constitutionality of that earlier measure, Shellabarger contended that Congress thus possessed power under the Thirteenth Amendment “to define and punish as a crime against the United States any act of deprivation of the newly made American citizenship.”³²¹ Shellabarger argued that “if the [T]hirteenth [A]mendment did so much as this, the far more explicit, complete, and careful provisions” of the Fourteenth Amendment had done that much and more.³²² According to Shellabarger:

[W]hen the United States inserted into its Constitution that which was not in it before, that the people of this country born or naturalized therein, are citizens of the United States and of the States also in which they reside, and that Congress shall have power to enforce by appropriate legislation the requirement that their privileges and immunities as citizens should not be abridged, it was done for a purpose, and that purpose was that the United States thereby were authorized to directly protect and defend throughout the United States those privileges and immunities . . . which inhere and belong of right to the citizenship of all free Governments. The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship.³²³

Opponents adopted divergent and, to some extent, conflicting strategies in responding to the supporters’ citizenship-based arguments. One strategy, reflected in Indiana Democrat Michael Kerr’s response to Shellabarger, focused on the “declaratory” nature of the Fourteenth Amendment’s Citizenship Clause.³²⁴ According to Kerr, because birthright citizenship had been the rule even before the Fourteenth Amendment’s adoption, as recognized in the 1866 Civil Rights Act, the Citizenship

³²⁰ Id. app. at 68 (statement of Rep. Shellabarger).

³²¹ Id.

³²² Id.

³²³ Id. app. at 69. For other examples of Republicans invoking the Citizenship Clause as support for the bill’s constitutionality, see id. at 693–94 (statement of Sen. Edmunds); id. at 500–01 (statement of Sen. Frelinghuysen); id. at 382 (statement of Rep. Hawley).

³²⁴ Id. app. at 47 (statement of Rep. Kerr).

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Clause conferred no new power on Congress but instead left both the definition of “*citizen*” and the “constituent elements of *citizenship* of the United States or of the States . . . where it found them, to rest upon the common law and the laws of the several States.”³²⁵

Not all opponents of the 1871 Act endorsed Kerr’s narrow interpretation of the Citizenship Clause. The more common response was simply to deny that Congress could invoke its Section 5 enforcement power in the absence of overtly discriminatory state action.³²⁶ A notable example of this line of argument was offered by Senator Garrett Davis of Kentucky, who claimed that Congress’s Section 5 enforcement power was limited to “pass[ing] acts declaring all State laws which contravene their objects” of Section One “to be unconstitutional, null, and void, or to provide for all cases involving them to be instituted in” or removed to federal courts.³²⁷ But despite this extremely narrow construction of Section 5, Davis endorsed a significantly broader interpretation of the Citizenship Clause:

The only purpose of this provision [that is, the Citizenship Clause] was to abolish discriminations and to give, “without regard to race, color or previous condition,” citizenship; *and to invest those who previously had been withheld from any rights, privileges, or immunities all that had been common to persons then citizens of the United States, and thus to put the colored citizen upon the same level with white citizens. . . .* [I]ts only effect is to abolish all discrimination against the black or colored race. To the extent that the laws of any State may make such discriminations Congress may intervene to abolish them, but no further.³²⁸

³²⁵ Id.; see also, e.g., id. app. at 259 (statement of Rep. Holman) (arguing that United States citizenship existed before the Fourteenth Amendment’s adoption and that the Citizenship Clause “only enlarges the body of citizens, nothing more”); id. app. at 165 (statement of Rep. Bird) (endorsing the “lucid and exhaustive argument” of Representative Kerr). Such arguments marked a significant shift from the rhetorical strategies of the Fourteenth Amendment’s opponents prior to enactment. See *supra* notes 200 & 294 and accompanying text (discussing opponents’ arguments that making blacks citizens would require that they be given full legal and political equality).

³²⁶ See, e.g., Cong. Globe, 42d Cong., 1st Sess. app. at 218–19 (1871) (statement of Rep. Thurman); id. app. at 138–39 (statement of Rep. McCormick); id. at 573 (statement of Sen. Stockton); id. 337–38 (statement of Rep. Whitthorne).

³²⁷ Id. at 648 (statement of Sen. Davis).

³²⁸ Id. (emphasis added).

Davis's description of the Citizenship Clause was strikingly egalitarian, especially for a border-state Democrat who had opposed both the Civil Rights Act and the Fourteenth Amendment while a member of the Thirty-ninth Congress in 1866.³²⁹ Davis clearly viewed the Citizenship Clause as the source of a legally enforceable equality principle that would justify federal intervention if states engaged in explicitly race-based discrimination against their own citizens. Significantly, Davis appears to have viewed this antidiscrimination requirement as arising directly from the Citizenship Clause itself, independently of the express prohibitions contained in the second sentence of Section 1, which he discussed separately.³³⁰

B. *The Slaughter-House Cases*

In 1869, the Republican-controlled legislature of Louisiana conferred a monopoly in the maintenance of butchering and slaughtering operations in New Orleans and its surrounding areas on a single private corporation, prompting a series of legal challenges by individual butchers and smaller corporations whose livelihoods were threatened by the law.³³¹ These legal actions culminated in the Supreme Court's notorious 1873 decision in the *Slaughter-House Cases*³³² in which the Court, by a 5-4 majority, rejected the private butchers' constitutional claims and, in doing so, practically "eviscerated" the Fourteenth Amendment's Privileges or Immunities Clause.³³³

The Citizenship Clause featured prominently in Justice Miller's majority opinion and provided the textual point of departure for the majority's narrow construction of the Privileges or Immunities Clause. Focusing on the fact that the former provision referred to both United States citizenship and state citizenship, whereas the latter focused solely on United States citizenship, Miller claimed that it was "quite clear" that

³²⁹ See Cong. Globe, 39th Cong., 1st Sess. 3042 (1866) (recording Davis's vote against the Fourteenth Amendment); id. at 1809 (recording Davis's vote against the Civil Rights Act).

³³⁰ Cong. Globe, 42d Cong., 1st Sess. 648 (1871) (statement of Sen. Davis).

³³¹ The background of the Louisiana legislation and the cases challenging its constitutionality are described in Ronald M. Labbé & Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (2003).

³³² 83 U.S. (16 Wall.) 36.

³³³ See, e.g., Roosevelt, *supra* note 240, at 64 (describing *Slaughter-House* as "famous . . . for its evisceration of the Privileges or Immunities Clause"); see also, e.g., Harrison, *supra* note 55, at 1387 (noting the decision "virtually read [the Privileges or Immunities Clause] out of" the Constitution).

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“citizenship of the United States, and . . . citizenship of a State . . . are distinct from each other” and claimed that the Privileges or Immunities Clause must therefore have been “intended” to protect solely those rights pertaining to the former status with rights pertaining to state citizenship left to the exclusive control of the states.³³⁴ Miller’s opinion classified all rights traditionally associated with *Corfield* and other Comity Clause cases as the exclusive province of state citizenship and state protection.³³⁵ The “privileges and immunities” of national citizenship, by contrast, were confined to a relatively narrow set of structurally derived rights such as the privilege of traveling from state to state and “[t]he right to use the navigable waters of the United States.”³³⁶

Justice Miller’s majority opinion in *Slaughter-House* is among the most widely criticized opinions in Supreme Court history.³³⁷ Miller’s narrow interpretation of the Privileges or Immunities Clause is susceptible to numerous criticisms, the most familiar of which being that the interpretation finds no support in the extensive legislative and ratification debates that preceded the Amendment’s adoption.³³⁸ This difficulty might not have been dispositive if Miller had provided a persuasive textual account of the Amendment’s language. But he did not. As Justice Field observed in his dissent, because all the “privileges or immunities” of national citizenship that Miller identified would have been adequately protected without the Fourteenth Amendment,³³⁹ Miller’s interpretation

³³⁴ *Slaughter-House*, 83 U.S. (16 Wall.) at 74.

³³⁵ *Id.* at 77–78.

³³⁶ *Id.* at 79–80.

³³⁷ See, e.g., Saenz v. Roe, 526 U.S. 489, 522 & n.1 (1999) (Thomas, J., dissenting) (“Legal scholars agree on little beyond the conclusion that the [Privileges or Immunities] Clause does not mean what the Court said it meant in 1873.”); Akhil Amar, Substance and Method in the Year 2000, 28 Pepp. L. Rev. 601, 631 n.178 (2001) (“Virtually no serious modern scholar—left, right, and center—thinks that [Miller’s interpretation] is a plausible reading of the Amendment.”).

³³⁸ See, e.g., Foner, *supra* note 172, at 530 (observing that the Court’s “studied distinction between the privileges deriving from state and national citizenship, should have been seriously doubted by anyone who read the Congressional debates of the 1860s”); cf. *Slaughter-House*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting) (contending that the majority’s interpretation “defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted”).

³³⁹ The clearest illustration of this observation’s correctness is provided by Miller’s principal example of a privilege or immunity of national citizenship—the right to travel from state to state and to the seat of the national government—which the Supreme Court had *already* recognized as constitutionally protected before the Fourteenth Amendment’s ratification. 83 U.S. (16 Wall.) at 79 (citing *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867)).

rendered the Amendment “a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.”³⁴⁰

Miller’s interpretation is also difficult to reconcile with the text of the Citizenship Clause, a considerable difficulty given that provision’s centrality to his textual argument. As Professor Harrison observes, although the Citizenship Clause “recognizes that there are separate citizenships of the states and the United States, the Amendment does not divide those citizenships, but staples them together” by conferring upon every United States citizen a citizenship in whichever state he or she chooses to reside.³⁴¹ Miller himself conceded as much by acknowledging that, under the Citizenship Clause, “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, *with the same rights as other citizens of that State.*”³⁴² It is thus difficult to escape the conclusion that the right to enjoy the privileges or immunities of *state* citizenship (at least on the same terms as are extended to other citizens of the same state) is therefore one of the “privileges or immunities” of United States citizenship protected by the Amendment.³⁴³

The principal dissent in the case, authored by Justice Field, drew inferences from the Citizenship Clause that were directly contrary to those drawn by Miller’s majority opinion. After noting the “diversity of opinion” that had existed before the Amendment’s adoption regarding the relationship between state citizenship and United States citizenship, Field observed that the Citizenship Clause:

changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights,

³⁴⁰ *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

³⁴¹ Harrison, *supra* note 55, at 1415; see also Kaczorowski, *supra* note 176, at 262 (observing that “Miller had to keep national and state citizenship distinct” in order to avoid “hav[ing] . . . to admit that national citizenship entitled the individual to state citizenship,” thereby “entitl[ing] [the individual] to all of the rights of citizens, even if they were derived from the states”).

³⁴² *Slaughter-House*, 83 U.S. (16 Wall.) at 80 (majority opinion) (second emphasis added).

³⁴³ Harrison, *supra* note 55, at 1415 (characterizing this conclusion as “virtually impossible to avoid”); see also *infra* notes 373–75 and accompanying text (discussing similar argument made by Representative Boutwell in post-*Slaughter-House* legislative debate).

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privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. . . . They do not derive their existence from [the State's] legislation, and cannot be destroyed by its power.³⁴⁴

Field noted that the Amendment did “not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing” but rather “assumes that there are such privileges and immunities which belong of right to citizens as such.”³⁴⁵ Rejecting Miller’s narrow construction of the Privileges or Immunities Clause, Field contended that the most logical interpretive source for identifying the “privileges or immunities” of United States citizenship was in the judicial interpretations that had been given to the similarly phrased Comity Clause, which Field described as “a clause which insures equality in the enjoyment of . . . rights between citizens of the several States whilst in the same State.”³⁴⁶ Field argued that:

What the [Comity Clause] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the [F]ourteenth [A]mendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the [F]ourth [A]rticle of the Constitution equality of privileges or immunities is secured between citizens of different States, under the [F]ourteenth [A]mendment the same equality is secured between citizens of the United States.³⁴⁷

Justice Bradley’s separate dissenting opinion likewise emphasized the inherent link between the newly recognized status of United States citizenship and the equality of all United States citizens:

The question is now settled by the [F]ourteenth [A]mendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen’s place of residence. . . . A citizen of the United States has a perfect constitu-

³⁴⁴ *Slaughter-House*, 83 U.S. (16 Wall.) at 94–96 (Field, J., dissenting).

³⁴⁵ *Id.* at 96.

³⁴⁶ *Id.* at 98.

³⁴⁷ *Id.* at 100–01.

tional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. . . . Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.³⁴⁸

Thus, for both Field and Bradley,³⁴⁹ the status of United States citizenship along with the corresponding constitutional recognition of the “privileges or immunities” associated with that status provided sufficient grounds for a legally enforceable equality guarantee that was apparently distinct from the separate Equal Protection Clause, which both dissenters mentioned only in passing.³⁵⁰

A great deal has been written about the possible motivations that may have driven Miller and the other members of the *Slaughter-House* majority to impose upon the Amendment the narrow construction reflected in the majority’s opinion.³⁵¹ But whatever the Justices’ motivations, their decision unquestionably altered the subsequent development of constitutional law by de-emphasizing the significance of citizenship in interpreting the Fourteenth Amendment and channeling constitutional arguments toward the Amendment’s separate Due Process and Equal Protection

³⁴⁸ Id. at 112–13 (Bradley, J., dissenting).

³⁴⁹ In a separate dissenting opinion, Justice Swayne endorsed the opinions of Justices Field and Bradley as “full and conclusive upon the subject” of the legislation’s constitutionality under the challenged provisions. Id. at 128 (Swayne, J., dissenting). Chief Justice Chase joined in Justice Field’s dissent without writing a separate opinion. Id. at 111 (Field, J., dissenting).

³⁵⁰ The only reference to “equal protection” in Field’s opinion was as part of a full quotation of the language of § 1. Id. at 93–94 (Field, J., dissenting). Following extended explanations of why the proposed Louisiana law violated both the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment, Justice Bradley remarked without elaboration that “[s]uch a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.” Id. at 122 (Bradley, J., dissenting).

³⁵¹ See, e.g., Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 39, 61–62 (1978) (attributing Miller’s decision to the “almost universal desire of Americans to preserve the basics of the federal system”); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 Const. Comment. 115, 133 (1994) (characterizing Miller’s opinion as “an attempt to assuage the conflict over Reconstruction by prudent compromise”).

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Clauses, both of which referred to “persons” rather than “citizens.”³⁵² Although the *Slaughter-House* dissenters’ views strongly influenced the jurisprudence that developed under the latter two provisions,³⁵³ the damage inflicted by the *Slaughter-House* majority on the significance of citizenship in interpreting the Fourteenth Amendment persists to this day.³⁵⁴

C. The Civil Rights Act of 1875

Although the *Slaughter-House* decision marked the beginning of the end of citizenship as a central concept in the Fourteenth Amendment’s interpretation, the transition from citizenship-based arguments to equal protection arguments did not happen all at once or without resistance. This transition played out most visibly in connection with the legislative debates surrounding a series of proposals that eventually culminated in the Civil Rights Act of 1875.³⁵⁵

In May 1870, Senator Charles Sumner of Massachusetts, a leader of the radical wing of the congressional Republicans, introduced legislation that would prohibit racial discrimination in various public accommodations, including public schools, common carriers, inns, theaters, cemeteries, churches, and benevolent institutions throughout the United States.³⁵⁶ Sumner’s proposed legislation sparked a series of legislative debates and counterproposals that would span nearly five years.³⁵⁷ In a

³⁵² Cf. Roosevelt, *supra* note 240, at 62–63 (describing modern academic “consensus” that, if not for *Slaughter-House*, much of Supreme Court’s modern due process and/or equal protection doctrine could have evolved instead under the Privileges or Immunities Clause).

³⁵³ See, e.g., David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* 17 (2011) (describing the *Slaughter-House* dissents as “crucial to the development of the liberty of contract idea” in the late nineteenth century); Saunders, *supra* note 50, at 294–301 (discussing influence of Field and Bradley in early development of equal protection doctrine).

³⁵⁴ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030–31 (2010) (plurality opinion) (refusing to overrule *Slaughter-House* and holding that the constitutional right to keep and bear arms applies to the states through the Fourteenth Amendment Due Process Clause rather than the Privileges or Immunities Clause).

³⁵⁵ 18 Stat. 335 (1875); see also McConnell, *supra* note 5, at 998–1005 (describing evolution of supporters’ constitutional theories in the wake of *Slaughter-House*).

³⁵⁶ McConnell, *supra* note 5, at 987.

³⁵⁷ See generally *id.* at 984–1117 (describing legislative history of the 1875 Civil Rights Act). Because the debates surrounding the proposed legislation reflect a far more detailed explication of the Fourteenth Amendment’s requirements than was reflected in the pre-enactment debates, scholars have looked to these debates as a “rich source of information about how the Fourteenth Amendment was understood at the time of its adoption.” Harrison, *supra* note 55, at 1425; see also, e.g., McConnell, *supra* note 5, at 1005–49 (looking to evi-

speech delivered in 1872 in support of an early version of the proposed bill, Sumner specifically invoked the newly conferred constitutional citizenship of African Americans as the basis for the legal equality the bill sought to confer:

Ceasing to be a slave the former victim has become not only a man, but a citizen, admitted alike within the pale of humanity and within the pale of citizenship. . . . [A]s a citizen he becomes a member of our common household with equality as the prevailing law. No longer an African, he is an American; no longer a slave, he is a component part of the Republic, owing to it patriotic allegiance in return for the protection of equal laws. By incorporation with the body-politic he becomes a partner in that transcendent unity, so that there can be no injury to him without injury to all. . . . Our rights are his rights; our equality is his equality; our privileges and immunities are his great possession.³⁵⁸

Sumner was far from alone in drawing a link between the legal status of United States citizenship and the equality guaranties set forth in his bill. Republican supporters of the bill routinely connected the equality rights the bill sought to protect with the “privileges or immunities” of United States citizenship and drew a link between those rights and the newly ratified Fourteenth Amendment.³⁵⁹ Though this theory was sometimes tied to the specific language of the Amendment’s Privileges or Immunities Clause,³⁶⁰ many Republicans took the position that equality of rights and privileges inhered in the very nature of United States citizenship itself.³⁶¹

dence of legislative debates regarding 1875 Act as evidence of Reconstruction-era understanding concerning school segregation).

³⁵⁸ Cong. Globe, 42d Cong., 2d Sess. 385 (1872).

³⁵⁹ See, e.g., Harrison, *supra* note 55, at 1425 (referring to the legislative debates surrounding the 1875 Civil Rights Act as “show[ing] that the equality theory of the Privileges or Immunities Clause was prominent among Republicans”).

³⁶⁰ See, e.g., Cong. Globe, 42d Cong., 2d Sess. 762 (1872) (statement of Sen. Carpenter) (“The fourteenth amendment assumes that there are certain privileges and immunities belonging to the citizens of the United States, and it declares that no State shall abridge those privileges and immunities [T]o abridge the rights of any citizen it must follow that the privileges and immunities of all citizens must be the same.”).

³⁶¹ See, e.g., 2 Cong. Rec. 4081 (1874) (statement of Sen. Pratt) (“No one reading the Constitution can deny that every colored man is a citizen, and as such, so far as legislation may go, entitled to equal rights and privileges with white people.”); *id.* at 425 (statement of Rep. Purman) (“A citizen of the United States and a State is always equal to any other citizen of said state.”); *id.* at 414 (1874) (statement of Rep. Lawrence) (“The colored man is a citizen

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As in the earlier congressional debates concerning the constitutionality of the 1871 Ku Klux Act,³⁶² many opponents of the 1875 legislation conceded the link between citizenship and equality posited by the legislation's supporters but merely denied the supporters' claim of broad congressional authority.³⁶³ One of the most notable examples of such a concession came from Democratic Representative Alexander Stephens of Georgia, the former Vice President of the Confederacy who "was considered by many to have been the most eloquent defender of slavery in the later years of the antebellum period."³⁶⁴ But in the congressional debates of the 1870s, Stephens acknowledged that, as a result of the Civil War and the Reconstruction Amendments, "all classes of men, whether white, red, brown or black" now had "an equal right to justice, and to stand, so far as governmental powers are concerned or exercised over them, perfectly equal before the law."³⁶⁵ Describing the effect of the Fourteenth Amendment specifically, Stephens declared his understanding that Section 1 had:

of the republic, and his rights, equally with all others, this Congress must respect if the Constitution is to be obeyed."); Cong. Globe, 42d Cong., 2d Sess. 900 (1872) (statement of Sen. Edmunds) ("If it is not a privilege and immunity of a citizen, being otherwise equal and otherwise qualified, to stand on an equality irrespective of color, what is a privilege and an immunity of citizenship upon which you can stand?"); id. at 845 (statement of Sen. Sherman) ("It seems to me as clear as day . . . that if in any community where a great number of black men are by law citizens, if a law of the State prevents those men from sitting on a jury because they are black men, such a law does deprive such citizens of a privilege, an immunity which they have a right to enjoy in every part of this country as citizens of the United States."); id. at 436 (statement of Sen. Frelinghuysen) ("[A]n equality of citizenship is established [by the Constitution], and we are directed to see to it that that citizenship is nowhere abridged. It is, therefore, perfectly constitutional for Congress to say to the States, . . . 'you shall treat citizenship as citizenship' . . ."); Cong. Globe, 42d Cong., 2d Sess. 273 (1871) (statement of Sen. Sawyer) ("I believe . . . that as long as the Constitution stands as it does now, every citizen of the country should stand upon an equal plane with every other; that to every citizen of the country the same rights and privileges should belong as to every other . . .").

³⁶² See supra notes 326–30 and accompanying text.

³⁶³ See, e.g., 2 Cong. Rec. app. at 241 (1874) (statement of Sen. Norwood) ("Now, it is clear that all citizens of the United States possess the same privileges and immunities. In their relation as citizens of the Federal Government, are not the rights of all citizens precisely the same? No one can deny it."); id. at 2 (statement of Rep. Southard) (conceding that the Fourteenth Amendment guaranteed equality with respect to "fundamental rights" of citizenship, including protections set forth in the Civil Rights Act of 1866, but denying that it had any "relation to the peculiar and special privileges comprehended in the bill before the House").

³⁶⁴ McConnell, supra note 5, at 1065.

³⁶⁵ 2 Cong. Rec. 379 (1874).

but two objects[:] . . . first, to declare the colored race to be citizens of the United States, and of the States, respectively, in which they reside; and, secondly, to prohibit the States, severally, from denying to the class of citizens, so declared, the same privileges, immunities, and civil rights which were secured to the citizens of the several States, respectively, and of the United States, by the Constitution as it stood before citizenship to the colored race was declared by this amendment.³⁶⁶

The *Slaughter-House* decision was handed down in the midst of the congressional debates regarding the proposed civil rights legislation and significantly altered the trajectory of the debates.³⁶⁷ Prior to that decision, supporters had premised their claims to constitutional authority to enact the bill almost exclusively on the Privileges or Immunities Clause and the inherent equality of United States citizens.³⁶⁸ Justice Miller's opinion for the majority thus gave the legislation's opponents a powerful weapon to argue against the bill's constitutionality.³⁶⁹

The bill's supporters initially adopted divergent arguments in response to the opponents' invocations of *Slaughter-House*. Some simply denied that the case had any bearing on Congress's authority to pass the proposed legislation.³⁷⁰ Others argued for a narrow interpretation of the decision, denying that it prohibited congressional efforts to address racial discrimination.³⁷¹

³⁶⁶ Id. at 379–80. Though Stephens agreed that the Amendment prohibited states from discriminating against their black citizens, he argued that the only “proper remedies” for a state’s violation were “the judgments of courts, to be rendered in such way as Congress might provide.” Id. at 380.

³⁶⁷ McConnell, supra note 5, at 998–1001 (observing that “[t]he constitutional argument” regarding the bill “took an abrupt and surprising turn in 1873, when the Supreme Court handed down its” *Slaughter-House* decision, and that the decision “changed the tenor of the debate and forced the Republicans to clarify or revise the textual basis for their constitutional position”).

³⁶⁸ Id. at 997–98; see also Harrison, supra note 55, at 1425–29.

³⁶⁹ See, e.g., Harrison, supra note 55, at 1429 (observing that “opponents [of the legislation] took up *Slaughter-House* as a chorus”); McConnell, supra note 5, at 1000 (“Democratic opponents of the bill immediately seized on the *Slaughter-House* decision and quoted it over and over.”).

³⁷⁰ See, e.g., 2 Cong. Rec. app. at 304 (1874) (statement of Sen. Alcorn) (denying opinion issued by “another branch” of the government was binding on Congress); id. at 3453–54 (statement of Sen. Frelinghuysen) (conceding that “as citizens of the United States we are all bound to respect that decision and not erect slaughter-houses in that district” but denying that it affected Congress’s power to adopt the proposed law).

³⁷¹ See, e.g., 3 Cong. Rec. 943 (1875) (statement of Rep. Lynch) (claiming that *Slaughter-House* allowed legislation to redress “distinctions and discriminations . . . made on account

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The most forceful challenge to the decision's authority came from radical Senator George Boutwell of Massachusetts. Though Boutwell conceded that the decision was the "law of the case" for the parties, he denied that the decision had any broader legal significance.³⁷² Boutwell harshly criticized Justice Miller's majority opinion, contending that the majority had "made a great mistake" by suggesting "that there were two classes of rights appertaining to citizens of the United States: those derived from the Government of the United States, and those derived from the States."³⁷³ Invoking the Citizenship Clause, Boutwell argued:

Now, then, what is the effect of this [that is, the Citizenship Clause]? First, [the persons described in the Clause] are citizens of the United States; and secondly, they are citizens of the State in which they reside. First and best, the most comprehensive, indeed the only definition of citizenship, is equality of rights. You need no other definition. . . . [A]nd of course one of the first rights, not of the citizen of the State, but of the citizen of the United States, is that in the State in which he chooses to reside he shall be the equal of any other citizen in that State. That is his first immunity, his first privilege; and therefore he claims as a citizen of the United States every privilege and immunity of citizenship in the State in which he resides³⁷⁴

Boutwell argued that even if the Fourteenth Amendment had contained "nothing substantive" except for the declaration of citizenship and Congress's Section 5 enforcement power, Congress would still possess sufficient authority to adopt the proposed civil rights bill.³⁷⁵

Despite the many imaginative attempts to explain away, distinguish, or reject the authority of *Slaughter-House*, the more common response

of race, color, or previous condition of servitude" even if the Amendment did not extend to other contexts).

³⁷² Id. at 1792 (statement of Sen. Boutwell) (stating that the Court's decision "is the law of the case, but it is not law beyond the case; it is not law with reference to the rights of States generally, and certainly is not law for the Senate").

³⁷³ 2 Cong. Rec. 4116 (1874).

³⁷⁴ Id.

³⁷⁵ Id.; see also, e.g., 2 Cong. Rec. app. at 359 (1874) (statement of Sen. Morton) (conceding that Amendment conferred no power on Congress to protect rights that "belong to the citizens of the States as States" but insisting that the right to be free from racial discrimination was not such a right because the "right of a citizen of one State to go into another State and there to enjoy all the privileges and immunities of citizens of that State upon equal terms, is one of the highest franchises that belong to any man as a citizen of the United States").

among Republicans was to turn away from the Citizenship and Privileges or Immunities Clauses as grounds for the legislation's constitutionality and embrace instead an alternative textual theory grounded in the Equal Protection Clause.³⁷⁶ Because the *Slaughter-House* majority had only obliquely touched upon that provision, the equal protection justification avoided a direct conflict with the Court's authority.³⁷⁷ The transition from the citizenship-based justification to equal protection theories did not happen all at once and was hardly seamless.³⁷⁸ Evidence of the eventual transition was, however, clearly reflected in the final language of the bill. Unlike earlier drafts, which had prohibited discrimination against "citizen[s] of the United States," the final version approved by Congress and enacted into law tracked the language of the Equal Protection Clause by extending protection to "all persons within the jurisdiction of the United States."³⁷⁹

D. The Civil Rights Cases

The Civil Rights Act of 1875 was the last significant civil rights legislation adopted by the Reconstruction Congress.³⁸⁰ Congressional Republicans suffered "disastrous" losses in the elections of 1874 and the 1876 Republican presidential nominee, Rutherford B. Hayes, narrowly secured election through a brokered agreement following a disputed Electoral College victory tainted by allegations of pervasive voting fraud.³⁸¹ The contested election of 1876 produced the notorious "Compromise of 1877," which resulted in the removal of federal military authority from the southern states and marked the effective end of Reconstruction.³⁸²

³⁷⁶ See McConnell, *supra* note 5, at 1002.

³⁷⁷ Cf. *Slaughter-House*, 83 U.S. (16 Wall.) at 81 (identifying the existence of discriminatory laws "in the States where the newly emancipated negroes resided," as "the evil to be remedied by" the provision, and expressing doubt that the provision should apply in any other context).

³⁷⁸ See McConnell, *supra* note 5, at 1001 ("So unnatural was the *Slaughter-House* reasoning that most members of Congress continued to speak in terms of privileges and immunities except when explicitly discussing the decision itself.").

³⁷⁹ *Id.* at 1070 (observing that the changed language "reflected the doctrinal shift from the Privileges or Immunities Clause to the Equal Protection Clause" as the basis for the bill).

³⁸⁰ McConnell, *supra* note 351, at 136.

³⁸¹ McConnell, *supra* note 5, at 1088–89.

³⁸² McConnell, *supra* note 351, at 127–30. The background of the disputed Election of 1876 and the Compromise of 1877 are described in Foner, *supra* note 172, at 564–87.

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Following the election of 1876, federal enforcement of the Civil Rights Act of 1875 was sporadic and haphazard.³⁸³ In addition to the declining national political will to protect the rights of southern blacks, federal civil rights enforcement was hampered by the Supreme Court's narrow construction of the Fourteenth Amendment in *Slaughter-House* and subsequent cases.³⁸⁴ The Court adhered to this pattern of narrow interpretation in its 1883 decision in the *Civil Rights Cases*,³⁸⁵ its first decision addressing the constitutionality of the private discrimination provisions of the 1875 Civil Rights Act.

In crafting the private discrimination provisions of the 1875 Act, congressional Republicans had specifically targeted institutions that were assumed to operate under a common law or statutory duty to serve all members of the public without discrimination, such as inns, common carriers, and licensed providers of public accommodations. Supporters thus contended that the law did not create any new legal rights or obligations but merely provided a means for enforcing rights to which all citizens were already entitled.³⁸⁶ Justice Bradley's opinion for the eight-Justice majority rejected the proponents' constitutional theory, holding that "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority."³⁸⁷

The Court's lone dissenter, Justice Harlan, complained that Bradley's decision had "proceed[ed] . . . upon grounds entirely too narrow and artificial."³⁸⁸ Picking up on Bradley's concession that Section 2 of the Thirteenth Amendment gave Congress "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery,"³⁸⁹ Harlan

³⁸³ McConnell, *supra* note 5, at 1087–88.

³⁸⁴ See, e.g., *United States v. Harris*, 106 U.S. 629, 637–40, 644 (1882) (invalidating portions of Ku Klux Act of 1871); *United States v. Cruikshank*, 92 U.S. 542, 552–54 (1875) (holding that right to assemble and right to keep and bear arms were not privileges or immunities of national citizenship that Congress had power to protect).

³⁸⁵ 109 U.S. 3 (1883).

³⁸⁶ See McConnell, *supra* note 5, at 992–97 (describing supporters' constitutional theory); see also Harrison, *supra* note 55, at 1425 (observing that "the private persons covered by the 1875 Act were those *already* under a duty to serve the public without discrimination").

³⁸⁷ *The Civil Rights Cases*, 109 U.S. at 17.

³⁸⁸ *Id.* at 26 (Harlan, J., dissenting).

³⁸⁹ *Id.* at 20. Bradley rejected the claim that the Thirteenth Amendment provided the requisite constitutional authority for the 1875 Act by denying that racial discrimination by common carriers, public accommodations, and similar facilities was an "incident" of slavery. *Id.* at 22–24 (majority opinion).

first contended that the law could be defended as a proper exercise of that constitutional power.³⁹⁰

Harlan then turned to the Fourteenth Amendment, focusing specifically and extensively on the significance of the Citizenship Clause. Harlan argued that “[t]he citizenship . . . acquired, by [the former slaves], in virtue of an affirmative grant from the nation,” could be “protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character” pursuant to Congress’s Section 5 power.³⁹¹ Harlan observed that the “essential inquiry” in determining the scope of such power was “what, if any, right, privilege or immunity was given, by the nation, to colored persons, when they were made citizens of the State in which they reside?”³⁹²

Harlan asserted that there was at least one right, “if there be no other” that was “secured to colored citizens of the United States—as between them and their [own] respective states—by the national grant to them of State citizenship,” namely “exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State.”³⁹³ According to Harlan:

Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude.³⁹⁴

Harlan’s dissent in the *Civil Rights Cases* is today one of the best-remembered articulations of the “equal citizenship” interpretation of the Fourteenth Amendment expressed during the Reconstruction era.³⁹⁵ It was also among the last. The ascendancy of the *Slaughter-House* “dual citizenship” theory, which by 1883 had become firmly entrenched in Supreme Court doctrine, rendered Harlan’s effort to revive the Citizen-

³⁹⁰ Id. at 34–37 (Harlan, J., dissenting).

³⁹¹ Id. at 46.

³⁹² Id. at 47.

³⁹³ Id. at 48.

³⁹⁴ Id.

³⁹⁵ See, e.g., Kenneth L. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 19–20 (1977) (citing Harlan’s dissent as support for the equal citizenship understanding of the Fourteenth Amendment); Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330, 355–56 (2006) (same).

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ship Clause as a source of legally enforceable equality rights a “lost cause.”³⁹⁶

IV. THE ORIGINAL MEANING OF THE CITIZENSHIP CLAUSE

The foregoing discussion has focused on surveying the copious historical evidence demonstrating that at least one widely shared understanding of “citizenship” at the time of the Fourteenth Amendment’s enactment entailed a commitment to extending equal civil rights to all persons legally recognized as “citizens.” It remains to be shown, however, that this understanding should lead self-professed originalists to embrace an interpretation of the Fourteenth Amendment’s Citizenship Clause that encompasses such an “equal citizenship” component. This Part assesses the equal citizenship interpretation of the Citizenship Clause in light of the two leading theories of originalist interpretation—original intent originalism and original public meaning originalism. This Part also considers how the equal citizenship interpretation of the Citizenship Clause relates to the more explicit equality guarantee set forth in the Fourteenth Amendment’s Equal Protection Clause.

A. *The Equal Citizenship Interpretation and Originalist Methodology*

Originalism has been famously described as a “theory working itself pure.”³⁹⁷ A perhaps more fitting description might be that of originalism as a “big tent” comprising diverse and, to some extent, conflicting theories united by a core commitment to the interpretive primacy of the “fixed” meaning of the constitutional text at the time of enactment.³⁹⁸ The existence of significant diversity among originalist theories complicates efforts to make definitive claims regarding whether a particular re-

³⁹⁶ Benedict, *supra* note 351, at 76–77; see also Karst, *supra* note 395, at 19 (observing that Bradley’s opinion for the majority in the *Civil Rights Cases* “sealed the fate of the equal citizenship principle for some seventy years”).

³⁹⁷ Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1114 (2003).

³⁹⁸ See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *Duke L.J.* 239, 244 (2009) (arguing that “originalism” is “not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories”); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law and Legal Theory Research Paper Series, Working Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> (acknowledging diversity among originalist theories but describing the proposition “that the meaning . . . of a given Constitutional provision was fixed at the time the provision was framed and ratified” as a core commitment uniting the “family of originalist theories”).

sult either is or is not consistent with “originalism” as an interpretive methodology. At a minimum, such claims must be attentive to the diversity of originalist theories and, where necessary, clearly explain the particular version of “originalism” that is driving one’s argument.

Though it is possible to categorize originalist theories across a range of dimensions, it is common to divide such theories into two broad families—“original intent” theories, which focus on the intentions or understandings of the particular historical actors who participated in the relevant drafting and/or ratification processes, and “original public meaning” theories, which focus on how the relevant constitutional text would most likely have been understood by a hypothetical “reasonable person” at the time of enactment.³⁹⁹ Over time, the weight of academic originalist opinion has shifted away from intent-focused theories, which had predominated during the 1970s and 1980s, and toward approaches that emphasize original public meaning.⁴⁰⁰ Despite this shift in emphasis, intent-based theories continue to attract the support of prominent adherents.⁴⁰¹

In the two Subsections that follow, I consider how proponents of original intent and original public meaning theories, respectively, might assess the case for recognizing an equality component as inhering in the original meaning of the Citizenship Clause based on the evidence surveyed in Parts I through III above. In view of the sheer diversity among originalist theories, it may not be possible to construct an argument that will fully satisfy all originalists. But, as the following Subsections will show, a compelling argument can be made for recognizing an equality

³⁹⁹ See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *Nw. U. L. Rev.* 751, 758–61 (2009) (identifying “original intent” and “original public meaning” approaches as the “two leading positive theories of [originalist] interpretation”).

⁴⁰⁰ See, e.g., Colby & Smith, *supra* note 398, at 247–55 (describing the shift from “original intent” originalism to “original meaning” originalism).

⁴⁰¹ Prominent intentionalist originalists include Keith E. Whittington, Richard S. Kay, Larry Alexander, and Saikrishna Prakash. See, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 110–59 (1999); Larry Alexander & Saikrishna Prakash, “Is that English You’re Speaking?” *Why Intention Free Interpretation Is an Impossibility*, 41 *San Diego L. Rev.* 967 (2004); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *Nw. U. L. Rev.* 703 (2009).

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component in the Citizenship Clause under both an original intent and an original public meaning framework.⁴⁰²

1. Equal Citizenship and Original Intent

Proponents of original intent theories generally argue that the meaning of language necessarily depends upon the intentions or understandings of some actual or assumed speaker.⁴⁰³ And because the Constitution's status as law derives from its enactment by actual, historically situated framers and ratifiers, original intent theorists argue that the actual subjective intentions and understandings of these historical actors, rather than the understanding of some imagined "reasonable person," must furnish the standard for interpretive correctness.⁴⁰⁴

One possible objection to the equal citizenship interpretation of the Citizenship Clause that might be asserted from an original intent perspective arises from the somewhat unusual circumstances through which the provision came to be included in the Amendment. As discussed above, the provision was inserted late in the drafting process with rela-

⁴⁰² At a minimum, the historical evidence surveyed in the preceding Parts should be sufficient to convince proponents of either approach that the equality interpretation defended in this Article falls within the broad range of historically plausible interpretations of the constitutional text. Cf. H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659, 690 (1987) (observing that "[h]istory sometimes reveals a range of 'original understandings'" rather than a single determinate understanding). For some originalists, this conclusion alone would likely suffice to justify judicial invalidation of federal laws that subject citizens to legal inequalities on the basis of race. Cf. Jack M. Balkin, *Living Originalism* 267–68 (2011) (defending a version of originalism that emphasizes objective meaning of the text and values history primarily "as a check on our assumptions about what" meanings the text can plausibly bear); id. at 249–54, 433 n.150 (arguing that *Bolling* and its associated doctrine are consistent with the objective meanings of multiple provisions, including the Citizenship Clause and the Fifth Amendment Due Process Clause). Other originalists, however, insist on a more demanding standard that would limit courts to enforcing only the "most probable" interpretation from among the range of textually and historically plausible candidates. See, e.g., McGinnis & Rappaport, *supra* note 399, at 773 (arguing that interpreters should "choose the most probable interpretation available with the aid of interpretive rules—norms internal to the enterprise of originalism"). The analysis in the Subsections that follow will be addressed primarily to those who advocate this more demanding standard.

⁴⁰³ See, e.g., Alexander & Prakash, *supra* note 401, at 969 (asserting that "one cannot interpret texts without reference to the intentions of some author"); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 230 (1988) ("Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them.").

⁴⁰⁴ See, e.g., Kay, *supra* note 403, at 231 (arguing that substituting ordinary meaning for intended meaning "in interpreting a *legal* text raises an acute issue of authority because it replaces the actual lawmaker with a hypothetical normal speaker of the language").

tively little debate or discussion and seems to have been added largely for the purpose of clarifying who would be entitled to claim the benefits of Section 1's separate Privileges or Immunities Clause.⁴⁰⁵ Based on this background, Professor Siegel contends that "[f]or originalists wedded to the constitution makers' specific intent, the Citizenship Clause can be read only to specify those who participate in the status" of citizenship but "cannot be read to secure for status holders any particular panoply of rights."⁴⁰⁶

If one focuses narrowly on the specific motivations that drove the decision to include a definition of citizenship in the Fourteenth Amendment, this objection has some force. The congressional debates preceding the Amendment's enactment suggest that the drafters understood the Amendment's separate Privileges or Immunities and Equal Protection Clauses as the primary constraints on state discrimination.⁴⁰⁷ The principal motivation for including the Citizenship Clause was, as Siegel observes, simply to clarify who would be protected by the former provision.⁴⁰⁸ Moreover, there seems to have been virtually no explicit discussion of the potential effect of the Clause on the permissibility of discrimination by the *federal* government during the framing and ratification debates.⁴⁰⁹ An original intent originalist who insists on identifying the relevant "intent" as encompassing only those consequences specifically foreseen and discussed during the enactment process may thus have difficulty accepting the Citizenship Clause as the source of a judicially enforceable equality norm applicable to the federal government.

Without denying that some original intent originalists might insist upon a similarly narrow approach to identifying the relevant "original intent," it is clear that such a narrow focus is neither compelled by the theory of original intent, as such, nor embraced by all original intent originalists.⁴¹⁰ For example, Professor Richard Kay, one of the leading

⁴⁰⁵ See *supra* Section II.C.

⁴⁰⁶ Siegel, *supra* note 19, at 580.

⁴⁰⁷ McConnell, *supra* note 5, at 997–1005.

⁴⁰⁸ See *supra* notes 250–58 and accompanying text (discussing Senator Wade's proposal to clarify the Privileges or Immunities Clause and subsequent addition of Citizenship Clause).

⁴⁰⁹ See Siegel, *supra* note 19, at 585 ("[I]n extensive congressional and public debates, no one ever specifically intimated the Fourteenth Amendment's first section had any effect on the national government beyond settling the vexed definition of citizenship.").

⁴¹⁰ See, e.g., Whittington, *supra* note 401, at 178–79 (distinguishing between extratextual "motivations" or "expectations" that drove the decision to include a particular provision in the Constitution and the "illocutionary intentions" conveyed by the text itself and arguing that only the latter should be considered binding); cf. Raoul Berger, *Government by Judici-*

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modern proponents of original intent originalism, argues that “[a]s a practical matter, an approach which relies on ordinary meanings will usually result in the same interpretation that would follow from original intentions adjudication.”⁴¹¹ As Kay explains:

We expect the constitution-makers to use words according to ordinary usage at the time of enactment. The best evidence of the enactors’ intent is the language they used. Indeed, in many cases, any other conclusion is so unlikely that an explicit reference to extrinsic evidence of intent is unnecessary. Certainly, when most readers agree that a particular clause or phrase means one thing, the burden of persuasion ought to be on the advocate of some other meaning. Such a presumption is fully consistent with original intentions adjudication⁴¹²

Because enactors choose language deliberately for the purpose of conveying their intended meaning and because such language is carefully considered during the drafting and ratification processes, Kay argues that occasions where the intended meaning of a text fails to match its objective public meaning should be “very rare.”⁴¹³ In fact, Kay contends that any such divergence would involve “some kind of mistake by the rulemakers” in attempting to convey their intended meaning.⁴¹⁴

Thus, an original intent originalist working within a framework similar to Kay’s should presume that the “original intent” underlying the Citizenship Clause corresponds to the public meaning of its text at the time of enactment absent compelling evidence of some “mistake” by the enactors that caused its public meaning to diverge from the meaning they collectively intended. Kay suggests two possible categories of “mistakes” that may cause the intended meaning of a constitutional provision

ary: *The Transformation of the Fourteenth Amendment* 363 (1977) (defining “original intent” as “the meaning attached by the framers to the words they employed in the Constitution”).

⁴¹¹ Kay, *supra* note 403, at 234; see also Kay, *supra* note 401, at 713 (contending that “the public meaning of the constitutional text will almost always mirror the intentions of the human beings who drafted and approved it”). Kay’s work is unusually detailed in specifying a methodology by which the “intentions” of the relevant constitutional enactors may be discerned and aggregated together into a single collective “original intent.” See, e.g., Solum, *supra* note 398, at 42 (crediting Kay with providing the “best answers to the collective intentions problem”). For this reason, I focus particular attention on Kay’s methodology for identifying the relevant “original intent” of the Citizenship Clause.

⁴¹² Kay, *supra* note 403, at 234–35 (footnotes omitted).

⁴¹³ Kay, *supra* note 401, at 712.

⁴¹⁴ *Id.*

to diverge from its original public meaning. The first category involves a simple drafting or transcription error of the type typically associated with the “scrivener’s error” doctrine in statutory interpretation.⁴¹⁵ The second category involves situations in which the scope of a constitutional provision is vague or otherwise unclear such that results that were not collectively intended by all the enactors whose assent was necessary to enactment might nonetheless fall within the literal meaning of the enacted text.⁴¹⁶

Though these two categories are conceptually distinct and, on Kay’s account, call for different methods of resolution,⁴¹⁷ they may, for present purposes, be collapsed into a single overarching inquiry—namely, whether, based on the available evidence of the intentions of the Fourteenth Amendment’s framers and ratifiers, we can be confident that a specific proposal to prohibit the federal government from discriminating against United States citizens would have been rejected. If this question is answered in the affirmative, we can be reasonably confident that interpreting the Citizenship Clause to achieve this result would be inconsistent with the original intent of the relevant enactors, even if a hypothetical “reasonable person” at the time of enactment might have read the provision more broadly.⁴¹⁸ By contrast, if this question is answered in the negative, a proponent of Kay’s version of original intent originalism should have relatively little difficulty concluding that the “original intent” of the Citizenship Clause on this particular issue is consistent with the “public meaning” of the enacted text.

In assessing the evidence of the enactors’ intentions on this point, it will be useful to proceed in stages. As an initial matter, it seems abundantly clear that the Citizenship Clause was intended to bind both state

⁴¹⁵ Id. at 713.

⁴¹⁶ Id.

⁴¹⁷ Kay argues that mistakes of the first variety should be resolved by giving the text its obviously intended meaning rather than its unintended objective meaning. Id. at 713–14. Somewhat more controversially, he urges that “mistakes” involving vague and open-ended provisions should be resolved by narrowing the provision to a “core” intended meaning shared by the group of enactors whose assent was necessary to enactment, excluding any “idiosyncratic” meanings that were held by only a minority of the enacting coalition. Id. at 713; see also Kay, *supra* note 403, at 248–51. But cf. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 *Wake Forest L. Rev.* 909, 954–55 (1998) (criticizing Kay’s proposed “core meaning” approach for summing different understandings).

⁴¹⁸ Cf. Kay, *supra* note 401, at 714–21 (criticizing public meaning originalism as insufficiently connected to the democratic processes that rendered the constitutional text authoritative and as unduly prone to manipulation by modern interpreters).

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and federal actors. This intention is plainly reflected in language of the provision, which, unlike the Fourteenth Amendment's second sentence, is not limited to "state" conduct.⁴¹⁹ Further evidence on this point is provided by the remarks of Senator Jacob Howard, the provision's principal sponsor, during the Senate debate of May 30, 1866. During that debate, Senator Doolittle, who opposed the Fourteenth Amendment, asserted that the proposed Citizenship Clause demonstrated that the Amendment's supporters entertained doubts regarding Congress's authority to confer citizenship by statute, as it had done in the earlier-adopted Civil Rights bill.⁴²⁰ Howard denied Doolittle's assertion and insisted that the provision's goal was to entrench the citizenship definition against future repeal by a pro-Southern Congress:

We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.⁴²¹

This response would have been unavailable to Howard had he not understood the Citizenship Clause as a restraint on federal as well as state lawmaking and no other Senator questioned Howard's explanation.

It is equally apparent that many members of the Thirty-ninth Congress shared the understanding that United States citizenship carried with it certain rights, including, paradigmatically, a right to equal legal treatment at the hands of government. The legislative debates concerning both Section 1 and its predecessor provision in the Civil Rights bill abound with statements evincing this understanding.⁴²² Indeed, my review of the debates has revealed only a single occasion where a member

⁴¹⁹ If anything, the applicability of the Clause to the federal government would have been even more apparent than its applicability to the states given the relevant background interpretive presumptions applied to constitutional provisions at the time. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that "the limitations on power," set forth in the Constitution "if expressed in general terms, are naturally, and we think, necessarily applicable to the government created by the instrument").

⁴²⁰ Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).

⁴²¹ *Id.*

⁴²² See *supra* Sections II.A–C. For particularly clear illustrations of this understanding, see *supra* text accompanying notes 182–92 (statement of Sen. Trumbull), 197 (statement of Rep. Wilson), 202–04 (statement of Sen. Van Winkle), 272 (statement of Sen. Howard).

of Congress expressed a contrary understanding.⁴²³ Those remarks not only failed to persuade but also seem to have sparked genuine puzzlement on the part of those to whom they were addressed.⁴²⁴

Combining these two understandings—namely, that the Citizenship Clause bound the federal government and that citizenship required legal equality with respect to civil rights—yields a fairly strong inference that the federal government, like the states, was constitutionally required to respect the legal equality of all United States citizens.

There remains, however, the question of why this specific understanding, if intended, failed to leave any clear trace in the legislative record.⁴²⁵ Two plausible answers suggest themselves. First, the central problem at which both Section 1 and the subsequent Reconstruction-era civil rights legislation were targeted was the problem of *state* discrimination. Constitutional debates surrounding these issues understandably focused on the source of Congress's power to redress such state abuse and the scope of that power. By contrast, congressional efforts to eliminate racially discriminatory federal laws and policies—many of which had already been eradicated during the Civil War period⁴²⁶—raised no comparable questions of constitutional authority. Because members of the Reconstruction Congress generally supported efforts to eliminate race-based discrimination in federal laws on policy grounds, invocations of the Constitution in such contexts would have been largely beside the point. It is thus hardly surprising that Reconstruction-era lawmakers devoted relatively little attention to the Amendment's effect on the permissibility of federal discrimination.

A second explanation for the lack of explicit discussion of the Citizenship Clause as a source for a federal constitutional equality requirement arises from the fact that many Reconstruction-era lawmakers assumed that the federal government was *already* prohibited from discriminating on the basis of race before the Fourteenth Amendment's

⁴²³ See *supra* note 207 and accompanying text (discussing remarks of Senator Henderson during the debate over the Civil Rights Act).

⁴²⁴ See *supra* notes 208–09 and accompanying text (quoting reactions to Henderson's remarks). Even Henderson himself seemed to embrace the broader conception of citizenship in a subsequent speech addressing the meaning of the Fourteenth Amendment's Citizenship Clause. See *supra* note 276.

⁴²⁵ See *supra* note 409.

⁴²⁶ Siegel, *supra* note 19, at 549; see also *id.* at 558 (noting that “the Civil War and Reconstruction Congresses repealed almost all laws granting preferences to ‘whites’”).

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enactment.⁴²⁷ Though Republican lawmakers were not always clear or consistent in identifying the precise source of such a requirement,⁴²⁸ it is clear that many viewed the requirement as inhering in the very nature of United States citizenship itself.⁴²⁹ Given the prevailing view among congressional Republicans that the Citizenship Clause was merely declaratory of what existing law already required,⁴³⁰ it is hardly surprising that such lawmakers did not point to that specific provision as the source of the federal government's obligation to treat all citizens equally—a requirement they presumed would have existed even if the Fourteenth Amendment was never added to the Constitution.⁴³¹

⁴²⁷ See, e.g., Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why "No State" Does Not Mean "No State,"* 10 *Const. Comment.* 87, 89 (1993) ("Leading participants in the debate over the Fourteenth Amendment treated as common knowledge the proposition that the pre-Civil War Constitution already prohibited federal laws inconsistent with equal protection."); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *Va. L. Rev.* 753, 787–88 (1985) ("[T]here is substantial evidence that the framers of the fourteenth amendment . . . believed that Congress was, and indeed always had been, bound by the principles that the amendment extended to the states.").

⁴²⁸ See, e.g., Balkin, *supra* note 402, at 250–51 (discussing belief by Bingham and others that "equal protection" was synonymous with the Fifth Amendment's "due process of law"); Siegel, *supra* note 19, at 553–54 (discussing Sumner's argument that the Declaration of Independence prohibited the federal government from discriminating on the basis of race); cf. *Cong. Globe*, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens) (asserting that "every one of [the] provisions" proposed to be included in the Fourteenth Amendment (including the Equal Protection Clause) was already "asserted, in some form or other, in our DECLARATION or organic law" and that the principal Amendment was needed because the existing limitations applied only to the federal government and not the states) (emphasis in original).

⁴²⁹ See *supra* note 422.

⁴³⁰ See *supra* notes 170, 190–92 and accompanying text (discussing pre-Fourteenth Amendment Republican belief that native birth alone established citizenship).

⁴³¹ The declaratory understanding of the Citizenship Clause does suggest that congressional Republicans most likely expected that the Clause would only clarify, rather than change, the content of existing law. It does not follow, however, that they did not understand or intend the provision's language to require equality. To see why, consider the Seventeenth Amendment, which opens with a declaration that "[t]he Senate of the United States shall be composed of two Senators from each State" before providing that such Senators are to be "elected by the people" of the State. U.S. Const. amend. XVII. The enactors of this Amendment clearly expected that their "elected by the people" language would change the existing practice of allowing each state's legislature to select its senators. See U.S. Const. art. I, § 3, cl. 1. But they almost certainly did *not* expect that the language providing for "two Senators from each State" would change existing law, as that language merely repeated language that already appeared in the Constitution. *Id.* It does not follow, however, that the "two Senators" requirement was not part of the Amendment's intended meaning. If, by some bizarre chain of events, the meaning of "two Senators" at the time of the Seventeenth Amendment's adoption had somehow diverged from its original intended meaning at the time of Article One's

In arguing that the equal citizenship interpretation is consistent with the extrinsic evidence of the enactors' intentions, I do not wish to be understood as making the stronger claim that such evidence is so overwhelming as to compel such an interpretation without regard to the objective meaning of the enacted text. As discussed above, the original version of Section 1 that emerged from the Joint Committee in April 1866 contained no express limitation on federal conduct whatsoever.⁴³² Had this version of the Amendment been enacted into law without the addition of the Citizenship Clause, an original intent originalist might have a very difficult time accepting that Section 1 could nonetheless be interpreted to bind the federal government.⁴³³

But if one accepts the seemingly uncontroversial claim that the objective meaning of the enacted text provides strong evidence of intended meaning,⁴³⁴ then such objective meaning should provide an important interpretive baseline against which claims about intended meaning may be judged. Identifying that baseline involves an inquiry that largely corresponds to the methodology of original public meaning originalism, which will be considered in the following Subsection.⁴³⁵ For present purposes, the critical point is simply that the extrinsic evidence of the relevant enactors' intentions provides no grounds for confidence that the enactors specifically intended to leave the federal government free to discriminate.⁴³⁶ As such, there is little basis for believing that original

adoption, it would not change the fact that the adopters of the later amendment intended their own understanding of "two Senators" despite their failure to recognize the inconsistency between that portion of their Amendment and the intended meaning of the preexisting constitutional rule. Similarly, if the Fourteenth Amendment's framers understood citizenship to require equality, then it seems natural to read the citizenship declaration they adopted as embodying that understanding, even if those framers had no conscious awareness that they were changing the content of existing law. Cf. Williams, *supra* note 13, at 500–09 (elaborating similar argument with respect to the relationship between the Fifth and Fourteenth Amendment Due Process Clauses).

⁴³² See *supra* Section II.C.

⁴³³ Professor Mark Graber has suggested such an argument, contending that the Amendment's framers "chose the limiting phrase 'No State shall deny' only because they believed that the Constitution already prohibited federal officials from making arbitrary and discriminatory distinctions among individuals." Graber, *supra* note 427, at 91. For a critique of Graber's argument, see Siegel, *supra* note 19, at 573–78.

⁴³⁴ See Kay, *supra* note 401, at 712.

⁴³⁵ See *id.* at 712–14 (discussing overlap between original intent and original public meaning approaches).

⁴³⁶ See also *infra* note 472.

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intent originalism and original public meaning originalism would point to inconsistent interpretations on this particular issue.

2. *Equal Citizenship and Original Public Meaning*

Unlike original intent theorists, proponents of original public meaning originalism reject the proposition that the “meaning” of constitutional language is equivalent to the meaning subjectively understood or intended by the actual actors who participated in the drafting and ratification processes.⁴³⁷ Instead, most original public meaning originalists identify the relevant “meaning” as the objective public meaning of the constitutional text, when read in context, as it would have been understood by a reasonable observer at the time of the provision’s adoption.⁴³⁸

Though different public meaning originalists describe the “reasonable observer” at the center of their methodological approach in subtly different ways,⁴³⁹ most agree on a handful of key characteristics such an individual should possess, including the ability to speak competently and understand English and at least a reasonable degree of familiarity with the provision’s background political and legal context and the particular circumstances that motivated its adoption.⁴⁴⁰ To determine the objective public meaning that the relevant constitutional language would have conveyed to such a hypothetical observer, public meaning originalists consult a broad range of interpretive sources, including standard dictionary definitions, contemporaneous legal treatises and judicial opinions, public statements regarding the provision during the drafting and ratifi-

⁴³⁷ See, e.g., Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 *Const. Comment.* 191, 196 n.20 (2001) (“[M]ost modern originalists . . . reject any strict reliance on direct historical evidence of founding-era beliefs.”).

⁴³⁸ See, e.g., Barnett, *supra* note 247, at 92 (“‘[O]riginal meaning’ originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”); McGinnis & Rappaport, *supra* note 399, at 761 n.29 (“Most original public meaning theorists rely on a reasonable reader or author.”).

⁴³⁹ See, e.g., Kay, *supra* note 401, at 721–24 (describing various formulations public meaning originalists have used to describe the hypothetical “reasonable person”).

⁴⁴⁰ See, e.g., Kesavan & Paulsen, *supra* note 397, at 1132 (focusing on the understanding of a “hypothetical, objective, reasonably well-informed reader”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 37–38 (Amy Gutmann ed., 1997) (arguing that the Constitution should be interpreted in accordance with the original meaning of the text as understood by “intelligent and informed people of the time”).

ation processes, and early post-enactment interpretations and applications of the provision.⁴⁴¹

Accepting these methodological premises as a starting point, it seems reasonable to conclude that most public meaning originalists would consider the full range of materials surveyed in Parts I through III as bearing on the most probable original public meaning of the Citizenship Clause. A hypothetical reasonable person at the time of the Fourteenth Amendment's enactment could at least potentially have been aware of all the materials surveyed in Parts I and II, all of which predate the Amendment's adoption. And although the early interpretations surveyed in Part III would not have been available at the time of enactment, they are nonetheless probative evidence of how actual interpreters at a point close in the time to the Amendment's enactment understood and discussed its terms.⁴⁴²

Viewing the Citizenship Clause in light of this background context gives rise to a strong inference that a hypothetical "reasonable person" at the time of the Fourteenth Amendment's adoption would most likely have recognized the Clause as doing something more than conferring a formal legal status on the persons it recognizes as "citizens of the United States." During the antebellum period, both the pro-Southern theory underlying the denial of free black citizenship and the abolitionist theory supporting free blacks' entitlement to equal civil rights were premised on the assumption that "citizenship" carried with it an entitlement to certain legal rights, including the right to equal treatment at the hands of government.⁴⁴³ This assumption was reflected in numerous antebellum legal opinions, including Chief Justice Taney's *Dred Scott* opinion—the specific holding that drove the decision to include a definition of citizen-

⁴⁴¹ See, e.g., Kesavan & Paulsen, *supra* note 397, at 1148 (identifying various "commonly-accepted" sources of original public meaning, including public statements made during the ratification process, "early congressional, executive, and judicial precedents" and "the works of early commentators on the Constitution"); cf. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *Tex. L. Rev.* 1, 27 (2011) ("In order to recapture the objective original public meaning of § 1, it is helpful to consult extratextual sources that document the events that led to the writing of the Amendment, the intellectual history of the times, contemporaneous dictionaries, the discussion of the Amendment, and newspaper accounts at the time of the Fourteenth Amendment's adoption.").

⁴⁴² See, e.g., Kesavan & Paulsen, *supra* note 397, at 1182 (arguing that post-enactment evidence "is probative of original linguistic meaning and should be consulted even when" pre-enactment evidence "is seemingly unambiguous").

⁴⁴³ See *supra* Subsection I.B.3.

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ship in the Constitution.⁴⁴⁴ The assumption was also clearly reflected in the extensive legislative debates surrounding the Citizenship Clause's predecessor provision in the Civil Rights Act as well as in the more abbreviated Senate debate preceding the adoption of the Citizenship Clause itself and the subsequent ratification debates in the states.⁴⁴⁵

There are, however, at least two potential objections that might be raised against the equal citizenship interpretation of the Citizenship Clause under a public meaning originalist framework—one grounded in the provision's text and the other in the background historical and legal context against which it was enacted.

The textual challenge arises from the absence of a federal equivalent to the "No state shall" language that introduces the Privileges or Immunities, Equal Protection, and Due Process Clauses of the Amendment's second sentence. The absence of parallel prohibitory language explicitly binding the federal government to the restrictions expressly imposed upon the states through the latter set of provisions might reasonably be thought to invite the inference that the Amendment should be read to impose no similar restraints on federal conduct.⁴⁴⁶

While an express prohibition of federal discrimination would have left little room for doubt, it does not necessarily follow that the absence of such express language should be understood to negate reasonable inferences that might otherwise be drawn from the Citizenship Clause as a standalone provision. As an initial matter, while it is true that most rights-conferring provisions of the federal Constitution contain explicit mandatory or prohibitory language,⁴⁴⁷ this is not the only textual formulation capable of conveying an intention to confer rights. Consider the following two alternative formulations for recognizing a right to be free from "unreasonable searches and seizures," the first drawn from the Fourth Amendment to the federal Constitution and the second from the Declaration of Rights in Massachusetts' Constitution of 1780:

⁴⁴⁴ See *supra* Subsection I.C.1.

⁴⁴⁵ See *supra* Sections III.A–D.

⁴⁴⁶ See Siegel, *supra* note 19, at 585 (suggesting that "originalists may decide that the . . . failure [of the Fourteenth Amendment's framers] to specifically constrain the power of the national government to discriminate indicates a determination to leave that power undiminished").

⁴⁴⁷ See, e.g., Gregory Brazeal, *A Machine Made of Words: Our Incompletely Theorized Constitution*, 9 U. N.H. L. Rev. 425, 435 (2011) ("Unlike the Declarations of Rights in many of the state constitutions, the Bill of Rights consists [almost] entirely of concise, functional rules in the form of 'shall' and 'shall not' statements.").

1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated⁴⁴⁸
2. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions.⁴⁴⁹

Unlike the Fourth Amendment, which contains the familiar “shall not” language used in most of the federal Constitution’s rights-conferring provisions, the Massachusetts provision merely recognizes the existence of the right without expressly declaring that it “shall not” be infringed. But the omission of express prohibitory language in the Massachusetts provision does not render it any less clear than its federal counterpart. Because the prohibition on infringement inheres in the very nature of a “right,” the textual recognition of the right itself connotes that governmental actors may not violate that right even if such a prohibition is not expressly spelled out on the face of the constitutional text.⁴⁵⁰

Of course, the Citizenship Clause stops short of even explicitly acknowledging a right to equal treatment at the hands of government as an incident of citizenship. Instead the Clause merely declares *who* is entitled to citizenship without saying anything specific about *what* that status entails.⁴⁵¹ But while the Citizenship Clause alone does not explicitly require the federal government to accord any particular rights to its citizens, the Fourteenth Amendment as a whole does something quite similar. The Citizenship Clause requires the federal government to recognize certain individuals—that is, those born or naturalized in the United States and subject to its jurisdiction—as its citizens. The Privileges or Immunities Clause recognizes a class of “privileges or immunities” that belong to “citizens of the United States” and prohibits the states from

⁴⁴⁸ U.S. Const. amend. IV.

⁴⁴⁹ Mass. Const. art. XIV, pt. I (1780).

⁴⁵⁰ See, e.g., Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 *Oxford J. Legal Stud.* 18, 27 (1993) (“The term correlative to the [constitutional] claim-right is of course the duty incumbent upon officials and others to respect and uphold the right.”); cf. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 31–32 (1914) (describing a correlative relationship between a grant of “rights” and the corresponding “duties” that arise as a result).

⁴⁵¹ See Smith, *supra* note 62, at 683 (observing that “technically, the language of the first sentence of Section One does not provide a true ‘definition’ of the term ‘citizen,’ but rather a statement of the conditions sufficient for attaining the status of ‘citizen’ of a state as well as of the United States”).

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“mak[ing]” or “enforc[ing]” any laws that “abridge” such rights.⁴⁵² While the federal government is not similarly prohibited from “abridging” such rights by the express terms of the Amendment’s second sentence, reading that sentence in conjunction with the first sentence’s mandate that certain persons be recognized as “citizens of the United States” gives rise to a strong inference that the federal government, like the states, is bound to respect the “privileges or immunities” that belong to such individuals.⁴⁵³ As in the above-described example drawn from the Massachusetts Declaration of Rights, the textual recognition of certain rights as belonging to “citizens of the United States” suggests that the United States, like the states, may not abridge those rights.⁴⁵⁴

Moreover, even if construed strictly as a standalone provision, apart from any additional inferences that might be drawn from the Privileges or Immunities Clause, the Citizenship Clause alone could reasonably be construed to require that the United States refrain from abridging whatever inherent rights its citizens were understood to possess by virtue of their citizenship. Sometimes, the mere textual recognition of a preexisting legal status or concept might be understood to incorporate the incidents or attributes traditionally associated with that status or concept. For example, the Constitution’s textual recognition of certain public officials as “judges”⁴⁵⁵ might reasonably be understood “to mean not simply a judicial official who decides cases according to law” but rather “an

⁴⁵² Cf. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 *J. Contemp. Legal Issues* 409, 423 (2009) (“The semantic content of the [Privileges or Immunities Clause] is sufficient, by itself, to support the conclusion that at least some rights must be included—otherwise the clause would be without legal effect.”).

⁴⁵³ See, e.g., Balkin, *supra* note 29, at 87 (“[T]he text of the [Fourteenth] [A]mendment recognizes and confirms the existence of privileges and immunities of national citizenship. If the states may not abridge these privileges or immunities, a fortiori neither may the federal government.”).

⁴⁵⁴ See *supra* notes 448–50 and accompanying text. This inference is particularly strong if the Privileges or Immunities Clause is understood to refer to “privileges or immunities” that persons possess by virtue of their United States citizenship. On this reading, the Privileges or Immunities Clause would be equivalent to a declaration that United States citizenship does, in fact, confer certain privileges and immunities. It should be noted that this is not the only possible way to make textual sense of the Amendment’s reference to “privileges or immunities of citizens of the United States.” See, e.g., Solum, *supra* note 452, at 423–26 (surveying various possible readings of this phrase). But this reading is a very plausible way of understanding the text and is consistent with the way numerous contemporaneous interpreters actually described the “privileges or immunities” referred to in the Clause. See *infra* notes 467–68 and accompanying text.

⁴⁵⁵ See, e.g., U.S. Const. art. III, § 1 (referring to “[t]he Judges . . . of the supreme and inferior Courts”).

official who possesses” at least some “of the traditional powers and immunities of Anglo-American judges,” such as the common law rule of absolute judicial immunity against damages suits.⁴⁵⁶ Nor is this example unique. Similar textual arguments have been advanced in support of recognizing inherent attributes or incidents of other constitutionally recognized concepts, including “states,”⁴⁵⁷ “Indian tribes,”⁴⁵⁸ “Congress,”⁴⁵⁹ and “war.”⁴⁶⁰

If arguments of this form are acknowledged as legitimate ways of reasoning from the constitutional text, there seems to be little basis, at least in principle, to resist reading the Citizenship Clause as encompassing those rights that were widely recognized at the time of its adoption as traditional “incidents” of citizenship. In fact, the proposition that the declaration of citizenship encompasses at least *some* rights that were not expressly identified in the Constitution seems difficult to resist. For example, it seems dubious, under any reasonable understanding of “citizenship” (either in 1868 or today), that the federal government could forcibly deport persons acknowledged to be “citizens” or make it a crime for them to remain within the territorial jurisdiction of the United States.⁴⁶¹ If one is prepared to concede that the status of “citizen” carries with it at least *some* corresponding rights and privileges (beyond the

⁴⁵⁶ Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions, 93 Nw. U. L. Rev. 819, 824 (1999).

⁴⁵⁷ *Id.* at 831–60 (arguing the Constitution’s reference to “states” provides a defensible textual basis for immunizing certain aspects of states’ sovereign functions from federal regulation and control).

⁴⁵⁸ See Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 130 (2002) (arguing that Indian Commerce Clause and exclusion of “Indians not taxed” from the Census Clause reflects an “unquestionabl[e]” textual recognition of “the sovereignty of the Indian tribes”).

⁴⁵⁹ See Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. 1083, 1093–1131, 1143 (2009) (surveying historical foundations of Congress’s implied power to hold nonmembers in contempt and concluding “that such a power was considered inherent in what it meant to be a legislature”).

⁴⁶⁰ See, e.g., *United States v. Miller*, 78 U.S. (11 Wall.) 268, 304–06 (1870) (interpreting Congress’s power to “declare war” as encompassing “the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted,” including the power to confiscate enemy property).

⁴⁶¹ See, e.g., *United States v. Worthy*, 328 F.2d 386, 394 (5th Cir. 1964) (“[I]t is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil.”).

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bare “privilege of writing ‘citizen’ after your name”),⁴⁶² then the question of which particular rights and privileges should be understood to inhere in the Fourteenth Amendment’s declaration of constitutional citizenship under an original public meaning framework requires a historical and factual inquiry to identify the types of rights members of the ratifying generation generally understood “citizenship” to entail.⁴⁶³

The contextual objection to interpreting the Citizenship Clause as encompassing a guarantee of constitutional equality stems from the narrower conception of “citizenship” that was embraced by Chancellor Kent, Justice Curtis, and certain other legal commentators prior to the commencement of Reconstruction.⁴⁶⁴ This narrower view understood the status of “citizenship” to confer very few concrete rights and left governments free to prescribe different rules for different “classes” of citizens, even with respect to basic civil rights. The existence of this narrower conception of “citizenship,” which competed with the equally prominent, broader understanding throughout the antebellum period, might reasonably give one pause before concluding that the ratifying public at the time of the Fourteenth Amendment’s enactment would necessarily have interpreted the Citizenship Clause as encompassing the broader understanding.⁴⁶⁵

⁴⁶² Cf. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 62–63 (1969) (arguing that the Fourteenth Amendment’s “conferral of citizenship” must encompass some rights unless “one is prepared to say that all that relationship implies is the privilege of writing ‘citizen’ after your name”).

⁴⁶³ In this regard, it is notable that contemporaneous dictionaries tended to define the term “citizen” by reference to a bundle of rights inhering in that status, typically identifying “citizenship” with the right to vote and own property. See sources cited *supra* note 294. Though many supporters of the Amendment denied that citizenship would entail voting rights, see *supra* notes 295–98, 326 and accompanying text, they were virtually unanimous in endorsing the proposition that citizenship entailed equality of basic civil rights. See *supra* Sections II.A–D.

⁴⁶⁴ See *supra* notes 118–22 and accompanying text (discussing Kent’s views) and *supra* notes 144–50 and accompanying text (discussing Curtis’s *Dred Scott* dissent).

⁴⁶⁵ The difference between the narrow understanding of citizenship endorsed by Kent and Curtis and the broader understanding embraced by both southern courts and northern abolitionists during the antebellum era (and by most Reconstruction-era congressional Republicans) reflect two markedly different conceptions of what it means to be a “citizen”—that is, either a person who possesses a formal legal status, though not necessarily any particular rights or privileges (under the Kent-Curtis view), or the possessor of a set of rights and entitlements, the possession of which inheres in and defines the status of citizenship (under the broader view). See *supra* Subsection I.B.3; cf. Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 *Ohio St. L.J.* 1285, 1304 (2002) (noting a similar distinc-

Most textually minded originalists believe that ambiguities of this nature can usually be resolved by looking to the surrounding context of the ambiguous term, including the immediately surrounding linguistic context, how well each proposed meaning fits within the broader constitutional structure, and the circumstances surrounding the provision's enactment.⁴⁶⁶ Although the matter is not entirely free from doubt, there are reasonably strong grounds for concluding that the broader conception of citizenship provides the more plausible of the two senses of "citizens" as that term is used in the Citizenship Clause.

A significant problem with viewing the narrower understanding of citizenship as reflecting the relevant sense of the term "citizens" in the Fourteenth Amendment's first sentence is the difficulty that such an interpretation would pose for interpreting the reference in the Amendment's second sentence to the "privileges or immunities of citizens of the United States." As reflected in Senator Howard's speech introducing the Fourteenth Amendment in the Senate (before the addition of the Citizenship Clause), a common way of interpreting the Amendment's Privileges or Immunities Clause at the time of its enactment was as a protection for those privileges and immunities that belonged to "citizens of the

tion between "thin" and "thick" conceptions of citizenship in modern political and social theory).

Identifying which of these two conceptions reflects the most probable original meaning of the term "citizens" in the Fourteenth Amendment involves a problem of *ambiguity* in that there are two distinct senses of the term from which to choose; the term "citizens," particularly as used in its broader sense, might also be *vague* to the extent there was disagreement regarding how broadly the rights inhering in the status of citizenship should be understood to extend. See, e.g., Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol'y 65, 67 (2012) (explaining that "language is ambiguous when it has *more than one sense*" and "is vague when its meaning admits of *borderline cases* that cannot definitively be ruled in or out of its meaning"). Though public meaning originalists generally agree that problems of ambiguity will usually be resolvable by looking to the surrounding historical and linguistic context of a given provision, see *infra* note 466, they express differing views regarding the extent to which such interpretive methods are capable of resolving vagueness. Compare *id.* at 68 (arguing that vague provisions, even when interpreted contextually, "simply do not contain the information necessary to decide matters of application"), with McGinnis & Rappaport, *supra* note 399, at 774–76 (predicting that constitutional vagueness will usually be resolvable through traditional interpretive techniques).

⁴⁶⁶ See, e.g., Barnett, *supra* note 465, at 67 ("When it comes to resolving ambiguity, the context of a statement usually reveals which sense is meant."); Rappaport, *supra* note 456, at 823 (arguing that "[w]hen judges are resolving an ambiguity, textualism requires that they take various considerations into account," including structure, purpose and background history).

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United States as such,”⁴⁶⁷ that is, those rights that citizens enjoyed by virtue of their status as United States citizens.⁴⁶⁸ Another common view of that provision was that it would protect (at least) the types of nondiscrimination rights identified in *Corfield* and in the Civil Rights Act of 1866.⁴⁶⁹

But under the narrower of the two available senses of “citizenship,” at least one of these understandings must have been mistaken. If one’s status as a “citizen of the United States” conferred no or very few legal rights or privileges, then prohibiting states from abridging the “privileges or immunities” belonging to persons in their capacity as United States citizens would not support a *Corfield*-type equality rule. Rather, the prohibition of abridging the “privileges or immunities of citizens of the United States” would yield, at most, a relatively narrow set of rights similar to those described by the Supreme Court majority in *Slaughter-House*.⁴⁷⁰ But while such a narrow interpretation might reflect a thinly plausible linguistic reading of the text, it faces the considerable historical and contextual difficulties of having virtually no relation to either the public statements regarding the Amendment that were made before the *Slaughter-House* decision itself or to the types of concerns that motivat-

⁴⁶⁷ See Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

⁴⁶⁸ See also, e.g., Cong. Globe, 42d Cong., 2d Sess. 1650 (1872) (statement of Sen. Butler) (“The only privileges and immunities secured by the Constitution are those of citizens of the United States as such.”); *id.* at 820 (statement of Sen. Morton) (referring to “the privileges or immunities that belong to citizens of the United States as such”). Notably, this understanding of the Privileges or Immunities Clause as protecting rights that inhere in the status of United States citizenship was one of the few points of agreement between the majority and dissenting Justices in the *Slaughter-House Cases*. See 83 U.S. (16 Wall.) 36, 74–75 (1873) (Miller, J., majority opinion) (identifying “privileges and immunities” protected by the Clause as “privileges and immunities belonging to a citizen of the United States as such”); *id.* at 96 (Field, J., dissenting) (arguing that the Privileges or Immunities Clause “assumes that there are such privileges and immunities which belong of right to citizens as such”); *id.* at 119 (Bradley, J., dissenting) (“It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens . . . Their very citizenship conferred these privileges, if they did not possess them before.”). The Justices, of course, divided on the question of precisely what “privileges or immunities” United States citizenship entailed. See *supra* Section III.B (discussing Justices’ opinions).

⁴⁶⁹ See, e.g., Harrison, *supra* note 55, at 1414–33 (surveying evidence supporting this understanding); see also Cong. Globe, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull) (identifying *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) and other Comity Clause cases as providing the judicial sense of “what was meant by the term ‘citizen of the United States’”).

⁴⁷⁰ Cf. *supra* notes 332–43 and accompanying text (describing Miller’s interpretation of the Privileges or Immunities Clause).

ed the Amendment's adoption.⁴⁷¹ If one takes seriously the contemporaneous characterization of the Privileges or Immunities Clause as protecting a class of preexisting rights that individuals possessed by virtue of their United States citizenship, it seems necessary to acknowledge the broader understanding of "citizens" as reflecting the more plausible meaning of "citizens of the United States" in *both* sentences of Section 1.

The broader understanding of "citizens" also provides a better fit with the Amendment's overall structure and the constitutional structure as a whole. The Fourteenth Amendment significantly altered the relationship between the states and the federal government by repudiating the doctrine of primary state citizenship through which the Confederate states had justified their rebellion and emphasizing the paramount nature of national citizenship. An important component of this changed relationship was the conferral of an express power on Congress and the federal courts to protect the rights of United States citizens against state infringement and discrimination. In restructuring this trilateral relationship between the state and federal governments on the one hand and between those two governments and their respective citizens on the other, it would have been more than a bit odd for the federal government to have reserved to itself a right to violate the very same rights of its citizens that it was simultaneously seeking to protect against state infringement.⁴⁷²

⁴⁷¹ See *supra* notes 338–39 and accompanying text.

⁴⁷² Such differential treatment might have made sense if the Republican lawmakers who championed the Amendment had believed that the federal government was less prone to abusing its citizens' rights than were the states. Cf. McConnell, *supra* note 18, at 166–67 (suggesting that the Fourteenth Amendment's framers may have believed that "the federal government [was] less likely to countenance the systematic oppression of minority groups"). But the evidence for such a hypothesis is lacking. The members of the Thirty-ninth Congress and their contemporaries had lived through the fugitive slave controversies of the 1850s and had witnessed firsthand the dangers posed by discriminatory and oppressive federal legislation. See, e.g., Paul Finkelman, *Prelude to Reconstruction: Black Legal Rights in the Antebellum North*, 17 *Rutgers L.J.* 415, 450–63 (1986) (discussing northern hostility to the Fugitive Slave Act of 1850 and conflict between federal enforcement of that law and "personal liberty laws" enacted by northern states to protect accused fugitives). And, as Professor Siegel notes, the threat of a future, pro-Southern Congress hostile to black equality was "very much on the . . . minds" of those who framed the Fourteenth Amendment and was reflected in many of its provisions, including the Citizenship Clause itself. Siegel, *supra* note 19, at 572–73 (citing the Citizenship Clause as well as provisions limiting Congress's power to allow certain ex-Confederates to hold public office and prohibiting the federal government from paying Confederate war debts as examples of provisions restricting future federal law-making).

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Thus, while Chief Justice Warren's "unthinkable" dictum in *Bolling* might have overstated the matter, his remark nonetheless reflects a reasonable intuition that there would be something at least deeply incongruous about prohibiting the states from discriminating against their citizens on the basis of race while leaving the federal government free to engage in identical forms of discrimination.

Of course, the original version of Section 1 that emerged from the Joint Committee in April 1866 proposed to do exactly that. By focusing narrowly on the problem of state abuse and selecting language that expressly and exclusively applied only to "state" governments, the Joint Committee's proposal seemed to foreclose any plausible reading that would ban federal racial discrimination.⁴⁷³ The addition of the Citizenship Clause, however, significantly changed the meaning of Section 1. That provision required both the states *and* the federal government to recognize as "citizens" all persons who were born or naturalized in the United States and subject to its jurisdiction. Following the Amendment's adoption, the entitlement of such persons to "citizenship" was no longer a matter of governmental discretion or political morality, but rather a legally enforceable right recognized in the text of the Constitution. While the types of structural concerns identified above might not have sufficed to contradict the plain meaning of the Amendment's second sentence,⁴⁷⁴ the use of such considerations to resolve a textual ambiguity of the type presented by the reference to "citizens" in the Amendment's first sentence is fully consistent with both textualism and originalism.⁴⁷⁵

⁴⁷³ See, e.g., Siegel, *supra* note 19, at 577 ("To the extent that originalism is a species of textualism, 'No state' is what the [Amendment's second] sentence enacts, and 'no state' is all that originalists can read the sentence to encompass.").

⁴⁷⁴ See, e.g., Michael Ramsey, *Missouri v. Holland* and Historical Textualism, 73 *Mo. L. Rev.* 969, 972 (2008) ("A historical textualist will be skeptical of conclusions supposedly based on an abstract constitutional 'structure' or 'purpose' but not tied to particular words and phrases."); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 *Colum. L. Rev.* 498, 568–69 (2011) (collecting additional criticisms of such abstract structural reasoning).

⁴⁷⁵ See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003, 2067 (2009) ("Modern textualists readily embrace . . . [the] proposition that when a structural provision is semantically indeterminate, its meaning can sometimes be illuminated by considering its fit with, and functional relationship to, other provisions of the text.").

B. Equal Citizenship and the “Equal Protection of the Laws”

To this point, I have argued that the Fourteenth Amendment’s Citizenship Clause provides a more historically defensible textual source for the equality guarantee that the *Bolling* Court applied to the federal government through the Fifth Amendment’s Due Process Clause. But just as *Bolling* raised questions about the relationship between Fifth Amendment due process and Fourteenth Amendment equal protection,⁴⁷⁶ the arguments presented here raise similar questions regarding the precise relationship between the equality component of the Fourteenth Amendment’s Citizenship Clause and the Equal Protection Clause.

The Equal Protection Clause complicates the argument for viewing the Citizenship Clause as *Bolling*’s proper constitutional source in two ways. First, because the Citizenship Clause applies to states as well as to the federal government, some might question whether identifying that provision as containing an equality component would violate the familiar “anti-surplusage” canon by rendering the Equal Protection Clause wholly redundant.⁴⁷⁷ Second, and conversely, if the Equal Protection Clause were originally understood to be broader than the equal citizenship aspect of the Citizenship Clause, the federal government might be permitted to make certain types of race-based distinctions among its citizens that would be unconstitutional if made by the states. The available evidence regarding the public understandings of “citizenship” and “equal protection” at the time of the Fourteenth Amendment’s enactment, however, render both of these possibilities unlikely.

Responding to the surplusage argument does not require looking very far beyond the text of the two provisions. The class of persons who can claim the rights of state citizenship under the Citizenship Clause is obviously limited to those whom the Clause itself identifies as “citizens”—that is, persons born or naturalized in the United States and who also reside within the state. The Equal Protection Clause, by contrast, extends protection to all “persons” within the state’s territorial jurisdiction, re-

⁴⁷⁶ See Primus, *supra* note 19, at 986–89 (describing initial uncertainty regarding the precise relationship between the due-process standard applied to federal conduct and the equal-protection standard applied to the states, but observing that “[b]y the mid-1970s, the Court asserted flatly and repeatedly that the” two standards “were, and had always been, the same”).

⁴⁷⁷ Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.”).

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ardless of whether or not those persons are also citizens.⁴⁷⁸ This distinction did not go unrecognized during the pre-enactment congressional debates. Multiple members of the Thirty-ninth Congress, including Bingham and Howard, expressly noted that the Equal Protection Clause, unlike the Privileges or Immunities Clause, would extend protection to non-citizens.⁴⁷⁹ Thus, even if there is a perfect overlap between the equality rights that citizens enjoy by virtue of their status as “citizens” and the “equal protection” to which they are entitled as “persons,” the Equal Protection Clause would not be redundant.

The distinction between “citizens” and “persons” also suggests a likely relationship between the rights inhering in citizenship and the “equal protection” that states must extend to citizens and non-citizens alike. Nineteenth-century legal and political thought recognized a clear distinction between the rights of citizens and the rights of persons who were not citizens.⁴⁸⁰ In view of this background, it is reasonable to conclude that the rights extended to “citizens” by the Amendment’s Citizenship and Privileges or Immunities Clauses are broader than the rights extended to all “persons” by the Equal Protection Clause.⁴⁸¹

⁴⁷⁸ U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to *any person within its jurisdiction* the equal protection of the laws.”) (emphasis added).

⁴⁷⁹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (stating that the Fourteenth Amendment would “disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State”); *id.* at 1090 (statement of Rep. Bingham) (“Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?”).

⁴⁸⁰ Certain scholars have argued that the Equal Protection Clause was originally understood to apply solely to the types of legal “protection” to which non-citizens were presumptively entitled, such as the right to claim protection by law enforcement and the right to bring legal actions in court. See, e.g., Green, *supra* note 315, at 219–20 (endorsing a “protection-only” reading of the Equal Protection Clause); Harrison, *supra* note 55, at 1434–51 (same). This view has been contested by other scholars who argue that the original meaning of the Equal Protection Clause was much broader. See, e.g., Saunders, *supra* note 50, at 251–93; cf. Calabresi & Rickert, *supra* note 441, at 23 (observing that “a number of the [Fourteenth Amendment’s] Framers seemed to understand ‘equal protection of the laws’ as a requirement of equal legislation”). For reasons explained in the text, I believe that even under the broader of these two interpretations, the equality rights the provision extends to all “persons” are properly viewed as a subset of the equality rights that citizens enjoy by virtue of their status as “citizens.” See *infra* notes 482–94 and accompanying text.

⁴⁸¹ See, e.g., McConnell, *supra* note 5, at 1002 (arguing that “the Privileges or Immunities Clause applies to a smaller class of persons and a larger class of rights” than the Equal Protection Clause).

A clear indication of the relationship between the equality rights thought to inhere in citizenship and the equality rights protected by the Equal Protection Clause is provided by a federal law adopted in 1870 that extended to non-citizens some (but not all) of the protections of the Civil Rights Act of 1866.⁴⁸² The legislative history of that provision, which was adopted as part of the Voting Rights Act of 1870,⁴⁸³ indicates that it was “designed to enforce the Equal Protection Clause for the benefit of alien immigrants, mainly Asians in California.”⁴⁸⁴ The 1870 Act largely mirrored the language of Section 1 of the 1866 Civil Rights Act with two significant exceptions. First, unlike the Civil Rights Act, which was limited to “citizens of the United States,” the 1870 Act applied to all “persons.”⁴⁸⁵ Second, the 1870 Act omitted language that had been included in the Civil Rights Act, which prohibited states from making race-based distinctions with respect to the right to buy, hold, sell, lease or convey real or personal property.⁴⁸⁶ The omission of the 1866 Act’s property provisions, which the sponsor of the 1870 Act acknowledged had been intentional,⁴⁸⁷ strongly suggests that Reconstruction-era lawmakers understood the Equal Protection Clause to allow at least some race-based distinctions among “persons” that would not be permitted if the “persons” discriminated against were also “citizens.”⁴⁸⁸

An additional indication that the equality rights attaching to citizenship were understood to sweep at least as broadly as the equality rights derived from the Equal Protection Clause is provided by post-enactment statements regarding the relationship between the status of citizenship and the “equal protection of the laws.” In *Strauder v. West Virginia*,⁴⁸⁹ “the Supreme Court’s first great Equal Protection Clause case,”⁴⁹⁰ the Court described the Fourteenth Amendment’s Equal Protection Clause

⁴⁸² The background of the enactment is described in Harrison, *supra* note 55, at 1443–47.

⁴⁸³ Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144.

⁴⁸⁴ Harrison, *supra* note 55, at 1444.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 1445–46 (recounting colloquy between Senator Stewart, the 1870 Act’s sponsor, and Senator Samuel Pomeroy of Kansas).

⁴⁸⁸ *Id.* at 1446; see also, e.g., Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court’s Alienage Jurisprudence*, 28 *Ariz. St. L.J.* 1135, 1148 (1996) (citing the 1870 statute as evidence that “the rights guaranteed by the Fourteenth Amendment to persons generally were viewed as less sweeping than those guaranteed to citizens”).

⁴⁸⁹ 100 U.S. 303 (1880).

⁴⁹⁰ Harrison, *supra* note 55, at 1433.

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as having been intended merely to provide a mechanism by which the federal government could enforce the *preexisting* rights that former slaves possessed by virtue of their citizenship:

By their manumission *and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided*; and the apprehension that through prejudice they might be denied that equal protection . . . was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice, that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.⁴⁹¹

In other words, according to the Court, the entitlement of citizens to the “equal protection of the laws” derived from their status as citizens and it was only out of apprehension that state officials would, “through prejudice” deny them that right that the framers had included an explicit guarantee of equal protection in the Fourteenth Amendment.

To similar effect were the remarks of Justice Bradley in an 1870 Circuit Court opinion, which addressed one of the early constitutional challenges that eventually culminated in the Supreme Court’s *Slaughter-House* decision three years later.⁴⁹² Bradley’s opinion, which reflects one of the earliest judicial interpretations of the Fourteenth Amendment, declared that one of “the essential privileges which belong to a citizen of the United States, as such, and which a state cannot by its laws invade” was “to have, with all other citizens, the equal protection of the laws.”⁴⁹³ Likewise, the Supreme Court of Indiana, on multiple occasions in the 1870s, declared its understanding that “[t]he *only* effect of the” Fourteenth Amendment had been “to extend the protection and blessings of the constitution and laws to a new class of persons” by conferring citizenship upon them and that when these persons had been:

made citizens they were as much entitled to the protection of the constitution and the laws as were the white citizens, and the states could no more deprive them of privileges and immunities than they could

⁴⁹¹ *Strauder*, 100 U.S. at 309 (emphasis added).

⁴⁹² *Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8408).

⁴⁹³ *Id.* at 652.

citizens of the white race. *Citizenship entitled them to the protection of life, liberty, and property, and the full and equal protection of the laws.*⁴⁹⁴

Thus, according to multiple courts during the immediate post-ratification period, the right of equal protection recognized in the Fourteenth Amendment's second sentence arose by virtue of, and existed as a necessary incident and consequence of, the citizenship that had been recognized in the Amendment's first sentence. In view of this background, there is a strong basis for concluding that whatever equality rights citizens possess against state governments by virtue of their status as "persons" protected by the Equal Protection Clause are equally enforceable against the federal government by virtue of their status as "citizens" under the Citizenship Clause.

CONCLUSION

I do not entertain any illusions that the fate of originalism as an interpretive theory will stand or fall based on its ability to justify the result in a single case, even a case as significant as *Bolling* (or, for that matter, *Brown*).⁴⁹⁵ Likewise, more than a half-century of skepticism that *Bolling* can be reconciled with a plausible account of the Constitution's text and original understanding has not prevented that decision and its associated doctrine from becoming deeply entrenched in modern constitutional law.

At the same time, however, neither originalism nor *Bolling* emerges fully unscathed from a conclusion that the former is incapable of justifying the latter. If originalist theory aspires to real-world practical significance for constitutional adjudication, then it seems fair to judge the desirability of such an adjudicative approach at least in part by asking what real-world changes in legal doctrine that approach requires. While the inability of originalism to justify a particular politically popular result—or even a series of such results—would not necessarily be fatal to the theory's acceptance, such inabilities should certainly be counted as a

⁴⁹⁴ *Cory v. Carter*, 48 Ind. 327, 353–54 (1874) (emphasis added) (quoting *State v. Gibson*, 36 Ind. 389, 393–94 (1871)); cf. *State v. Moody*, 26 Ind. 299, 306–07 (1866) (holding state constitutional provision prohibiting migration by free blacks was void in view of the 1866 Civil Rights Act's recognition of blacks' citizenship).

⁴⁹⁵ Cf. Harrison, *supra* note 55, at 1463 n.295 ("Man is not the measure of all things . . . and neither is [*Brown*]. An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.").

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mark against the theory.⁴⁹⁶ And, in the absence of sufficiently desirable offsetting benefits, such results might legitimately call into question the utility of a strictly originalist approach to resolving constitutional controversies.

Bolling too suffers to at least some extent from its perceived inconsistency with the Constitution's text and original meaning. Though originalism as a distinctive theory of constitutional interpretation remains controversial, virtually all plausible interpretive theories acknowledge an important role for the Constitution's text and original meaning.⁴⁹⁷ Decisions like *Bolling* that appear to ignore (or openly flout) such traditional interpretive criteria thus raise legitimate concerns regarding the proper role of courts in our constitutional system.⁴⁹⁸

If this Article's conclusions are correct, then the longstanding conventional wisdom regarding *Bolling*'s suspect originalist provenance has been mistaken. Although Chief Justice Warren's opinion identified the wrong textual source for the prohibition of federal racial discrimination, his intuition that there would be something deeply problematic about interpreting the Fourteenth Amendment to subject states to an equality principle that the federal government was free to violate at will was hardly ahistorical. Rather, this intuition was widely shared among participants in the Fourteenth Amendment framing and ratification debates, as evidenced by the pervasive characterizations of the rights protected by the Amendment as rights that citizens already possessed by virtue of their United States citizenship. The adoption of the Fourteenth Amendment's Citizenship Clause constitutionalized this understanding by requiring both the states and the federal government to recognize certain

⁴⁹⁶ See generally Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 641 (1999) (arguing that "[f]ormalism should be defended pragmatically, with close reference to the likely performance of various institutions, and in terms of its consequences").

⁴⁹⁷ See, e.g., Philip Bobbitt, Constitutional Fate 11–12 (1982) (identifying arguments from text and history as common forms of constitutional argument); Sanford Levinson, The Limited Relevance of Originalism in the Actual Performance of Legal Roles, 19 Harv. J.L. & Pub. Pol'y 495, 501 (1996) (observing that "almost all of us pay homage to some kind of originalism").

⁴⁹⁸ One leading constitutional law casebook asks students to ponder whether "the method used to obtain the result in *Bolling* could be used to obtain any result at all" and asks students if they can "imagine why *Bolling* poses a challenge to every approach to constitutional interpretation." Randy E. Barnett, Constitutional Law: Cases in Context 538–39 (2008); see also Rubin, supra note 14, at 1885–86 (discussing ambivalent treatment of *Bolling* in other leading casebooks).

persons as “citizens” and foreclosing future legislative efforts to deny such citizenship.

Of course, a comprehensive originalist defense of *Bolling* could not end here. Just as the mere existence of the Fourteenth Amendment’s express prohibition of state discrimination through the Equal Protection and Privileges or Immunities Clauses did not resolve all questions regarding the originalist defensibility of *Brown*, the mere existence of an analogous constitutional ban on federal discrimination does not answer the question of whether *Bolling* was correctly decided. Among other things, a comprehensive originalist defense of *Bolling* would require proof that public education fell within the class of interests to which the citizen-equality principle would have been understood to extend and that racial segregation in public schools should be understood to deny equality in a constitutionally relevant way.⁴⁹⁹

Questions of this nature, however, which apply with equal force to both *Bolling* and *Brown*, do not account for *Bolling*’s distinctive status or explain why originalists who readily defend *Brown* as correctly decided balk at similarly defending *Bolling*.⁵⁰⁰ Instead, *Bolling*’s assumed originalist indefensibility has stemmed largely from the assumption, encouraged by Chief Justice Warren’s opinion, that a judicially enforceable constitutional equality principle applicable to federal conduct must be located in an eighteenth century Constitution that not only tolerated but openly supported the institution of slavery.⁵⁰¹ Once the Fourteenth Amendment’s Citizenship Clause is recognized as the appropriate textual source for the ban on federal racial discrimination and understood in light of its full historical context, this difficulty evaporates. Those originalists who support *Brown* as correctly decided should thus feel little hesitancy in concluding that *Bolling* was correctly decided as well.

⁴⁹⁹ See, e.g., McConnell, *supra* note 5, at 1036–43 (discussing Reconstruction-era debates over whether public education was a “civil right” protected by the Amendment); *id.* at 1006–23 (discussing arguments that segregation did not violate equality).

⁵⁰⁰ Cf. *supra* note 41 (citing originalists who have argued *Brown* is defensible on originalist grounds but *Bolling* is not).

⁵⁰¹ Cf. Graglia, *supra* note 15, at 774 (observing that *Bolling* asks us “to believe that a constitutional provision adopted in 1791 as part of a Constitution that explicitly recognized and protected slavery was meant to prohibit school racial segregation”).