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ORIGINALISM AND THE OTHER DESEGREGATION DECISION

Ryan C. Williams[*]

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[*] Sharswood Fellow, University of Pennsylvania Law School. My thanks to Jack Balkin, Eric Fish, Kurt Lash, Kermit Roosevelt and participants at a faculty workshop at the University of Pennsylvania Law School for helpful comments on prior drafts.

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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 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

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[1] *See*, *e.g.*, 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."); 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."); *cf.* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. L. REV. 857, 898 (2009) (describing and responding to criticisms of originalism grounded in the "argument from bad results").

[2] *See*, *e.g.*, 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"); 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").

[3] 347 U.S. 483 (1954).

[4] *See*, *e.g.*, Robert 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*, 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, for example, 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."); 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.").

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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* [*i.e.*, 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 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

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[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.*, 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"); Calabresi & Fine, *supra* note 2, at 686 ("[W]e think *Brown v. Board of Education* is correct on originalist grounds.").

[7] 347 U.S. 498 (1954).

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

[9] 347 U.S. at 499-500.

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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 Reports[11]—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 unsupportable on originalist grounds.[14]

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

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[10] *Id*. at 499.

[11] *Id.* at 498-500.

[12] *See*, *e.g.*, Kermit Roosevelt, III, *Forget the Fundamentals: Fixing Substantive Due Process*, 9 U. PA. J. CONST. L. 983, 997 (2006) (observing that "[t]he argumentation … in *Bolling* is somewhat less than satisfactory" and that "[t]his 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, 428-60 (2010) (examining evidence indicating that meaning of Fifth 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 18 (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 the Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1879-80 (2006) ("[I]t is widely accepted, by 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. 955, 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. 773-74 (1998) (citing *Bolling* as an example of "the irrelevance of the Constitution to constitutional law").

[16] *See*, *e.g.*, Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 94, 104 (2010) (observing that "as official racial discrimination became a consensus evil, *Bolling* ceased to have detractors"); *cf.* Keith 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").

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 antidiscrimination norm for which the case has come to stand.[19]

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

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[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, *McConnell, J., concurring in the Judgment*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 166-68 (Jack M. Balkin ed., 2001).

[19] *See*, *e.g.*, Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Law: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 480 (1998) (observing that because *Bolling* "has not acquired the iconic status of *Brown*," "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 Amar, *Intratextualism*, 112 HARV. L. REV. 747, 768-72 (1999) (arguing that *Bolling* could be justified by the original meanings of, among other provisions, the Bill of Attainder and Titles of Nobility Clauses of Article I); Michael J. Perry, Brown, Bolling, & *Orginalism: 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 "unconvincing 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 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 109 (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*.").

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 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,

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[21] *See*, *e.g.*, Richard H. Fallon, *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.*, 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, public schools, or anything it chooses"); 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"); Paul Brest, *The Misconceived Quest for 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 … .").

[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, 1253 (2004) (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").

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 discrimination[26] 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]

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

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[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. amd. XIV § 1.

[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.*, Amar, *supra* note 19, at 768-69; Jack Balkin, *Opinion of Jack Balkin, C.J.*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, *supra* note 18, at 87; Drew S. Days, III, *Drew S. Days, III (concurring)*, *in id.* at 92, 97-98; Bruce Ackerman, *Bruce Ackerman (concurring)*, *in id.* at 100, 114-16; *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 famous dissent in *Plessy v. Ferguson*—an opinion 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 "All citizens are equal before the law" as support for reading the Citizenship Clause to include an equality component) (quoting Plessy v.

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]

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 targeted 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 arguments 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]

Ferguson, 163 U.S. 537, 556 (1896) (Harlan, J. dissenting)); *see also*, *e.g.*, AKHIL 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 v. Mississippi*, 162 U. S. 565 (1896) 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 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").

[32] *Cf. infra* Part I.C (discussing Taney's *Dred Scott* opinion).

[33] *See infra* Part I.A.

[34] *See infra* Parts I.B and I.C.

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 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. Although 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, this Part argues that there is a strong argument for recognizing an equality component in the Fourteenth Amendment's Citizenship Clause that would require that the federal government 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.

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Of course, any comprehensive originalist defense of *Bolling* would almost certainly require a defense of *Brown*'s interpretive correctness as

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[35] *See infra* notes 168-176 and accompanying text.
[36] *See infra* notes 200, 259-271 & 290 and accompanying text.
[37] 83 U.S. (16 Wall.) 36 (1873).

well.[38] As noted above, the proposition that *Brown* can be reconciled 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]

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[38] *Cf.* Michael C. Dorf, *What Does the Second Amendment Mean Today?,* 76 CHI.-KENT L. REV. 291, 326 (2000) ("Clever lawyers can concoct all sorts of arguments for why *Bolling* is no more problematic than *Brown* but for an originalist that still leaves the puzzle of *Brown* itself.") (footnote omitted).

[39] *See supra* note 6.

[40] *See*, *e.g.*, Jamal Greene, *Fourteenth Amendment Originalism*, 71 MARYLAND 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

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]

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 ENGLISH LANGUAGE (3rd ed. 1768) (unpaginated) (defining "citizen" as "a townman; 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* 1AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 606, 612–13 (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, 5 (1789).

[47] 2 U.S. (2 Dall.) 419 (1793).

[48] *Id.* at 471-72 (Jay, C.J.); *see also*, *e.g.*, 1 BLACKSTONE'S COMMENTARIES WITH NOTES AND REFERENCES TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE CONSTITUTION, (Appendix), 28 (Henry St. George Tucker, ed., Philadelphia, William Young Birch & Abraham Small 1803) (describing the "perfect equality of rights among citizens" as "indispensably necessary to the very existence of" the American species of democracy); BENJAMIN LYNDE OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN: WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES, at 51 (1832) (observing that "[a]s all men are naturally equal in their rights, there can be no doubt … that no individual would be

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 Privileges and Immunities

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willing to join in organizing a society, unless he were put on an equal footing with others, as to all rights secured to him in the social compact, or constitution of society."); Wilkins' Lessee v. Allenton, 3 Yeates 273 (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").

[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 at 33-45 (1993); *cf.* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE, 36-38 (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, 127 (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 Saunders, *Equal Protection, Class Legislation, and Color-Blindness*, 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, 2nd 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).

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]

The ambiguity surrounding the rights attaching to citizenship was

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[53] U.S. CONST. 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) ("[M]ost 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. 3,230); *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] *Id.* at 551-52.

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

Id. at 551-52.

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 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

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[58] U.S. Const., art. I, § 8, cl.

[59] *See*, *e.g.*, JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, 287 (1978); ("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 288-333 (discussing contested citizenship status of Native Americans and African Americans).

[61] *See*, *e.g.*, ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY, 106-10, 181-85 (1997); KETTNER, *supra* note 59, at 288-300.

[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 influence of Roman law distinction between citizens and slaves on antebellum legal thought).

[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.

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 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 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

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[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] For useful discussions of the political background of the controversy over Missouri's admission, *see* ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH, 33-141 (2007); and 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., 16th Cong. 2d Sess., at 47 (1820) (Rep. Burris) (contending that proposed migration restriction as "entirely repugnant to the Constitution of the United States."); *id.* at 92 (Rep. Otis) (proposed restriction was in "palpable collision with" the Comity Clause).

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 that "[t]he term citizen … could not with propriety be applied to anyone 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 Missouri'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 that 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

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[70] *Id.* at 615.

[71] *Id*. at 545; *see also*, *e.g.*, *id.* at 585 (Rep. Archer) (arguing that while "[c]itizens might be admitted in various degree 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 ranks 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 rights.").

[72] *See*, *e.g.*, *id.* at 546 (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 (Rep. Holmes (pointing to denial of voting rights and right to keep and bear arms as illustrating that free blacks were not citizens); *cf. id.* at 93-94 (Rep. 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").

[73] *See*, *e.g.*, *id.* at 93-94 (Rep. Otis) (observing that "[i]n every country women and minors are subject to disqualifications" in the exercise of important civil and political rights"); *id.* at 596 (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").

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 objected 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 South Carolina legislature issued a proclamation denying that "free negroes or 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]

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[74] Philip Hamburger, *Privileges or Immunities*, 105 NW. L. REV. 61, 87-88 (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 Seamens' 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, SLAVERY, FEDERALISM AND COMITY, 109 n.28 (1981); *see also* WILLIAM WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, 128-40 (1977). The mistreatment of the Massachusetts delegation became a staple of antislavery political 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 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").

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, Kentucky'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 on the subject" warranted a "presumption

[80] Amy v. Smith, 11 Ky (1 Litt.) 326, 327 (Ct. of App. 1822).
[81] *Id.* at 327.
[82] *Id.* at 333.

that no State had made persons of color 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 having arisen 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 the 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 more restrictive conception of citizenship endorsed by the majority in *Amy v. Smith* rather than the more permissive 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]

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[83] *Id.*

[84] *Id.* at 342. 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 (1820).

[85] *Id.*

[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.*, 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 [*i.e.*, the word "citizens" in the Comity Clause] was used in the Constitution"); 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 equality provision in state's bill of rights); Cooper and Worsham v. The Mayor and Aldermen 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

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 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 Cushing[93] 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

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legislature, or to hold any civil office."); Aldridge v. The 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 was "not considered to extend equally to both classes of our population.").

[90] GRABER, *supra* note 67, at 53.

[91] William Wirt, *Rights of Virginia Free Negroes*, 1 Op. Att'y Gen. 506 (Nov. 7, 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.

[92] *Id.* at 507.

[93] *See* Caleb Cushing, *Right of Expatriation*, 8 Op. Att'y Gen. 139, 142 (Oct. 31, 1856); *see also* Caleb Cushing, *Relation of Indians to Citizenship*, 7 Op. Att'y Gen. 746, 751-52 (July 5, 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, 101 (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. Hugh S. Legare, *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.*

blacks if they were recognized as "citizens" within the meaning of that Clause—pervaded 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 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]

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[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 & Others v. Fogg, 6 Watts 553, 560 (Pa. 1837).

[96] *See*, *e.g.*, Wirt, *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").

[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 can not 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, 339 (1838); *cf.* 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 352-53, 376 (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* Part I.B.3 (describing moderate pro-citizenship position).

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 1830's.[99] Crandall was prosecuted under an ordinance prohibiting the education of non-resident 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 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

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[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.

[101] Crandall v. State, 10 Conn. 339, 347 (1834) (quoting trial court's jury instruction).

[102] 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, 6 (Boston, Garrison & Knapp, 1834).

[103] *Id.* at 7.

[104] *Id.* at 12.

[105] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 675 (Bos., 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 like

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 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

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circumstances.'").

[106] *Id.* at 11.

[107] *Crandall*, 10 Conn. at 372.

[108] *See* WIECEK, *supra* note 77, at 163-66; Howard J. Graham, *The Antislavery Origins of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 505 (describing Ellsworth and Goddard's arguments as "the first comprehensive crystallization of abolitionist constitutional theory").

[109] WILLIAM JAY, AN INQUIRY INTO THE CHARACTER AND TENDENCY OF THE AMERICAN COLONIZATION AND AMERICAN ANTI-SLAVERY SOCIETIES 38-45 (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.*

[110] PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION: HELD AT PUTNAM, ON THE TWENTY-SECOND, TWENTY-THIRD, AND TWENTY-FOURTH OF APRIL, 36-40 (Beaumont & Wallace, 1835); *see also* Graham, *supra* note 102, 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 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

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 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 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

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immunities).

[112] *See* 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 (Miami, Mnemosyne Publishing Co. 1969) (reprint) (1849); LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY, 90-94 (Boston, Bela Marsh 1847).

[113] TIFFANY, *supra* note 112, at 95-97; SPOONER, *supra* note 112, at 93-94; *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.

"fundamental" rights of citizenship.[117]

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 respectively may deem it

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

[118] *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 605 (New York, O. Halsted 1827).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 33-36.

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. Sanford*.[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:

> 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

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[122] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 290-92 n.(*b*) (William Kent, 9th ed. 1858). A similar position was embraced by the North Carolina Supreme Court in *State v. Manuel*, 20 N.C. 21 (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 24, 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 (1857).

[124] *See*, *e.g.*, The Slaughter-House Cases, 83 U.S. 36, 73 (1873) (Citizenship Clause was adopted primarily "[t]o remove th[e] difficulty" presented by the holding in *Dred Scott* concerning African American citizenship).

[125] *See Scott*, 60 U.S. 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] 60 U.S. at 400.

> existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied 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 "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 discriminatory laws that had existed in the northern states at the time of the Constitution's adoption, Taney concluded that it would:

> hardly [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

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[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] 60 U.S. at 405.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 406-07

> 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 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]

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[134] *Id.* at 416.
[135] *Id*. at 416-17.
[136] 60 U.S. at 427.
[137] *Id.* at 417.
[138] *Id.* at 422-23.
[139] *Id.* at 423. Justice Daniel's concurring opinion was even more expansive on this point. *See id.* at 476 ("[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

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 adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States ... at the time of" the Constitution's adoption.[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 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 of a particular political or even of all civil rights," claiming that "any attempt so to define it must

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enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.").

[140] 60 U.S. (19 How.) 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, 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.

[142] *Id*.

[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.

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 conditions," 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 "so frame their Constitutions and laws" 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]

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

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[146] *Id.* at 583.

[147] *Id.*

[148] *Id.* at 583-84.

[149] *Id.*

[150] *See supra* Section 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, 274-75, 309-10 (1939) (discussing Kent's "contemptuous" attitude toward abolitionism and other social reform movements); Paul Finkelman, Scott v. Sandford: *The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 30 (2007) (describing Curtis as a conservative Massachusetts Whig who "was not even moderately antislavery").

[151] GRABER, *supra* note 73, at 33.

[152] FEHRENBACHER, *supra* note 68, at 417-19.

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]

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 holding office," which did "not belong to all citizens alike, nor to any citizen, merely in virtue of citizenship" but rather "depend[] upon extraneous facts and superadded qualifications ..."[161] Bates thus insisted

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

[154] Edward Bates, *Citizenship*, 10 Op. Att'y Gen. 382 (Nov. 29, 1862).

[155] FEHRENBACHER, *supra* note 68, at 564-65.

[156] ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY, 235 (2011).

[157] Bates, *supra* note 154, at 413. On the events leading up to the issuance of Bates's citizenship opinion, *see* James P. McClure, Leigh Johnsen and Michael Vanderlan, *Circumventing the* Dred Scott *Decision: Edward Bates, Salmon P. Chase, and the Citizenship of African Americans*, 43 CIVIL WAR HISTORY 279 (1997).

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

[159] Bates, *supra* note 154, at 383.

[160] *Id.* at 388.

[161] *Id*. at 399.

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]

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]

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[162] *Id*. at 387.

[163] *Id*. at 388.

[164] *Id*.

[165] *See*, *e.g.*, Michael Vorenberg, *Reconstruction as a Constitutional Crisis*, *in* RECONSTRUCTIONS: NEW PERSPECTIVES ON THE POSTBELLUM UNITED STATES 168-70 (Thomas J. Brown, ed. 2008) (discussing 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

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, 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.

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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, JAMES MCPHERSON, BATTLE CRY OF FREEDOM, 562-67 (1988); SMITH, *supra* note 61, at 274-75; and HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMENS' RIGHTS 1861-1866, 19-35 (2000).

[169] *See*, *e.g.*, BELZ, *supra* note 168, at 25-35.

[170] *Id.* at 25-27; EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869, 5-11 (1990).

[171] SPEECH OF MAJ.-GEN. BENJ. F. BUTLER, UPON THE CAMPAIGN BEFORE RICHMOND, 1864, DELIVERED AT LOWELL, MASS. , Jan. 29, 1865, 82 (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, 1863-1866, at 199-202 (1988).

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

Reports of the Black Codes and of racial violence against former slaves "aroused an indignation" in the North "that spread far beyond the 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 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 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 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

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[174] FONER, *supra* note 172, at 225.

[175] *Id.* at 225-27, 239-55.

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

[178] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

[179] *See infra* Part 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").

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 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 rights[184]—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 the definition of civil liberty," it "ought to be understood ... that the restraints introduced by the laws 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

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[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).

[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.* at 498.

[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.

other citizens," was "an unjust encroachment upon his liberty" and a "badge of slavery" 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 on Justice Washington's *Corfield* decision, which Trumbull described as "the most elaborate [decision] upon this clause in 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

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[187] *Id.*

[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*, 6 F. Cas. at 551-52). 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 474-75.

[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, when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter 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 the cases were introduced.

Id.

[190] *Id.*

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 position were incorrect, it was nonetheless "competent for Congress" to "settl[e]" 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 non-discrimination 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 preenactment 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 declared that a declaration of citizenship pursuant to Congress's naturalization power would "entitl[e]" 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 secure 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]

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[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 (Rep. Broomall); *id.* at 1115 (Rep. Wilson); *id.* at 1124 (Rep. Cook) ; *id.* at 1152 (Rep. Thayer).

[192] *Id.*

[193] *See*, *e.g.*, *id.* at 475 (Sen. Trumbull); id at 503-04 (Sen. Howard); *id.* at 1151-52 (Rep. Thayer).

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

[195] *Id.*

[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

Similarly, Representative James Wilson of Iowa, the 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 people."[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

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viewed as within the scope of Congress's power to protect:

> 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 citizens 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 (Rep. Raymond) ("I desire, as the next step 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 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 477-78 (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

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 willingness "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 should give in relation to 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 country 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

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no clearer definition of civil rights than that …"); *id.* at 1122 (Rep. Rogers) (defining "civil rights" as the "privileges and immunities created and granted to citizens of a country by virtue of the sovereign power under which the citizen lives").

[200] *See*, *e.g.*, *id.* at 478 (Sen. Saulsbury) (arguing that "civil rights" included the right to vote); *id.* at 500 (Sen. Cowan) (arguing that the bill would prohibit all discrimination based on race and would thus outlaw segregated schools); *id.* at 505 (Sen. Johnson) (contending that the law would "repeal all legislation" barring intermarriage between blacks and whites); *id.* at 1121 (Rep. Rogers) (arguing that bill would confer voting rights and prohibit bans on intermarriage and segregated schools). 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.*, *id.* at 504 (Sen. Johnson); *id.* at 523 (Sen. Davis); *id.* at 1155 (Sen. Eldridge).

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

[203] *Id.*

[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.

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 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 puzzlement on the part of Republican supporters of the bill.[209] Henderson's argument does not

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[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] *Id.* at 571.

[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.

[209] *See*, *e.g.*, *id.* at 573 (Sen. Williams) ("I do not exactly understand what the Senator means when he insisted that Congress shall make them citizens and does not claim that any right attaches to that character"); *id.* at 574 (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"). As noted below, Henderson may have subsequently changed his own view regarding the rights that attach to United States

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 belong 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 left entirely to the mercy of State legislation. He has a right, when 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

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citizenship prior to the final vote on the Fourteenth Amendment. *See infra* note 273.

[210] *Id.* at 575 (recording vote on proposed amendment); Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) ("[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).

[211] Shawhan, *supra* note 180, at 32.

[212] *Id*.

[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 32-33.

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

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 *Corfield* opinion and other Comity Clause cases as indicative of the rights belonging to all United States citizens.[218] 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 ..."[219] According to Lawrence, the rights protected by the bill inhered by their nature in "national citizenship" such that,

> [f]rom 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.[220]

Shortly after Trumbull and Lawrence delivered their respective speeches, the Senate (on April 6) and the House (on April 10) approved the bill by the requisite two-thirds majorities sufficient to enact the Civil Rights bill into law over the President's veto.[221]

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.[222] One such proposal, which provided an important template for language that was eventually selected for inclusion in the Amendment's first section, was introduced by

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[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] *Id*. at 1835-36.

[219] *Id.* at 1846.

[220] *Id*.

[221] *See* Cong Globe, 39th Cong, 1st Sess. 1809 (Apr 6, 1866) (Senate vote); *id.* at 1861 (Apr 10, 1866) (House vote).

[222] 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.

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.[223]

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."[224] 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.[225]

But Bingham's understanding of what the existing Article IV provision required differed from the orthodox understanding of that provision.[226] In a January 1866 speech in support of an early version of his 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.[227]

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."[228] Bingham's interpretation of the provision, however,

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[223] Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1866).

[224] *Id*.

[225] *Id*.

[226] On Bingham's constitutional theories, which were heavily influenced by abolitionist constitutionalism, see, for example, Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 346-49 (2011).

[227] *Id*. at 158.

[228] *See*, *e.g.*, *Dred Scott*, 60 U.S. at 403 (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 (Curtis, J. dissenting) (same); Wirt, *supra* note 91, at 507 (same).

diverged from the standard comity-based reading as a protection of travelers' interstate rights by reading it to protect citizens' *intra*state rights against their own state governments as well.[229]

Other members of the 39th Congress appear to have understood that Bingham's proposal would do more than authorize federal legislation to protect the rights of non-residents under the traditional understanding of the Comity Clause. For example, Representative Giles Hotchkiss of New York declared his understanding that Bingham's proposal 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."[230] 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 ..."[231] 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."[232]

Immediately after Hotchkiss spoke, the House (Bingham included) voted to postpone consideration of the amendment indefinitely.[233] 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.[234] Bingham's revised language, which tracks the language eventually included in Section One's second sentence, followed Hotchkiss's suggestion by replacing the grant of power to Congress with a directly enforceable declaration of rights.[235] Bingham's

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[229] *Cf.* Maltz, *supra* note 54, at 337 ("Bingham's invocation of the comity clause as a limitation 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 Section One as embodying that understanding. *See* Lash, *supra* note 226, at 348-55, 397-402. The extent to which this understanding was shared by other members of the 39th 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).

[230] *Id.* at 1095 (emphasis added).

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] MALTZ, *supra* note 170, at 84-92.

[235] A separate grant of enforcement power was provided by the Amendment's fifth section. *See* U.S. Const. amd. XIV § 5 ("The Congress shall have power to enforce, by

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 non-residents against state discrimination, which, as noted above, had been suitably clear to at least certain members of Congress under Bingham's original language.[236] 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.[237]

Though a few Congressmen persisted in understanding Bingham's revised language as nothing more than a reiteration of the Comity Clause as traditionally understood,[238] the more common understanding was that the provision operated as a more general protection of the rights pertaining to United States citizenship.[239] This understanding is clearly reflected in the remarks of Senator Jacob Howard of Michigan when introducing the proposed amendment in the Senate.[240] Howard began his remarks by

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appropriate legislation, the provisions of this article.").

[236] *See supra* notes 230-233 and accompanying text.

[237] *See supra* notes 189 & 197-198 and accompanying text.

[238] 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 [*i.e.*, the Comity Clause]." Cong. Globe, 39th Cong. 1st Sess. 2961 (1866).

[239] 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.

[240] Professor Lash describes Howard's speech as "[p]robably the most studied speech

observing 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."[241] 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 the limits of the United States and subject to their laws."[242]

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."[243] 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.[244] 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."[245]

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 and/or substantive protection of other "fundamental" rights through the

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of the Thirty-ninth Congress regarding the Fourteenth Amendment …" Lash, *supra* note 235, at 402.

[241] Cong. Globe, 39th Cong. 1st Sess. 2765 (1866).

[242] *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.

[243] *Id.*

[244] *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 *Connor v. Elliott*, 59 U.S. 591 (1855), in which the Court declined to "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." 59 U.S. at 593.

[245] *Id.* (emphasis added).

Privileges or Immunities Clause.[246] For purposes of the present inquiry, 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. 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 non-discrimination 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 One.[247] 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."[248] In explaining his proposed revision, Wade cautioned that the "the word

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[246] For some of the representative positions scholars have taken regarding the meaning of Howard's speech, *see*, *e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, 61-62 (2004) (interpreting Howard as supporting a broad "natural rights" reading of the Privileges or Immunities Clause); Lash, *supra* note 235, at 402-08 (interpreting Howard as identifying the "privileges or immunities" protected by Section One as including "the equal protection rights [but not substantive rights] of Article IV and the substantive 'personal rights' of the first eight amendments"); 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").

[247] MALTZ, *supra* note 170, at 44-45.

[248] Cong. Globe, 39th Cong., 1st Sess. 2768 (1866)

'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 question had still been "regarded by some as doubtful."[249] 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."[250]

Debate quickly turned to other provisions of the proposed amendment and no further action was taken on Wade's proposal.[251] But after that day's adjournment, Senate Republicans caucused together and agreed upon an alternative revision that addressed Wade's concerns.[252] 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."[253] Howard's proposal, which closely tracks the final language of the Citizenship Clause,[254] was modeled upon, but did not perfectly mirror, the similar citizenship definition in the recently adopted Civil Rights Act.[255] 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."[256]

Immediately after Howard proposed his revision, conservative Senator James Doolittle of Wisconsin, who opposed the Amendment, proposed to

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[249] *Id.*

[250] *Id.* at 2768-69.

[251] Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 353 (2010).

[252] *Id.*

[253] 39th Cong., 1st Sess. 2890 (May 30, 1866).

[254] 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.

[255] *Compare* U.S. Const. amd 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, 14 Stat. 27 ("[A]ll persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are citizens of the United States.").

[256] *Id.* at 2890. 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.*

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.[257] 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 the Gypsy born in Pennsylvania."[258]

At the outset of his remarks, Cowan affected uncertainty regarding the "legal definition of 'citizenship of the United States,'" observing that:

> [s]o 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.[259]

Cowan inquired "[a]re those people [*i.e.*, 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."[260] 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 of the United States, we ought to exclude others besides Indians not taxed" because other groups might be more dangerous if so recognized.[261]

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 [*i.e.*, the children of Chinese immigrants] is very small indeed and never promises to be very

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[257] *Id.*

[258] *Id.* The issues raised by 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.*, Cong. Globe, 39th Cong., 1st Sess. 498 (1866) (Sen. Cowan) (questioning whether citizenship definition in the Civil Rights bill would encompass "the children of Chinese and Gypsies born in this country"); *id.* at 571-72 (Sen. Doolittle) (discussing effect of limiting that bill's citizenship definition to "Indians not taxed").

[259] *Id.* at 2890.

[260] *Id.* at 2891.

[261] *Id.*

large."[262] 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."[263]

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—*i.e.*, that recognition of a person as a "citizen of the United States" would not, as Cowan suggested "put him out of 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 only a few months earlier by Senator Henderson of Missouri in connection with the Civil Rights Act debates.[264] 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.

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 he himself had "voted for the proposition to declare that the children of all parentage whatever born in California should be citizens of the United States, entitled to equal civil rights with other citizens of the United States."[265] 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.[266]

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[262] *Id.* at 2891.
[263] *Id.* at 2892.
[264] *See supra* notes 207-210 and accompanying text.
[265] *Id.* at 2891.
[266] *Id.* at 2892.

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 accomplish.[267]

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 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.[268] 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.[269]

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,[270] his suggestion is nonetheless

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[267] *Id.* at 2893 (emphasis added).

[268] *Id.* at 2895.

[269] *Id.* (emphasis added).

[270] In his earlier speech introducing the proposed Amendment in the Senate on May 10, Howard had expressly denied that the Amendment would "give … the power to Congress of regulating suffrage in the states," a view he maintained after the Amendment's ratification. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866); *see also* Cong. Globe, 40th Cong. 3rd Sess. 1003 (1869) (Sen. Howard) (denying that Amendment conferred voting

clear evidence that citizenship was viewed by members of the 39th 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 30 to 10 and debate quickly moved on to other Sections of the Amendment.[271] 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.[272] The House approved the final version of the Fourteenth Amendment on June 11, 1866 without substantive debate on the addition of the Citizenship Clause.[273] After that, the focus of debate over the Amendment shifted from Congress to the states.

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.[274] But if

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rights).

[271] *Id.* at 2897.

[272] *See id.* at 2890-97.

[273] 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 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.

Cong. Globe, 39th Cong., 1st Sess. 3148 (1866). 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" Section One 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 207-210 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 39th Congress.

[274] *See supra* note 177.

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 Chicago[275] in which he characterized Section One as "declar[ing] the rights of the American citizen" and as a mere "reiteration of the Civil Rights Bill."[276] 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 Republic."[277] "In other words," its purpose "was to make all people equal before the law" with respect to rights of contract, property and "every right which belongs to man as a man."[278] Although Trumbull characterized Section One 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."[279] 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 One.

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 the Constitutional Amendment" as "simply a re-affirmation 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."[280] In September of the same year, the National Union Republican

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[275] Trumbull's speech originally appeared in the *Chicago Tribune* on August 4, 1866 and was subsequently republished in full the next day in the *Cincinatti 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* SPEECHES OF THE CAMPAIGN OF 1866 IN OHIO, INDIANA, AND KENTUCKY, 6 (1866) [hereinafter "SPEECHES AND DEBATES"].

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] Cincinnatti Commercial, Aug. 20, 1866, p. 1 (reprinted in SPEECHES AND DEBATES,

Committee issued a campaign address to the American people in which the "substance" of Section One 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 the power to contravene this most necessary and righteous provision.[281]

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 One 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 State and entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights, except for treason or other infamous crime?[282]

These statements, and similar remarks by supporters emphasizing the citizenship declaration as the central focus of Section One,[283] are consistent with supporters' efforts to link Section One 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 One did little more than "embody" the more specifically worded protections of the Civil Rights bill.[284]

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supra note 275, at 14).

[281] Chicago Tribune, Sept. 22, 1866, p. 2. The address was signed by New Jersey Governor Marcus L. Ward, the Committee's chairman, and other party leaders, including Horace Greeley.

[282] 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, 40 (Baker, Bailache & Co. 1867).

[283] *See also*, *e.g.*, Cincinnati Commercial, Aug. 27, 1866 (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 …") (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 20); New York Times, Sept. 27, 1866 (quoting resolutions adopted by Pittsburgh Convention of Union Soldiers and Sailors) (proposed amendment "clearly defines American citizenship and guaranties all his rights to every citizen"); Cincinnati Commercial, Aug. 31, 1866, p. 2 (speech of Rep. Columbus Delano) (describing Section One as "in substance, a definition of citizenship") (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 23).

[284] *See*, *e.g.*, text accompanying *supra* note 276 (quoting Trumbull's characterization of Section One as a "reiteration of the Civil Rights Bill."); text accompanying *supra* note 280 (quoting Sen. Henry Lane's statement describing Section One as "a re-affirmation of the first clause in the Civil Rights Bill"); Cincinnati Commercial, Sept. 24, 1866, p. 1 (speech of Sen. John Sherman) (describing Section One as the "embodiment of the Civil

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 the State of Virginia."[285] Observing that this "anomalous condition of civil rights exists in no other civilized country," the editorial praised the proposed Amendment for "defin[ing] in the Constitution itself what constitutes a citizen and ... declar[ing] ... that a citizen of the whole Republic ... shall also be a citizen of the State in which he resides."[286] While the paper observed that the "proposed provision making citizenship uniform" would "concede[] 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.[287] 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 *Corfield* opinion as indicative of "the "long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere."[288] An editorial in the *North American and United States Gazette* of Philadelphia during this same period declared "that the primary importance" of Section One "lies in the fact that it specifically places the citizenship of the republic above that of the States, and makes

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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") (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 39).

[285] *American Citizenship*, Chicago Tribune, Oct. 10, 1866, p.2.

[286] *Id.*

[287] *Id.*

[288] *The National Question, The Constitutional Amendment—National Citizenship*, N.Y. Times, Nov. 10, 1866. In a subsequent editorial 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" (*i.e.*, in the first unsigned editorial) as indicative of "what privileges and immunities were intended" by that provision. *The Proposed Constitutional Amendment—What it Provides*, N.Y. Times, Nov. 15, 1866. This latter editorial also suggested that the Amendment would extend to citizens "protection … coextensive with the whole Bill of Rights" against the state governments. *Id.*

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."[289]

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 One to the relatively narrow and uncontroversial 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.[290] In

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[289] *The Amendment Alone*, Philadelphia North American and United States Gazette, Nov. 22, 1866, p.2.

[290] Such claims were pervasive among the Amendment's opponents in both the North and the South. *See*, *e.g.*, TEX. HOUSE J. 578 (1866) (report of Committee on Federal Relations) (objecting to Section One 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 Sates, 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); Cincinnati Commercial, Aug. 9, 1866 (speech of Sen. Thomas Hendricks) (arguing that the Amendment would "confer citizenship on 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") (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 9); IND. HOUSE J. 102 (1867) (minority report of Select Committee on Constitutional Amendment) (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); WIS. SEN. J. 96 (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.").

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.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, 208 (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."); 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, (T. & J. W. Johnson, 1843) (defining "citizen" as "[o]ne who, under the Constitution and laws of the United States, has a right to vote … and who is qualified to fill offices in the gift of the people."). 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.*,

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 8, 1866, Speaker of the House Schuyler Colfax ridiculed opponents' reliance on the "chimera and hobgoblin of negro suffrage," granting that "the man who votes has the right to be called a citizen," but contending that "it don't follow that every citizen has a right to vote."[291] 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."[292] Representative Columbus Delano of Ohio went even further, asserting that there was "nobody in this community so illy informed as not to know that voting does not follow from citizenship ..."[293]

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 One. 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.[294]

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.[295] 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 39th Congress,

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Cincinnati Commercial, Aug. 25, 1866 (speech of the Hon. John Hannah) (criticizing opponents' reliance on definitions from Bouvier and Webster and insisting that citizenship does not require suffrage) (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 21).

[291] Cincinnati Commercial, Aug. 8, 1866 (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 14).

[292] Cincinnatti Commercial, Aug. 20, 1866 (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 13-14).

[293] Cincinatti Commercial, Aug. 31, 1866 (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 23).

[294] *See*, *e.g.*, Cincinnati Commercial, Aug. 8, 1866 (speech of Rep. 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 …") (reprinted in SPEECHES AND DEBATES, *supra* note 275, at 14).

[295] *See* William H. Seward, 15 Stat 708, 708–10 (July 28, 1868) (announcing adoption of the Amendment).

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, 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.[296]

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.[297] After quoting both the Citizenship and Privileges or Immunities Clauses, Boutwell observed that "[o]ne of the privileges, then, of a citizen of the United States is that he shall be a citizen of the State where he resides ..."[298] This citizenship, according to Boutwell, was by its very nature equal.[299] 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*,[300] which Boutwell described as "an authority ... in which the characteristics of citizens are laid down ... in the most satisfactory and conclusive language."[301] 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."[302]

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,[303] 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

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[296] Cong. Globe, 40th Cong., 2d Sess. 1967 (1868).

[297] MALTZ, *supra* note 170, at 81.

[298] Cong. Gobe, 40th Cong., 3d Sess. 558 (1869).

[299] *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.").

[300] 11 Ky (1 Litt.) 326 (Ct. of App. 1822).

[301] *Id*.

[302] *Id.* at 558-59 (quoting *Amy v. Smith*, 11 Ky (1 Litt.) 326 (Ct. of App. 1822)). Boutwell's invocation of *Amy v. Smith* was echoed by his fellow radical, Senator George Edmunds of Vermont. *See id.* at 1001 (Sen. Edmunds).

[303] *See supra* notes 80-87 and accompanying text.

conception of citizenship such as the one reflected in *Amy*, had been used to deny that free blacks were eligible for citizenship.[304] 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.[305] 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.[306] 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.[307] Though Boutwell and other radicals had responses to such objections,[308] more moderate Republicans, including former members of the 39th Congress who had supported the Amendment, rejected the radicals' claim that the Amendment authorized Congress to regulate suffrage in the states.[309] The proposed legislation attracted relatively little Congressional support and was eventually abandoned in favor of an alternative strategy of securing equal suffrage through constitutional amendment.[310]

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[304] *See supra* Section I.C.1.

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

[306] *See supra* notes 291-294 and accompanying text.

[307] *See* U.S. Const. amd. 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. 3rd Sess. 1003 (1869) (Sen. Howard) (contending that Section Two demonstrated that Section One did not confer voting rights).

[308] Boutwell acknowledged that "some persons" in the 39th 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 Section Two merely provided a "penalty" for a state's failure to extend voting rights to all citizens as Section One required. *Id.*at 559.

[309] *See*, *e.g.*, Cong. Globe, 40th Cong. 3rd Sess. 1003 (1869) (Sen. Howard); *id.* at 1002 (Sen. Drake); *id.* at 977-79 (Sen. Frelinghuysen).

[310] MALTZ, *supra* note 170, at 146-47.

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")[311] 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.[312]

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.[313] 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?"[314] 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 ..."[315]

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 averting to the constitutional theory underlying the 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."[316] After observing that several courts had affirmed the constitutionality of that earlier measure, Shellabarger contended that

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[311] Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RIGHTS L. J. 219, 239 n.88 (2009).

[312] *Id.* at 224-25.

[313] *See id.* at 227-52 (collecting statements of supporters reflecting a "duty to protect" interpretation of the Equal Protection Clause).

[314] Cong. Globe 42nd Congress 1st Session 607 (1871).

[315] *Id.*

[316] Cong. Globe 42nd Congress 1st Sess., app. 68 (1871).

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 United States citizenship."[317] Shellabarger argued that "if the [T]hirteenth [A]mendment had done so much as this, the far more explicit, complete and careful provisions" of the Fourteenth Amendment had done that much and more.[318] According to Shellabarger:

> [W]hen the United States inserted into its Constitution that which was not there 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.[319]

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.[320] 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 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."[321]

Not all opponents of the 1871 Act endorsed Kerr's narrow interpretation

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[317] *Id.*

[318] *Id.*

[319] *Id.* at 69. For other examples of Republicans invoking the Citizenship Clause as support for the bill's constitutionality, *see* Cong. Globe, 42nd Cong., 1st Sess., 693-94 (1871) (Sen. Edmunds); *id.* at 382 (Rep. Hawley); *id.* at 500 (Sen. Frelinghuysen).

[320] *Id*. at 47.

[321] *Id*.; *see also*, *e.g.*, *id.* app. at 165 (Rep. Bird) (endorsing the "lucid and exhaustive argument" of Representative Kerr); *id.* app. at 259 (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"). Such arguments marked a significant shift from the rhetorical strategies of the Fourteenth Amendment's opponents prior to enactment. *See supra* notes 200 & 290 and accompanying text (discussing opponents' arguments that making blacks citizens would require that they be given full legal and political equality).

of the Citizenship Clause. The more common response was simply to deny that Congress could invoke its Section Five enforcement power in the absence of overtly discriminatory state action.[322] A notable example of this line of argument was offered by Senator Garrett Davis of Kentucky who claimed that Congress's Section Five enforcement power was limited to "pass[ing] acts declaring all State laws which contravene [the] 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.[323] But despite this extremely narrow construction of Section Five, Davis endorsed a significantly broader interpretation of the Citizenship Clause:

> The only purpose of this provision [*i.e.*, 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 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.[324]

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 39th Congress in 1866.[325] 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 One, which he discussed separately.[326]

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,

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[322] *See*, *e.g.*, *id.* app. at 218-19 (Rep. Thurman); *id.* app. at 138-39 (Rep. McCormick); *id.* at 573 (Sen. Stockton); *id.* at 337-38 (Rep. Whitthorne).

[323] *Id.* at 648.

[324] *Id*.

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

[326] Cong. Globe 42nd Congress 1st Sess. 648-49 (1871).

prompting a series of legal challenges by individual butchers and smaller corporations whose livelihoods were threatened by the law.[327] These legal actions culminated in the Supreme Court's notorious 1873 decision in *The Slaughter-House Cases*[328] in which the Court, by a five-to-four majority, rejected the private butchers' constitutional claims and, in doing so, practically "eviscerated" the Fourteenth Amendment's Privileges or Immunities Clause.[329]

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 "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.[330] 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.[331] The "privileges or 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."[332]

Justice Miller's majority opinion in *Slaughter-House* is among the most widely criticized opinions in Supreme Court history.[333] Miller's narrow interpretation of the Privileges or Immunities Clause is susceptible to

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[327] 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).

[328] 83 U.S. (16 Wall.) 36 (1873).

[329] *See*, *e.g.*, Roosevelt, *supra* note 239, 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 (decision "virtually read [the Privileges or Immunities Clause] out of" the Constitution).

[330] 83 U.S. (16 Wall.) at 74.

[331] *Id*. at 77-78.

[332] *Id.* at 78-80.

[333] *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 Immunites] Clause does not mean what the Court said it meant in 1873"); Akhil Amar, *Substance and Method in the Year 2000*, 28 PEPPERDINE 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").

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.[334] 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,[335] Miller's interpretation rendered the Amendment "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[336]

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.[337] 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*."[338] 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

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[334] *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.").

[335] 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)).

[336] 83 U.S. (16 Wall.) at 96.

[337] Harrison, *supra* note 55, at 1415; *see also* KACZYROWSKI, *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.").

[338] 83 U.S. (16 Wall.) at 80 (second emphasis added).

Amendment.[339]

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, 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.[340]

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."[341] 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."[342] Field argued that:

> [w]hat 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 fourth article 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.[343]

Justice Bradley's separate dissenting opinion likewise emphasized the inherent link between the newly recognized status of United States

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[339] Harrison, *supra* note 55, at 1415 (characterizing this conclusion as "virtually impossible to avoid"); *see also infra* notes 310-315 and accompanying text (discussing similar argument made by Senator Boutwell in post-*Slaughter-House* legislative debate).

[340] 83 U.S. (16 Wall.) at 95-96 (Field, J. dissenting).

[341] *Id.* at 96.

[342] *Id.* at 98.

[343] *Id.* at 100-01.

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 constitutional 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 States 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.[344]

Thus, for both Field and Bradley,[345] 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.[346]

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.[347] 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

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[344] *Id.* at 112-13 (Bradley, J. dissenting).

[345] 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.). Chief Justice Chase joined in Justice Field's dissent without writing a separate opinion.

[346] The only reference to "equal protection" in Field's opinion was as part of a full quotation of the language of Section One. *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).

[347] *See*, *e.g.*, Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 133 (1994) (characterizing Miller's opinion as "an attempt to assuage the conflict over Reconstruction by prudent compromise"); 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").

Amendment's separate Due Process and Equal Protection Clauses, both of which referred to "persons" rather than "citizens."[348] Although the *Slaughter-House* dissenters' views strongly influenced the jurisprudence that developed under the latter two provisions,[349] the damage inflicted by the *Slaughter-House* majority to the significance of citizenship in interpreting the Fourteenth Amendment persists to this day.[350]

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.[351]

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.[352] Sumner's proposed legislation sparked a series of legislative debates and counter-proposals that would span nearly five years.[353] In a speech

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[348] *Cf.* Roosevelt, *supra* note 239, 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).

[349] *See*, *e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*, at 17-20 (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).

[350] *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).

[351] 18 Stat. 335 (1875); *see* McConnell, *supra* note 5, at 998-1005 (describing evolution of supporters' constitutional theories in the wake of *Slaughter-House*).

[352] McConnell, *supra* note 5, at 987.

[353] *See 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 984-1117

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.[354]

Sumner was far from alone in drawing a link between the legal status of United States citizenship and the equality guarantees 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.[355] Though this theory was sometimes tied to the specific language of the Amendment's Privileges or Immunities Clause,[356] many Republicans took the position that equality of rights and privileges inhered in the very nature of United States citizenship itself.[357]

(looking to evidence of legislative debates and votes regarding 1875 Act as evidence Reconstruction-era understanding concerning school segregation).

[354] Cong. Globe, 42d Cong., 2d Sess. 385 (1872).

[355] *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.").

[356] *See*, *e.g.*, Cong. Globe, 42nd Cong., 2nd Sess. 762 (1872) (Sen. Carpenter) ("The fourteenth amendment assumes that there are certain privileges and immunities belonging to 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.").

[357] *See*, *e.g.*, 2 Cong. Rec. 4081 (1874) (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."); 2 Cong. Rec. 425 (1874) (Rep. Purman) ("A citizen of the United States and a State is always equal to any other citizen of said state."); 2 Cong. Rec. 414 (1873) (Rep. Lawrence) ("The colored man is a citizen of the republic, and his rights, equally with all others, this Congress must respect if this Constitution is to be obeyed."); Cong. Globe, 42nd Cong., 2nd Sess. 436 (1872) (Sen. Frelinghuysen) ("[A]n equality of citizenship is established [by the Constitution] and we are directed to see to it that citizenship is nowhere abridged. It is therefore, perfectly constitutional for Congress to say to the States, … you shall treat citizenship as citizenship."); *id.* at 845 (Sen. Sherman) ("It seems to me clear as day … that if in any

As in the earlier Congressional debates concerning the constitutionality of the 1871 Ku Klux Act,[358] 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.[359] 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."[360] But in the Congressional debates of the 1870's, 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."[361] Describing the effect of the Fourteenth Amendment specifically, Stephens declared his understanding that Section One had "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 second, to "prohibit the States 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."[362]

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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 citizen of a privilege and immunity which they have a right to enjoy in every part of the country as citizens of the United States"); *id*. at 900 (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?"); Cong. Globe, 42nd Cong. 2nd Sess. 273 (1871) (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.").

[358] *See supra* notes 322-326 and accompanying text.

[359] *See*, *e.g.*, 2 Cong. Rec. app. 241 (1874) (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 1-2 (Rep. Southard) (conceding that 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").

[360] McConnell, *supra* note 5, at 1065.

[361] 2 Cong. Rec. 381 (1874).

[362] *Id.* at 380. 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 judgment of courts, to be rendered in such a way as Congress

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.[363] 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.[364] Justice Miller's opinion for the majority thus gave the legislation's opponents a powerful weapon to argue against the bill's constitutionality.[365]

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.[366] Others argued for a narrow interpretation of the decision, denying that it prohibited Congressional efforts to address racial discrimination.[367]

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.[368] 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

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might provide ..." *Id.* at 380-81.

[363] McConnell, *supra* note 5, at 998 (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.").

[364] *Id.* at 997-98; *see also* Harrison, *supra* note 55, at 1425-29.

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

[366] *See*, *e.g.*, 2 Cong. Rec. app. 304 (1874) (Sen. Alcorn) (denying opinion issued by "another branch" of the government was binding on Congress); 2 Cong. Rec. 3453 (1873) (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).

[367] *See*, *e.g.*, 3 Cong. Rec. 943 (1875) (Rep. Lynch) (claiming that *Slaughter-House* allowed legislation to redress "distinctions and discriminations … made on account of race, color, or previous condition of servitude" even if Amendment did not extend to other contexts).

[368] 3 Cong. Rec. 1792 (1875) (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 the States generally, and certainly is not law for the Senate").

States."[369] Invoking the Citizenship Clause, Boutwell argued:

> Now, then, what is the effect of this [*i.e.*, 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... . and 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 resides ... . [370]

Boutwell argued that even if the Fourteenth Amendment had contained "nothing substantive" except for the declaration of citizenship and Congress's Section Five enforcement power, Congress would still possess sufficient authority to adopt the proposed civil rights bill.[371]

Despite the many imaginative attempts to explain away, distinguish or reject the authority of *Slaughter-House*, the more common response among Republicans was to turn away from the Citizenship and Privileges or Immunities Clauses as grounds of the legislation's constitutionality and embrace instead an alternative textual theory grounded in the Equal Protection Clause.[372] 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.[373] The transition from the citizenship-based justification to equal-protection theories did not happen all at once and was hardly seamless.[374] But the evidence of the transition was 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

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[369] 2 Cong. Rec. 4116 (1874).

[370] *Id.*

[371] *Id.*; *see also*, *e.g.*, 2 Cong. Rec. app. 359 (1874) (speech of Sen. Morton) (conceding that Amendment conferred no power on Congress to protect rights that "belong to the citizens of 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 enjoy all the privileges and immunities of citizens of that State on equal terms is one of the highest privileges of citizens of the United States.").

[372] *See* McConnell, *supra* note 5, at 1002.

[373] *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).

[374] *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").

tracked the language of the Equal Protection Clause by extending protection to "all persons within the jurisdiction of the United States."[375]

D. The Civil Rights Cases

The Civil Rights Act of 1875 was the last significant civil rights legislation adopted by the Reconstruction Congress.[376] 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.[377] 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.[378]

Following the election of 1876, federal enforcement of the Civil Rights Act of 1875 was sporadic and haphazard.[379] 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.[380] The Court adhered to this pattern of narrow interpretation in its 1883 decision in the *Civil Rights Cases*,[381] 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

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[375] *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).

[376] McConnell, *supra* note 347, at 136.

[377] McConnell, *supra* note 5, at 1088-89.

[378] McConnell, *supra* note 347, 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.

[379] McConnell, *supra* note 5, at 1087-88.

[380] *See*, *e.g.*, United States v. Harris, 106 U.S. 629 (1882) (invalidating portions of Ku Klux Act of 1871); United States v. Cruikshank, 92 U.S. 542 (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).

[381] 109 U.S. 3 (1883).

already entitled.[382] Justice Bradley's opinion for the eight-Justice majority rejected the proponents' constitutional theory, holding that "civil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority … ."[383]

The Court's lone dissenter, Justice Harlan, complained that Bradley's decision had "proceed[ed] ... upon grounds entirely too narrow and artificial ..."[384] Picking up on Bradley's concession that Section Two of the Thirteenth Amendment gave Congress "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery,"[385] Harlan first contended that the law could be defended as a proper exercise of that constitutional power.[386]

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 by 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 Five power.[387] 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?"[388]

Harlan asserted that there was at least one right, "if there be no others" that was "secured to colored citizens of the United States—as between them and their [own] respective states—by the 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."[389] According to Harlan:

> Citizenship in this country necessarily imports at least equality of civil rights

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[382] *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.").

[383] 109 U.S. at 17.

[384] 109 U.S. at 26 (Harlan, J. dissenting).

[385] *Id.* at 20-21. 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 22-23.

[386] *Id.* at 34-37 (Harlan, J. dissenting).

[387] *Id.*

[388] *Id.* at 47.

[389] *Id*. at 48.

> 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.[390]

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.[391] It was also among the last. The ascendance 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 Citizenship Clause as a source of legally enforceable equality rights a "lost cause."[392]

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."[393] A perhaps more fitting description might be that of originalism as a "big tent" comprising diverse, and to some extent, conflicting theories

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[390] *Id*.

[391] *See*, *e.g.*, Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L. J. 330, 355-56 (2006) (citing Harlan's dissent as support for the equal citizenship understanding of the Fourteenth Amendment); Kenneth L. Karst, *Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 19-20 (1977) (same).

[392] Benedict, *supra* note 347, at 76-77; *see also* Karst, *supra* note 391, 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.").

[393] Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003).

united by a core commitment to the interpretive primacy of the "fixed" meaning of the constitutional text at the time of enactment.[394] The existence of significant diversity among originalist theories complicates efforts to make definitive claims regarding whether a particular result 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.[395] Over time, the weight of academic originalist opinion has shifted away from intent-focused theories, which had predominated during the 1970's and 1980's, and toward approaches that emphasize original public meaning.[396] Despite this shift in emphasis, intent-based theories continue to attract the support of prominent adherents.[397]

In the two subparts 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

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[394] *See*, *e.g.*, Thomas Colby & Peter 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*, at 2 (Illinois Pub. Law Research 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").

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

[396] *See*, *e.g.*, Colby & Smith, 394 note 409, at 247-55 (describing the shift from "original intentions" originalism to "original public meaning" originalism).

[397] Prominent intentionalist originalists include Keith 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); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009); Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

through III above. In view of the shear diversity among originalist theories, it may not be possible to construct an argument that will fully satisfy all originalists. But as the following subparts will show, a compelling argument can be made for recognizing an equality component in the Citizenship Clause under both an original intent and an original public meaning framework.[398]

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.[399] 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.[400]

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[398] 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 history "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 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); *see also 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 395, at 779 (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 subparts that follow will be addressed primarily to those who advocate this more demanding standard.

[399] *See*, *e.g.*, Alexander & Prakash, *supra* note 397, 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.").

[400] *See*, *e.g.*, Kay, *supra* note 397, at 970 (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.").

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 relatively 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 One's separate Privileges or Immunities Clause.[401] 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."[402]

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.[403] The principal motivation for including the Citizenship Clause was, as Siegel observes, simply to clarify who would be protected by the former provision.[404] 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.[405] 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.[406]

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[401] *See* Part II.D *supra*.

[402] Siegel, *supra* note 19, at 580.

[403] McConnell, *supra* note 5, at 997-1005.

[404] *See supra* notes 248-256 and accompanying text (discussing Senator Wade's proposal to clarify the Privileges or Immunities Clause and subsequent addition of Citizenship Clause).

[405] *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.").

[406] *See*, *e.g.*, WHITTINGTON, *supra* note 397, at 178-79 (distinguishing between extratextual "motivations" or "expectations" that drove the decision to include a particular

For example, Professor Richard Kay, one of the leading 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."[407] 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 adjudication . . . .[408]

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 "extremely rare."[409] In fact, Kay contends that any such divergence would involve "some kind of mistake by the rulemakers" in attempting to convey their intended meaning.[410]

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 to diverge from its original public meaning. The first category involves a simple

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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 JUDICIARY: 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.").

[407] *Id*. at 234; *see also* Kay, *supra* note 397, 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 394, 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.

[408] Kay, *supra* note 399, at 234-35 (footnotes omitted).

[409] Kay, *supra* note 397, at 712.

[410] *Id*.

drafting or transcription error of the type typically associated with the "scrivener's error" doctrine in statutory interpretation.[411] 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.[412]

Though these two categories are conceptually distinct and, on Kay's account, call for different methods of resolution,[413] 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.[414] 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 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.[415] Further evidence on this point is provided by the

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[411] *Id.* at 713.

[412] *Id.*

[413] 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 399, at 248-51; *cf.* Brett 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).

[414] *Cf.* Kay, *supra* note 397, 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).

[415] 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

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.[416] 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 oppression of their old masters.[417]

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 39th 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 One and its predecessor provision in the Civil Rights bill abound with statements evincing this understanding.[418] Indeed, my review of the debates has revealed only a single occasion where a member of Congress expressed a contrary understanding.[419] Those remarks not only failed to persuade but seem to have sparked genuine puzzlement on the part of those to whom they were addressed.[420]

Combining these two understandings—namely, that the Citizenship Clause bound the federal government and that citizenship required legal

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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.").

[416] Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).

[417] *Id.*

[418] *See supra* Parts II.A-II.C. For particularly clear illustrations of this understanding, see the text accompanying *supra* notes 182-192 (Sen. Trumbull), 197 (Rep. Wilson), 202-204 (Sen. Van Winkle), 269 (Sen. Howard).

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

[420] *See supra* notes 208-209 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 273.

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 U.S. citizens.

There remains, however, the question of why this specific understanding, if intended, failed to leave any clear trace in the legislative record.[421] Two plausible answers suggest themselves. First, the central problem at which both Section One 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 period[422]—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 enactment.[423] Though Republican lawmakers were not always clear or consistent in identifying the precise source of such a requirement,[424] it is

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[421] *See supra* note 405.

[422] Siegel, *supra* note 19, at 549; *see also id.* at 559 (noting that "the Civil War and Reconstruction Congresses repealed almost all laws granting preferences to 'whites.'").

[423] *See*, *e.g.*, Mark Graber, *A Constitutional Conspiracy Unmasked: Why "No State" Does Not Mean "No State"*, 10 CONST. COMMENTARY 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 (1984) ("[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").

[424] *See*, *e.g.*, BALKIN, *supra* note 398, 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. 2549 (1866) (Rep. Stevens) (asserting

clear that many viewed the requirement as inhering in the very nature of United States citizenship itself.[425] Given the prevailing view among Congressional Republicans that the Citizenship Clause was merely declaratory of what existing law already required,[426] 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.[427]

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 One that emerged from the Joint Committee in April 1866 contained no express limitation on federal conduct whatsoever.[428] Had this version of the

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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).

[425] *See supra* note 418.

[426] *See supra* notes 170 & 193 and accompanying text (discussing pre-Fourteenth Amendment Republican belief that native birth alone established citizenship).

[427] 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. amd. 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 I's 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).

[428] *See* Part II.C *supra*.

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 One could nonetheless be interpreted to bind the federal government.[429]

But if one accepts the seemingly uncontroversial claim that the objective meaning of the enacted text provides strong evidence of intended meaning,[430] 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 subpart.[431] 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.[432] As such, there is little basis for believing that original 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.[433] 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.[434]

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[429] 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 423 at 91. For a critique of Graber's argument, *see* Siegel, *supra* note 19, at 573-78.

[430] *See* Kay, *supra* note 397, at 712.

[431] *See id.* at 712-14 (discussing overlap between original intent and original public meaning approaches).

[432] *See also infra* note 468.

[433] *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").

[434] *See*, *e.g.*, BARNETT, *supra* note 246, 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*

Though different public meaning originalists describe the "reasonable observer" at the center of their methodological approach in subtly different ways,[435] most agree on a handful of key characteristics such an individual should possess, including the ability to competently speak 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.[436] 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 ratification processes, and early post-enactment interpretations and applications of the provision.[437]

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 pre-date 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

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note 395, at 761 n.29 ("Most original public meaning theorists rely on a reasonable reader or author.").

[435] *See*, *e.g.*, Kay, *supra* note 397, at 721-24 (describing various formulations public meaning originalists have used to describe the hypothetical "reasonable person").

[436] *See*, *e.g.*, 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"); Kesavan & Paulsen, *supra* note 393, at 1132 (focusing on the understanding of a "hypothetical, objective, reasonably well-informed reader").

[437] *See*, *e.g.*, Kesavan & Paulsen, *supra* note 393, at 1148 (identifying various "commonly-accepted" sources of original public meaning, including public statements made during 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 Section One, 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").

terms.[438]

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.[439] 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 citizenship in the Constitution.[440] 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.[441]

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.[442]

While an express prohibition of federal discrimination would have left

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[438] *See*, *e.g.*, Kesavan & Paulsen, *supra* note 393, 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.").

[439] *See* Part I.B.3 *supra*.

[440] *See supra* Part I.C.1.

[441] *See* Part III.A-D *supra*.

[442] *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").

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,[443] 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:

> 1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...[444]
>
> 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.[445]

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.[446]

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

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

[444] U.S. CONST. amd. IV.

[445] MASS. CONST. pt. I, art. XIV (1780).

[446] *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 that right."); *cf.* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31-32 (1914) (describing correlative relationship between a grant of "rights" and the corresponding "duties" that arise as a result).

to citizenship without saying anything specific about *what* that status entails.[447] 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—*i.e.*, 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 "mak[ing]" or "enforc[ing]" any laws that "abridge" such rights.[448] 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.[449] 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.[450]

Moreover, even if construed strictly as a standalone provision, apart from any additional inferences that might be drawn from the Privileges or

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[447] *See* Smith, *supra* note 62, at 683 (observing that "technically, the language of the first sentence of Section 1 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.").

[448] *Cf.* Lawrence Solum, *Incorporation and Original Meaning*, 18 J. CONTEMP. L. 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.").

[449] *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.").

[450] *See supra* notes 444-446 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 Sates." *See*, *e.g.*, Solum, *supra* note 448, 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 463-464 and accompanying text.

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"[451] might reasonably be understood "to mean not simply a judicial official who decides cases according to law" but rather "an 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.[452] 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,"[453] "Indian tribes,"[454] "Congress"[455] and "war."[456]

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

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[451] *See*, *e.g.*, U.S. Const. art. III § 1 (referring to "[t]he Judges … of the supreme and inferior Courts …").

[452] Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis for the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 824 (1999).

[453] *Id.* at 831-60 (arguing that Constitution's reference to "states" provides a defensible textual basis for immunizing certain aspects of states' sovereign functions from federal regulation and control).

[454] *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 Indian tribes").

[455] *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 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").

[456] *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).

acknowledged to be "citizens" or make it a crime for them to remain within the territorial jurisdiction of the United States.[457] If one is prepared to concede that the status of "citizen" carries with it at least *some* corresponding rights and privileges (beyond the bare "privilege of writing 'citizen' after your name"),[458] 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.[459]

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.[460] 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.[461]

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[457] *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.").

[458] *Cf.* CHARLES BLACK, 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").

[459] 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 in note 290 above. Though many supporters of the Amendment denied that citizenship would entail voting rights, *see supra* notes 291-294 and 322 and accompanying text, they were virtually unanimous in endorsing the proposition that citizenship entailed equality of basic civil rights. *See supra* Parts II.A-D.

[460] *See supra* notes 118-122 and accompanying text (discussing Kent's views) and *supra* notes 144-150 and accompanying text (discussing Curtis's *Dred Scott* dissent).

[461] 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"—*i.e.*, either a person who possesses a formal legal status, though not necessarily

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.[462] 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 United States as

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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* Section I.B.3; *cf.* Linda Bosniak, *Constitutional Citizenship through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1305-06 (2002) (noting a similar distinction 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 462, they express differing views regarding the extent to which such interpretive methods are capable of resolving vagueness. *Compare* Barnett, *supra* 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 395, at 774-76 (predicting that constitutional vagueness will usually be resolvable through traditional interpretive techniques).

[462] *See*, *e.g.*, Barnett, *supra* note 461, at 68 ("When it comes to resolving ambiguity, the context of a statement usually reveals which sense is meant."); Rappaport, *supra* note 452, at 823 ("When judges are resolving an ambiguity, textualism requires that they take various considerations into account," including structure, purpose and background history).

such,"[463] that is, those rights that citizens enjoyed by virtue of their status as United States citizens.[464] Another common view of that provision was that it would protect (at least) the types of non-discrimination rights identified in *Corfield* and in the Civil Rights Act of 1866.[465]

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*.[466] 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 motivated the Amendment's adoption.[467] 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,

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[463] *See* text accompanying *supra* note 251 (quoting Senator Howard's speech).

[464] *See also*, *e.g.*, Cong. Globe, 42nd Cong. 2nd Sess. 820 (1872) (Sen. Morton) (referring to "the privileges or immunities that belong to citizens of the United States as such"); *id.* at 1650 (Sen. Butler) ("The only privileges and immunities secured by the Constitution are those of 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.) at 74-75 (Miller, J.) (identifying "privileges or 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) (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* Part III.B *supra* (discussing Justices' opinions)

[465] *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) (Sen. Trumbull) (identifying *Corfield* and other Comity Clause cases as providing the judicial sense of "what was meant by the term 'citizen of the United States.'").

[466] *Cf. supra* notes 328-339 and accompanying text (describing Miller's interpretation of the Privileges or Immunities Clause).

[467] *See supra* notes 334-335 and accompanying text.

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 One.

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.[468] 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 One that emerged from the Joint Committee in April 1866 proposed to do exactly that. By focusing

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[468] 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 39th Congress and their contemporaries had lived through the fugitive slave controversies of the 1850's and had witnessed first-hand 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 multiple 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 lawmaking).

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.[469] The addition of the Citizenship Clause, however, significantly changed the meaning of Section One. 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,[470] 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.[471]

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,[472] the arguments presented here raise similar questions regarding the precise relationship

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[469] *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.").

[470] *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).

[471] *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.").

[472] *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").

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-surplussage" canon by rendering the Equal Protection Clause wholly redundant.[473] 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 surplussage 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"—*i.e.*, 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, regardless of whether or not those persons are also citizens.[474] This distinction did not go unrecognized during the pre-enactment Congressional debates. Multiple members of the 39th Congress, including Bingham and Howard, expressly noted that the Equal Protection Clause, unlike the Privileges or Immunities Clause, would extend protection to non-citizens.[475] Thus, even if there is a perfect overlap between the equality rights 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

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[473] *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.").

[474] U.S. Const. amd. XIV § 1 ("No State shall … deny to *any person within its jurisdiction* the equal protection of the laws.") (emphasis added).

[475] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (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?"); *id*. at 2765-66 (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.").

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.[476] 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.[477]

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 to extend to non-citizens the protections of most (but not all) of the protections of the Civil Rights Act of 1866.[478] The legislative history of that provision, which was adopted as part of the Voting Rights Act of 1870,[479] indicates that it was "designed to enforce the Equal Protection Clause for the benefit of alien immigrants, mainly Asians in California."[480] The 1870 Act largely mirrored the language of Section One 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."[481] Second, the 1870 Act omitted language that had been included in the Civil Rights Act, which prohibited states from making race-based distinctions

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[476] 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 311, 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 55, at 251-93; *cf.* Calabresi & Rickert, *supra* note 437, 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 478-490 and accompanying text.

[477] *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).

[478] The background of the enactment is described in Harrison, *supra* note 55, at 1443-47.

[479] Act of May 31, 1870, cl. 114, § 16, 16 Stat. 144.

[480] Harrison, *supra* note 55, at 1444.

[481] *Id.*

with respect to the right to buy, hold, sell, lease or convey real or personal property.[482] The omission of the 1866 Act's property provisions, which the sponsor of the 1870 Act acknowledged had been intentional,[483] 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."[484]

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*,[485] "the Supreme Court's first great Equal Protection Clause case,"[486] the Court described the Fourteenth Amendment's Equal Protection Clause 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.[487]

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

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[482] *Id.*

[483] *Id.* at 1445-46 (recounting colloquy between Senator Stewart, the 1870 Act's sponsor, and Senator Samuel Pomeroy of Kansas).

[484] *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").

[485] 100 U.S. 303 (1880).

[486] Harrison, *supra* note 55, at 1443.

[487] 100 U.S. at 309 (emphasis added).

that eventually culminated in the Supreme Court's *Slaughter-House* decision three years later.[488] 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."[489] Likewise, the Supreme Court of Indiana, on multiple occasions in the 1870's, 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 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*.[490]

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*).[491] Likewise, more than a half-century of skepticism that *Bolling* can be reconciled with a plausible account of the Constitution's text and

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[488] 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. 8,408).

[489] *Id*. at 652.

[490] Cory v. Carter, 48 Ind. 327, 353 (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).

[491] *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*.").

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 mark against the theory.[492] 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.[493] 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.[494]

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

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[492] *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 …").

[493] *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").

[494] 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).

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 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.[495]

But questions of this nature, 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*.[496] 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.[497] 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.

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[495] *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).

[496] *Cf. supra* note 45.

[497] *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.").