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General Citizenship Rights

ABSTRACT. Current scholarship and case law assume that citizenship rights come in only two sets: state and national. This binary approach reflects broader contemporary attitudes about the positivist grounding of constitutional rights and the dualistic character of American sovereignty. From the Founding up until Reconstruction, however, many Americans took a different view. For those steeped in older ways of thinking, citizenship rights included not only local and national rights but also general citizenship rights. Premised on social-contractarian assumptions and a common jurisprudential heritage, general citizenship rights were fundamental rights that were putatively held by all American citizens. Moreover, these rights were secured across state lines through the conferral of general citizenship in Article IV, reflecting the interstate dimensions of federalism. Coming in three sets, not two, citizenship rights were thus based not only on the positively enacted law of particular sovereigns but also on general law, coupled with the notion that Americans belonged to a federative political family. Recovering these ideas of general citizenship rights and general citizenship enables new ways of seeing our constitutional past and can help to clarify or resolve long-running controversies about the Privileges and Immunities Clause in Article IV and the Privileges or Immunities Clause in the Fourteenth Amendment. This history also points toward a different way of framing those disputes, focused less on linguistic analysis of constitutional text and more on underlying conceptions of fundamental rights, federalism, and sovereignty.

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INTRODUCTION

Interest in the history of citizenship rights is off the charts,[1] but there is little scholarly agreement about how Americans understood those rights or their relation to state and federal power. Debates are especially lively concerning the Privileges and Immunities Clause in Article IV and the Privileges or Immunities Clause in the Fourteenth Amendment. Some scholars interpret these clauses as securing only "relative" rights of nondiscrimination (interstate and intrastate, respectively),[2] while others read them as guaranteeing "substantive" rights that states cannot abridge, even under nondiscriminatory laws.[3] The scope of these rights is also hotly disputed, especially over the perennial issue of unenumerated rights.[4] Meanwhile, some legal historians argue that any quest for original meaning on these matters is futile because of historical indeterminacy.[5]

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1. For historical work published within the past decade, see, for example, Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021); LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865 (2018); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000 (2015); GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866 (2013); David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117 (2016); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020); and 1–2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021) [hereinafter ESSENTIAL DOCUMENTS].
2. *See, e.g.*, David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RSRV. L. REV. 794, 843 (1987); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992).
3. *See, e.g.*, Chester J. Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 1 (1967); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 215-20 (1986).
4. *Compare, e.g.*, LASH, *supra* note 1, at 13 (arguing that the only substantive rights guaranteed by the Privileges or Immunities Clause are rights enumerated elsewhere in the Constitution), *with* BARNETT & BERNICK, *supra* note 1, at 210–12 (critiquing Kurt T. Lash's argument).
5. *See, e.g.*, FONER, *supra* note 1, at xxiv-xxvi; WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 123 (1998).

This Article joins these conversations by introducing two concepts—*general citizenship* and *general citizenship rights*—at the heart of how many Americans thought about the privileges and immunities of citizenship. Today, the idea of general citizenship is nowhere to be found in the literature.[6] The Constitution speaks only of citizens of states and citizens of the United States,[7] so we have naturally assumed that citizenship rights came in only two bundles: *state* and *national*.[8] In the nineteenth century, however, many jurists thought that citizenship rights came in three sets: *local*, *national*, and *general*. Local and national citizenship rights were those attached exclusively to one's status as a citizen of a state and of the nation, respectively.[9] General citizenship rights, by contrast, were often linked to more than one type of citizenship. But these rights were especially tied to a distinctive notion of *general citizenship*, grounded in the view that the United States was not merely a unitary nation but also a federation of states.[10] In other words, the idea of general citizenship—a status conferring reciprocal

6. For further discussion, see *infra* notes 22-28 and accompanying text. Although the concept of general citizenship has been forgotten, scholars have roughly identified the concept of general citizenship rights—that is, fundamental rights commonly held by Americans. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 153-58 (1998); Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1293-99 (2000); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 32-55 (2007); Charles W. McCurdy, *The Problem of General Constitutional Law: Thomas McIntyre Cooley, Constitutional Limitations, and the Supreme Court of the United States, 1868-1878*, 18 GEO. J. L. & PUB. POL'Y 1, 1-12 (2020); WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: BARRON V. BALTIMORE AND THE FOUNDATIONS OF AMERICAN LIBERTY 189-99 (2017); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171-72 (1992) [hereinafter Sherry, *Natural Law*]; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1157-58 (1987). But scholars have not situated these rights in the ternary taxonomy discussed here or explored their disputed relationship to general citizenship.

7. References to state citizenship appear in U.S. CONST. art. III, § 2 ("Citizens of different States"); *id.* art. IV, § 2, cl. 1 ("Citizens of each State"); *id.* amend. XI ("Citizens of another State"); *id.* amend. XIV, § 1 ("citizens of the United States and of the State wherein they reside"); *id.* art. I, § 2 ("Citizen of the United States"); *id.* art. I, § 3 (same); *id.* art. II, § 1 (same); *id.* amend. XIV, §§ 1-2 ("citizens of the United States"); *id.* amend. XV, § 1 (same); *id.* amend. XIX, § 1 (same); *id.* amend. XIV, § 1 (same); and *id.* amend. XXVI, § 1 (same).

8. *See infra* notes 22-29 and accompanying text. Jack M. Balkin has described a "tripartite theory of citizenship," but that idea relates to three possible categories of rights that citizens might enjoy (civil, political, and social), not to the notion of general citizenship described here. JACK M. BALKIN, LIVING ORIGINALISM 221-22 (2011).

9. As used in this Article, the term "local" citizenship rights does not refer to municipality-level rights. Rather, it refers to rights grounded in local law, in contrast to general law.

10. *See, e.g.*, THE FEDERALIST NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961) (stating that the Constitution "is in strictness neither a national nor a federal constitution; but a composition of both"). James Madison was not referring to citizenship rights, but he was grappling with the underlying sovereignty issues that influenced views of citizenship.

protection of general citizenship rights across state lines—reflected a *federative* (or confederal) aspect of American federalism.[11] My primary goals in this Article are to trace the concepts of general citizenship and general citizenship rights from the colonial period through Reconstruction and to examine how those concepts illuminate several historical debates about fundamental rights.

My other aims are to show how these different notions of citizenship were linked to underlying views about sovereignty and, in doing so, to suggest that originalists have often focused too narrowly on the text of the Fourteenth Amendment and not enough on antecedent, nontextual premises about the nature of the federal union.[12] Over and over, historical conflicts over citizenship were less about the meaning of words and more about the nature and distribution of political authority.[13] When recovering earlier views about citizenship rights, then, we cannot assume that those rights were textually derived or that debates about them turned on linguistic analysis. Appreciating this point can thus open new ways of seeing the historical terrain of constitutional debate.

The first step in broadening our range of vision is to recover the idea that Americans enjoyed, as Justice Joseph Story wrote in his *Commentaries*, "a general

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11. The Founders often used the word "federal" to capture this notion. *See, e.g.*, *id.* at 257. But "federal" today means "national," so this Article uses the word "federative." As used here, the term does *not* refer to the Lockean concept of "federative" powers, like the ability to levy war and make peace. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 37-38 (2020).

12. Because this Article is a descriptive work of legal history, it cannot answer present-day questions of constitutional method. My point is that any effort to recover attitudes about fundamental law in the past must account for the undergirding assumptions that historical figures used to identify that law. For further discussion, see *infra* Part IV.

13. In other words, the controversies were, at heart, social-contractarian disputes over political identity, not textual disputes about the meaning of language. This point is well-recognized in recent historical scholarship concerning who belonged to the polity. *See, e.g.*, LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP, at xxiii (1998); GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S-1830S, at 4 (2019); PARKER, *supra* note 1, at 4; ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 6 (1997). But this literature often "treat[s] citizenship as a cultural construct involving civic participation rather than as a legal status." Michael Les Benedict, *"Membership of a Nation and Nothing More": The Civil Rights Act of 1866 and the Narrowing of Citizenship in the Civil War Era*, *in* THE GREATEST AND THE GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY 9, 9 (Christian G. Samito ed., 2018); *see also* William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, *in* THE DEMOCRATIC EXPERIMENT 85, 92 (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2009) ("Whereas modern citizenship involves a single, formal, and undifferentiated legal status—membership in a central nation-state—that confers universal and internal transjurisdictional rights upon its holders, nineteenth-century American governance was precisely about differentiation, jurisdictional autonomy, and local control.").

citizenship."[14] This concept was linked to the interstate dimensions of the Constitution. In a renowned attack on the constitutionality of the Fugitive Slave Act, for instance, future Chief Justice Salmon P. Chase explained that although the "leading object" of the Constitution "was to create a national government," a "secondary object was to adjust and settle certain matters of right . . . between the citizens of different states, by permanent stipulations having the force and effect of a treaty."[15] Article IV, in other words, functioned essentially as a treaty among sovereign states, not as a *national* constitution. Thus, while *state* and *national* citizenship referred to membership in a sovereign polity, the idea of *general* citizenship was that Americans also belonged to a federative political family, whose members shared a common jurisprudential heritage and mutually secured fundamental rights—namely, the rights of general citizenship. These included axiomatic common-law and natural rights, like due process, habeas, speech, property, locomotion, and so on.[16]

Although their terminology often varied,[17] jurists from the Founding through Reconstruction widely embraced this way of thinking. Consider, for instance, the two most well-known opinions in *Dred Scott*. The ternary theory of citizenship rights was featured not only in Justice Curtis's classic dissent, which included seven explicit references to the rights of "general citizenship," but also in Chief Justice Taney's majority opinion. To be sure, Curtis and Taney disagreed about how the three notions of citizenship rights were linked and—most notoriously—who qualified for them. But both Justices agreed that citizenship rights came in three sets, not two.

The concept of general citizenship might seem strange today, with federalism debates now focused on vertical issues of state and national power. But this federative idea came naturally to those steeped in the legacies of British constitutionalism, the Articles of Confederation, and long-running debates over interstate relations and slavery. The concept of general citizenship rights also made intuitive sense for those who thought that fundamental rights were secured before constitutional ratification and who were acclimated to the idea of general law—that is, "rules that are not under the control of any single jurisdiction, but

14. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 674 (Boston, Hilliard, Gray & Co. 1833).

15. SPEECH OF SALMON P. CHASE, IN THE CASE OF THE COLORED WOMAN, MATILDA 19 (Cincinnati, Pugh & Dodd 1837).

16. *See* Jud Campbell, *Fundamental Rights at the American Founding*, *in* 4 THE CAMBRIDGE HISTORY OF RIGHTS (Dan Edelstein & Jennifer Pitts eds., forthcoming 2023); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 252-55 (1984).

17. *See infra* notes 159-161, 297-301 and accompanying text.

instead reflect principles or practices common to many different jurisdictions."[18] In sum, the ideas of general citizenship and general citizenship rights reflected a different constellation of ideas about federalism and fundamental law.

Given that general citizenship rights were features of the federal system and belonged to all American citizens, jurists frequently described them as rights of "citizens of the United States."[19] But that term came with latent ambiguity. As Representative Philemon Bliss of Ohio observed in 1858,

> [T]he phrase "citizen of the United States" is no less loosely used than the term [citizenship] itself. It is not only employed to mean a person entitled to all the privileges of citizens in the several States — sometimes called a *general citizen* — but also to designate one as primarily a citizen of the Union as a single consolidated Government.[20]

For many Americans in the nineteenth century, *general* citizenship rights and *national* citizenship rights were distinct groups of rights, even though both sets were known as rights of "citizens of the United States."

Perhaps because of this terminological slipperiness, the ternary theory of citizenship rights has been overlooked in the scholarly literature.[21] For instance, in the leading history of American citizenship, James H. Kettner assumes a binary division between state and national citizenship.[22] William M. Wiecek's seminal work on anti-slavery constitutionalism does so too, misidentifying Story's invocation of general citizenship as referring to "national citizenship."[23] Similarly,

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18. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006).

19. For further discussion, see *infra* notes 180-184 and accompanying text.

20. CONG. GLOBE, 35th Cong., 1st Sess. 210 (1858) (remarks of Rep. Bliss) (emphasis added). Following the usual convention, this Article quotes speakers even when their statements were reported by someone who likely did not create a word-for-word record. In considering the accuracy of the Bliss quotation, however, it is worth noting that his speech was extensively reported and was reprinted in an eight-page pamphlet. *See* PHILEMON BLISS, CITIZENSHIP: STATE CITIZENS, GENERAL CITIZENS (Washington, Buell & Blanchard 1858).

21. Much of this literature focuses on other issues, like who qualified for citizenship or what citizenship rights entailed. For recent reviews of the literature, see the bibliographic essays in PARKER, *supra* note 1, at 231-43; and EDWARDS, *supra* note 1, at 177-89.

22. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 248-49, 286, 331 (1978). James H. Kettner identifies the term "general citizenship" but treats it as a synonym for national citizenship. *See, e.g.*, *id.* at 255-56, 261.

23. WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 166 (1977); *see also* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 888 (1986) (treating "general or national citizenship" as the same); Bogen, *supra* note 2, at 796 ("[T]he privileges and immunities clause . . . was solely concerned with creating a national citizenship.").

Don E. Fehrenbacher's tome on *Dred Scott* uses a binary conception of citizenship, leading to consequential interpretive errors.[24] And the list goes on.[25] Some scholars have mentioned the term "general citizenship" in passing,[26] but they have portrayed general citizenship rights simply as national rights against state governments.[27] In other words, the existing literature does not identify or explore the distinctly *federative* character of general citizenship[28] or the *general-law* grounding of general citizenship rights[29]—including the way that these rights were usually linked to multiple forms of citizenship.

But while many politicians and jurists embraced the ternary approach to citizenship, it was not universally accepted. Prior to the Civil War, Americans on

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24. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 341-46 (1978).

25. *See, e.g.*, Novak, *supra* note 13, at 92 ("Federalism . . . wreaked havoc on the substantive articulation of a coherent conception of national citizenship rights. As the United States Constitution made clear, most privileges and immunities were products of state citizenship rather than national citizenship."). As discussed in Part III, it is less problematic to attribute a consistently binary view of citizenship to Reconstruction-era politicians and judges. *See, e.g.*, FONER, *supra* note 1, at 120, 134-35. But scholars have yet to explore how the lingering effects of the ternary view of citizenship shaped the thinking of Republicans, many of whom continued to embrace a ternary view of citizenship rights. *See infra* Part III.

26. *See, e.g.*, GREEN, *supra* note 1, at 21 (identifying "general citizenship"); Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 104 (2011) ("[T]he Comity Clause secured the rights arising from a general citizenship."). For other examples, see *supra* notes 22-23.

27. *See, e.g.*, GREEN, *supra* note 1, at 77 n.120 (distinguishing "national" and "state" citizenship rights); Hamburger, *supra* note 26, at 111 (claiming that Bingham "advocated black Comity Clause rights in terms of national citizenship"). For other examples, see *supra* notes 22-23. Other scholars have linked the Privileges and Immunities Clause to "interstate citizenship," *see, e.g.*, SMITH, *supra* note 13, at 97; David R. Upham, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1490 n.29 (2005), while also treating the Clause as having secured rights of "national citizenship," *see, e.g.*, SMITH, *supra* note 13, at 152; Upham, *supra*, at 1502; *see also* Upham, *supra* note 1, at 1128 (associating *Corfield* with the "national privileges of citizenship"). It should be noted, however, that some of these authors may intend to use the term "national" only in reference to the geographic reach of the rights, rather than to suggest that the rights derived from national citizenship as such.

28. Richard L. Aynes and Maeve Glass both emphasize the federative dimensions of Article IV. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 71 (1993); Glass, *supra* note 1, at 896-97. But they use a binary categorization of citizenship. *See, e.g.*, Aynes, *supra*, at 69; Glass, *supra* note 1, at 918. Accordingly, both scholars consistently interpret references to "privileges and immunities of citizens of the United States" as references to the rights of *national* citizenship. *See* Aynes, *supra*, at 78-80; Glass, *supra* note 1, at 878-79, 891 n.115, 894 & n.127, 888-99 & 899 n.152.

29. Some scholars have emphasized the relevance of "general constitutional law" in diversity cases without considering its connection to citizenship or to the original design of Article IV or the Fourteenth Amendment. *See, e.g.*, Collins, *supra* note 6; McCurdy, *supra* note 6.

opposite sides of the political landscape came to embrace competing binary conceptions of citizenship and citizenship rights. The competition between these approaches reflected larger struggles over federalism and sovereignty, shaped by long-running debates over the nature of the federal union.[30]

On one extreme, those who adopted a "compact theory" of the union wholly rejected the concept of *national* citizenship in the sense of membership in a sovereign national polity. Articulated most famously by John C. Calhoun of South Carolina, compact theory posited that the Constitution was merely an agreement among sovereign states, thus making *all* federal constitutional provisions confederal.[31] From this perspective, Americans had only *local* and *general* citizenship rights, with both being ultimately derivative of state citizenship.[32] Thus, although these figures did not oppose a federative notion of general citizenship, they firmly rejected the idea of national citizenship. As the Attorney General of South Carolina asserted in 1834: "There is no such being, then, under the Constitution of the U.S., as *a citizen of all the States generally*. A citizen of the U.S. is a citizen of one of the States of the confederacy."[33] After the Civil War, many Southern advocates of the "lost cause" held onto this view.[34]

On the other extreme, the "radical" anti-slavery activist Joel Tiffany defended another binary theory of citizenship.[35] On his view, individuals held the essential

30. There is a huge literature on conflicts over state and national sovereignty. *See, e.g.*, ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010); Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783 (2021). Debates over sovereignty were not always dichotomous, *see* Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019), but this Article shows that even a dualistic framing of sovereignty did not necessarily correspond to a binary set of citizenship rights.

31. *See* discussion *infra* Section II.B.

32. *See* 2 THE WORKS OF JOHN C. CALHOUN: SPEECHES OF JOHN C. CALHOUN, DELIVERED IN THE HOUSE OF REPRESENTATIVES, AND IN THE SENATE OF THE UNITED STATES 242-43 (Richard K. Crallé ed., New York, D. Appleton Co. 1853) (denying that one could be a "citizen of the United States" in the sense of being "a citizen at large").

33. THE BOOK OF ALLEGIANCE; OR, A REPORT OF THE ARGUMENTS OF COUNSEL, AND OPINIONS OF THE COURT OF APPEALS OF SOUTH CAROLINA, ON THE OATH OF ALLEGIANCE 103 (Columbia, Telescope Off. 1834) [hereinafter THE BOOK OF ALLEGIANCE] (argument of Att'y Gen. Smith, better known as Robert Barnwell Rhett).

34. *See, e.g.*, 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES; ITS CAUSES, CHARACTER, CONDUCT AND RESULTS 34-35 (Philadelphia, Nat'l Publ'g Co. 1868) (suggesting that "there is no such thing as being a citizen of the United States").

35. For a discussion of "radical" abolitionists, see HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 92-93 (1982).

rights of citizenship as members of the *national* body politic.[36] These rights, Tiffany wrote, were "natural and inalienable rights which the Declaration of Independence asserted, the war of the Revolution maintained, and the adoption of the Federal Constitution secured."[37] Tiffany admitted that state governments were primarily responsible for securing these rights with respect to their own citizens. But on his view, states lacked authority to abridge these rights of *national* citizenship, and the federal government ultimately had the power and responsibility to enforce them.[38] In essence, Tiffany treated general citizenship rights as national citizenship rights.[39]

After the Civil War, Republicans mostly abandoned or ignored a federative notion of general citizenship. They instead asserted that the people of the United States were *one* people whose common fundamental rights were grounded in that unitary account of sovereignty. "[T]he great central idea of the Republican party to day," Senator Oliver Morton of Indiana explained, was "that the sovereignty does not reside in a State, but resides in this whole nation . . . . We are one great nation, and the States are but integral and subordinate parts of this great nation."[40] And with constitutional debates no longer focused on the legal treatment of fugitives from slavery, or on whether states had authority to grant citizenship to free Black persons, Republicans stopped promoting a federative understanding of Article IV.

But what would follow from the decline of general citizenship was not yet clear. Would its obsolescence lead to a parallel abandonment, or at least a broad rethinking, of general citizenship rights? Or would older patterns of thought linger, even as adjacent parts of the intellectual matrix were quickly changing?

As the terrain of constitutional debate shifted, Republicans widely retained an idea of general citizenship rights, but an intraparty split developed in their approach to these rights. So-called "Radical Republicans" typically came to see them as being grounded in a freestanding national social contract dating back to 1776, making general citizenship rights subject to direct congressional control and enforcement, even in cases involving private abridgment. In essence, these Republicans viewed general citizenship rights as a subset of national citizenship

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36. *See, e.g.*, 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 87 (Cleveland, J. Calyer 1849).

37. *Id.* at 88.

38. *See infra* notes 267-268 and accompanying text.

39. On this view, states still had authority over local matters, like suffrage, but Joel Tiffany denied that these rights were citizenship rights. *See* TIFFANY, *supra* note 36, at 95.

40. *Speech of Senator Morton*, WYANDOT CNTY. REPUBLICAN, Sept. 28, 1871, at 1.

rights. As Ohio Representative Samuel Shellabarger observed, general citizenship rights "grow out of and belong to national citizenship and not out of State citizenship."[41] Some "moderate" Republicans, on the other hand, held onto more traditional ideas, viewing congressional authority as flowing from only the Constitution, not a freestanding national social contract.[42] Although Republicans agreed that general citizenship rights were somehow tied to national citizenship, moderate Republicans did not view them as distinctively national objects.

By assuming a nationalistic account of federal constitutional rights, scholars have portrayed the Fourteenth Amendment's Framers as having faced a choice about whether—and how—to "nationalize" citizenship rights.[43] For instance, those who emphasize Justice Washington's decision in *Corfield v. Coryell*[44] typically conclude that the Privileges or Immunities Clause "nationalized" rights previously secured under Article IV's Privileges and Immunities Clause.[45] Meanwhile, others argue that the Privileges or Immunities Clause embraced only a nondiscrimination rule,[46] or that it "nationalized" only certain enumerated rights.[47] Finally, some conclude that the Fourteenth Amendment simply reflected conflicting priorities.[48] As framed in the current literature, Republicans could not have it both ways: they could not secure the rights mentioned in *Corfield* while also preserving the basic structure of American federalism.[49]

Although a nationalistic understanding of federal constitutional rights is unreflectively assumed today, it was hardly obvious in the 1860s. After all, Republican elites had grown up in an era when a federative view of general citizenship

41. CONG. GLOBE, 39th Cong., 1st Sess. app. 293 (1866) (remarks of Rep. Shellabarger).

42. *See infra* notes 400-401 and accompanying text.

43. *See, e.g.*, Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391-92 (2018).

44. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). For evidence that *Corfield* was actually decided in 1825, see Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019).

45. *See infra* note 369 (collecting sources).

46. *See, e.g.*, Harrison, *supra* note 2, at 1388; WURMAN, *supra* note 1, at 102.

47. *See* LASH, *supra* note 1, at 168.

48. *See* NELSON, *supra* note 5, at 123.

49. Pamela Brandwein's scholarship is a notable exception. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 38-39 (2011). Brandwein does not identify a concept of general citizenship. *Cf. id.* at 38 (describing the Fourteenth Amendment solely in terms of "national citizenship"). But my argument dovetails with her challenge to the prevailing assumption that the federal enforcement of fundamental rights and the preservation of federalism were incompatible objects. For further discussion, including a proposed refinement to Brandwein's thesis, see *infra* notes 387-389 and accompanying text.

rights prevailed across the political spectrum.[50] And with those older ideas still in mind, moderate Republicans did not need to choose between securing fundamental rights and preserving federalism. According to its leading framer, Ohio Representative John Bingham, the Fourteenth Amendment supplied federal power to enforce general citizenship rights in cases of state abridgment. Strictly speaking, however, the Amendment did not create *new* rights or withdraw any powers that states could *rightfully* exercise. Its novelty came from an explicit recognition that in-state citizens enjoyed these rights and from the conferral of a federal enforcement power. But on Bingham's view, the Fourteenth Amendment preserved traditional federalism principles.[51]

Neither of these Republican perspectives aligned with the Supreme Court's eventual evisceration of the Privileges or Immunities Clause in the *Slaughter-House Cases*.[52] But critics of that decision have overlooked the way that Justice Miller's majority opinion drew on *both* Republican positions while combining them in a way that gutted the Clause of its intended force. By embracing a nationalistic framing of the Privileges or Immunities Clause, Miller echoed the view of Radical Republicans. But he joined moderates in asserting that the regulation and enforcement of general citizenship rights was principally left to states. In merging these two positions, however, Miller rejected a crucial point of Republican consensus: the Clause protected general citizenship rights.

* * *

This Article explores the intellectual history of general citizenship and general citizenship rights from the Founding through Reconstruction.[53] My focus is

50. Crucially, most anti-slavery activists agreed with Calhoun about the federative nature of Article IV. Before the Civil War, Tiffany's nationalistic approach to citizenship rights was a fringe theory. *See* WIECEK, *supra* note 23, at 269 (observing that Tiffany was making "a strained argument, even for the radicals"); *see also id.* at 274 (noting that anti-slavery radicalism was politically marginal at the time, even though its "long-term impact was more substantial").

51. For further discussion, see *infra* Part III.

52. 83 U.S. 36, 76-78 (1873).

53. Along the way, this Article frequently grapples with *other* notions of citizenship and of citizenship rights, but my goal is not to provide a full treatment of those concepts. Moreover, this Article is limited to explicating how general citizenship rights shaped rights discourse in relation to their domestic operation within states, without addressing how those rights were understood in connection with foreign affairs or federal territories. Finally, this Article does not dispute that national citizenship was an "abstract and underdeveloped constitutional category" prior to Reconstruction. Novak, *supra* note 13, at 98. Some authors did recognize national citizenship rights. *See, e.g.*, WILLIAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 181 (New York, Collins & Hannay 1833) ("[A]s

on mapping out how these concepts were used and contested in constitutional discourse, particularly among legal and political elites.[54] But caution is needed with respect to terminology. The term "general citizenship" often appeared in legal discourse,[55] but Americans used other equivalent phrases, including most notably "United States citizenship" and the correlative idea of "privileges and immunities of citizens of the United States."[56] Yet, these labels sometimes referred to other concepts, too,[57] raising the likelihood that historical figures were sometimes talking past each other. To provide clarity, this Article uses consistent terminology, but that rhetorical strategy is not meant to suggest that Americans had a unified or stable way of referring to the underlying concepts.

From a methodological standpoint, then, this Article tries to chart a tricky course. My aim is to recover lost concepts, so it is vital to explain those ideas clearly. But doing so requires precision that is not always present in the sources.

Citizens of the United States, [D.C. residents] are entitled to the benefit of all commercial and political Treaties with foreign powers, and to the protection of the Union, at home as well as abroad."); 1 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 81-82 (Philadelphia, H.C. Carey & I. Lea 1825) (associating the "incidents to the character of a citizen of the United States" with "the right to the general protection and to commercial benefits at home and abroad, derived either from treaties or from the acts of congress"). But by employing the term "national citizenship rights," this Article does not mean to suggest that such rights were historically prominent or well-defined.

54. My attention, then, will be on how Americans *deployed* rights talk—not on their *motives* in doing so. *See* Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 872-74 (2022) (discussing this approach); *see also* QUENTIN SKINNER, *Interpretation and the Understanding of Speech Acts*, *in* 1 VISIONS OF POLITICS: REGARDING METHOD 103, 118 (2002) ("[O]ur main attention should fall not on individual authors but on the more general discourse of their times. The type of historian I am describing is someone who principally studies what J. G. A. Pocock calls 'languages' of debate . . . ." (footnote omitted)).

55. For references to "general citizenship" or its cognates, see *infra* notes 143, 158, 185, 192, 271, 281, 289, 293, 295, 296, 328, 332, and accompanying text.

56. For further discussion, see *infra* notes 180-184 and accompanying text.

57. *See, e.g.*, *infra* notes 312-313 and accompanying text. The term "general citizenship" also could take other meanings. In 1872, for instance, Senator Lot Morrill of Maine used the term "general citizenship" as a synonym for membership in the national body politic, *see* CONG. GLOBE, 42d Cong., 2d Sess. app. 2 (1872), while also recognizing what this Article calls general citizenship rights, *see id.* at 3-4 (referring interchangeably to "those rights and those privileges which are common to the citizens of the United States," "the great and ample privileges and immunities secured by the Constitution of the United States to all the citizens of each State in the several States," and "those common privileges which one community accords to another in civilized life"). Along these lines, it is worth noting that Americans often referred to the federal government as the *general* government. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 349 (1819).

This obscurity surely accounts for why such an important feature of rights discourse has been overlooked in prior scholarship.[58] But it also calls for further explanation about the nature of my argument.

The Article proceeds on the routine assumption that intellectual historians can usefully explore—and clarify for modern readers—the implicit and undertheorized premises of constitutional discourse in earlier eras.[59] In doing so, however, one must take care not to offer too much clarity by treating the underlying concepts as fully formed, timeless entities. As intellectual historians have shown time and again, ideas are socially constructed and contingent.[60] That observation applies, of course, to ideas about American fundamental law.[61] Consequently, although my hope is that readers will come away with a better understanding of the ideas of general citizenship and general citizenship rights, a parallel goal is to avoid suggesting that these concepts had precise, stable definitions. Indeed, one of my arguments is that they were transformed during Reconstruction.

Still, it can be immensely generative to dig beneath the discursive surface to reveal underlying premises that structured constitutional debate in earlier eras, and to explore how certain concepts were used and contested.[62] Sometimes this type of project involves recovering ideas that speakers consciously had in view but often felt no need to express. But discourse is also shaped by an underlying

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58. *See supra* notes 22-29 and accompanying text.

59. As J.G.A. Pocock says, intellectual-history scholarship is

> explicatory in the sense that it aims constantly to render the implicit explicit, to bring to light assumptions on which the language of others has rested, to pursue and verbalize implications and intimations that in the original may have remained unspoken, to point out conventions and regularities that indicate what could and could not be spoken in the language, and in what ways the language *qua* paradigm encouraged, obliged, or forbade its users to speak and think.

J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 1, 10 (1985); *see also, e.g.*, John W. Burrow, *Intellectual History in English Academic Life: Reflections on a Revolution*, *in* PALGRAVE ADVANCES IN INTELLECTUAL HISTORY 8, 22 (Richard Whatmore & Brian Young eds., 2006) (observing that intellectual historians can explore "the tacit rules and conventions and limitations of which speakers in the past were not, or were not habitually, conscious, and of which they did not therefore explicitly speak, as we are not usually consciously aware of, nor do we usually feel constrained by, the grammar of our own language").

60. *See, e.g.*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996); 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978).

61. *See, e.g.*, RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920 (1997); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016).

62. For a powerful recent example, see JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018), which explores changes in how the Founders imagined the very idea of a constitution.

matrix of ideas that includes implicit and inchoate concepts and relations, much like grammar subconsciously structures our uses of language.[63] It seems likely that both modes—conscious and subconscious[64]—explain how the concepts of general citizenship and general citizenship rights influenced earlier debates. However, nothing in my argument turns on whether any particular speaker deliberately theorized about citizenship, so this Article makes no effort to distinguish the two situations. In other words, even among historical figures who did not consciously conceptualize a distinctive idea of general citizenship, they nonetheless often held views about related topics—like the general-law grounding of basic rights and the federative nature of Article IV—that conditioned them to think and argue about citizenship and citizenship rights in the ways identified in this Article.

For the most part, general citizenship and general citizenship rights remained in the background of political discourse because the concepts themselves were not in dispute. By and large, these concepts were embraced across the political spectrum. Thus, we can usually see them in action only by exploring *other* topics, like controversies over who was eligible for citizenship. That is not to say that studying these ideas is limited to examining the shadows they cast. Historical figures often discussed general citizenship and general citizenship rights explicitly, and they sometimes even used those labels.[65] But we should not expect any comprehensive historical exposition of the ternary view of citizenship rights. That is not what the debate was about.[66]

It is worth clarifying one final point. General citizenship rights were always linked to some form of citizenship, and for the most part this Article emphasizes their connection to general citizenship. But these rights were not exclusively tied to that federative concept. For one thing, Americans widely thought that citizens enjoyed these rights in their own states by virtue of state citizenship.[67] (To avoid

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63. *See supra* note 59.

64. The binary distinction between these two mental states is stylized.

65. *See, e.g.*, *infra* notes 143, 158, 185, 192, 271, 281, 289, 293, 295, 296, 328, and 332.

66. Prior to the Civil War, Americans often differentiated *local* citizenship rights and *general* citizenship *rights*, but *national* citizenship was mostly irrelevant to those debates, except in controversies over who qualified for general citizenship, as *Dred Scott* illustrated. After the Civil War, by contrast, Republicans came to view general citizenship rights as being tied to *national* citizenship rather than a distinctive, federative notion of general citizenship. As a result, constitutional debates did not explicitly focus on a ternary account of citizenship, even though that way of thinking was prevalent in Antebellum thought and tacitly continued to frame how some Republicans viewed general citizenship rights.

67. Latching onto this fact, Lash argues that the set of substantive rights that this Article calls "general citizenship rights" were rights of *state* citizenship, and that the Fourteenth Amendment was designed to offer only relative security (i.e., nondiscrimination) for these rights

confusion, this Article uses the term *local citizenship rights* in reference to rights based *only* on local state law, in contrast to general law.)[68] Moreover, during Reconstruction, Republicans began to treat general citizenship rights as rights of *national* citizenship, thereby illustrating that it was possible to embrace a ternary view of citizenship *rights* alongside a binary account of citizenship.[69] Indeed, some people might have thought along those lines prior to Reconstruction.[70]

through the "State Citizenship Clause." *See* Kurt T. Lash, *The State Citizenship Clause* (Aug. 21, 2022) (unpublished manuscript), https://ssrn.com/abstract=4196204 [https://perma.cc/D2WJ-NCX3]. In my view, Americans often viewed substantive general citizenship rights as rights of state citizenship *and* as "privileges or immunities of United States citizens" (meaning rights of general citizenship, national citizenship, or both). Lash's approach—which one might call "positivist"—implicitly denies that a single substantive right can be linked to multiple forms of citizenship. To be sure, a positivist would have little trouble imagining identically interpreted clauses in state constitutions and the Federal Constitution. But as a technical matter, the positivist would insist that those provisions secure *different* rights—rights supplied by state law and rights supplied by federal law, respectively. By contrast, the notion of general fundamental law made possible the idea that a single right (or set of rights) could attach to multiple forms of citizenship. For further discussion, see *infra* notes 108-111 and accompanying text.

68. Thus, my term *local* citizenship rights maps onto Ilan Wurman's term *special* citizenship rights. *See* Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4098064 [https://perma.cc/WYE6-UWL3].

69. Moreover, some Americans acknowledged a general fundamental right of representation, even though jurists widely thought that out-of-state citizens lacked voting rights as a privilege of general citizenship under Article IV. For further discussion, see *infra* notes 160-168 and accompanying text.

70. Some historical figures might have thought that general citizenship was an *aspect* of national citizenship, or an *aspect* of state citizenship, rather than being a different form of citizenship. Some readers have thus questioned whether this Article should have adopted a binary framing of citizenship and a ternary view of citizenship rights. In my view, compelling reasons support treating general citizenship as a distinct concept using a distinct label. First, historical figures often used distinctive terminology to refer to general citizenship. Second, even when referring only to "United States citizens," sources sometimes indicated that a person could be a citizen in one sense of that term but not in another. *See, e.g.*, *Report of the Judiciary Committee* (1831), *in* SPEECHES, CONGRESSIONAL AND POLITICAL, AND OTHER WRITINGS, OF EX-GOVERNOR AARON V. BROWN, OF TENNESSEE 549, 555 (Nashville, John L. Marling & Co. 1854) ("[I]t is not intended, nor necessary to assert, that free persons of color are in no respect to be considered as citizens of the General Government . . . . All that is meant to be asserted on this subject is, that they are not meant by, nor included as citizens, under that clause of the Constitution which secures to each the rights and immunities of the several States."). Third, the ternary framing helps account for a broad, overlapping consensus with respect to views of general citizenship; for instance, two people could agree in substance about general citizenship even if one viewed it as linked to state citizenship and the other viewed it as linked to national citizenship. Fourth, the ternary framing helps account for why views of general citizenship and general citizenship rights were relatively coherent and stable notwithstanding uncertainty about the concept of national citizenship. *See supra* note 53. Fifth, as argued throughout this Article, ideas of citizenship were linked to *three* conceptually distinct sources of authority: state sovereignty, national sovereignty, and the federative aspects of the Constitution.

These complicated ideas will be unpacked in the pages that follow. For now, the key point is that tracing the intellectual history of general citizenship and general citizenship rights requires attention not only to the traditional pairing of these concepts but also to their separability.

Part I begins by assessing the origins of general citizenship in British constitutionalism and its continuation under the Articles of Confederation and Federal Constitution. It also discusses the first judicial interpretations of the Privileges and Immunities Clause. The broader goals of this Part are to clarify the concepts of general citizenship and general citizenship rights and to show their links to a broader array of ideas about rights and sovereignty.

Part II then considers four episodes in which American politicians and jurists debated the relationship among state, national, and general citizenship: first, congressional debates over the Missouri Compromise; second, the furor over the Negro Seaman Acts; third, disputes over the constitutionality of the Fugitive Slave Act of 1793; and fourth, the *Dred Scott* controversy. Not coincidentally, each episode focused on issues of race and slavery, which fueled broader contests over federalism, sovereignty, and citizenship. These debates, this Part argues, display a considerable degree of stability in the underlying concepts of general citizenship and general citizenship rights, even as Americans vigorously disputed a range of closely related issues—like who could enjoy these rights, how the rights could be regulated, and how citizenship status was determined.

Part III examines how different notions of citizenship framed debates during Reconstruction. General citizenship rights were central to Republicans' design of the Civil Rights Act of 1866 and the Fourteenth Amendment's Privileges or Immunities Clause. Nonetheless, Republicans abandoned the federative grounding of general citizenship, thus giving rise to new conceptual problems and intraparty fractures over how to conceptualize general citizenship rights. After exploring debates in Congress, this Part addresses the *Slaughter-House Cases*, showing how the debate over general citizenship rights, along with the decline in general citizenship, framed the dispute.

Part IV then considers modern implications. My goal is not to advance a particular view of how history should inform present-day constitutional law.[71] Instead, this Part focuses on broader lessons for our approach to constitutional interpretation. In particular, historical debates over citizenship rights illustrate a lost way of thinking about the nature and grounding of American fundamental law, thus exposing significant conceptual challenges for those seeking to use history as a modern guide.

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71. Future work will evaluate modern payoffs in greater detail.

I. THE ORIGINS OF GENERAL CITIZENSHIP

General citizenship entered public debate in the nineteenth century amidst controversies over slavery and federalism, but the idea had deeper roots, grounded in British constitutionalism and the Articles of Confederation.[72] This Part shows how various ways of viewing citizenship rights reflected different underlying conceptions of citizenship itself—both in terms of where sovereignty resided and in terms of whether citizenship was connected to allegiance, membership in a polity, or both. These debates are especially challenging to unpack because different notions of citizenship were interconnected and nonrivalrous. For example, individuals could belong to distinct polities as *state citizens* while also belonging to a federative league as *general citizens*. And they enjoyed general citizenship rights in both of these capacities.

Americans also had different assumptions about the nature of rights. Jurists often described rights as being secured in an imagined social contract, even if not enumerated in a written constitution. Moreover, because certain rights were presumptively embodied in each state's fundamental law, they were defined by general law—a body of legal rules and principles, identified through reason and custom, that operated across jurisdictions and that lacked any final interpretive authority.[73] In the words of Chief Justice Marshall, general law entailed "those general principles and those general usages which are to be found not in the legislative acts of any particular State, but in that generally recognized and long established law, which forms the substratum of the laws of every State."[74] The concept of general citizenship rights thus stemmed not only from the federative notion of general citizenship but also from other shared assumptions about fundamental rights. At the same time, however, states could regulate these rights under local law, sometimes leading to tricky choice-of-law questions. Tracing earlier views thus requires putting aside modern assumptions about rights and considering different ways of thinking about citizenship and fundamental law.

Because of these challenges, this Part attempts to *clarify*, using text and illustrations, the way that American legal elites tended to think about citizenship rights. The point of doing so is not to suggest that these views were uniformly

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72. This Article does not excavate the origins of general citizenship before the 1770s. For a look at older colonial-era ideas, see Daniel J. Hulsebosch, *English Liberties Outside England: Floors, Doors, Windows, and Ceilings in the Legal Architecture of Empire*, *in* THE OXFORD HANDBOOK OF ENGLISH LAW AND LITERATURE, 1500-1700, at 747 (Lorna Hutson ed., 2017).

73. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822-26 (1997); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517-25 (1984); Nelson, *supra* note 18, at 505-07.

74. United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694).

held or even consciously theorized in every respect. Rather, offering a crisp exposition of the key ideas is simply meant to help readers navigate these debates, including their ambiguities and complexities.[75]

A. The Rights of Englishmen

On the eve of the Revolution, the British American colonists articulated a binary theory of citizenship, encompassing colonial citizenship and royal subjecthood. But this approach was based on a federative understanding of the British Empire, not an embrace of dual sovereignty.[76]

In part, colonial elites saw themselves as citizens of colonies, which by the mid-1770s they described as independent polities.[77] In adopting this view, Americans asserted the primacy of their local citizenship and denied being part of a unitary British nation, virtually represented in Parliament.[78] The social-contractarian language of *citizenship*—not *subjecthood*—is appropriate in this context because that term reflects membership in a political society.[79]

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75. *Cf.* POCOCK, *supra* note 59, at 11 ("It does not make the historian an idealist to say that he regularly, though not invariably, presents the language in the form of an ideal type: a model by means of which he carries on explorations and experiments.").

76. Although the following discussion draws on more recent scholarship, Kettner's work remains foundational in this field. *See* KETTNER, *supra* note 22, at 131-209.

77. The colonists did not declare themselves free of *royal* authority until 1776, but they already viewed themselves as "independent" in terms of *sovereignty*. *See* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 139 (2011); *see, e.g.*, Thomas Jefferson, Notes of Proceedings in the Continental Congress (June 8, 1776), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON 311 (Julian P. Boyd ed., 1950) ("[A]s to the people or parliament of England, we had always been independent of them . . . ."); James Iredell, To the Inhabitants of Great Britain (Sept. 1774), *reprinted in* 1 THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 218-20 (Griffith J. McRee ed., New York, D. Appleton & Co. 1857) (defending colonial legislative independence); *see also infra* notes 78, 80, and 85 (collecting sources); *cf.* Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1, 22 (2020) (denying that the colonies were "asserting independence from Britain" prior to May 1776).

78. For further discussion, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 224-26 (rev. ed. 1992); LACROIX, *supra* note 30, at 81-91; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 350-54 (1969); JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 116-20, 133-50, 153 (1990). English authorities replied that Americans were "of the same community with the people of England." WILLIAM KNOX, THE CONTROVERSY BETWEEN GREAT BRITAIN AND HER COLONIES REVIEWED 50-51 (London, J. Almon 1769). For further discussion, see KETTNER, *supra* note 22, at 146; and GREENE, *supra*, at 129-30.

79. *See, e.g.*, 1 EMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 92 (London, J. Newbery,

While rejecting parliamentary authority, Americans also professed loyalty to the Crown as royal subjects,[80] owing allegiance to the King and being entitled to his protection.[81] It was in this sense that Americans described themselves as "Englishmen" or "British subjects" and claimed "all the rights, liberties and privileges of his Majesty's natural born subjects within the realm."[82] On this view, the citizens of each colony were not citizens of England as such, but as royal subjects they were nonetheless entitled to all the fundamental rights and privileges of Englishmen. Colonists in Virginia, for instance, could purchase property and sue in North Carolina without being treated as aliens.[83]

Local citizenship and royal subjecthood thus existed alongside each other but were not, from an American perspective, parallel concepts. To be a citizen of a colony meant being a member of a sovereign polity. To be a royal subject, by contrast, meant being under the common protection of a King who held dele-

J. Richardson, S. Crowder, T. Caslon, T. Longman, B. Law, J. Fuller, J. Coote & G. Kearsly 1760) ("The citizens are the members of the civil society."); *see also* Holly Brewer, *Subjects by Allegiance to the King?: Debating Status and Power for Subjects—and Slaves—Through the Religious Debates of the Early British Atlantic*, *in* STATE AND CITIZEN 25, 39 (Peter Thompson & Peter S. Onuf eds., 2013) (recognizing the appropriateness of using the term citizenship in this context).

80. *See, e.g.*, ALEXANDER HAMILTON, THE FARMER REFUTED (Feb. 23, 1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON, 81, 98 (Harold C. Syrett ed., 1961) (describing the colonies as "individual societies, or bodies politic, united under one common head"). Claiming to be under the King's protection enabled Americans to affirm their loyalty to the King while also asserting independence from England. *See* Daniel J. Hulsebosch, *The Plural Prerogative*, 68 WM. & MARY Q. 583, 585-86 (2011).

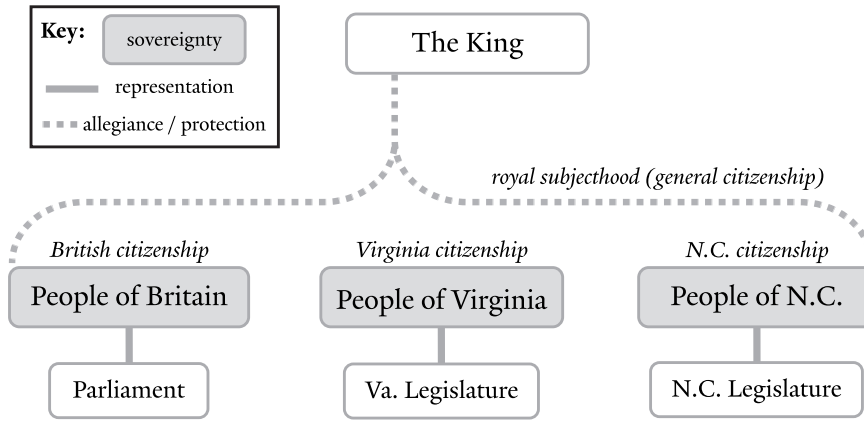
81. Americans emphasized the consensual and contingent nature of this relationship, thus "repudiat[ing] the principle of natural and perpetual allegiance," KETTNER, *supra* note 22, at 171; *see* HAMILTON, *supra* note 80, at 90 (George III was "King of America, by virtue of a compact between us and the Kings of Great-Britain"); John Adams, *Novanglus No. VII* (1775), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS 58, 74 (George W. Carey ed., 2000) ("[W]e, as well as the people of England, made an original, express contract with King William.").

82. Letter from the House of Representatives of Massachusetts to Dennys de Berdt (Jan. 12, 1768), *in* 1 THE WRITINGS OF SAMUEL ADAMS 134, 140 (Harry Alonzo Cushing ed., 1904); *see also, e.g.*, *The Bill of Rights [and] a List of Grievances* (Oct. 27, 1774), *reprinted in* A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS, 1774-1776, at 49, 53-54 (James H. Hutson ed., 1975) (claiming "all the rights, liberties, and immunities of free and natural born subjects, within the realm of England"). Colonial charters generally contained similar language. *See, e.g.*, Bogen, *supra* note 2, at 798-801.

83. Americans often tied this approach to *Calvin's Case* (1608) 77 Eng. Rep. 377 (K.B.). *See* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 481 (2003); Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1554-58, 1563-64 (2016).

gated powers and duties within a federative league of sovereign states, not a unitary nation.[84] In this latter sense, Americans recognized a *general citizenship* within the British Empire. The King's subjects, in other words, were members of separate but federatively linked sovereign polities.[85] As we will see, a similar notion of general citizenship survived under the Articles of Confederation, the Federal Constitution, and perhaps even the Fourteenth Amendment.

FIGURE 1. AMERICAN VIEW OF BRITISH CONSTITUTIONALISM CIRCA 1775



Explanation: This figure depicts the dual, federative nature of citizenship under the standard American theory of British constitutionalism just before the Revolution. In part, the colonists were royal subjects along with other "Englishmen." But the colonists also viewed themselves as possessing sovereignty and thus asserted their independence from Parliamentary authority well before the Declaration of Independence.

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84. In this way, theories about royal protection made space for a proliferation of claims about sovereignty. *See* Ablavsky, *supra* note 30, at 1806-08.

85. *See, e.g.*, HAMILTON, *supra* note 80, at 103 ("[W]e are a part of the British Empire; but in this sense only, as being the free-born subjects of his Britannic Majesty."); MOSES MATHER, AMERICA'S APPEAL TO THE IMPARTIAL WORLD 19 (Hartford, Ebenezer Watson 1775) ("[A]llegiance is due to the King in his natural and political capacity; and doth not necessarily superinduce an obligation of obedience to the power of parliament; for a person may be a subject of the King of England and not of the realm . . . ."); James Wilson, *Consideration on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 721, 745 (Robert G. McCloskey ed., 1967) ("[A]ll the different members of the British empire are distinct states, independent of each other, but connected together under the same sovereign in right of the same crown.").

B. The Articles of Confederation

When Americans declared their independence, their conceptions about sovereignty and citizenship changed less than one might expect. The war effort occupied most of their energies, leaving little time for theorizing.[86] But there also was no need to substantially rethink the locus of sovereignty or the nature of constitutionalism.[87] Although states reformed their systems of government by cutting ties to royal authority, the standard American view posited that the Revolution did not affect sovereignty itself.[88] Sovereignty *already* resided in themselves, not in Parliament or even in the people of a unitary British empire.[89] Consequently, local citizenship rights remained in place.[90]

Americans also quickly sought to reconstitute general citizenship through a league of states.[91] Days after the Continental Congress promulgated the Declaration of Independence, a congressional committee reported the first draft of the Articles of Confederation, including the Privileges and Immunities Clause.[92] As

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86. *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 146 (2005); GREENE, *supra* note 78, at 173.

87. For discussion and sources, see Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 336-38 (2021). This sense of continuity was further bolstered by the Continental Congress's assumption of most royal prerogatives. *See* JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776, at 9 (1987).

88. *See* Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375, 391 (1965); Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 724 (2011) (reviewing ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010)).

89. *See supra* notes 62-80 and accompanying text.

90. As the Supreme Court later put it, "The dissolution of the form of government did not involve in it a dissolution of civil rights." Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50 (1815).

91. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446-47 (1987). But the locus of sovereignty remained controversial, *see* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 164-76 (1979), with some Americans asserting that a national polity existed *before* the Constitution was ratified, *see* Gienapp, *supra* note 30, at 1796-97.

92. ARTICLES OF CONFEDERATION of 1781, art. IV. The Clause's recognition that "free inhabitants" would enjoy the rights of "free citizens" was likely premised on the notion that all free inhabitants *were* free citizens. *See* Resolution of June 24, 1776, *in* 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788, at 385 (Washington, Way & Gideon 1823) ("[A]ll persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony."); *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 599 n.25 (2008) [hereinafter HAMBURGER, LAW AND JUDICIAL DUTY] (discussing a 1785 Massachusetts judicial decision that took this view). Indeed,

James Wilson later observed, the Clause effectively "[made] the Citizens of one State Citizens of all."[93] Wilson was not saying that Americans became citizens of every state for all purposes. Rather, his point was that the Privileges and Immunities Clause revived general citizenship, thus preventing states from treating each other's citizens as aliens.[94]

Within this federative system, local institutions bore primary responsibility for protecting rights. Formally, this arrangement reflected a shift from the earlier colonial model. In the British system, the rights of Englishmen were nominally secured and protected by the King. In practice, of course, rights were enforced by local authorities, like juries and justices of the peace.[95] But technically, legal process was still issued under the King's name.[96] With independence, however,

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contemporaries regularly described the Clause as securing rights to citizens. *See, e.g.*, *Committee Report on Carrying the Confederation into Effect and on Additional Powers Needed by Congress* (Aug. 22, 1781), *in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 143, 144 (Merrill Jensen ed., 1976) (describing the Clause as applying to "the Citizens of one State"); Place v. Lyon, 1 Kirby 404, 406 (Conn. 1788) ("[C]itizens of any other of the United States have, by the articles of the confederation, the same right to sue here as citizens of this state."); Camp v. Lockwood, 1 U.S. (1 Dall.) 393, 398 (Pa. Ct. Com. Pl. 1788) (argument of Jared Ingersoll) ("[I]t is declared by the articles of Confederation, that a citizen of one State, is a citizen of every State."); *cf.* THE FEDERALIST NO. 42, at 285-86 (James Madison) (Jacob E. Cooke ed., 1961) (noting that "the term 'inhabitants'" could be understood to apply "to citizens alone"). This perspective reflects an older emphasis on the pairing of rights with allegiance. *See* Novak, *supra* note 13, at 87-90; Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1838-44 (2009) [hereinafter Hamburger, *Beyond Protection*]; *see also* Bogen, *supra* note 2, at 821-22 (discussing the language of the Articles of Confederation); Leonard S. Goodman, *Eighteenth Century Conflict of Laws: Critique of an* Erie *and* Klaxon *Rationale*, 5 AM. J. LEGAL HIST. 326, 329-31 (1961) (discussing the relationship between inhabitancy, residency, and citizenship).

93. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 272 (Max Farrand ed., 1911). For example, in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), the Superior Court of Law and Equity of North Carolina held that Elizabeth Bayard, a citizen of New York, enjoyed the same jury right as North Carolina citizens enjoyed because "citizens of one of the United States" were to be treated as "citizens of this State, by the confederation of all the States," *id.* at 7. *See also* HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 92, at 601 (providing a newspaper report of *Bayard*).

94. *See, e.g.*, Representative Alexander Smyth, Remarks at the Virginia Legislature on the Kentucky Amendment, VA. ARGUS (Richmond), Jan. 9, 1807, at 1 (remarking that a citizen of Maryland would be "entitled to all *the privileges* of a citizen of Virginia, yet he is not a citizen of Virginia. He is still a citizen of Maryland").

95. For a survey of the colonial legal system, see 4 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735-1776 (2018).

96. *See id.* at 148; KETTNER, *supra* note 22, at 175.

common-law and equity courts were no longer agents of a central authority. Rather, securing rights was now a local matter, with legal process issuing in the name of states or other local authorities.[97]

Because rights protection was a state responsibility, scholars have widely portrayed the Privileges and Immunities Clause as a nondiscrimination rule, thus extending whatever rights states happened to confer on their own citizens.[98] There is *some* truth to this view. But that element of truth is incomplete and deceptive, for it masks a very different way of thinking about fundamental rights that influenced American constitutional thought well into the nineteenth century. Though no longer under royal protection, Americans continued to say that they enjoyed a common set of fundamental rights—the proverbial "rights of Englishmen"—that states had no rightful authority to abridge.

In large part, the notion that Americans enjoyed a common set of basic rights was an engrained assumption that needed no explanation. Ideas about general citizenship rights were something that Americans simply inherited. But attitudes about social-contract theory, natural law, and customary constitutionalism also underlay and reinforced the notion that all American citizens enjoyed a common set of basic rights.[99] In practice, these sources of law often worked in tandem,[100] but social-contract theory warrants emphasis given its focus on citizenship. This widely accepted theory posited that political authority ultimately resided in a

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97. NELSON, *supra* note 95, at 148; KETTNER, *supra* note 22, at 175.

98. *See, e.g.*, BARNETT & BERNICK, *supra* note 1, at 61-64; David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 697; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 335 (1988). This nondiscrimination approach is sometimes coupled with the view that the Clause "also is the source of a right to travel and a right to establish residence and become a citizen in a new state without being subjected to unwarranted residence requirements." Bogen, *supra* note 2, at 845.

99. *See, e.g.*, Joseph Larned, *Massachusetts and South Carolina*, 3 NEW ENGLANDER 606, 606, 612, 621 (1845) (explicating general citizenship rights by invoking "those principles of natural, common, and constitutional law," "*essential rights* . . . which belong to men as members of the state, and which all free states recognize," and "the first principles of the common law and of natural reason"). For a discussion of natural law in this period, see STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 11-45 (2021); R. H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142-72 (2015); and Sherry, *Natural Law*, *supra* note 6, at 182-222. For a discussion of the customary constitution, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9-34 (2004).

100. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 290-94 (2017); Gienapp, *supra* note 87, at 338-42. Although these diverse traditions were not always in harmony, they cohered more than scholars sometimes appreciate. *See* Campbell, *supra*, at 292 n.210. Moreover, the key point here is that each tradition bolstered the view that Americans enjoyed a common set of rights, notwithstanding any disagreements about exactly what those rights entailed.

sovereign body politic formed through unanimous consent to a social contract. In this imagined agreement, individuals obtained or secured citizenship rights (or "civil" rights).[101] At least in principle, then, even the sovereign body politic could not abridge the rights of citizenship secured in the social contract.[102]

These social-contractarian premises undergirded the idea that all American citizens held—and every state's fundamental law secured—a common set of fundamental rights, whether enumerated in a written constitution or not.[103] In some sense, these were rights of *state* citizenship, grounded in the social contract of each state. Crucially, however, Americans also viewed these rights as being recognized across states. These were, in the words of the Northwest Ordinance, "the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected."[104] As Justice Story later remarked in *Terrett v. Taylor*, these rights were part of "the fundamental laws of every free government."[105] A polity could declare and define these rights, but it could not rightfully abridge or abandon them.[106] Every state thus had to protect certain natural and common-law rights, including speech, property, due process, and so on. These were the proverbial "rights of Englishmen."

Stepping back, we can now appreciate why it is misleading to say that the Privileges and Immunities Clause operated merely as a nondiscrimination rule, leaving each state free to recognize whatever rights it wanted to. That statement is partly accurate insofar as the Clause did not confer in-state citizenship rights. Yet, it did not operate solely as a nondiscrimination rule, either. After all, it presupposed the existence of general fundamental rights that states were already

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101. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87-99 (2017). But the term "civil rights" sometimes referred to rights in *civil society*, in contradistinction to "natural rights." *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 299 n.9. Consequently, this Article uses the term "citizenship rights."

102. The idea that rights were antecedent to constitutions was a staple of Founding-Era thought. *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 9 (1989). And that way of thinking continued well into the nineteenth century. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 36-37 (Da Capo Press 1972) (1868).

103. On the importance of unwritten fundamental law, see Gienapp, *supra* note 87, at 337-49. For further discussion of general fundamental rights, see *supra* note 6.

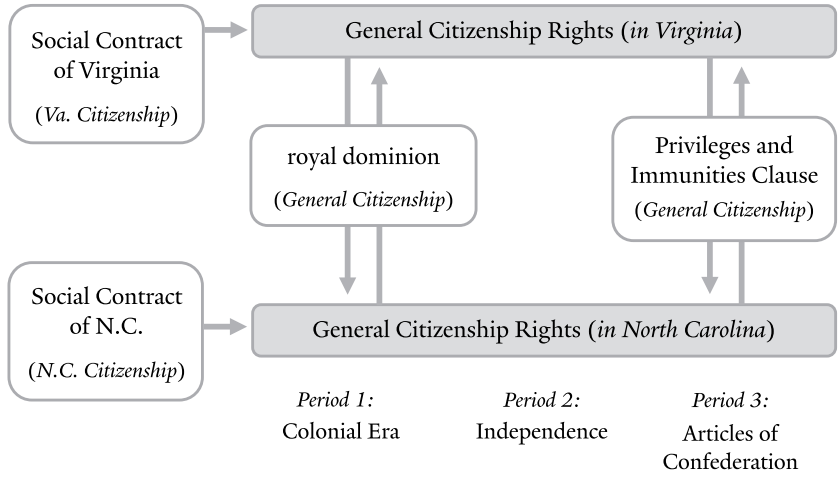
104. 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 339 (Roscoe R. Hill ed., 1936).

105. 13 U.S. (9 Cranch) 43, 52 (1815); *see, e.g.*, Place v. Lyon, 1 Kirby 404, 406 (Conn. Super. Ct. 1788) (refusing to apply a Rhode Island legal-tender statute because it violated "a fundamental principle of jurisprudence").

106. *See* Campbell, *supra* note 16.

obliged to recognize and secure.[107] The Privileges and Immunities Clause thus reconstituted the status of general citizenship, with states mutually obliged to extend a common set of rights to out-of-staters. Therefore, general citizenship rights operated not only as rights of state citizenship but also as rights of general citizenship. By guaranteeing that Americans "shall be entitled to all *privileges and immunities of free citizens* in the several states," the Privileges and Immunities Clause was essentially saying that Americans "shall be entitled to all *general citizenship rights* in the several states."

FIGURE 2. GENERAL CITIZENSHIP RIGHTS BEFORE AND AFTER INDEPENDENCE



Explanation: This figure depicts the link between *general citizenship* (a status) and *general citizenship rights* (a set of fundamental rights). It illustrates that although general citizenship conferred reciprocal recognition of these rights across state lines, the general citizenship rights of in-state citizens were not dependent upon general citizenship and thus remained in place even after the Declaration of Independence.

107. The Clause thus assumed not only that states *would* recognize a common set of citizenship rights, *see* Upham, *supra* note 1, at 1128, but also that state governments *had to* recognize these rights. This obligation, however, was not created by the Articles of Confederation. Rather, it inhered in the general fundamental law that undergirded every state's constitution.

Today, this way of thinking about fundamental rights is difficult to wrap our heads around. For one thing, American constitutional discourse is dominated by the notion—sometimes called "positivist"[108]—that constitutional rights are limited to those rights enumerated in the state and federal constitutions.[109] Related to this development, we also view fundamental rights as being defined by the law of a particular jurisdiction; state constitutional rights are defined by *state* law, and federal constitutional rights are defined by *federal* law.[110] Prior to the twentieth century, however, many jurists viewed fundamental rights as being defined by *general-law* principles recognized across jurisdictions.[111] To be sure, each state had authority to regulate these rights along with the modes of proceeding to enforce them—a point to which we will return shortly. But the underlying rights themselves were common across jurisdictions.

Although this Article focuses on exploring how Americans conceptualized different *categories* of citizenship and citizenship rights—not on the *content* of those rights—it is worth noting the breadth of general citizenship rights. Today, constitutional rights operate against the government and are derived from the Constitution,[112] whereas private rights operate against third parties and are derived from inferior sources of law, such as common law and statutes.[113] Historically, however, the fundamental rights of citizenship included retained natural rights, often summarized as "life, liberty, and property," that ran against both

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108. *See* Gienapp, *supra* note 87, at 323 n.3 (discussing different variants of "positivism").

109. Notably, even advocates of so-called "unenumerated" rights now ground their arguments on the constitutional protection for "liberty" enumerated in the Due Process Clause. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

110. To be sure, one jurisdiction can adopt a "lockstep" method of interpretation, such that (for instance) the rights enumerated in a state constitution are interpreted in lockstep with federal-constitutional case law. But this approach is a bit puzzling in a positivist age. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 173-75 (2018). And in any event, this method still views constitutional rights as grounded in positively enacted law and subject to one jurisdiction's supreme interpretive authority.

111. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1440-51. The distinction between state, federal, and general law is perhaps more accurately expressed as a distinction between *local* state law, *local* federal law, and *general* law—the latter of which could be adopted by particular jurisdictions. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013) ("The relevant distinction at the time was not between general law and state law, but between two kinds of state law: general law and local law."); Nelson, *supra* note 18, at 505 ("Throughout the nineteenth century, the authority of the general law within any particular jurisdiction was often treated as a matter of that jurisdiction's law.").

112. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

113. *See* Campbell, *supra* note 54, at 887.

private actors and state actors, and that state governments were obliged to protect.[114] In short, the quintessential citizenship rights in the eighteenth century were traditional common-law rights. Not surprisingly, then, the suits invoking Article IV's Privileges and Immunities Clause were paradigmatically private actions brought against private parties.[115]

C. The Constitution

The members of the Philadelphia Convention reworked many aspects of the federal structure, but they spent little time on the Privileges and Immunities Clause. Although the Framers slightly revised its text, they did not seem to desire substantive changes.[116] The Clause also did not trigger much discussion among the participants in the ratification debates.[117] To be sure, a few related provisions garnered attention. For instance, Anti-Federalist writers fretted about diversity jurisdiction,[118] leading Alexander Hamilton to respond that it would help to se-

114. *See* Campbell, *supra* note 16.

115. This statement applies to the operation of the Clause under the Articles of Confederation, *see, e.g.*, Bayard v. Singleton, 1 N.C. (Mart.) 5, 7 (1787), and under the Constitution, *see, e.g.*, Lavery v. Woodland, 2 Del. Cas. 299, 307 (1817).

116. The Framers substituted "citizen" for "free inhabitant," but it is doubtful that this change was substantive. *See supra* note 92.

117. *See* Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship Under Article IV*, 45 LOY. U. CHI. L.J. 1, 2 (2013); Novak, *supra* note 13, at 89.

118. Some tied this critique to the Privileges and Immunities Clause, arguing that by making citizens of each state effectively citizens of all other states, an "ingenious Lawyer, will always make one appear before the Court as a Citizen" of another state for purposes of diversity jurisdiction, thus "giv[ing] the continental Court Cognizance of Controversies between two Citizens of the same State." Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 618, 619-20 (John P. Kaminski & Gaspare J. Saladino eds., 1998); *see also* Brutus No. XII (Feb. 14, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 426, 426-27 (Herbert J. Storing ed., 1981) (making the same argument).

cure "that equality of privileges and immunities to which the citizens of the union will be entitled."[119] But the Privileges and Immunities Clause otherwise received little comment, likely reflecting its retention of the federative structure of the Articles of Confederation.[120]

The Constitution did, however, spark broader debates on topics relating to citizenship. The most important of these was over sovereignty. The very first line of the Constitution teed up this issue. As William Findley observed during the Pennsylvania ratification debates, "In the Preamble, it is said, 'We the People,' and not 'We the States,' which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power and delegating a portion of that power for their common benefit."[121] If Findley's

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119. THE FEDERALIST NO. 80, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Framers' underlying concerns related not only to interstate discrimination within state judiciaries, *see* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1006 (2007), but also to "laws which were made in the neighbouring States, before the adoption of the Constitution, . . . affecting the property of citizens of another State in a very different manner from that of their own citizens," Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 469 (1793) (opinion of Cushing, J.). *See also* James Madison, *Preface to Debates in the Convention of 1787*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 93, at 539, 548 ("In sundry instances" states had passed "navigation laws [that] treated the Citizens of other States as aliens.").

120. *See* Upham, *supra* note 1, at 1127 ("This silence probably resulted from the conservative, and thus uncontroversial, nature of the measure."). William J. Novak offers a different interpretation. For him, citizenship rights were rarely mentioned because they lacked importance as an organizing concept in rights discourse prior to Reconstruction. *See* Novak, *supra* note 13, at 87-94. That is not my view, but Novak's argument seems right to me in two important respects. First, citizenship rights were generally regulable, *see infra* note 131, so the recognition of citizenship did not confer a broad set of legally determinate rights in the way that one might anachronistically imagine today. Second, aliens were entitled to many citizenship rights, too, *see* Hamburger, *Beyond Protection*, *supra* note 92, at 1836, making questions of citizenship often less important than they might seem at first glance. Thus, to the extent that Novak's claim is about the centrality of citizenship in conferring particular legal rights (i.e., "rights" in the way that *we* understand that term), I basically agree with him. And given the literature that Novak was responding to, there is good reason to suspect that this was his intended argument.

121. Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (remarks of William Findley), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 447-48 (Merrill Jensen ed., 1976); *see also, e.g.*, *Chisholm*, 2 U.S. at 471 (opinion of Jay, C.J.) ("'We the people of the United States, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country."). For other sources, see Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183 (2020).

reading was correct, then the Constitution recognized a *national* polity with *national* citizens.[122] Arguments over national sovereignty were central to constitutional debate for the next century.[123]

Yet, the Constitution also included clauses not tied to national sovereignty. Consider, for instance, federal diversity jurisdiction. As James Iredell observed, "the subject in controversy [in diversity cases] does not relate to any of the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy."[124] Rather than turning on federal law, diversity cases typically involved issues of state law, including general common law.[125] Implicitly, then, Iredell indicated that the Privileges and Immunities Clause—which paralleled diversity jurisdiction by securing the rights of citizens of different states—did not "nationalize" all citizenship rights. The Clause was instead among the constitutional provisions that, in Virginia jurist St. George Tucker's words, "appear[] to be strictly federal."[126]

Even if the "privileges and immunities" of citizens were not *national* rights, difficult questions lingered over what body of law defined them. If citizens of Virginia traveled to North Carolina, for instance, what body of law would determine their rights while visiting? Virginia law? North Carolina law? General law?

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122. *See, e.g.*, THE FEDERALIST NO. 2, at 10 (John Jay) (Jacob E. Cooke ed., 1961) ("To all general purposes we have uniformly been one people—each individual citizen every where enjoying the same national rights, privileges, and protection."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 93, at 416 (remarks of James Wilson) ("Every man will possess a double Character, that of a Citizen of the US. & [that] of a Citizen of an individl. State."). Wilson did not deny general citizenship, which reflected a federative view of Article IV, not a third type of sovereignty.

123. *See supra* note 30 and *infra* note 232.

124. *Chisholm*, 2 U.S. at 435-36 (opinion of Iredell, J.).

125. In a posthumously published book, Wilfred J. Ritz argued that the Judiciary Act of 1789 anticipated that federal courts sitting in diversity would *only* apply general common law, not the local law of particular states. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 11 (Wythe Holt & L.H. LaRue eds., 1989). For a response, see Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 956-59 (2013); *see also* Fletcher, *supra* note 73, at 1529-38 (discussing the applicability of local law under the Judiciary Act of 1789). For the purposes of this Article, the key point is simply that diversity cases did not turn on *federal* law as such.

126. ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (1803), *reprinted in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 94-95 (1999); *see also* Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 626 (2018) ("Article IV . . . takes as its central focus the 'horizontal' relationships between states within the federal Union."); David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution as a Project in International Law*, 89 FORDHAM L. REV. 1841, 1865-69 (2021) (discussing the law-of-nations backdrop to various Article IV provisions).

Appreciating how jurists approached this question is important to understanding their ideas — and disagreements — about general citizenship.

In some ways, the choice-of-law question was straightforward. If all citizens enjoyed a common set of fundamental rights that were not nationalized, then surely those rights were grounded in general law, which was not specific to a particular jurisdiction.[127] After all, these rights were recognized across state lines and defined by social-contractarian and common-law precepts that undergirded what Jonathan Gienapp aptly calls "the general principles of fundamental law."[128] For those already acclimated to general law, as jurists back then were,[129] the grounding of these rights in general law might even have seemed obvious.

But in many instances, general law might not suffice. That is because the common law itself could vary according to local circumstances,[130] and because many fundamental rights were legislatively regulable in promotion of the public good.[131] As James Wilson observed, rights had limits "assigned . . . by the municipal law."[132] Consequently, their specific legal content varied across state lines,[133] and even among different demographic groups.[134] As Judge Cabell of Virginia explained, "[A]lthough municipal laws cannot take away or destroy" certain "inherent rights," states could "regulate the manner" of these rights and

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127. Again, this Article takes no issue with the idea that general law could be understood as a species of state law. *See supra* note 111. The key point is that it was also transjurisdictional.

128. Gienapp, *supra* note 87, at 342; *see* James Wilson, *Of Man, as a Member of a Confederation*, *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 264-65 ("[In confederations, it is not necessary] that there should be a precise and exact uniformity in all their particular establishments and laws. It is sufficient that the fundamental principles of their laws and constitutions be consistent and congenial; and that some general rights and privileges should be diffused indiscriminately among them.").

129. *See* Bellia & Clark, *supra* note 111, at 677-93.

130. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 567, 577-78 (2006).

131. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566-74 (2003); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 59-62, 66-67, 73-74 (2007). *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (discussing state regulatory authority in the nineteenth century). Although the body politic had ultimate authority to define fundamental rights, not all of these rights were regulable in the same way. *See* Campbell, *supra* note 100, at 280-94.

132. James Wilson, *Of the Natural Rights of Individuals*, *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 85, at 587.

133. *See* Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 803-07 (2008).

134. *See* Novak, *supra* note 13, at 94-97; MASUR, *supra* note 1, at 3-12, 147.

"prescribe the evidence of [their] exercise."[135] The rights to own property and to make contracts, for instance, were quintessential general citizenship rights, specified largely by general common law.[136] Yet, particular features of property law and contract law were defined by local law.[137] At least in some respects, then, the legal content of general fundamental rights turned not only on general law, but also on the local law of each state.

As a practical matter, general citizenship meant that citizens of one state would enter another state and be entitled to some form of equal treatment with the citizens of that state. Consequently, modern interpreters naturally view general citizenship as simply a *national* right of nondiscrimination with respect to *state* citizenship rights—not as a truly distinctive form of citizenship. But an alternative approach was available historically, based on notions of general law. On this view, the point of general citizenship was not that Virginians enjoyed *North Carolina* citizenship rights when visiting North Carolina. Rather, the point was that Virginians maintained *their* general citizenship rights in every state.[138] The choice-of-law problems created by the Privileges and Immunities Clause were thus harder than they might seem at first glance. If general citizens took their general citizenship rights into other states, which body of law would define the specific legal content of those rights and the means of their enforcement?

D. Early Judicial Interpretations

General citizenship was not discussed much at the Founding, but it hardly disappeared. In the decades after ratification, American jurists widely recognized the concept. Controversies about citizenship rights thus focused on how state, general, and national citizenship related to each other, and on the respective

135. Murray v. M'Carty, 16 Va. (2 Munf.) 393, 397 (1811) (opinion of Cabell, J.). The distinction between *modifying* and *abridging* rights was well recognized among legal elites at the Founding. *See, e.g.*, NELSON, *supra* note 95, at 106-09; Campbell, *supra* note 100, at 275.

136. *See* NELSON, *supra* note 95, at 53-57.

137. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 319-20 (1827) (opinion of Trimble, J.).

138. Perhaps a hybrid view was most common. On this way of thinking, individuals retained certain basic rights as they crossed state lines, but the *regulations* and *protections* for those rights were provided by the law of the states into which they entered. *See, e.g.*, Lavery v. Woodland, 2 Del. Cas. 299, 307 (1817) (subtly contrasting "private or civil rights" from the "redress" states provided as protection for those rights—the latter being "certainly one of the privileges secured to the citizens of other states"). For further discussion, see BARNETT & BERNICK, *supra* note 1, at 49-51.

powers of the state and federal governments to define and control access to citizenship rights.[139] This Section looks at early judicial decisions about these questions, and then Part II turns to the broader public discussion of general citizenship that emerged amidst debates over race and slavery.

Many of the key issues came up in the first known Privileges and Immunities Clause case, *Campbell v. Morris*.[140] The dispute arose when Maryland created special rules for out-of-state litigants. The legislature had authorized creditors to attach the property of out-of-state debtors but not the property of Maryland debtors, apparently because of the difficulties of serving process on persons outside the state. The key issue in *Campbell* was whether discrimination of this sort violated Article IV's Privileges and Immunities Clause.[141]

Notably, both parties differentiated *local* and *general* citizenship rights. As attorney Arthur Shaaff argued for the plaintiff, "The constitution never meant to give foreign citizens *all* the advantages of the citizens of any particular state," including "privileges [afforded] by its local institutions."[142] The Privileges and Immunities Clause did not, in other words, reach the rights of *local* citizenship. Rather, it only "extend[ed] to the citizens of every state in the union" the "general rights of citizenship,"[143] meaning "any civil right, which a man as a member of civil society must enjoy."[144] Shaaff thus argued that the Privileges and Immunities Clause secured the *general* rights to contract and own property but otherwise left states free to regulate those rights by adjusting local modes of procedure. "[I]t never could have been the intention of the framers of our national government," he insisted, "to melt down the states into one common mass; to put the citizens of each in the exact same situation, and confer on them equal rights."[145] The lawyers on the other side agreed with that much. Luther Martin, arguing for the defendant, noted that the Privileges and Immunities Clause barred alienage restrictions, thus making "the citizens of each state . . . citizens of every state."[146] But it did not touch wholly local rights, like the franchise.[147]

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139. For instance, these issues arose in debates in the First Congress over naturalization. *See* 12 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES 142-69 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1994).

140. 3 H. & McH. 535 (Md. 1797).

141. *See id.* at 547-49 (argument of Luther Martin, attorney for the defendant).

142. *Id.* at 542 (argument of Arthur Shaaff, attorney for the plaintiff) (emphasis added).

143. *Id.* at 542, 565.

144. *Id.* at 565.

145. *Id.*

146. *Id.* at 547-48 (argument of Luther Martin, attorney for the defendant); *see also id.* at 537 (noting that without the Privileges and Immunities Clause, "the citizens of each state, in relation to the citizens of other states, would be aliens").

147. *See id.* at 538.

The dispute in *Campbell*, then, was not about the scope or regulability of what Shaaff called "the general rights of citizenship."[148] Rather, the lawyers disagreed about whether the *locally defined* rules that secured those rights had to maintain formal equality for out-of-state citizens. Martin insisted that they did. The citizens of each state, he argued, "may hold real property in any state of the union, subject to the laws and regulations of that state, and his property and his person are entitled to the protection of the laws *in the same manner as the citizens of the state*."[149] In other words, each state had to maintain not only equal general citizenship rights but also equal local regulations of those rights. Shaaff, by contrast, argued that the Privileges and Immunities Clause secured only the general citizenship rights themselves without compelling formal equality with respect to local *regulations* of those rights.[150] In the end, Judge Jeremiah Chase sided with Martin. Although states could regulate general citizenship rights, each state had to do so on formally equal terms, treating the citizens of other states on par with its own citizens.[151]

Most other jurists took the same approach. "A redress of the private or civil rights belonging to individuals is certainly one of the privileges secured to the citizens of other states," the High Court of Errors and Appeals of Delaware explained in 1817, and that redress "must be obtained or exercised in the same manner and form of suit as if he were a citizen of the state."[152] In other words, the modes of regulating and securing fundamental rights had to be the same for in-state and out-of-state citizens. The members of the New York Court for the Correction of Errors echoed this view. The Privileges and Immunities Clause "means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights," Chancellor James Kent explained in *Livingston v. Van Ingen*.[153] "Their persons and property must, in all respects, be equally subject to our law."[154] Courts widely agreed that states could

148. *Id.* at 565 (argument of Arthur Shaaff, attorney for the plaintiff).

149. *Id.* at 548 (argument of Luther Martin, attorney for the defendant) (emphasis added).

150. *See id.* at 565 (argument of Arthur Shaaff, attorney for the plaintiff).

151. *See id.* at 554 (opinion of Chase, J.).

152. Lavery v. Woodland, 2 Del. Cas. 299, 307 (1817). Notably, however, the court indicated that some regulations of the mode of proceeding would be so restrictive as to constitute a violation of the underlying rights. *See id.* at 308.

153. 9 Johns. 507, 577 (N.Y. 1812) (opinion of Kent, C.).

154. *Id.*; *see also id.* at 561 (opinion of Yates, J.) ("[U]ntil a discrimination is made, no constitutional barrier does exist.").

regulate general citizenship rights but that those regulations had to afford equal treatment to out-of-state citizens.[155]

Even on this view, however, the Privileges and Immunities Clause did not demand equal treatment with respect to *all* rights. Although it reached local regulations of *general* citizenship rights, jurists denied that the Clause extended to *local* citizenship rights that were attached exclusively to *state* citizenship. This was the lesson of *Corfield v. Coryell*.[156] The case turned on whether a state could authorize only its own citizens to harvest oysters in public waters. Riding circuit, Justice Washington upheld this restriction because, in his view, only *general* citizenship rights implicated the Privileges and Immunities Clause:

> We feel no hesitation in confining these expressions to those privileges and immunities 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.[157]

These were, as Washington had previously described them, the rights of "*general* citizenship."[158] Americans widely recognized these general fundamental rights, identifying them as the rights "guarantied to British subjects,"[159] "the great and

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155. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 61-62 (New York, O. Halsted 1827); Hadfield v. Jameson, 16 Va. (2 Munf.) 315, 316 (1811) (opinion of Tucker, J.); Douglass v. Stephens, 1 Del. Ch. 465, 474 (1821) (opinion of Ridgely, C.). For a contrary view, see *Douglass*, 1 Del. Ch. at 476-79 (opinion of Johns, C.J.); Wm. H. Williams, *The Arrest of Non-Residents for Debt—Constitutionality of the Law*, 2 W.L.J. 265, 266-67 (1845) (reporting an Ohio opinion). As Wm. H. Williams described, states could differentially *regulate* rights so long as "the non-resident is deprived of none." Williams, *supra*, at 267; *see also* 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 352-53 (Boston, Little Brown & Co. 1862) (proposing that courts apply the common law of "personal privilege" without taking notice of local law).

156. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

157. *Id.* at 551.

158. Butler v. Farnsworth, 4 F. Cas. 902, 903 (C.C.E.D. Pa. 1821) (No. 2,240). Philip Hamburger criticizes Justice Washington for having artificially limited the reach of the Privileges and Immunities Clause notwithstanding its protection of "all" citizenship rights. *See* Hamburger, *supra* note 26, at 81. But this argument is circular. If Washington was correct that the term "privileges and immunities of citizens" referred to general fundamental rights, then *Corfield*'s reading of the Privileges and Immunities Clause did, in fact, reach *all* "privileges and immunities of citizens."

159. Nunn v. State, 1 Ga. 243, 249 (1846).

well established doctrines of English liberty,"[160] "the common privileges of every English subject and American citizen,"[161] and so on.[162]

State jurists echoed *Corfield*'s approach. "[A]lthough the constitution of *the United States* has wisely given to a citizen of each state the privileges of a citizen of any other state," Judge Cabell of Virginia explained, "yet it clearly recognises the distinction between the character of a citizen of the *United States*, and of a citizen of any *individual state*; and also of citizens of *different states*."[163] Certain rights, he observed, "belong exclusively to citizens of that state."[164] Cabell's colleague, Judge Roane, agreed. One could be "a citizen of *Virginia* in a *particular* and limited sense, as contradistinguished from the *general* privilege *conferred*, by the constitution, upon the citizens of each state, in every other state."[165] Without distinguishing between "particular" and "general" citizenship, he insisted, the Privileges and Immunities Clause "would savour too much of consolidation, as throwing out of view the particular sovereignties of which the *American* confederacy is composed."[166] In other words, the Clause reached only general citizenship rights, not local citizenship rights like "the rights of election and of representation."[167]

160. Rich v. Flanders, 39 N.H. 304, 359 (1859) (opinion of Fowler, J.).

161. CONG. GLOBE, 42d Cong., 2d. Sess. 843 (1872) (remarks of Sen. Sherman).

162. *See* sources mentioned *supra* note 6. But some judges took a more textually grounded, positivist approach. *See, e.g.*, Barker v. People, 3 Cow. 686, 701-02 (N.Y. 1824); Dorman v. State, 34 Ala. 216, 236 (1859).

163. Murray v. M'Carty, 16 Va. (2 Munf.) 393, 398 (1811) (opinion of Cabell, J.); *see also, e.g.*, Lavery v. Woodland, 2 Del. Cas. 299, 307 (1817) ("The Constitution certainly meant to place, in every state, the citizens of all the states upon an equality as to their private rights, but not as to political rights.").

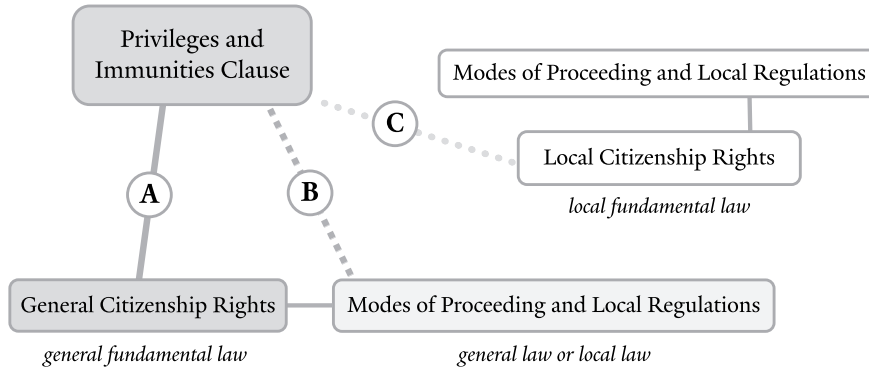
164. *Murray*, 16 Va. at 398.

165. *Id.* at 403 (opinion of Roane, J.).

166. *Id.* (emphasis added); *see also, e.g.*, State v. Medbury, 3 R.I. 138, 142 (1855) (invoking similar reasoning).

167. *Murray*, 16 Va. at 398 (opinion of Cabell, J.).

FIGURE 3. THE SCOPE OF THE PRIVILEGES AND IMMUNITIES CLAUSE



Explanation: This figure depicts three bodies of law mentioned in debates over the scope of the Article IV Privileges and Immunities Clause. Jurists widely agreed that the Privileges and Immunities Clause secured rights of general citizenship (line "A"). Legal controversies thus overwhelmingly focused on the Clause's *other* consequences. Some argued that it had no further application. More commonly, however, jurists thought that the Clause demanded nondiscrimination with respect to state regulation of general citizenship rights (line "B"). Meanwhile, judges widely rejected the application of the Clause to local citizenship rights defined by local law (line "C").

But voting rights warrant further comment. Today, scholars usually dismiss out of hand the notion that suffrage could have been a right of citizenship since it was not, in fact, enjoyed by most citizens.[168] Historically, however, politicians and jurists frequently linked voting rights to citizenship.[169] This was not because American elites were blissfully unaware that many citizens were ineligible to

168. *See, e.g.*, Hamburger, *supra* note 26, at 79-80, 95-96.

169. For discussion, see Les Benedict, *supra* note 13, at 14-23; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 12 (rev. ed. 2009). This linkage was especially common among Black civil-rights leaders. *See* FONER, *supra* note 1, at 52, 94-95; James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 U. PA. J. CONST. L. 267, 347 (2021).

vote, nor was it because they thought that all nonvoters were noncitizens.[170] Rather, it was because citizens enjoyed the right of representation.[171] And voting-eligibility rules were thought to be *regulations* of that general fundamental right.[172]

Yet, it was implausible that *general citizenship* conferred a right to vote in other states.[173] For instance, nobody thought that North Carolinians enjoyed a right to representation in Virginia's legislature or vice versa. But if the right of representation was a general fundamental right, how could states discriminate against out-of-staters? Jurists offered two responses. First, they asserted that voting rights were *local* citizenship rights tied exclusively to *state* citizenship.[174] On this view, the franchise was indeed linked to citizenship, as many insisted,[175] but it nonetheless fell beyond the reach of the Privileges and Immunities Clause.

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170. Many white elites denied Black citizenship along these lines, but their point was not that each and every citizen had to be a voter. Rather, it was that denying Black people the franchise demonstrated that Black people *as a race* had no right to representation and thus were not members of the polity. *See* Amy v. Smith, 11 Ky. (1 Litt.) 326, 333-34 (1822); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 51-52 (2006). In other words, the argument was premised on racism.

171. *See* Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1172-73 (1992). On the centrality of the right of representation, see, for example, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 291, 293-95 (1996). As Jack N. Rakove emphasizes, representation was thought to be a necessary safeguard to secure other rights. *See id.* Later, Black activists were particularly vocal in espousing this view. *See, e.g.*, WILLIAM H. DAY, CHARLES H. LANGSTON & CHARLES A. YANCEY, ADDRESS TO THE CONSTITUTIONAL CONVENTION OF OHIO FROM THE STATE CONVENTION OF COLORED MEN HELD IN THE CITY OF COLUMBUS, JANUARY 15TH, 16TH, 17TH AND 18TH, 1851, at 20 (Columbus, E. Glover 1851).

172. *See, e.g.*, JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 266 (Boston, The Boston Daily Advertiser 1821) (remarks of Mr. Lincoln) ("Secure the right of representation; but in the regulation of that right, you may restrict it to any proportion whatever."); CONG. GLOBE, 39th Cong., 1st Sess. 30 (1866) (remarks of Sen. Johnson) (acknowledging "a right to be represented, but not a right to vote"); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *170-71 ("[I]n a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given.").

173. *See, e.g.*, Murray v. M'Carty, 16 Va. (2 Munf.) 393, 398 (1811) (opinion of Cabell, J.); Custis v. Lane, 17 Va. (3 Munf.) 579, 592 (1813); Thomas Burke's Notes on the Articles of Confederation (1777), *in* 8 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 433 (Paul H. Smith ed., 1981). Nonetheless, some states extended the right to vote to resident aliens. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 63-71 (1996).

174. *See, e.g.*, *Murray*, 16 Va. at 398.

175. *See supra* note 169.

In this way, the rights of *general citizenship* did not quite reach all *general citizenship rights*, insofar as representation fell within that latter category. A second response, however, denied any link between voting and citizenship by claiming that "political rights" relating to self-governance were entirely distinct from the "civil rights" of citizenship.[176] Notably, everybody agreed about the bottom line: out-of-state citizens had no right to vote.

Nonetheless, jurists often associated the Privileges and Immunities Clause with voting rights when talking about a specific situation: interstate relocation.[177] The logic was that *general* citizenship entailed not only a right to enjoy certain fundamental rights in other states but also a right to equality in *local* citizenship rights upon moving to a new state.[178] As just mentioned, these latter rights were often thought to include suffrage. In this narrow way, then, general citizenship was linked to voting. But virtually everyone understood that the only protection that the Privileges and Immunities Clause offered in this situation was a right to *equal* local citizenship rights—whatever they happened to be. Indeed, as a mere right of nondiscrimination, this rule underscored that states could define local citizenship rights however they wanted. Few jurists claimed that the Privileges and Immunities Clause set a substantive floor on *local* citizenship rights, like the franchise.[179]

Despite the *federative* nature of general citizenship, jurists often spoke about general citizenship rights in ways that sound nationalistic. Chancellor Nicholas Ridgely of Delaware, for instance, referred to them as rights of "every citizen in the United States" and of "all citizens of the United States."[180] Scholars have naturally interpreted these sorts of statements as invocations of *national* citizenship

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176. *See* Les Benedict, *supra* note 13, at 18, 21. For an earlier effort to distinguish these rights, see JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 9 (London, J. Johnson 2d ed. 1771).

177. *See, e.g.*, Abbot v. Bayley, 23 Mass. 89, 92-93 (1827). This was the minority view in the Judiciary Committee that issued the "Woodhull Report." *See* H.R. REP. NO. 41-22, pt. 2 (1871), *reprinted in* 2 ESSENTIAL DOCUMENTS, *supra* note 1, at 615.

178. Today, "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State" is based not only on the "right to travel" but also on the Privileges or Immunities Clause of the Fourteenth Amendment. Saenz v. Roe, 526 U.S. 489, 502-03 (1999).

179. But there were notable exceptions. Proponents of Black suffrage, for example, sometimes invoked the rights of resettled citizens to equal treatment as a way of arguing for *intrastate* racial equality. *See* NATHANIEL H. CARTER & WILLIAM L. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 184 (Albany, E. and E. Hosford 1821) (remarks of Mr. Jay); *id.* at 190-91 (remarks of Mr. Kent).

180. Douglass v. Stephens, 1 Del. Ch. 465, 473-74 (1821) (opinion of Ridgely, J.).

rights.[181] But this inference is unsound. As Ridgely noted, these rights were still tied in some way to state citizenship and secured under state law.[182] The rights were *federative* in nature. Another illustrative example comes from Pennsylvania lawyer Thomas Bell's remarks at the state's 1837 constitutional convention. "[A] clause in the Constitution of the United States . . . secures our individual rights, not as an inhabitant of a State, but as a citizen of the United States," Bell explained.[183] But he was not asserting a nationalistic conception of these rights. Rather, Bell continued, citizens enjoyed these rights as members "of the great confederation of the Union."[184]

In an oft-quoted passage from his constitutional treatise, *Commentaries on the Constitution of the United States*, Supreme Court Justice Joseph Story nicely captured this federative way of thinking. The Privileges and Immunities Clause, he wrote, "confer[red] on [the citizens of each state], if one may so say, a general citizenship," thereby "communicat[ing] all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances."[185] Story's point was not that the Clause recognized the rights of national citizenship.[186] Nor was he saying that states were entirely free to define these rights however they wanted.[187] Rather, Story was highlighting the federative character of "general citizenship."

Debates about naturalization further underscored that citizenship rights came in three sets, not two. For example, some commentators asserted that states

181. *See, e.g.*, *supra* notes 24-28 and accompanying text.

182. *See Douglass*, 1 Del. Ch. at 472 ("[A] citizen of another State may claim . . . the enforcement of his contracts or satisfaction for their breach, precisely as the citizens of this State can.").

183. 2 JOHN AGG, PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION 492 (Harrisburg, Packer, Barrett, and Parke 1837) (remarks of Mr. Bell).

184. *Id.*

185. 1 STORY, *supra* note 14, at 674.

186. *But see supra* notes 24-28 and accompanying text.

187. For further discussion, see Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657-58 (1829).

could "make citizens for state purposes,"[188] even though only the federal government could confer *general* and *national* citizenship.[189] As St. George Tucker noted, "states retain the power of admitting aliens to become citizens of the states respectively," even though they "would still be regarded as aliens in every [other] state."[190] Such persons, Tucker explained, would enjoy "local privileges only," without "being entitled to carry [citizenship] with [them] into another state."[191] Discussions of naturalization thus reinforced that *state* citizenship differed from *general* citizenship.[192]

Yet state-based naturalization illustrates once again how general citizenship rights were not inextricably linked to general citizenship. States could grant local enjoyment of general citizenship rights, including the right to own real property, but they could not confer upon aliens the status of general citizenship. Thus, although general citizenship was a sufficient condition for enjoying general citizenship rights, it was not quite a necessary condition.

II. THE ANTEBELLUM PERIOD

The ideas of general citizenship and general citizenship rights gained broader public salience in the Antebellum period amidst virulent debates over federalism and slavery. This Part shows the centrality of these concepts to several prominent historical episodes. The discussion begins with the dispute over the admission of Missouri to statehood, and particularly whether disallowing slavery in Missouri would deny the "rights, advantages and immunities of citizens of the

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188. *House of Representatives: Naturalization Bill (Debate Concluded)*, LANCASTER [PA.] INTELLIGENCER, Feb. 26, 1803, at 2. This idea of effective state citizenship was not uniformly embraced, *see, e.g.*, Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844), but it was consistent with states having essentially plenary power over those matters, like property law, that were linked to traditional alienage disabilities, *see* 1 RAWLE, *supra* note 53, at 87 ("The United States do not intermeddle with the local regulations of the states in those respects."). For later discussion, see, for example, *In re Wehlitz*, 16 Wis. 443 (1863).

189. The need for uniform control over naturalization was often linked to the Privileges and Immunities Clause. *See, e.g.*, THE FEDERALIST NO. 42, at 285-86 (James Madison) (Jacob E. Cooke ed., 1961); 1 STORY, *supra* note 14, at 1-3; 2 KENT, *supra* note 155, at 397.

190. TUCKER, *supra* note 126, at 300.

191. *Id.* at 199; *see also* 2 KENT, *supra* note 155, at 61 (making the same point).

192. General citizenship rights also came up in *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 450 (1805) (argument of counsel). *See id.* ("If the term *state* is to have the limited construction contended for by the opposite counsel, the citizens of Columbia will be deprived of the general rights of citizens of the United States."). For an argument that D.C. residents enjoyed *general* citizenship rights, see *Custis v. Lane*, 17 Va. (3 Munf.) 579, 581-83 (1813) (argument of counsel Edward Lee). For an argument that D.C. residents enjoyed *national* citizenship rights, see DUER, *supra* note 53, at 181.

United States" guaranteed under the Louisiana Purchase Treaty. It then addresses controversies over the Negro Seaman Acts and the Fugitive Slave Act, including the embrace of competing binary conceptions of citizenship rights by "radical" abolitionists and advocates of states' rights. The Part then concludes with a discussion of the *Dred Scott* case, showing how the ternary conception of citizenship rights remained the mainstream view, even as jurists disputed its particulars.

A. The Admission of Missouri

General citizenship rights hit the national political stage during debates over whether to admit Missouri into the Union.[193] The controversy erupted when New York Representative James Tallmadge proposed banning "the further introduction of slavery" in Missouri.[194] Proslavery representatives replied that doing so would violate the Louisiana Purchase Treaty's guarantee of "all these rights, advantages and immunities of citizens of the United States" by depriving Missourians of the right to decide whether to recognize slavery.[195] In other words, the slavery proponents viewed the "rights, advantages and immunities of citizens of the United States" as including the right of local self-governance.

In response, supporters of the Tallmadge Amendment construed the treaty as limited to rights of United States citizenship, not including local rights linked exclusively to state citizenship. And rights in slavery, they insisted, were wholly local. As Senator David Morril of New Hampshire explained:

> A right to hold slaves is not a right of a citizen of the United States, as such; it is not essential to constitute such citizenship. The enjoyment of this right is not essential to the enjoyment of the rights of a citizen of the United States. . . . It is acquired by the government of a particular State.[196]

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193. Another debate arose a year later over Missouri's proposed constitution, which excluded free Black people from entering the state. Some argued that this exclusion violated citizenship rights, while others argued that Black people could not become "citizens" within the meaning of the Federal Constitution. For discussion, see MASUR, *supra* note 1, at 45-55.

194. 33 ANNALS OF CONG. 1170 (1819) (proposed amendment of Rep. Tallmadge).

195. Treaty with France for the Cession of Louisiana, U.S.-Fr., art. III, Apr. 30, 1803, 18 Stat. 232, 233.

196. 35 ANNALS OF CONG. 146 (1820) (remarks of Sen. Morril); *see also* 1 DANIEL WEBSTER, *Memorial to Congress on Restraining the Increase of Slavery* (Dec. 15, 1819), *reprinted in* THE PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS 55 (Charles M. Wiltse ed., 1986) (stating that the treaty reached "such [rights] as are recognized or communicated by the Constitution

Or, as Representative John Sergeant of Pennsylvania stated, the rights "of a citizen of the United States . . . are the same throughout the United States. They are, therefore, independent of local rights, or those which depend upon residence in a particular place."[197] Because slavery existed only pursuant to the *local* law of particular states, rights in slavery could not be among the rights of United States citizenship.

This argument had plenty of legal support.[198] American elites throughout the first half of the nineteenth century almost uniformly recognized slavery as a product of *local* law, not *general* law.[199] Based on this distinction, supporters of the Tallmadge Amendment argued that the right to enslave others could not be among the "rights, advantages, and immunities of citizens of the United States" because any right in slave property was wholly *local*.[200] Therefore, requiring that Missouri be admitted as a free state would not violate any rights of citizens of the United States—that is, any *general* or *national* citizenship rights.

Without considering the notion of general citizenship, other scholars have portrayed the supporters of the Tallmadge Amendment as having focused on *national* citizenship rights. For instance, Kurt T. Lash concludes that the phrase "rights, advantages, and immunities of citizens of the United States" was a term of art that meant "national rights conferred by the Constitution itself—rights . . . wholly separate and distinct from the state-conferred rights of Article

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of the United States; such as are common to all citizens, and are uniform throughout the United States. The clause cannot be referred to rights, advantages, and immunities derived exclusively from the State governments, for these do not depend upon the federal Constitution").

197. 35 ANNALS OF CONG. 1203 (1820) (remarks of Rep. Sergeant).

198. Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (K.B.) ("[S]lavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law.").

199. *See, e.g.*, Harry v. Decker, 1 Miss. 36, 42 (1818) ("Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations . . . ."). This was essentially common ground between pro- and anti-slavery advocates. *See* LASH, *supra* note 1, at 58. For a perceptive discussion of how views shifted later in the South, see Derek A. Webb, *The* Somerset *Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America*, 32 LAW & HIST. REV. 455, 482-89 (2014).

200. *See, e.g.*, RUFUS KING, THE SUBSTANCE OF TWO SPEECHES DELIVERED IN THE SENATE OF THE UNITED STATES, ON THE SUBJECT OF THE MISSOURI BILL 6 (1819) ("The citizens of each state possess rights . . . that are peculiar to, and arise out of the constitution and laws of the several states. . . . [N]one is so remarkable or important as . . . slavery."); *cf.* 33 ANNALS OF CONG. 1209 (1819) (remarks of Rep. Tallmadge) (stating that the inability to own slaves in Missouri would be "annexed to the particular district of country, and in no manner attached to the individual").

IV."[201] In his concurring opinion in *McDonald v. City of Chicago*, Justice Thomas accepted Lash's reading of this evidence, concluding that the "rights and immunities of 'citizens of the United States'" referred to only *national* rights, not *state*-level rights.[202] Randy E. Barnett and Evan D. Bernick agree that these debates were about "the privileges and immunities of *national* citizenship," though they disagree with Lash's understanding of what those rights entailed.[203]

But it is highly doubtful that supporters of the Tallmadge Amendment were drawing a crisp distinction between rights of *national* and *state* citizenship. To be sure, their phrasing reads that way today. To us, terms like "federal rights,"[204] rights "recognized or communicated by the Constitution,"[205] and rights "derived from the Constitution" evoke the idea of *national* rights.[206] Once we take general citizenship rights into view, however, the picture looks quite different. It seems far more likely that anti-slavery politicians were merely insisting that rights in slavery were *local* citizenship rights and therefore not protected under the treaty. They were not insisting that general citizenship rights were unprotected.

Consider, for instance, Senator Morril's statement that the rights of citizens of the United States were "federal rights" which were "derived from the Constitution."[207] From a modern perspective, it appears that he was referring to enumerated constitutional rights, just as Lash concludes. In the same speech, however, Morril observed that "the prohibition of this right [to hold slaves] is no infringement of any right *essential to consummate citizenship*. . . . If a right to hold slaves is *essential to constitute a citizen of the United States*, then, those who cannot hold slaves are not citizens of the United States."[208] These "essential" citizenship

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201. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1300 (2010); *see* LASH, *supra* note 1, at 52-55. Scholars have critiqued Lash's argument on various other grounds. *See* GREEN, *supra* note 1, at 26; Hamburger, *supra* note 26, at 65-66; James W. Fox, Jr., *Publics, Meanings & the Privileges of Citizenship*, 30 CONST. COMMENT. 567, 577-78 (2015) (reviewing LASH, *supra* note 1).

202. 561 U.S. 742, 824 (2010) (Thomas, J., concurring) (quoting MARCUS [JOSEPH BLUNT], EXAMINATION OF THE EXPEDIENCY AND CONSTITUTIONALITY OF PROHIBITING SLAVERY IN THE STATE OF MISSOURI 17 (New York, C. Wiley & Co. 1819)). For Justice Thomas's detailed analysis of the term, see *id.* at 823-26.

203. BARNETT & BERNICK, *supra* note 1, at 66.

204. KING, *supra* note 200, at 15-16; *see also* 35 ANNALS OF CONG. 146 (1820) (remarks of Sen. Morril).

205. 1 WEBSTER, *supra* note 196, at 55.

206. 35 ANNALS OF CONG. 146 (1820) (remarks of Sen. Morril); *see also* KING, *supra* note 200, at 15 (referencing "all the rights, advantages, and immunities, which citizens of the United States derive from the constitution").

207. 35 ANNALS OF CONG. 146 (1820) (remarks of Sen. Morril).

208. *Id.* at 147 (emphases added); *see also id.* at 146 (arguing that the right to hold slaves "is not a right of a citizen of the United States" and "is not essential to constitute such citizenship").

rights, he explained, stood in stark contrast with "local rights, which arise from local situation."[209] Notably, the term "essential rights" was often used as a synonym for general citizenship rights.[210] And aside from slavery, the only other local right that Morril mentioned was the franchise.[211]

The same point applies to New York Senator Rufus King's remark that the rights of United States citizens "derive from the constitution thereof." Again, this phrasing might seem to support Lash's view. Yet, King continued by observing that

> these rights may be denominated federal rights, are uniform throughout the union, and are common to all its citizens: But the rights derived from the constitution and laws of the states, which may be denominated state rights, in many particulars differ from each other. Thus while the federal rights of the citizens of Massachusetts and Virginia are the same, their state rights are dissimilar, and different, slavery being forbidden in one, and permitted in the other state.[212]

Like Morril, King defined "federal rights" as those common to all citizens, not as rights enumerated in the Constitution or defined by national law. (He also did not deny state power to *regulate* those rights.) And the only "state right[]" that King mentioned apart from slavery was voting.[213]

These debates thus reveal an important but misunderstood terminological shift in discussions of citizenship rights. Without appreciating the concept of general citizenship, scholars have assumed that the term "rights of citizens of the United States" necessarily referred to *national* rights.[214] But that assumption is

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209. *Id.* at 146.

210. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 569 (1823) ("[Indians] are not citizens . . . since they are destitute of the most essential rights which belong to that character." (emphasis omitted)); Arnold v. Mundy, 6 N.J.L. 1, 13 (1821) ("[The colonists] came over here clothed with all the essential rights and privileges secured to the subject by the British constitution . . . ."); TUCKER, *supra* note 126, at 252 (referring to "the great and essential rights"); MASS. CONST. OF 1780, pt. I, art. I ("All men are born free and equal, and have certain natural, essential, and unalienable rights . . . .") (amended 1976); PA. CONST. OF 1790, art. IX (referring to "the general, great, and essential principles of liberty and free Government").

211. 35 ANNALS OF CONG. 146 (1820) (remarks of Sen. Morril) (observing state-to-state variations in voting qualifications).

212. KING, *supra* note 200, at 15.

213. *Id.* at 15-16. Another source mentioned exemptions from militia service as an example of a "state" right as opposed to a "federal" right that was "common to all citizens of this republic." MARCUS, [JOSEPH BLUNT], EXAMINATION OF THE EXPEDIENCY AND CONSTITUTIONALITY OF PROHIBITING SLAVERY IN THE STATE OF MISSOURI 17-18 (New York, C. Wiley & Co. 1819).

214. *See supra* notes 27, 28, 202, and 203.

unwarranted. This term often referred to *general* citizenship rights putatively enjoyed by all Americans within a federative political community.[215] In sum, the supporters of the Tallmadge Amendment were not trying to make a point about *national* rights as such. Rather, their point was that the right to enslave other humans was exclusively conferred by local law.[216]

B. The Negro Seaman Acts

Only a few years after Missouri's admission to statehood, citizenship rights returned to the national political conversation in a decades-long controversy over state laws known as the Negro Seaman Acts.[217] This Section shows how participants in these debates employed, and at times challenged, distinctions between state, national, and general citizenship.

Passed by the South Carolina legislature in 1822 after authorities foiled an alleged slave uprising, the first Negro Seaman Act imposed onerous restrictions on "free negroes, or persons of color" who arrived by sea.[218] Among other things, the Act provided for the jailing of any such sailors while their ships were docked in South Carolina.[219] Justice Johnson quickly ruled in a Circuit Court case that

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215. *See, e.g.*, Joseph Larned, *Massachusetts and South Carolina*, 3 NEW ENGLANDER 411, 433 (1845).

216. Nor does it matter that Tallmadge Amendment supporters embraced a nondiscrimination reading of the Privileges and Immunities Clause. Lash argues that this demonstrates that the underlying substantive rights were *state-law* rights, not rights of United States citizenship. *See* LASH, *supra* note 1, at 59 n.195. But once again, this conclusion simply does not follow. It was perfectly consistent to think *both* that Article IV required nondiscrimination *and* that Article IV referred to substantive general citizenship rights that no state could rightfully abridge. *See supra* notes 98-115 and accompanying text. Other treaty-related evidence further demonstrates that the rights of "citizens of the United States" secured by the treaty included general citizenship rights, and not just enumerated rights. *See, e.g.*, New Orleans v. De Armas, 34 U.S. (9 Pet.) 224, 235 (1835) (noting that the treaty secured the right to vindicate property rights in state court). Other scholars have discussed this evidence in detail. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 537-39 (2019); Fox, *supra* note 201, at 577-78; Upham, *supra* note 1, at 1124-27. For Lash's reply, see Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 600-07 (2019).

217. These well-known debates have received plenty of attention from legal historians. *See, e.g.*, Glass, *supra* note 1; JONES, *supra* note 1; MASUR, *supra* note 1.

218. *An Act for the Better Regulation and Government of Free Negroes and Persons of Color; and for Other Purposes* (1822), *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 461, 461 (David J. McCord ed., 1840). As the title suggested, the Act applied to nonwhite sailors, and it was in fact enforced against Native Americans. *See Law Report. State of South-Carolina vs. Daley*, CHARLESTON COURIER, June 29, 1824, at 2, *reprinted in* H.R. REP. NO. 27-80, at 18 (1843).

219. For a more detailed summary, see MASUR, *supra* note 1, at 122-23.

the Act violated the Commerce Clause.[220] Despite this ruling, South Carolinian officials continued to enforce the Act.[221] Other states soon replicated South Carolina's repressive legislation.

Initially, the Negro Seaman Acts did not trigger much discussion of the Privileges and Immunities Clause.[222] But the citizenship issue eventually gained plenty of attention. In the 1830s and 1840s, civil-rights activists became increasingly vocal in protesting the Negro Seaman Acts. For instance, lawyer David L. Child wrote in 1833 that "[e]very slave State has nullified . . . the only article of the constitution which protects our free fellow-citizens."[223] Chiming in a decade later, a congressional committee report announced "no hesitation in agreeing" that the Negro Seaman Acts were "violations of the privileges of citizenship guarantied by the Constitution of the United States."[224] Whatever those rights entailed, the report noted, the citizens of other states were at least entitled not to be subject to "seizure and imprisonment" simply upon entering the state.[225] Importantly, however, these were *federative* rights secured among the citizens of the several states, not *national* rights as such.[226]

But not everyone agreed that these restrictions violated citizenship rights. Proponents of the Negro Seaman Acts relied on two arguments. First, they asserted that Black people were categorically excluded from citizenship — a prelude to Chief Justice Taney's racist argument in *Dred Scott*.[227] Second, they defended

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220. Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C. D.S.C. 1823) (Case No. 4,366).

221. *See* MASUR, *supra* note 1, at 126.

222. Much of the initial controversy related to foreign sailors. Henry Elkison, for instance, was a British subject born in Jamaica. *Elkison*, 8 F. Cas. at 493. The opinion of Attorney General William Wirt declaring the South Carolina legislation unconstitutional was also issued in response to a British protest and thus did not mention citizenship. Validity of the South Carolina Police Bill, 1 Op. Att'y Gen. 659 (1824).

223. DAVID L. CHILD, THE DESPOTISM OF FREEDOM; OR THE TYRANNY AND CRUELTY OF AMERICAN REPUBLICAN SLAVE-MASTERS, SHOWN TO BE THE WORST IN THE WORLD; IN A SPEECH, DELIVERED AT THE FIRST ANNIVERSARY OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY, 1833, at 59 (1833).

224. H.R. REP. NO. 27-80, at 2 (1843). The Committee later repeated this phrase. *Id.* at 6 (describing the Negro Seaman Acts as "a violation of the privileges of citizenship guarantied by the [Privileges and Immunities Clause]").

225. *Id.*; *see also* MINORITY OF THE JOINT SPECIAL COMM., REPORT ON THE DELIVERANCE OF CITIZENS, LIABLE TO BE SOLD AS SLAVES, H.R. 38, 60th Sess., at 5-7 (Mass. 1839) (arguing that the Negro Seaman Acts violated the rights of general citizenship).

226. *See* Glass, *supra* note 1, at 869 (observing that arguments against the Negro Seaman Acts were not framed in terms of national citizenship).

227. *See, e.g.*, H.R. REP. NO. 27-80, at 40-42 (1843). For discussion of historical views on this topic, see GRABER, *supra* note 170, at 28-33, 50-57.

the Acts as reasonable exercises of the police power.[228] At times, this second argument seemed to treat the Privileges and Immunities Clause as a mere nondiscrimination rule, without reflecting or securing any substantive rights. A minority report in Congress, for example, insisted that authority to define citizenship rights rested "entirely with State[s]."[229] On this view, Article IV demanded only that each state "extend to the citizens of each and every State, the same privileges and immunities she extends to her own 'under the like circumstances.'"[230]

These claims about state legislative authority, however, were not based entirely on textual inferences from the Privileges and Immunities Clause. They also rested on a state-centered view of sovereignty and a federative view of the Union. As scholars have widely appreciated, disputes over the nature of the Constitution had arisen in the earliest contests over congressional power,[231] and they regularly resurfaced in the coming decades.[232] The crux of this disagreement was whether federal power stemmed from a "merely federal" agreement, as St. George Tucker put it, or instead from a "social, and national" compact tied to a unitary national body politic.[233] In other words, the dispute was over whether the Constitution was essentially like a treaty among sovereign states or instead was a true constitution of government.[234]

This controversy came to a head in the late 1820s and early 1830s during the Nullification Crisis, when South Carolinians asserted power to conclusively adjudge the constitutionality of federal laws.[235] The basis for this position, as John C. Calhoun explained, was that "sovereignty resides in the people of the States."[236] Initially, this dispute was not directly about citizenship. But that issue came up in 1834, after two militia officers challenged the constitutionality of a

228. *See, e.g.*, H.R. REP. NO. 27-80, at 37-38 (1843).

229. *Id.* at 40.

230. *Id.* at 39 (quoting 1 STORY, *supra* note 14, § 947, at 674).

231. *See, e.g.*, Gienapp, *supra* note 30, at 1804-05.

232. *See, e.g.*, Bernadette Meyler, *Between the States and the Signers: The Politics of the Declaration of Independence Before the Civil War*, 89 S. CAL. L. REV. 541, 553-71 (2016); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 924-47 (1985).

233. St. George Tucker, *View of the Constitution of the United* States, *in* 1 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. D, at 151 (Lawbook Exch. 1996) (1803), *reprinted in* 1 ESSENTIAL DOCUMENTS, *supra* note 1, at 60, 65; *see also* 1 STORY, *supra* note 14, § 153, at 118 ("The distinction between a constitution and a confederation is well known, and understood.").

234. *See* Campbell, *supra* note 101, at 109-10; Gienapp, *supra* note 87, at 353-54.

235. *See, e.g.*, John C. Calhoun, *South Carolina Exposition* (1828), *reprinted in* 1 ESSENTIAL DOCUMENTS, *supra* note 1, at 97-102.

236. *Id.* at 99.

South Carolina statute requiring them to swear primary allegiance to the state.[237] When the case reached the South Carolina Court of Appeals, the lawyers and judges wrestled at length over the nature of citizenship and sovereignty.

Those defending the constitutionality of the South Carolina legislation put particular emphasis on the Privileges and Immunities Clause, which, in their view, demonstrated the primacy of state citizenship. Notice the assumption here: the nature of sovereignty was inextricably linked to the nature of citizenship. And in the words of South Carolina Attorney General Robert Barnwell Smith (who is better known by his subsequent surname, Rhett[238]),

> There is no such being . . . under the Constitution of the U.S., as *a citizen of all the States generally*. A citizen of the U.S. is a citizen of one of the States of the confederacy, entitled, under the Constitution, to the "privileges and immunities of the citizens of the several States." He owes *allegiance* to his native State; and he owes *obedience*, as the price of the privileges and immunities he enjoys, when residing in any of the other States, to their constituted authorities and laws.[239]

By insisting that "[a] citizen of the U.S." enjoyed only *federative* rights under Article IV, Smith was rejecting *national* citizenship. One of the three judges, Judge Harper, agreed with Smith, noting that the Privileges and Immunities Clause had appeared in the Articles of Confederation—a genealogy that, in his view, disproved claims of national sovereignty.[240] These men thus defended a binary, federative conception of citizenship rights.

Notably, the opposing lawyers and other judges did not deny the federative character of general citizenship. Rather, they insisted that the rights of citizens of the United States were not limited to those rights.[241] It was simply "a mistake," lawyer Abram Blanding argued, to assume that "all the rights of citizenship in the United States" were linked to the Privileges and Immunities Clause.[242] Americans, he thought, had other rights "[a]s citizens of the United States."[243] Even without the Privileges and Immunities Clause, "a citizen of the United

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237. For a discussion of oath requirements in South Carolina, see HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 119-38 (1959).

238. He changed his name in the late 1830s. *See* LAURA A. WHITE, ROBERT BARNWELL RHETT: FATHER OF SECESSION 33-34 (Peter Smith 1965).

239. THE BOOK OF ALLEGIANCE, *supra* note 33, at 103 (argument of Att'y Gen. Robert Barnwell Smith).

240. *Id.* at 266 (opinion of Harper, J.).

241. *See* HYMAN, *supra* note 237, at 126-29.

242. THE BOOK OF ALLEGIANCE, *supra* note 33, at 177 (argument of Abram Blanding).

243. *Id.*

States . . . would have equally participated in the privileges and immunities of every other man in the Union, so far as they are under the general government."[244] For instance, Blanding asked rhetorically, "How else could a man born in a Territory, or in the District of Columbia, be President of the United States?"[245] In other words, Blanding was pointing to *national* citizenship rights, not ones tied to the Privileges and Immunities Clause. Judge O'Neall made a similar argument, observing that "the Constitution teems with provisions speaking of citizens of the United States."[246] None of the clauses that O'Neall cited were in Article IV. By implication, everyone agreed about the federative character of general citizenship.

C. Fugitive Slave Debates

Though not directly about general citizenship, Antebellum debates over the Fugitive Slave Clause powerfully shaped anti-slavery thinking in ways that intersected with views of citizenship. These issues came to the fore in the 1830s and 1840s when anti-slavery lawyers began to challenge the constitutionality of the Fugitive Slave Act of 1793, which displaced state-law processes for reclaiming fugitive slaves as property.[247] Of particular note were the arguments of then-Ohio lawyer Salmon P. Chase, whom historians have identified as "the leading expositor of the Republican constitutional argument about the relationship between the federal government and slavery."[248]

Chase's argument against the Fugitive Slave Act emphasized the federative nature of Article IV. Other parts of the Constitution, he acknowledged, were truly national in character. But a "secondary object" of the Constitution "was to adjust and settle certain matters of right and duty, between the states and between the citizens of different states, by permanent stipulations having the force and effect of a treaty."[249] In this way, he explained, the Constitution "establishes

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244. *Id.*

245. *Id.*

246. *Id.* at 220 (opinion of O'Neall, J.).

247. Proponents of the Fugitive Slave Act were interpreting it in increasingly expansive ways. *See* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1151-60 (2012).

248. Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 LAW & SOC. INQUIRY 459, 459 (1997); *see also* FONER, *supra* note 1, at 9-10 (noting Salmon P. Chase's influence).

249. CHASE, *supra* note 15, at 19. Chase repeated these arguments nearly word-for-word in his Supreme Court argument a decade later. *See* SALMON P. CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES VS. JOHN VANZANDT 98-99 (Cincinnati, R. P. Donogh & Co. 1847).

certain articles of compact or agreement between the states," including the recognition of rights.[250] "It prescribes certain duties to be performed by each state and its citizens, towards every other state and its citizens," he observed, "and it confers certain rights upon each state and its citizens, and binds all the states to the recognition and enforcement of those rights."[251]

By viewing Article IV as essentially a treaty, Chase denied that Congress could enforce its provisions absent an expressly enumerated power. "The clauses of compact confer no powers on the government," he insisted, "and the powers of government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact."[252] In his view, this conclusion followed from the fact that the "parties to the [Article IV] agreement are the states."[253] Chase generally opposed Calhoun's compact theory,[254] but he thought that Article IV, in particular, should be interpreted using principles of strict construction.[255]

The Supreme Court, however, upheld the Fugitive Slave Act. Because rights in slavery were wholly local, Justice Story reasoned in *Prigg v. Pennsylvania*, the right to recaption of escaped slaves in other states was not grounded in general law.[256] Instead, he concluded, that right was "exclusively" national.[257] The Fugitive Slave Clause, in other words, did not secure a preexisting principle of comity among the states. Rather, it had created "a new and positive right"—a *national* right that was "confined to no territorial limits, and bounded by no state institutions or policy."[258] Power to enforce that national right thus necessarily resided in the *national* government.[259]

Anti-slavery activists were unpersuaded. "From the very language employed it is obvious that this [Fugitive Slave Clause] is merely a *compact* between the

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250. CHASE, *supra* note 15, at 19.

251. *Id.*

252. *Id.*

253. *Id.* at 20.

254. *See id.* at 19 ("These different ends of the constitution—the creation of a government and the establishment of a compact, are entirely distinct in their nature.").

255. For discussion of a New Jersey decision reaching this conclusion, see Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law*, 23 RUTGERS L.J. 753, 770-74 (1992).

256. 41 U.S. (16 Pet.) 539, 611-12 (1842).

257. *Id.* at 622.

258. *Id.* at 623.

259. *Id.*

States, with a *prohibition* on the States, *conferring no power on the nation*," Massachusetts Senator Charles Sumner declared.[260] Chase concurred.[261] But it is important to be precise about their objection. These men did not, as scholars have suggested,[262] reject *Prigg*'s major premise that nationally created rights triggered an implied national enforcement power. Rather, they objected to *Prigg*'s minor premise that the Fugitive Slave Clause in fact created national rights. It was specifically because that Clause was among the "clauses of compact," Sumner explained, that it came "without any power attached."[263]

Some "radical" anti-slavery activists, however, used *Prigg* to assert federal power to suppress slavery.[264] "[U]nder the Federal Union," lawyer Joel Tiffany wrote, "we have become citizens of one, and the same government. We have a National relation to each other, which is of a higher character, and into which state relations, for certain purposes, are merged; and to which, when in conflict, state regulations must yield."[265] Consequently, he reasoned, "as citizens of the United States, we stand mutually pledged to each other, to see that all the rights, privileges, and immunities, granted by the constitution of the United States, are extended to all, if need be, by the force of the whole Union."[266] Tiffany accepted

260. CHARLES SUMNER, FREEDOM NATIONAL; SLAVERY SECTIONAL 29 (Washington, Buell & Blanchard 1853) (1852).

261. *See* CHASE, *supra* note 249, at 98-99; CONG. GLOBE, 31st Cong., 1st Sess. app. at 476-77 (1850) (remarks of Sen. Chase); *see also* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 631 n.21 (1994) (collecting other sources demonstrating anti-slavery activists' agreement with this proposition).

262. *See* Aynes, *supra* note 28, at 78 n.124; MASUR, *supra* note 1, at 317.

263. SUMNER, *supra* note 260, at 19; *see also Ex parte* Bushnell, 9 Ohio St. 77, 123 (1859) (argument of Ohio Att'y Gen. Christopher P. Wolcott) (describing the Privileges and Immunities Clause as "a clause of compact, but no grant of power").

264. Joel Tiffany and Lysander Spooner were the leading exponents of this view. *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 206-10, 224-28 (2011); *see also* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 104-12 (Boston, Bela Marsh 1845) (drawing on an account of national citizenship). Other "radical" anti-slavery activists embraced a nationalistic position regarding *personhood* rights. *See* Barnett, *supra*, at 243-44.

265. TIFFANY, *supra* note 36, at 87; *see also* WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY 138 (rev. 2d ed. 1845) (asserting that the Declaration of Independence constituted the nation and that the Articles of Confederation and Constitution were secondary).

266. TIFFANY, *supra* note 36, at 56.

that states were principally responsible for securing the rights of their own citizens.[267] But on this view, rights of *national* citizenship were ultimately the *nation's* responsibility to defend.[268]

For those who viewed these rights as being tied to *general* citizenship, however, the logic of *Prigg* did not support Tiffany's argument.[269] To be sure, these rights were sometimes federally enforceable through diversity jurisdiction. But they were not *national* citizenship rights as such, subject to a plenary congressional enforcement power.[270] Rather, these rights were *federative* in character. As one judge put it, "[T]he citizens of the different states are, as it respects the privileges and immunities they enjoy in their respective states, brought into a general citizenship with each other."[271] On this view, states had primary authority to regulate and enforce these rights,[272] with the Privileges and Immunities Clause recognizing, in the words of Justice Wayne, "a community of rights and privileges for all citizens in the several states."[273]

D. Dred Scott

The most important Antebellum discussion of citizenship rights came in *Dred Scott v. Sandford*.[274] Today, the case is remembered mostly for Chief Justice Taney's racist rejection of Black citizenship and Justice Curtis's forceful reply. For purposes of this Article, however, the key point is what these dueling opinions had in common. Both Justices agreed that citizenship rights came in three sets: local, national, and general. The disagreements between Taney and Curtis were over how these notions of citizenship were linked, what they entailed, and who got to enjoy them.

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267. *Id.* at 57.

268. *Id.* at 87-88.

269. For instance, Chief Justice Taney reasoned along these lines when disagreeing with Justice Story's interpretation of the Fugitive Slave Clause as conferring an *exclusive* federal enforcement power. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 628-29 (1842) (Taney, C.J., concurring).

270. *See id.* at 629-30.

271. Wiley v. Parmer, 14 Ala. 627, 629 (1848); *see also* Lemmon v. People, 20 N.Y. 562, 608 (1860) (opinion of Denio, J.) (describing the federative nature of Article IV).

272. *See* Larned, *supra* note 99, at 622 ("[A] right . . . in its very nature [is] subject to be regulated.").

273. *Prigg*, 41 U.S. at 645 (Wayne, J., concurring). Justice Wayne concurred fully with Justice Story's majority opinion and starkly distinguished fugitive-slave cases from "contest[s] for other property." *Id.* at 646; *see also id.* at 649 (referring to slave property as "the property of some of the states in which the others have no interest").

274. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Writing for the majority, Chief Justice Taney argued that *general* citizenship was linked to *national* citizenship, not *state* citizenship.[275] In his view, a state could "confer on whomsoever it pleased the character of citizen"—that is, *state* citizenship.[276] Nonetheless, Taney explained, "It does not by any means follow [that] because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States."[277] In other words, state conferral of *state* citizenship did not also confer *general* citizenship. A person, he noted, "may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State."[278] Instead, Taney argued, being a "citizen" for purposes of Articles III and IV was determined by *national* law and linked to membership in the *national* polity.[279] In sum, general citizenship was only derived from national citizenship, not state citizenship.[280]

Justice Curtis disagreed. On his view, the Privileges and Immunities Clause replicated the federative nature of the Articles of Confederation. Thus, while agreeing with Chief Justice Taney that the Clause "confer[s] . . . the privileges and immunities of general citizenship,"[281] Curtis parted ways by claiming that general citizenship for native-born persons flowed from citizenship criteria set

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275. In Chief Justice Taney's view, general citizenship conferred a right to sue in federal diversity jurisdiction. This was debatable at the time. Some thought that diversity jurisdiction should be based on state citizenship or state residency. *See* FEHRENBACHER, *supra* note 24, at 277, 295-96.

276. *Dred Scott*, 60 U.S. at 405.

277. *Id.*; *see also id.* ("[H]e would not be a citizen in the sense in which that word is used in the Constitution of the United States.").

278. *Id.*

279. *Id.* at 404 ("The words 'people of the United States' and 'citizens' . . . describe the political body who . . . form the sovereignty . . . and every citizen is one of this people, and a constituent member of this sovereignty."); *see also* Smith v. Turner, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) ("For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States . . . .").

280. For this reason, the visual depiction of Chief Justice Taney's reasoning in Figure 4 does not include a line running between state citizenship and general citizenship. Figure 4, however, is not meant to address whether states had to recognize as state citizens any residents who, under federal law, were national and general citizens.

281. *Dred Scott*, 60 U.S. at 575 (Curtis, J., dissenting). At one point, Justice Curtis described the rights of general citizenship as "national rights of citizenship," *id.* at 580, which apparently referred to their national scope. For a later invocation of Article IV as the "provision of the Constitution designed to create a general citizenship," see Constitutional Law—Freedom of Trade (1865), *in* 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS 297, 301 (Benjamin R. Curtis ed., Boston, Little, Brown, & Co. 1879).

by state law.[282] "[M]y opinion," Curtis explained, "is, that, under the Constitution of the United States, 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."[283] Moreover, Curtis insisted, the Constitution granted to Congress the power to set uniform rules for the naturalization of aliens, not the power to set rules regarding the status of native inhabitants.[284]

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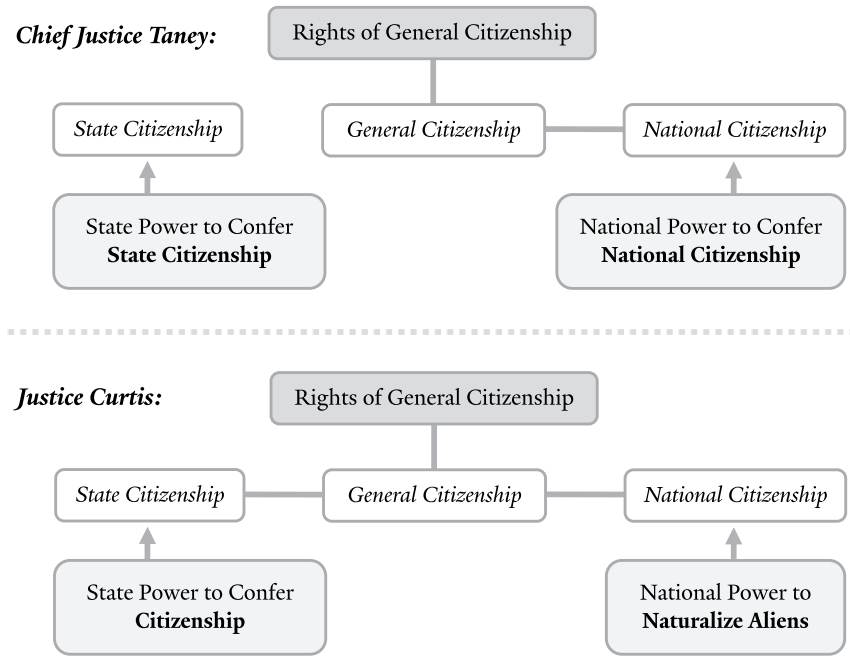
282. Justice Curtis also claimed that the legal content of rights linked to general citizenship were specified by state law. *See Dred Scott*, 60 U.S. at 583 (Curtis, J., dissenting) ("What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined [by state law]."). Thus, although Curtis's opinion reflected the ternary approach to citizenship, Curtis seemed to embrace a more positivist outlook than those who viewed general citizenship in connection with general fundamental rights.

283. *Id.* at 576. His point was not that general citizenship was equivalent to state citizenship. *Id.* at 580. Rather, the question at hand was whether a Black person could be a state citizen "within the meaning of the Constitution and laws of the United States," *id.* at 571, that is, whether any Black person could enjoy "general citizenship," *id.* at 580. As a formal matter, Justice Curtis thus viewed *general* citizenship as linked to citizenship of the United States and as conceptually distinguishable from *state* citizenship. *See id.* at 571 ("[A] citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State."); *see also* Gassies v. Ballon, 31 U.S. (6 Pet.) 761, 762 (1832) ("A citizen of the United States, residing in any state of the union, is a citizen of that state."). Nonetheless, Curtis also thought that whether a native-born person was a citizen of the United States turned on whether that person was a *state* citizen under *state* law. *Dred Scott*, 60 U.S. at 576, 578 (Curtis, J., dissenting). For complicated procedural reasons, however, Curtis never addressed whether Scott was a state citizen under Missouri law. *See id.* at 568-71 (insisting that the only question properly presented was whether *any* Black person could be a citizen of the United States).

284. *Dred Scott*, 60 U.S. at 578 (Curtis, J., dissenting).

FIGURE 4. APPROACHES TO GENERAL CITIZENSHIP IN *DRED SCOTT*



Explanation: This figure depicts the competing positions of Chief Justice Taney and Justice Curtis in *Dred Scott*. On Taney's view, the federal government had exclusive power to confer national citizenship, which was linked to general citizenship. On Curtis's view, state governments could decide whether to confer citizenship on non-alien residents, and all three notions of citizenship were linked.

Without attention to general citizenship, scholars have misunderstood these ideas. Don E. Fehrenbacher, the leading historian of *Dred Scott*, lambasted Chief Justice Taney's view of citizenship as being entirely contrived. "Out of his own will and imagination," Fehrenbacher wrote, "Taney had fashioned *two different kinds of state citizenship*," displaying "astonishing . . . disregard for the precise wording of the Constitution."[285] Taney's opinion warrants our contempt in many respects, but not on this point. He was merely differentiating state and general citizenship, precisely as Justice Curtis did.[286] And *if* citizenship for purposes of Articles III and IV were exclusively determined by national law, then Taney was

285. FEHRENBACHER, *supra* note 24, at 345.

286. *See* discussion *supra* note 283.

surely right that *general* citizenship was not ultimately derived from *state* citizenship.[287] Fehrenbacher's critique only hits its mark if the criteria for enjoying citizenship rights under Articles III and IV were not exclusively determined by national law—just as Curtis argued.

The jurisprudential dimensions of the citizenship debate between Chief Justice Taney and Justice Curtis in *Dred Scott* thus reflected two different understandings of the nature of general citizenship. The key question was whether, for native-born persons, that status was derivative of national law—drawing on the Preamble and a broad reading of Article I powers—or instead was tied to state law, reflecting the federative nature of Article IV. Taney took the former view, aiming not only to pacify Southern political interests but also to rebut Calhoun's compact theory. Curtis took the latter view, echoing the federative arguments of Salmon P. Chase.

Understanding the debate in these terms helps to clarify why anti-slavery advocates with a nationalistic outlook eventually found so much to like in Chief Justice Taney's opinion.[288] In the immediate aftermath of the decision, however, most Republicans echoed Justice Curtis's view of general citizenship. Consider, for instance, a speech by Ohio Representative Philemon Bliss excoriating Taney's opinion. Bliss began by noting confusion about the term "citizen of the United States":

> [T]he phrase "citizen of the United States" is no less loosely used than the term [citizenship] itself. It is not only employed to mean a person entitled to all the privileges of citizens in the several States—sometimes called a general citizen—but also to designate one as primarily a citizen of the Union as a single consolidated Government. For the former case we have seen that the Constitution has made ample provision, by making every State citizen a general citizen. But, as we go beyond that, we tread uncertain ground; and I know of no surer indication of our departure from the true idea of this Federation, than the loose habit we all have of speaking of United States citizenship . . . .[289]

Bliss was not rejecting the idea of national citizenship.[290] But it was important, he thought, to mark the relations of different ideas of citizenship without falling into "the seductive influence of the pervading consolidation tendencies."[291] On

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287. If state citizenship conferred general citizenship, then the national power to establish who counts as a "citizen" for purposes of Article III and Article IV would not be exclusive.

288. *See* Upham, *supra* note 1, at 1161.

289. CONG. GLOBE, 35th Cong., 1st Sess. 210 (1858) (remarks of Rep. Bliss).

290. *See id.* ("That there is such a thing as citizenship of the United States, in some sense, is clear.").

291. *Id.*

his view, *state* citizenship was primary, and being a "citizen of the United States" flowed from that status.[292] Thus, apart from federal naturalization rules, it was state law that "made general citizens."[293]

Other critics of *Dred Scott* took the same approach, embracing Justice Curtis's linkage of *state* and *general* citizenship. According to the renowned Chief Judge of the Maine Supreme Judicial Court, John Appleton, the "right of general citizenship is conferred on the citizens of the several states."[294] In other words, the Privileges and Immunities Clause "assumes the citizenship of the state, however it may be constituted, as the basis of general citizenship."[295] Although references to the rights of "general citizenship" were frequent,[296] jurists used other equivalent phrases, including the rights of "common citizenship,"[297] the "privileges and immunities of citizens of the Union,"[298] the "privileges and immunities of an

292. Bliss did clarify, however, that he was "speak[ing] not now of resident natives of the District of Columbia, or the Territories." *Id.*

293. *Id.* at 211.

294. 44 Me. 521, 548 (1857) (opinion of Appleton, C.J.).

295. *Id.*

296. *See, e.g.*, 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 448 (New York, Harper & Bros. 1858) (referring to the Privileges and Immunities Clause as "respecting the privileges of general citizenship"); Connor's Widow v. Adm'rs & Heirs of Connor, 10 La. Ann. 440, 442 (1855) ("The intention of the [Privileges and Immunities Clause] was to confer on them, if one may say so, a general citizenship . . . ." (quoting Justice Story)); Smith v. Moody, 26 Ind. 299, 301 (1866) (quoting Justice Story and then echoing his use of the term "general citizenship"); GEORGE LUNT, THE ORIGIN OF THE LATE WAR: TRACED FROM THE BEGINNING OF THE CONSTITUTION TO THE REVOLT OF THE SOUTHERN STATES 95-96 (New York, D. Appleton & Co. 1866) ("[The Privileges and Immunities Clause] is, certainly, a very marked recognition of the rights of States, as well as of general citizenship . . . ."); *see also Speech of Hon. John A. Bingham at Belpre, Ohio, September 14, 1871*, CADIZ REPUBLICAN [Cadiz, Ohio], Sept. 28, 1871, at 1 ("[T]he general privileges and immunities of citizens.").

297. Lemmon v. People, 20 N.Y. 562, 611 (1860) (referring to the Privileges and Immunities Clause as "the provision securing a common citizenship"); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 468 (1857) (enslaved party) (Nelson, J., concurring) (describing the Privileges and Immunities Clause as recognizing "the rights and privileges secured to a common citizen of the republic"), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; CONG. GLOBE, 24th Cong., 1st Sess. app. 84 (1835) (remarks of Rep. Slade) (referring to the Privileges and Immunities Clause as securing "common rights").

298. Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 352 (1854); *see also* The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, J., dissenting) ("[R]ights which belong to the citizens of other States as members of the Union.").

American citizen,"[299] and the "general privileges and immunities of a citizen of the United States."[300] As John Codman Hurd remarked in his monumental two-volume work, *The Law of Freedom and Bondage in the United States*, "The condition of privilege which is produced by [the Privileges and Immunities Clause], we may, if we choose, call citizenship of the United States."[301] Nonetheless, Hurd observed, the "provision is *quasi*-international in effect as between the several States."[302]

Representative John Bingham of Ohio was among those who referred to general citizenship rights as the "rights of citizens of the United States."[303] Only a couple of years after *Dred Scott*, Bingham protested Oregon's proposed constitution as "violative of the rights of citizens of the United States."[304] Its most objectionable feature, he stated, was the disability on Black people enjoying fundamental rights, including the right to enter the state, the right to own property, and the right to sue. Bingham explained his "ellipsis" understanding of the Privileges and Immunities Clause as follows:

> The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several states." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several states" that it guaranties.[305]

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299. *To the Senate and House of Representatives of the United States, the Memorial and Petition of the Subscribers, Inhabitants of the Town of Northampton, in the Commonwealth of Massachusetts, Respectfully Represents, as Follows*, LIBERATOR, June 3, 1842, at 1; CONG. GLOBE, 36th Cong., 2d. Sess. app. at 80 (1861) (remarks of Rep. Bingham); *see also* Larned, *supra* note 215, at 414 ("[E]ssential rights of American citizens.").

300. *Lemmon*, 20 N.Y. at 581 (citing the argument of counsel).

301. 2 HURD, *supra* note 155, at 308 n.1.

302. *Id.* at 318; *see also id.* at 320 ("[T]he persons here indicated by the terms, 'the citizens of each State,' are called citizens of, and in respect to, the State of which they are domiciled inhabitants, not in respect to that national sovereignty . . . .").

303. CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859) (remarks of Rep. Bingham).

304. *Id.*

305. *Id.* at 984.

Moreover, Bingham continued, these "privileges and immunities of citizens of the United States" included "the rights of life and liberty and property, and their due protection in the enjoyment thereof by law."[306]

Bingham was articulating a substantive theory of general citizenship rights. His "ellipsis" reading of the Privileges and Immunities Clause posited that *all* states had to secure to *all* United States citizens certain fundamental rights, in contrast to local "rights and immunities which result exclusively from State authority."[307] This framing did not focus on interstate discrimination.[308] At the same time, however, Bingham limited his analysis to the relationship between citizenship and *state* governance without mentioning national power. Nothing in his speech supported the radical-abolitionist theory that life, liberty, and property were federally enforceable as rights of *national* citizenship, grounded in a national social contract dating back to the Declaration of Independence.[309] Rather, these rights operated at the state level, so to speak, functioning as "limitation[s] upon State sovereignty."[310] Though often not understood today,[311] Bingham was talking about general citizenship rights.

In some contexts, however, the term "citizens of the United States" referred to *national* citizenship, without carrying any federative valence. For instance, in construing a federal statute providing that "citizens of the United States" could command American shipping vessels, Attorney General Edward Bates opined in

306. *Id.*

307. *Id.*

308. But Bingham was not considering the effect of local *regulations* of general citizenship rights. He thus was not disputing the standard view, which assumed that states had to secure *substantive* general citizenship rights and had to afford equal treatment to out-of-staters with respect to local regulations of those rights. *But see* BARNETT & BERNICK, *supra* note 1, at 85 (describing the conventional view as being solely about nondiscrimination and then treating Bingham as having dissented from that view).

309. For a similar recognition of this point, though without noting the distinction between national and general citizenship, see CURTIS, *supra* note 3, at 61.

310. CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859) (remarks of Rep. Bingham); *see also* CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (remarks of Rep. Bingham) (repeating this view).

311. Without recognizing the concept of general citizenship rights, scholars have been perplexed by Bingham's position. *See, e.g.*, Harrison, *supra* note 2, at 1418 n.134 ("Bingham's understanding of Article IV, and of the content of privileges and immunities, is difficult to unravel because he sometimes spoke as if the Privileges and Immunities Clause protected rights of national citizenship as opposed to rights of state citizenship.").

1862 that "[t]he phrase 'a citizen of the United States,' without addition or qualification, means neither more nor less than a member of the nation."[312] But citizenship, Bates emphasized, was an elusive concept, "little understood in its details and elements."[313]

III. THE RECONSTRUCTION ERA

Prior to the Civil War, many Americans accepted the ternary approach to citizenship. And the federative grounding of general citizenship was essentially a point of consensus, even amidst contests over whether *other* parts of the Constitution were similarly federative in character. In the aftermath of the Civil War, Republicans still widely embraced the notion of general citizenship rights, and they sometimes even invoked general citizenship by name. Under the surface, however, a seismic shift was taking place in rights discourse as Republicans abandoned the federative nature of general citizenship.

This Part surveys those debates during Reconstruction. It begins with a discussion of the Civil Rights Act of 1866, showing that Republican leaders expressly characterized the Act as securing general citizenship rights. But Representative John Bingham, a leading moderate, denied congressional power to enforce these rights. His effort to cure this defect culminated in the Fourteenth Amendment. This Part argues that Bingham conceptualized these rights in a way that retained some of their traditional characteristics, even as his Republican colleagues were beginning to assert a more nationalistic view. Subsequent congressional debates in the 1870s over civil-rights legislation brought this intramural struggle among Republicans into stark relief. The discussion concludes with the *Slaughter-House Cases*, showing how debates about general citizenship rights shaped the majority and dissenting opinions.

By staying attuned to the lingering influence of general citizenship in these debates, this Article argues for a revised understanding of how Republicans viewed and reimagined citizenship rights during Reconstruction. In part, my argument is that traditional ideas about general citizenship rights help to account for how moderate Republicans envisioned national protection for those rights without nationalization of the rights themselves. This Article thus engages with debates over the original meaning of the Privileges or Immunities Clause and

312. EDWARD BATES, OPINION OF ATTORNEY GENERAL BATES ON CITIZENSHIP 7 (Washington, Gov't Printing Off. 1862).

313. *Id.* at 3.

pushes back against scholarship portraying Republicans as having faced an inextricable choice between either federally protecting citizenship rights or preserving federalism.[314]

At the same time, this Article offers a revised way of understanding the emergence of a new rhetoric about citizenship rights during Reconstruction. In separate works, William J. Novak and Christopher W. Schmidt argue that Americans in the 1860s essentially *created* a discourse of citizenship rights—or, as Schmidt emphasizes, "civil rights."[315] Both scholars make note of earlier discussions of citizenship rights, but they argue that such instances were peripheral in American rights discourse prior to Reconstruction.[316] In my view, Novak and Schmidt are onto something important, but the rhetorical shift may have rested in part on a development that they do not identify: the decline of general citizenship.

As we have seen, Americans often talked about citizenship rights prior to the Civil War. But the crucial distinction in most situations at that time was the line between rights of *general* citizenship and those exclusively linked to *state* citizenship.[317] And in that environment, one would hardly expect a distinctive rhetoric around a *unitary* notion of citizenship rights. At that time, for instance, people could refer to voting and other rights of political participation as citizenship rights,[318] but it was assumed that these rights were not secured under Article IV.[319] So was voting a "citizenship" right? Yes and no, depending on what type of citizenship was at issue. By analogy, Americans today sometimes talk about the rules of baseball, basketball, or football, but it would be quite odd for a distinctive language to emerge about the rules of ball.[320]

During Reconstruction, however, Republicans no longer emphasized how the Constitution was partly federative, and they similarly stopped talking about

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314. *See infra* notes 369-381 and accompanying text.

315. *See* Novak, *supra* note 13, at 106; CHRISTOPHER W. SCHMIDT, CIVIL RIGHTS IN AMERICA: A HISTORY 14-15 (2021). Christopher W. Schmidt limited his work to exploring uses of the *term* "civil rights," rather than attempting a broader excavation of the *concept* of citizenship rights. SCHMIDT, *supra*, at 4.

316. *See* Novak, *supra* note 13, at 87-94; SCHMIDT, *supra* note 315, at 13-15.

317. Rights discourse also featured the idea of *national* citizenship, but that is peripheral to my point here, which is to emphasize the lack of any *unitary* concept of citizenship rights that operated vis-à-vis state governments.

318. *See* Les Benedict, *supra* note 13, at 14-23.

319. *See supra* note 173 (collecting sources denying that Article IV extended the right to vote).

320. To be sure, one can talk about the rules of *sports*, either in an abstract sense (e.g., "Mitch Berman studies the rules of sports") or in reference to cross-cutting norms of personal conduct (e.g., "one rule of sports is to play fair"). Hopefully, readers will nonetheless appreciate my point, which is that it would make little sense for a distinctive discourse to emerge around the rules of *ball sports* since we appreciate that different ball sports have different sets of rules.

a federative notion of general citizenship.[321] As we will see, the *term* "general citizenship" did occasionally still come up. But Republicans were assimilating the earlier idea of general citizenship rights into a discourse about national citizenship. In other words, "general citizenship" was treated either as a synonym for, or as a subcategory of, "national citizenship." By and large, then, debates shifted from marking the line *between* local and general citizenship rights to marking the line *around* a set of rights linked to national citizenship.[322] To extend the earlier metaphor, Republicans were now debating the rules of ball.[323]

At the same time, however, Republicans continued to embrace the concept of general citizenship rights. But what would that concept mean in a new context, with the rights now viewed in connection to *national* citizenship? Complex constitutional concepts do not exist in a vacuum. They are enmeshed in a broader web of ideas and defined relationally to those ideas.[324] Changes to the web thus open up new interpretive possibilities and close off others. This Part tells the story of how Republicans during Reconstruction confronted these developments in relation to general citizenship rights. In short, my argument is that although some Republicans began to view general citizenship rights as distinctively national objects—grounded in a national social contract—other Republicans still viewed these rights in a more traditional way. In other words, the federative notion of general citizenship was fading, but engrained ideas about general citizenship rights lingered among some Republicans, informed by older ways of thinking about American federalism.

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321. To my knowledge, the only counterevidence from the 1866 congressional debates is New York Representative Robert Hale's observation that the Privileges and Immunities Clause was "part of the compact between the States." CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866).

322. To be sure, efforts to delineate state and general citizenship continued to some extent in applying Article IV. *See* McCready v. Virginia, 94 U.S. 391, 395-96 (1877); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-81 (1869). But debates over Article IV had now become peripheral in national rights discourse. And with the demise of its distinctively *federative* character, the idea of "general citizenship," *see McCready*, 94 U.S. at 395 (internal quotation marks omitted), came to be treated essentially as just a *national* constitutional rule of interstate nondiscrimination—not as a conceptually distinctive type of citizenship.

323. Though supplementing Novak's analysis, this account bolsters his bottom-line conclusion about the greater nationalization of rights discourse during Reconstruction.

324. *See generally* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015) (arguing that context is essential to understanding historical discourse).

A. The Civil Rights Act of 1866

After the Civil War, Republicans in Congress quickly proposed a federal Civil Rights Act to combat the notorious Black Codes, which denied general citizenship rights in many states. The bill announced that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State . . . on account of race."[325] The legislation thus called for equality of basic rights, including rights of contract and property. To address violations, it provided for federal criminal penalties and for removing certain civil cases to federal court.

The Republican managers of the bill insisted that it was necessary to protect the general citizenship rights of Black people. In the Senate, Lyman Trumbull of Illinois argued that the bill was needed to secure to every "citizen of the United States" the rights recognized in the Privileges and Immunities Clause.[326] These rights, he explained, were "[s]uch fundamental rights as belong to every free person."[327] Trumbull then quoted Justice Story's remark that "[t]he intention of this clause was to confer on citizens, if one may so say, a general citizenship."[328] He also defended this understanding of the rights "belonging to a citizen of the United States" by surveying judicial opinions, including *Campbell v. Morris* and *Corfield v. Coryell*.[329] "So long as a State does not abridge the great fundamental rights belonging, under the Constitution, to all citizens," he later explained, "it may grant or withhold such civil rights as it pleases."[330]

The bill's manager in the House of Representatives, James Wilson of Iowa, made the same points. The Civil Rights Act, he insisted, merely enforced rights that "citizens of the United States" already enjoyed under the Privileges and Immunities Clause.[331] To support this argument, Wilson quoted from *Corfield* and called on his colleagues to "recognize that 'general citizenship' which under this clause entitles every citizen to security and protection of personal rights."[332] "It is not the object of this bill to establish new rights," he explained, "but to protect

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325. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull).

326. *Id.* at 475.

327. *Id.* at 474.

328. *Id.* (quoting 3 STORY, *supra* note 14, § 1800).

329. *Id.* at 474-75.

330. *The Civil Rights Bill and the President's Veto. Speech of Senator Trumbull*, BURLINGTON FREE PRESS, Apr. 6, 1866, at 1. Another report of this speech features slightly different wording. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (remarks of Sen. Trumbull).

331. CONG. GLOBE, 39th Cong., 1st Sess. 1115-22 (1866) (remarks of Rep. Wilson).

332. *Id.* at 1118 (quoting 2 STORY, *supra* note 14, § 1806).

and enforce those which already belong to every citizen."[333] These rights, he noted, were "those which belong to Englishmen."[334]

Republican leaders in the House and Senate thus equated the privileges and immunities of "citizens of the United States" with the rights of "general citizenship" as explicated in cases like *Corfield*. In so doing, they were not suggesting that these rights entailed only interstate nondiscrimination, leaving state legislatures otherwise free to define citizenship rights however they wished. Rather, as Trumbull observed, there were "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."[335] Or, as Representative William Lawrence of Ohio stated, "there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him."[336] These were rights, he explained, that Article IV "recognizes or by implication affirms to exist among citizens of the same State."[337] Statements like these were commonplace.[338]

But while Republicans agreed that states already had to respect general citizenship rights, identifying federal power to enforce those rights was tricky.[339] Republicans most often invoked Section Two of the Thirteenth Amendment.[340] That reference made sense given the bill's focus on securing civil rights for Black people. But some congressmen relied on other theories. James Wilson, for instance, asserted inherent federal power to enforce general citizenship rights. "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," he remarked, "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."[341]

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333. *Id.* at 1117.

334. *Id.* at 1118; *see also id.* ("The great fundamental rights are the inalienable possession of both Englishmen and Americans.").

335. *Id.* at 1757 (remarks of Sen. Trumbull).

336. *Id.* at 1833 (remarks of Rep. Lawrence). Lawrence further remarked that courts construing the Privileges and Immunities Clause had held that these rights were "such as are fundamental civil rights, not political rights nor those dependent on local law . . . ." *Id.* at 1836.

337. *Id.* at 1835.

338. *See* CURTIS, *supra* note 3, at 71-83.

339. For discussion, see RUTHERGLEN, *supra* note 1, at 62-69.

340. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (remarks of Sen. Howard); *id.* at 1118 (remarks of Rep. Wilson).

341. *Id.* at 1118 (remarks of Rep. Wilson); *see also, e.g.*, *id.* at 1152 (remarks of Rep. Thayer).

This defense of federal power drew on the logic of *Prigg v. Pennsylvania*,[342] which had recognized inherent congressional power to enforce *national* rights.[343] Citing to *Prigg*, Representative William Lawrence concluded that "Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in national citizenship."[344] If Lawrence was correct that fundamental rights were the product of *national* citizenship, then *Prigg* indeed supported an inherent federal power to enforce them.

John Bingham agreed that general citizenship rights already protected every American citizen in every state. As Bingham explained, quoting from the Privileges and Immunities Clause:

> "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.[345]

Once again, Bingham was saying that Americans enjoyed general citizenship rights as "citizens of the United States," not merely as *state* citizens. On his view, the Privileges and Immunities Clause identified a set of rights that states could regulate but had no authority to abridge.[346]

Nonetheless, Bingham thought that Congress lacked power to enforce these rights against the states.[347] Consequently, the proposed Civil Rights Act would be invalid absent a constitutional amendment giving that power. Understanding why Bingham held this view deserves careful consideration. Pointing to *Barron v. Baltimore*, he insisted that enumerating rights was "a very different thing" from a "grant of power."[348] Scholars have read this statement as a rejection of the *Prigg* decision.[349] That conclusion is plausible but not necessarily persuasive. In light

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342. 41 U.S. (16 Pet.) 539 (1842); *see* CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (remarks of Rep. Lawrence) (quoting at length from *Prigg*).

343. For discussion, see *supra* notes 256-258 and accompanying text.

344. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866) (remarks of Rep. Lawrence). Notably, however, Lawrence acknowledged that states had *primary* responsibility for enforcing rights. *See id.*

345. *Id.* at 158 (remarks of Rep. Bingham).

346. *See id.* at 1034 (remarks of Rep. Bingham) ("[T]he proposed amendment does not impose upon any State of the Union . . . any obligation which is not now enjoined upon them by the very letter of the Constitution.").

347. *See id.* at 2542 (remarks of Rep. Bingham) (noting that Congress "could furnish by law no remedy whatever").

348. *Id.* at 1089-90, 1093 (remarks of Rep. Bingham).

349. *See* Aynes, *supra* note 28, at 78 n.124; MASUR, *supra* note 1, at 317.

of earlier conceptions of general citizenship rights, it appears that Bingham may have been making a different point.

Recall that *Prigg* had held that *national* rights—those "exclusively derived from and secured by the Constitution"—came paired with an implied *national* enforcement power.[350] On Justice Story's telling, rights in slavery existed only pursuant to "municipal regulation," not general law, and thus any interstate right to slave repatriation was *created* by the Constitution.[351] But matters were different with respect to general citizenship rights, including the ones at issue in *Barron*. Those rights were recognized in and partly secured by the Federal Constitution, but the underlying rights themselves were not distinctively *national* rights as such, in the sense of being created by federal law.[352] Thus, they were outside the purview of federal institutions unless the Constitution said otherwise.

It is hard to know how much of this reasoning Representative Bingham embraced. He may indeed have been rejecting *Prigg*'s major premise that distinctively national rights came with a national enforcement power. But there are good reasons to question that conclusion. First, anti-slavery opponents of *Prigg* did not deny that national rights triggered a national enforcement power.[353] Rather, by arguing that the clauses in Article IV should be construed as treaty provisions,[354] they disagreed with Justice Story's secondary conclusion that the Fugitive Slave Clause recognized a national right. Moreover, Republicans (including Supreme Court Justices) continued to embrace exactly this distinction—differentiating *national* rights created by the Constitution and *general* rights that it merely secured.[355] Finally, it would be odd if Bingham felt bound

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350. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 620, 625 (1842).

351. *Id.* at 611.

352. Thus, for example, Republicans could insist that the Privileges and Immunities Clause referred to general fundamental rights that operated against a citizen's own state, *see* CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866) (remarks of Sen. Trumbull), even as they recognized that the Clause itself only provided *interstate* security for those rights, *see id.* at 600 (remarks of Sen. Trumbull).

353. *Cf.* BRANDWEIN, *supra* note 49, at 37 (making a similar point about Trumbull's views).

354. *See supra* notes 249-255, 260-263, 269-273 and accompanying text.

355. *See* BRANDWEIN, *supra* note 49, at 12-17, 94-100; FONER, *supra* note 1, at 145, 148-49. The perils of overreading Bingham's distinction between rights and powers are nicely illustrated by Justice Harlan's famous dissent in the *Civil Rights Cases*, in which Harlan noted that "a prohibition upon a State is not a *power* in *Congress* or *in the national government*. It is simply a *denial* of *power* to the *State*." The Civil Rights Cases, 109 U.S. 3, 45 (1883) (Harlan, J., dissenting). But Harlan was not rejecting the logic of *Prigg*, and he explicitly embraced inherent federal power to "protect any right derived from or created by the national Constitution." *Id.* at 50. Indeed, he creatively used that logic to argue that by overturning *Dred Scott* and conferring

by *Barron* but refused to accept the subsequent holding in *Prigg*. It seems more likely that Bingham recognized that *Prigg*'s reasoning did not apply to general citizenship rights.

To be sure, Representative Bingham clearly was distinguishing federally enumerated rights from a "grant of power."[356] But his point was not to deny national power over genuinely national objects. Rather, he was denying that securing certain rights in the Federal Constitution converted those rights into national objects. For Bingham, this was the lesson of *Barron v. City of Baltimore*.[357] On this view, *Barron* had not held that the rights secured in the Bill of Rights did not apply to the states. Rather, it had held that any such rights were not, by force of their federal enumeration, converted into distinctively *national* rights that could be federally vindicated against state abridgments.[358] Those rights might be linked to United States citizenship, but in contrast to the right recognized in *Prigg*, general citizenship rights were not distinctively created and controlled by the nation.

B. John Bingham and the Fourteenth Amendment

Representative Bingham's view that general citizenship rights could be constitutionally *secured* without being *nationalized* was foundational to his design of the Fourteenth Amendment. To address the perceived lack of federal power to enforce general citizenship rights, Bingham proposed an amendment:

> 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 (Art. 4, Sec. 2); and to all persons

state citizenship, the Fourteenth Amendment *created* general citizenship rights for Black people, *id.* at 47, thus triggering federal power to protect Black people against racially discriminatory violations of those rights, even by private actors, *id.* at 48-50. It is worth noting that Harlan described these rights as being linked to state citizenship. But if Justice Field's view in the *Slaughter-House Cases* had prevailed a decade earlier, then Harlan likely would not have focused only on state citizenship.

356. CONG. GLOBE, 39th Cong., 1st Sess. 1093 (1866) (remarks of Rep. Bingham) ("A grant of power . . . is a very different thing from a bill of rights.").

357. *See id.* at 1090 (remarks of Rep. Bingham); Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833). For a similar reading of Bingham's views, see LASH, *supra* note 1, at 85.

358. In other words, although the amendments served only as "limitations of power granted" to the federal government, *Barron*, 32 U.S. at 247, states were bound by the same set of underlying rights.

> in the several States equal protection in the rights of life, liberty and property (5th Amendment).[359]

This amendment, Bingham explained, would provide for "the enforcement of the second section of the fourth article of the Constitution of the United States . . . ."[360] It would, in other words, supply federal power to secure general citizenship rights without "nationalizing" the rights themselves.

Representative Bingham's draft addressed his own concerns, but his colleagues voiced several objections. Representative Giles Hotchkiss of New York, for instance, worried that conferring federal power to provide for the equal protection of life, liberty, and property might enable plenary federal power to enforce private rights.[361] For present purposes, however, the defect that warrants our attention was the latent ambiguity in the phrase "privileges and immunities of citizens in the several states." As we have seen, Republicans in Congress understood that phrase as referring to *general* citizenship rights, in contrast to local citizenship rights. General citizenship rights were, as Representative William Lawrence described them, "inherent in every citizen of the United States," and did not include those "conferred by local law [that] pertain only to the citizen of the State."[362] But it was at least textually plausible that the "privileges and immunities of citizens in the several states" might reach *all* rights linked to state citizenship, including local citizenship rights. It was perhaps unwise, then, to duplicate Article IV's language, which might be misconstrued to allow federal interference in local matters, like the franchise.[363]

Representative Bingham's revised draft addressed this issue by replacing "privileges and immunities of citizens *in the several states*" with "privileges or immunities of citizens *of the United States*."[364] As we have seen, Republicans treated these phrases as synonyms. Senator Trumbull and Representative Wilson, for

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359. *Joint Committee, John Bingham, Proposed Amendment Granting Power to Secure the Rights "of Citizens in the Several States" and "to All Persons in the Several States Equal Protection in the Rights of Life, Liberty and Property"* (1866), *reprinted in* 2 ESSENTIAL DOCUMENTS, *supra* note 1, at 90.

360. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (remarks of Rep. Bingham).

361. *See* Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENT. 123, 136-38, 144-45 (1986). As Michael P. Zuckert persuasively argues, Bingham did not intend this result, even though the language was written in a somewhat ambiguous way. *See id.* at 140-41. According to Zuckert, both drafts were designed "to remedy state failure," thus incorporating a type of state-action requirement while also authorizing direct federal enforcement of private rights when states "defaulted in their duties" by not equally protecting private rights. *Id.* at 141.

362. CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (remarks of Rep. Lawrence).

363. For discussion of these concerns, see Les Benedict, *supra* note 13, at 21-27.

364. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) (remarks of Rep. Stevens) (introducing the revised proposal of the Joint Committee on Reconstruction).

instance, had introduced the Civil Rights Act in their respective chambers by equating the rights of "general citizenship" recognized in Article IV with the rights of citizens "of the United States."[365] But the phrase "in the several states" could be misconstrued as a reference to wholly local rights of *state* citizenship.[366] Bingham's revised draft avoided this ambiguity.[367] The proposed federal power would only reach general citizenship rights—rights that were not only linked to state citizenship but also to United States citizenship.[368]

Many scholars have emphasized "paramount national citizenship,"[369] but they have done so in ways that have ignored or elided ongoing disagreements about the nature of those rights. To be sure, many Republicans were coming to view general citizenship rights as distinctively national in character.[370] But scholars have convincingly shown that this nationalistic way of thinking was not shared by moderate Republicans like Bingham.[371] As Lash writes, "[A] nationalization of common law civil liberties was anathema to Bingham's belief in 'our dual system of government' that was 'essential to our national existence.'"[372]

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365. *Supra* notes 326-338 and accompanying text.

366. It is also possible that Bingham worried about readings of the Privileges and Immunities Clause that were *entirely* based on nondiscrimination, without presupposing *any* substantive citizenship rights. *See* William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 52 (1954).

367. *See* Upham, *supra* note 1, at 1164 ("By using this clarifying term, the Joint Committee sought to address one of the chief objections to the Amendment's first draft: that *arguably* Article IV privileges included political rights.").

368. Once again, the general-law grounding of these rights enabled seeing them as linked to more than one type of citizenship. *See supra* notes 67 and 138 and accompanying text.

369. For classic accounts, see JACOBUS TENBROEK, EQUAL UNDER LAW 94-115 (Collier Books 1st ed. 1965); and Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 13 (1954). For more recent scholarship, see, for example, Aynes, *supra* note 28, at 69; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 258 (Ann Finlayson ed., 1st ed. 1988); Kaczorowski, *supra* note 23, at 867; and Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 722, 729 n.72 (2003) (citing CURTIS, *supra* note 3, at 81).

370. *See infra* Section III.C.

371. *See, e.g.*, Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 275, 278-79 (1986). On so-called "moderate" Republicans, see MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869, at 315-24 (W. W. Norton & Co. 1st ed. 1974); and Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 67 (1974).

372. LASH, *supra* note 1, at 251-52 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871)); *see also* CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867) (remarks of Rep. Bingham) ("[T]his dual system of national and State government under the America organization is the secret of our strength and power. I do not propose to abandon it.").

But the countervailing theories fare no better. Some scholars, for instance, have argued that the Privileges or Immunities Clause conferred only a "relative" right of nondiscrimination, not "substantive" rights.[373] The core problem with this approach is that Republicans constantly referred to the privileges and immunities of United States citizens in substantive terms.[374] Taking a different approach, Lash has argued that the Privileges or Immunities Clause refers only to the enumerated constitutional rights of national citizenship.[375] The core problem with this approach is that Republicans, including Bingham, constantly linked the Privileges or Immunities Clause with both Article IV and the Civil Rights Act,[376] neither of which focused on enumerated rights.

An approach based on an older notion of general citizenship rights, by contrast, harmonizes the insights in earlier scholarship.[377] If Representative Bingham assumed a view of general citizenship rights that retained at least some of their traditional qualities, then his proposed amendment could avoid, in Lash's words, "nationalizing the subject of civil rights in the states."[378] States could remain the primary guardians of general citizenship rights, just as they had been

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373. *See, e.g.*, Hamburger, *supra* note 26, at 68; WURMAN, *supra* note 1, at 102; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 342-51 (1985). Harrison defends this view with less certitude. *See* Harrison, *supra* note 2, at 1397.

374. *See* Barnett & Bernick, *supra* note 216, at 531.

375. *See* LASH, *supra* note 1, at 186.

376. *See* David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 1004-05 (1985); Upham, *supra* note 1, at 1120; *see also* GREEN, *supra* note 1, at 44-46 (discussing the link between the Civil Rights Act and the Privileges or Immunities Clause). Another problem for Lash is the lack of evidence that Bingham's revised language was intended or understood to differ in substance from his earlier drafts. *See* Fox, *supra* note 201, at 579. Indeed, Bingham later said that the final version of Section One "embrace[d] all and more than" the earlier draft. CONG. GLOBE, 42d Cong., 1st Sess. app. 83 (1871) (remarks of Rep. Bingham). Some scholars draw a different conclusion based on Bingham's comment that the Privileges or Immunities Clause afforded "other and different privileges and immunities than those to which a citizen of a State was entitled." *Id.* at 84. But in that portion of his speech, Bingham was referring specifically to rights that were *federally enforceable*. *Cf.* GREEN, *supra* note 1, at 61 (making a similar point).

377. To maintain terminology uniformity throughout this Article, my argument in this Part is portrayed as a fight among Republicans over whether to view general citizenship rights as merely a subset of national citizenship rights, as the Radical Republicans insisted, or instead as rights that were merely linked to national citizenship but also still tied to state citizenship. (Recall that under my definition, "national citizenship rights" are those linked *exclusively* to national citizenship.) With different terminology, however, one might say that Republicans agreed that general citizenship rights were a subset of national citizenship rights but disagreed about the underlying nature of national citizenship itself, with Radical Republicans grounding national citizenship on a freestanding national social contract and moderate Republicans grounding national citizenship on the written Constitution.

378. LASH, *supra* note 1, at 221.

before the Civil War.[379] The innovation of the Fourteenth Amendment was to create federal security for rights that, in Bingham's view, state legislatures were already required to maintain. It would thus "protect by national law the privileges and immunities of all the citizens of the Republic," as Bingham remarked, while "tak[ing] from no State any right that ever pertained to it."[380] When states denied these rights, he "desire[d] to see the Federal judiciary clothed with the power to take cognizance of the question, and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every State."[381]

Understanding the Privileges or Immunities Clause in the light of older ways of thinking about general citizenship rights also helps make sense of Representative Bingham's otherwise perplexing views about voting rights. During congressional debates, Bingham sometimes distinguished citizenship rights from political rights, like voting.[382] Other times, however, Bingham said that suffrage was a right of citizenship.[383] During debates over Section Two of the Fourteenth

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379. *See* NELSON, *supra* note 5, at 119-22.

380. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (remarks of Rep. Bingham). Bingham continued:

> No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.

Id.

381. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (remarks of Rep. Bingham); *see also id.* at 2542 (remarks of Rep. Bingham) ("[The Fourteenth Amendment confers power to] protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."); CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (remarks of Sen. Howard) ("The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to secure absolutely the citizens of the United States in the various States against an infringement of their rights and privileges under [the Privileges and Immunities Clause].").

382. *See, e.g.*, CONG. GLOBE, 35th Cong., 2d Sess. 983-84 (1859) (remarks of Rep. Bingham); CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (remarks of Rep. Bingham); *see also* H.R. REP. NO. 41-22, at 2 (1871) ("[N]o citizen of the United States can rightfully vote in any State of this Union who has not the qualifications required by the Constitution of the State in which the right is claimed to be exercised . . . .").

383. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (remarks of Rep. Bingham) (identifying "the political right of all the free people therein, being male citizens of the United States of full age, to participate in the choice of electors," but grounding this right on Article I's guarantee that "the people of 'the States shall choose their Representatives'"); CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (remarks of Rep. Bingham) (identifying the right to elect federal

Amendment, for instance, he observed that "[t]he franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States as is the elective franchise for choosing Representatives in Congress or presidential electors."[384] On the surface, these claims seem inconsistent: voting *is* and *is not* a right of United States citizens.[385] But the pieces fall into place upon recognizing that, on Bingham's view, the Privileges or Immunities Clause secured general citizenship rights, not other rights attached to state and national citizenship.[386]

Pamela Brandwein defends a similar view of the Fourteenth Amendment's federalism-preserving balance by emphasizing the state-action requirement. Her work shows that jurists during Reconstruction distinguished between federally "secured" and federally "created" rights, with the state-action requirement applying to the former and not the latter.[387] Recovering the concept of general citizenship rights reinforces Brandwein's conclusions, though it casts them in a slightly different light. The reason why the secured/created distinction mattered, in my view, was that "secured" rights were grounded in general fundamental law, whereas "created" rights were distinctively national in character, with only the latter triggering an implied federal enforcement power under the logic of *Prigg*.[388] As the Supreme Court later noted in *United States v. Cruikshank*, any "attribute of national citizenship" was inherently "under the protection of, and

representatives as a "great political privilege" belonging to "the citizens of the United States," as members of the national body politic); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (remarks of Rep. Bingham) ("[A]re not political rights all embraced in the term 'civil rights' . . . ?").

384. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (remarks of Rep. Bingham). He also reaffirmed that it was "exclusively under the control of the States." *Id.*

385. *See, e.g.*, BARNETT & BERNICK, *supra* note 1, at 139; GREEN, *supra* note 1, at 47.

386. *See, e.g.*, H.R. REP. NO. 41-22 (3d Sess. 1871), *reprinted in* 2 ESSENTIAL DOCUMENTS, *supra* note 1, at 609 ("[The Privileges or Immunities Clause] does not . . . refer to privileges and immunities of citizens of the United States *other than* those privileges and immunities embraced in the original text of the Constitution, article four, section two." (emphasis added)).

387. *See* BRANDWEIN, *supra* note 49, at 15, 94-100. For further discussion, see Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007). *See also* G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RSRV. L. REV. 755, 781-82 (2014) (relying on Brandwein's work).

388. Thus, I disagree with Brandwein's conclusion that Representative James Wilson's "reliance on *Prigg* . . . did not cohere with . . . his view of the type of right the bill protected." BRANDWEIN, *supra* note 49, at 36. In fact, Wilson's invocation of *Prigg* was spot on given his view that the Privileges and Immunities Clause recognized *national* citizenship rights.

guaranteed by, the United States," thus warranting federal enforcement legislation, even without an express grant of power.[389] What made "secured" rights different was their status as *general* citizenship rights.[390]

C. *Debating Civil Rights*

Although Bingham intended for the Fourteenth Amendment to preserve the traditional character of general citizenship rights, many of his Republican colleagues embraced a nationalistic conception of those rights. In 1866, for instance, Republican Samuel Shellabarger of Ohio proposed legislation to enforce what he described as "all the 'privileges and immunities' of a 'general' or 'national' citizenship."[391] These rights were, he explained, the "fundamental rights" recognized in *Corfield* that "grow out of and belong to national citizenship and not out of State citizenship."[392] Consequently, he insisted, Congress had "the power and duty . . . to secure [them] by appropriate legislation,"[393] without any regard to state action.[394] Shellabarger was not denying that general citizenship rights could be understood as a discrete set of rights. He was not, in other words, saying that general citizenship rights were conceptually indistinguishable from all other national citizenship rights.[395] But Shellabarger was now treating general citizenship rights as a *subset* of national citizenship rights, disconnected from state citizenship.

With the eventual ratification of the Fourteenth Amendment, one might have thought that these intramural Republican debates would subside. Yet, they gained even more importance as the rise of the Ku Klux Klan in the late 1860s created a host of state-action concerns.[396] To justify federal intervention, Repub-

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389. 92 U.S. 542, 552 (1876).

390. A qualification is Justice Harlan's argument that the general citizenship rights of Black people were federally "created" through the overturning of *Dred Scott*. *See supra* note 355.

391. CONG. GLOBE, 39th Cong., 1st Sess. app. 293 (1866) (remarks of Rep. Shellabarger).

392. *Id.*

393. *Id.*

394. *See id.* at 294-95. Shellabarger's proposal applied only to out-of-state visitors, but it was transformational by asserting federal enforcement power directly over private rights, without any concern for state action.

395. Indeed, Shellabarger's legislative proposal and speech were specifically about general citizenship rights. Nor was he denying that these rights were grounded in general law. In these ways, Shellabarger's approach paralleled the thinking of other nationalists who recognized a discrete set of general citizenship rights while also treating those rights as a subset of national citizenship rights. *See supra* note 341 and accompanying text.

396. *See* BRANDWEIN, *supra* note 49, at 31-34.

licans often emphasized ways that Southern governments were, in fact, responsible for Klan violence – particularly by failing to provide equal protection to victims. For present purposes, however, the key arguments related to federal power to directly protect citizenship rights, even without considering state-action issues. On this topic, Republicans diverged.

As Shellabarger had previewed, Republicans with a nationalistic view of citizenship rights argued that Congress had inherent power to enforce those rights even against private action. "If the Constitution of the United States confers a right," Senator Oliver Morton of Indiana explained, "the enforcement or protection of that right belongs to the Government of the United States."[397] Thus, he continued, "if a man has [rights] because he is a citizen of the United States, . . . then it follows that the protection of those privileges belongs to the Government of the United States."[398] Senator Charles Sumner of Massachusetts agreed, emphasizing that rights were secured in the Declaration of Independence, which he viewed as constituting a unitary nation. "Unquestionably," he exclaimed, "the Constitution supplies the machinery by which those great rights are maintained."[399]

Moderate Republicans supported federal efforts to counteract the Klan, but they rejected their colleagues' nationalistic theory of citizenship rights. Responding to Sumner, Wisconsin Senator Matthew Carpenter colorfully commented that "[t]he dish of civil rights, in [Sumner's] estimation, is tasteless unless it be flavored with some unconstitutional ingredient."[400] According to Carpenter, Congress had a duty to preserve the federative structure for securing fundamental rights. "Why," he asked, "are Senators not required . . . to take an oath to observe the Declaration of Independence?"[401]

But while moderates continued to defend traditional federalism principles, the federative underpinnings of general citizenship were increasingly falling out of favor. As late as 1864, Judge John Underwood of Virginia, a Republican stalwart, had referred to the Privileges and Immunities Clause as operating "like a treaty stipulation between independent States."[402] Just eight years later, though, nobody was singing that tune about the Fourteenth Amendment. Indeed, even

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397. CONG. GLOBE, 42d Cong., 2d Sess. 524 (1872) (remarks of Sen. Morton).

398. *Id.*

399. *Id.* at 825 (remarks of Sen. Sumner). For further discussion, see BRANDWEIN, *supra* note 49, at 63-64, 69.

400. CONG. GLOBE, 42d Cong., 2d Sess. 826 (1872) (remarks of Sen. Carpenter).

401. *Id.* at 827.

402. EQUAL SUFFRAGE: ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, VA., TO THE PEOPLE OF THE UNITED STATES 24 (New Bedford, Massachusetts, E. Anthony & Sons 1865); *see also Opinion of Judge Underwood on the Right of Excluding the Testimony of Colored Men from Courts of Justice*, LIBERATOR, Nov. 25, 1864, at 192 (same quotation).

Carpenter's denial of the Declaration's authority was enough to trigger an admonishment from Sumner about the specter of John C. Calhoun.[403]

To be sure, plenty of congressmen still resisted an entirely nationalistic conception of general citizenship rights, and they retained a limited notion of general citizenship.[404] But the broader web of constitutional ideas that supported a federative view of citizenship rights was losing strength. Republicans were no longer concerned about the Fugitive Slave Clause, and now *they* held the keys of federal power. With these developments, a binary division between national and state citizenship was on the assent.

D. The Slaughter-House Cases

The Supreme Court entered the fray in the *Slaughter-House Cases*.[405] The dispute involved a constitutional challenge to an exclusive license that Louisiana's biracial government had granted to a private corporation. In their briefs, the challengers framed the Privileges or Immunities Clause in strikingly nationalistic terms. Prior to the Civil War, they explained:

> The doctrine of the "States-Rights party," led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States, except *sub modo* and by the permission of the States. . . . The fourteenth amendment struck at, and forever destroyed, all such doctrines. . . . The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the confederate features of the government have been obliterated. . . . The purpose is manifest, to establish through the whole jurisdiction of the United States one people.[406]

Charles Sumner could hardly have said it better.[407] In contrast to the "federative" Privileges and Immunities Clause, the Fourteenth Amendment had, the lawyers

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403. *See* CONG. GLOBE, 42d Cong., 2d Sess. 824 (1872) (remarks of Sen. Sumner).

404. *See supra* note 322.

405. 83 U.S. (16 Wall.) 36 (1873).

406. *Id.* at 52-53 (argument of counsel); *see also* Plaintiffs Brief upon the Re-argument at 10-21, *Slaughter-House Cases*, 83 U.S. 36 (Nos. 470, 476 & 480), 1872 WL 15118 (framing the Privileges or Immunities Clause in similarly nationalistic terms).

407. Others have noted that the challengers' lawyer "had purposefully placed the Republican justices of the Supreme Court in a difficult position." Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868-1873*, 49 CIV. WAR HIST. 235, 251 (2003). By taking this nationalist position, the challengers also sought to deny the regulatory authority of Louisiana's biracial government.

argued, "designated the members of the nation" and "affirm[ed] that every component part of this body politic is entitled to privileges and immunities by the very existence of the the [sic] nation, and which the nation guarantees."[408] In short, the Privileges or Immunities Clause had *nationalized* general citizenship rights, ensuring that those rights no longer depended on state law.[409]

The opposing lawyers also embraced a nationalistic reading of the Privileges or Immunities Clause, but they insisted that its scope was far narrower. The Clause, they argued, "refers to political privileges, and shields only such privileges and immunities as individuals may have in their peculiar character as citizens of the United States, *i.e.*, the *privilege* of voting, holding office, &c., or the immunity from certain public charges and duties, such as jury duty, military service, &c."[410] In essence, the Clause referred only to distinctively *national* citizenship rights and did not reach general citizenship rights.

Writing for the majority, Justice Miller also embraced a binary view of citizenship. "[T]he distinction between citizenship of the United States and citizenship of a State is clearly recognized and established," he wrote.[411] Moreover, Miller observed, the Privileges or Immunities Clause "speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States."[412] Therefore, it referred exclusively to rights of *national* citizenship:

> It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.[413]

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408. Plaintiffs Brief upon the Re-argument, *supra* note 406, at 20-21.

409. *See Slaughter-House Cases*, 83 U.S. at 55 (argument of counsel) (denying that the Fourteenth Amendment addressed rights that "deal with any interstate relations, nor relations that depend in any manner upon State laws, nor is any standard among the States referred to for the ascertainment of these privileges and immunities"). In *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 135 (1873), Matthew Carpenter—a defense counsel in the *Slaughter-House Cases* and counsel for the plaintiff in *Bradwell*—acknowledged the legitimacy of state professional licensing but claimed that "a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition."

410. Brief of Counsel of Defendant in Error at 5, *Slaughter-House Cases*, 83 U.S. 36, 1871 WL 14608.

411. *Slaughter-House Cases*, 83 U.S. at 73.

412. *Id.* at 74.

413. *Id.*

As we have seen, Miller was half right. The wording was intended to exclude *some* rights attached to state citizenship—namely, *local* citizenship rights.[414] But Miller was not referring to *those* rights. Rather, he meant rights recognized "in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'"[415]

Justice Miller's reasoning was seriously flawed. As Justice Bradley pointed out in dissent, Miller had even misquoted the Constitution. Article IV refers to the enjoyment of citizenship rights *in* the several states, not *of* the several states.[416] Indeed, the Antebellum cases explicitly distinguished *local* citizenship rights from *general* citizenship rights. But apparently trapped by a binary view of citizenship rights, Miller saw federal protection for general citizenship rights as the death knell of federalism. The purpose of the Fourteenth Amendment, he insisted, was not to "transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government . . . ."[417] Rather, it only applied to rights "which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws."[418] In sum, the Privileges or Immunities Clause only applied to *national* citizenship rights.

The dissenting Justices took a different approach. "The question presented," Justice Field wrote, was whether the Privileges or Immunities Clause "protect[s] the citizens of the United States against the deprivation of their common rights by State legislation."[419] Pointing to the history of the Black Codes and the Civil Rights Act of 1866, Field insisted that it did,[420] thus "plac[ing] the common rights of American citizens under the protection of the National government."[421] And in stark contrast to the majority, Field distinguished *general* citizenship rights from *local* citizenship rights. The "common rights" that were partially secured under Article IV, he wrote, were distinct from the "special privileges enjoyed by citizens in their own States."[422]

Notably, Justice Field did not assert that the Fourteenth Amendment *nationalized* these "common rights."[423] On his view, state police powers remained in

414. *See supra* Section III.B.

415. *Slaughter-House Cases*, 83 U.S. at 75.

416. *Id.* at 117 (Bradley, J., dissenting).

417. *Id.* at 77 (majority opinion).

418. *Id.* at 79.

419. *Id.* at 89 (Field, J., dissenting).

420. *Id.* at 91-92.

421. *Id.* at 93.

422. *Id.* at 99.

423. *Id.* at 89, 93, 97.

place,[424] just as Bingham had promised. But the fundamental rights of citizens would now be "under the guardianship of the National authority."[425] According to Field, the Fourteenth Amendment thus expanded national protection for rights while preserving state regulatory power.[426] Justice Bradley echoed this point in a separate opinion.[427] By not conflating general and national citizenship rights, the dissenters interpreted the Privileges or Immunities Clause in a way that maintained compatibility with traditional federalism principles.

In another dissenting opinion, Justice Swayne sharply rebutted Justice Miller's binary treatment of state and national citizenship rights. His embrace of a ternary theory of citizenship rights is worth quoting at length:

> A citizen of a State is *ipso facto* a citizen of the United States. . . . "The privileges and immunities" of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation. The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those rights which belong to the citizen of the United States that the category here in question throws the shield of its protection.[428]

In this passage, Swayne identified *double* citizenship and *three* buckets of citizenship rights. Citizens of the United States, he observed, enjoyed two sets of rights—"fundamental" rights, "includ[ing]" retained natural rights,[429] "and

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424. *Id.* at 95-96.

425. *Id.* at 101; *see also id.* at 105 ("[T]he fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States.").

426. Justice Field continued to make this point in later cases. *See, e.g.*, Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 138 (1874) (Field, J., concurring); Barbier v. Connolly, 113 U.S. 27, 31 (1885).

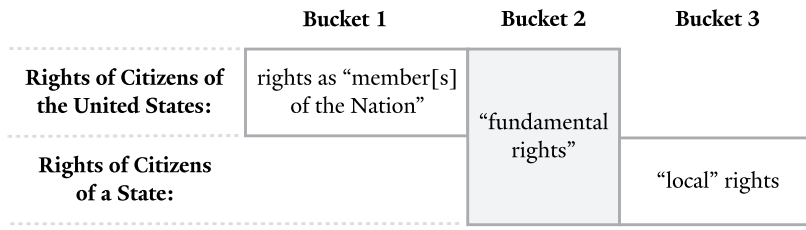
427. *See Slaughter-House Cases*, 83 U.S. at 113-14, 121-22 (Bradley, J., dissenting); *see also Bartemeyer*, 85 U.S. at 136-37 (Bradley, J., concurring); Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 653 (C.C.D. La. 1870) (opinion of Bradley, J.) (describing the preservation of state regulatory power under the Fourteenth Amendment).

428. *Slaughter-House Cases*, 83 U.S. at 126 (Swayne, J., dissenting).

429. *Id.* Justice Swayne also noted that these rights were associated with "reason and justice and the fundamental principles of the social compact." *Id.* at 129.

also" rights that "pertain to [each citizen of the United States] by reason of his membership of the Nation."[430]

FIGURE 5. JUSTICE SWAYNE'S APPROACH IN THE *SLAUGHTER-HOUSE CASES*



Explanation: This figure depicts three different sets of citizenship rights described in Justice Swayne's dissenting opinion in the *Slaughter-House Cases*. The split between "fundamental rights" and "local" rights on the bottom row corresponds to the division between general citizenship rights and local citizenship rights. On Swayne's view, the former set were also rights of "citizens of the United States" and thus fell within the scope of the Fourteenth Amendment's Privileges or Immunities Clause.

Likewise, citizens of a state also enjoyed two sets of rights—"the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State."[431] Swayne thus described three sets of citizenship rights corresponding to what this Article calls *national*, *general*, and *local* citizenship rights. And in his view, the Fourteenth Amendment only "throws the shield of its protection" over the first two buckets, not the third.[432]

The concept of general citizenship survived the *Slaughter-House Cases* in some respects. Three years later, for instance, the Justices noted the difference between a right of "special citizenship," belonging "only to the citizens of Virginia," and "a privilege or immunity of general . . . citizenship," belonging "to the

430. *Id.* at 126.

431. *Id.*

432. *Id.* Interestingly, Justice Swayne then indicated that these "local" rights included ones that can be "enjoyed in every State by the citizens of every other State by virtue of [the Privileges and Immunities Clause]." *Id.* at 127. The published report of Swayne's decision mistakenly cites "clause 2, section 4, article 1," rather than Article IV, Section 2, Clause 1. *Id.* But Swayne plainly meant the Privileges and Immunities Clause (Article I, Section 4, Clause 2 refers to the timing of congressional meetings).

citizens of all free governments."[433] But that observation was all about Article IV. The Court also applied general fundamental rights in diversity cases.[434] But because of the *Slaughter-House Cases*, these "principles of general constitutional law," as Justice Miller called them,[435] were not federally secured under the Privileges or Immunities Clause of the Fourteenth Amendment.

Ironically, though, Justice Miller's state-friendly ruling would end up having profoundly centralizing implications. By severing the Fourteenth Amendment's link to *general* citizenship, the *Slaughter-House Cases* unwittingly set the wheels in motion for the nationalization of fundamental-rights jurisprudence. In particular, once the Justices began to recognize a doctrine of "incorporation," the *general* fundamental rights that Bingham and his allies tried to secure through the Fourteenth Amendment came to be viewed as *national* constitutional rights, whose definition was left to the Supreme Court.[436]

IV. IMPLICATIONS

Nearly everybody thinks that history matters in constitutional interpretation, so it is worth considering the present-day implications of recovering the concepts of general citizenship and general citizenship rights.[437] More detailed analysis of evidence about the Fourteenth Amendment and of competing scholarly views will await future work; instead, my focus here will be on the nature of constitutional interpretation, using voting rights as a case study. Rather than trying to argue for any particular result, my goal is to highlight the crucial link between constitutional sociology—that is, predicate beliefs about the nature of constitutionalism—and the content of our fundamental law.

To begin, consider voting. Today, it is axiomatic that the Fourteenth Amendment restricts states' ability to limit voting rights, whether by denying the franchise directly or by diluting the strength of certain votes.[438] Because the *Slaughter-House Cases* decision has never been overturned, these holdings now rest on

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433. McCready v. Virginia, 94 U.S. 391, 396 (1877); *see also* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-81 (1869) (distinguishing "privileges and immunities which are common" from "[s]pecial privileges enjoyed by citizens in their own States").

434. *See, e.g.*, Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875). For an illuminating discussion, see Collins, *supra* note 6, at 1280-81, 1283.

435. Davidson v. New Orleans, 96 U.S. 97, 105 (1878).

436. *See* Campbell, *supra* note 111, at 1453-54.

437. *See, e.g.*, Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 676 (1999); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990).

438. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665-67 (1966); Reynolds v. Sims, 377 U.S. 533, 567-68 (1964).

the Equal Protection Clause. But historically, the crucial provision was the Privileges or Immunities Clause.[439] (While not seeking to prove the point here, the following discussion treats the rights of equal protection and due process as being *among* the rights of citizenship, not as sources of *different* rights.)[440] So was suffrage among the "privileges or immunities of citizens of the United States"?

In the 1860s, Republicans vociferously denied that either the Civil Rights Act of 1866 or the Fourteenth Amendment would affect state control over the franchise. For instance, as Senator Lyman Trumbull of Illinois later summarized, "the civil rights bill . . . [was] confined exclusively to civil rights and nothing else, no political and no social rights."[441] But this was not a universal view, and it was especially common for Black civil-rights leaders to assert that voting was among the rights of United States citizenship.[442] So what should a historically minded interpreter do?

The conventional approach is to acknowledge these disagreements and then weigh all of the evidence. The typical conclusion, then, is that suffrage was not a right of citizenship.[443] But some interpreters have argued that although "political rights" like voting were not originally viewed as citizenship rights, they still might later become "civil rights."[444] However, whether one focuses on the 1860s or on subsequent developments, these bean-counting approaches might be flawed. To know which evidence matters, we need to consider the *nature* of what we are looking for. We need to know which type of beans to count.

Scholars have widely appreciated a related problem with relying on "original expected applications" — that is, historical views of the expected consequences of a legal rule. Today, most originalists recognize a critical difference between original *meaning* and original *expected applications*.[445] And for good reason. Even if one correctly identifies a legal rule, views about how to apply that rule can be

439. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 999-1000 (1995); GREEN, *supra* note 1, at 54.

440. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (C.C.D. La. 1870); AMAR, *supra* note 6, at 170; BALKIN, *supra* note 8, at 192-93.

441. CONG. GLOBE, 42d Cong., 2d Sess. 901 (1872) (remarks of Sen. Trumbull).

442. *See, e.g.*, BARNETT & BERNICK, *supra* note 1, at 144; FONER, *supra* note 1, at 52, 94-95; Fox, *supra* note 169, at 347.

443. *See, e.g.*, Farber & Muench, *supra* note 16, at 274; GREEN, *supra* note 1, at 53; EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 113-15 (2003).

444. *See, e.g.*, BARNETT & BERNICK, *supra* note 1, at 220.

445. *See, e.g.*, Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559 (2006); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 383 (2013).

influenced by erroneous factual assumptions.[446] For example, even if Americans in the 1860s thought that states might prevent women from becoming lawyers, that conclusion might not be constitutionally ossified.[447] After all, factual assumptions that guided originally expected applications were not necessarily baked into the *meaning* of the Privileges or Immunities Clause.[448] To recover how historical figures understood the Constitution, then, an interpreter must consider not only *what* they thought about the constitutionality of various measures, but also, from an internal perspective, *why* they held those views.

Debates about whether voting rights were secured under the Privileges or Immunities Clause present a similar but conceptually distinct problem: historical views of the Constitution were often based on contestable and conflicting underlying beliefs about fundamental law. Therefore, before trying to ascertain the legal content of the Privileges or Immunities Clause, we need to pay closer attention to how it mapped onto predicate thinking about federalism, sovereignty, and citizenship. One cannot evaluate historical evidence about matters like voting without considering these antecedent issues.

Congressional debates in 1869 over how to read the Privileges or Immunities Clause nicely illustrate this point. Consider, for instance, the views of Senator Edmund Ross of Kansas. By denying Black people the "political rights of citizenship,"[449] he explained, states had "practically nullified" the Privileges or Immunities Clause.[450] Ross then unpacked the logic of his position. "[T]he citizen is the sovereign source of all political power," he observed,[451] and after "the fiery crucible of civil war," sovereignty rested in the people of the *nation*.[452] Thus, he stated, the "sovereignty supposed to reside in the States, has given way in the popular mind to a well-defined, compact, and undisputed jurisdiction on the part of the General Government over all questions involving the political status and political rights of the individual."[453] In sum, Ross was basing his view of the rights of United States citizenship on his nationalistic understanding of the nature of the union.

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446. *See, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 852-55 (2015).

447. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). For discussion, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243, 1268-69 (2019).

448. *See, e.g.*, BALKIN, *supra* note 8, at 100-08.

449. CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (remarks of Sen. Ross).

450. *Id.* at 982.

451. *Id.* at 984.

452. *Id.*

453. *Id.*

Others who favored broader voting rights denied that suffrage was within the scope of the Privileges or Immunities Clause. Senator Jacob Howard, for instance, endorsed a national guarantee "to impart to the colored man . . . if he be a citizen of the United States, the same . . . political rights."[454] But voting rights, he insisted, were not protected by the Constitution.[455] That was because the Privileges or Immunities Clause secured only the "rights and privileges under the second section of the fourth article of the old Constitution."[456] And "[n]obody," Howard continued, "ever supposed that the right of voting or of holding office was guarantied by that [clause]," which applied only to "personal rights," like those traditionally protected by the common law, not "political rights of any description."[457] Just like Ross had done, Howard was tying his conclusion about voting rights to an underlying theory of citizenship. In contrast to Ross, however, Howard confined the reach of the Privileges or Immunities Clause to general citizenship rights.[458]

Meanwhile, some Democratic congressmen took an even stronger position against federal interference with state restrictions on suffrage. On their view, even Article V amendments could not intrude upon core aspects of state sovereignty.[459] Senator Thomas Hendricks of Indiana, for instance, denied that constitutional amendments could "change the character and the nature of the Government."[460] This restricted view of the power to amend the Constitution might

454. *Id.* at 987 (remarks of Sen. Howard).

455. *Id.* at 1003 ("[T]his is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained.").

456. *Id.*

457. *Id.*; *see also id.* at 1002 (remarks of Sen. Drake) (taking the same view).

458. *See, e.g.*, H.R. REP. NO. 41-22 (1871), *reprinted in* 2 ESSENTIAL DOCUMENTS, *supra* note 1, at 609 ("[The Privileges or Immunities Clause] does not . . . refer to privileges and immunities of citizens of the United States *other than* those privileges and immunities embraced in the original text of the Constitution, article four, section two." (emphasis added)).

459. This view was not new. *See, e.g.*, JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 300 (Charleston, Steam Power-Press of Walker & James 1851) (describing unenumerated "limits of the amendment power," including changes to "the nature of the system"); Michael P. Zuckert, *Completing the Constitution: The Thirteenth Amendment*, 4 CONST. COMMENT. 259, 263 (1987) ("[T]he central issue which preoccupied the members of Congress [during debates over the Thirteenth Amendment] was, in effect, whether the proposed amendment to the Constitution was itself constitutional.").

460. CONG. GLOBE, 40th Cong., 3d Sess. 988 (1869) (remarks of Sen. Hendricks); *see also id.* at 995 (remarks of Sen. Davis) ("Congress has no power to propose an amendment to the Constitution that would revolutionize the essential nature and character of the Government by the Constitution.").

seem odd today, but it made plenty of sense at the time in light of social-contractarian precepts.[461] Consequently, Hendricks concluded, no Article V amendment could interfere with state powers that were "essential to the very nature of the Government itself."[462]

Radical Republicans did not necessarily disagree with this logic.[463] Rather, they denied that states were sovereign. "The whole argument from first to last," Senator Oliver Morton of Indiana exclaimed, "has proceeded upon that idea, that this is a mere confederacy of States."[464] If that were true, he acknowledged, states would have expansive rights, including even a right of secession.[465] But Morton vehemently denounced that understanding of the nature of the union. "The whole fallacy lies in denying our nationality," he continued.[466] "I assert that we are one people and not thirty-seven different peoples; that we are one nation, and as such we have provided for ourselves a national Constitution, and that Constitution has provided the way by which it may be amended."[467] On his view, the nation created the Constitution, not vice versa.

The critical point here is that views about citizenship rights reflected and relied upon implicit judgments about the distribution of sovereignty. As we have just seen, congressmen made this connection explicitly. Nor was this point lost on jurists. Treatises often emphasized the pivotal importance of the nature of the union.[468] John Norton Pomeroy's well-known *Introduction to the Constitutional Law of the United States*, for instance, led with this admonition:

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461. To many, sovereignty was a social-contractarian issue, and it was axiomatic that social contracts required unanimous agreement. *See* Campbell, *supra* note 101, at 88. For further discussion of implicit limits on the amendment power, see, for example, Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 117-19 (1893).

462. CONG. GLOBE, 40th Cong., 3d Sess. 988 (1869) (remarks of Sen. Hendricks). Notably, Hendricks did not deny that "the Constitution might be so amended as to regulate the suffrage in the election of Federal officers." *Id.*

463. The idea that the amending power had limits was not new among Republicans, either. During debates over the Thirteenth Amendment, "[t]he amendment's proponents largely accepted the constitutional principle regarding the use of the amending power," Zuckert, *supra* note 459, at 266-67, and "[f]or the most part," they "attempt[ed] to show the amendment's deep consistency with the Constitution," *id.* at 266.

464. CONG. GLOBE, 40th Cong., 3d Sess. 990 (1869) (remarks of Sen. Morton).

465. *Id.* ("If that is true there was the right of secession; the South was right and we were wrong. He did not draw that deduction, but it is one that springs inevitably from his premises.").

466. *Id.*

467. *Id.*

468. *See generally* ELIZABETH KELLEY BAUER, COMMENTARIES ON THE CONSTITUTION, 1790-1860 (1952) (documenting the centrality of sovereignty and nature-of-the-union issues in nineteenth-century treatises).

> Upon the conceptions we form of the essential character of this organic law, and of the body-politic which lies behind it, must depend our notions of all the relations of the United States and the several commonwealths to each other, and of all the functions of the general and local governments.[469]

Constitutional ontology was front and center, and for good reason. "The views we shall adopt," Pomeroy explained, "will give shape and color to all our subsequent opinions upon the various matters which shall come under discussion."[470]

With so much focus on constitutional text, it is easy to overlook these underlying questions of constitutional ontology. But interpreters in the nineteenth century recognized the central importance of underlying assumptions about sovereignty, citizenship, and rights.[471] Crucially, these questions were *internal* to their views of fundamental law and, therefore, cannot be ignored by those trying to understand the linguistic or conceptual dimensions of our constitutional history. Even supposing that law is a limited domain and that some forms of context are irrelevant to constitutional interpretation,[472] any genuinely historical account of earlier fundamental law needs to consider disagreements about the nature of the Constitution itself.[473]

In part, recognizing ontological disagreements can help to *clarify* historical debates that otherwise may seem hopelessly indeterminate. Just as divergent original expected applications do not necessarily prove that meaning itself was unclear, recovering the internal premises of constitutional thought can help reveal a more organized constellation of views.[474] Historical disagreements about

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469. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 20 (New York, Hurd & Houghton 1868).

470. *Id.* at 20-21.

471. To be sure, overlapping consensus may have existed on many issues. For instance, all likely agreed that the Constitution's reference to "domestic violence" did not refer to interpersonal conflict within a home. *Cf.* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 16-18 (2015) (discussing the meaning of the constitutional reference to "domestic violence").

472. *See, e.g.*, William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 814 (2019); *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) (embracing the view that "'legal inquiry is a refined subset' of a broader 'historical inquiry'" (quoting Baude & Sachs, *supra*, at 810-11)).

473. For a broader discussion, see JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (forthcoming 2023).

474. *See* Campbell, *supra* note 100, at 254 ("[I]dentifying methodological differences among the Founders can help clarify, and not merely complicate, the historical meanings of constitutional concepts." (citation omitted)).

the meaning of the Privileges or Immunities Clause, for instance, were not necessarily based on textual ambiguity or on the Framers' embrace of the "language of general principles," as historians have argued.[475] Rather, those divisions often flowed from *underlying* disagreements about the nature of the union. If interpreters can figure out how to approach *that* issue, then, they will be in a far better position to incorporate history more thoughtfully and coherently, without implicitly crediting a mishmash of inconsistent premises.

At the same time, historical disagreements about constitutional ontology pose problems for approaches that focus on recovering the original public meaning of the Constitution's text.[476] For some, this inquiry is essentially *linguistic* in nature, "seek[ing] to establish an empirical fact about the objective meaning of the text at a particular point in time."[477] It is, as Randy E. Barnett says, a "purely descriptive empirical inquiry."[478] Others emphasize the need to construe the text using *legal* interpretive methods.[479] But either way, the goal of interpretation is to recover the meaning of a distinctively textual object—the written Constitution.[480] As Christopher R. Green writes, "Textually-expressed meaning is just what the Fourteenth Amendment *is*."[481]

But Americans often did not imagine the Constitution as a textual instrument that had to be interpreted in light of its "ordinary" or "legal" meaning. To be sure, the Founders quickly accepted the written Constitution's legitimacy and began to fill their debates with references to textual authority.[482] The text thus

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475. FONER, *supra* note 1, at 73; *see* NELSON, *supra* note 5, at 51.

476. For a summary and critique of this view, see Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783 (2017). For another work exploring these themes, albeit with less focus on constitutional law, see Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011).

477. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 415 (2013).

478. *Id.* at 411; *see also* Solum, *supra* note 471, at 1 (describing the "fixation thesis," which posits that the "meaning of the constitutional text is fixed when each provision is framed and ratified"). For a notable counterexample, see Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017).

479. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751-52 (2009); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1325 (2018).

480. *See, e.g.*, GREEN, *supra* note 1, at 7. Some originalists even go so far as to claim that constitutional interpretation should *exclusively* focus on original textual meaning. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011).

481. GREEN, *supra* note 1, at 8.

482. *See* GIENAPP, *supra* note 62, at 8 ("Because political disputants recognized that the ultimate legitimacy of a position hinged on whether it could be justified in terms of the Constitution, there was . . . cause to press the Constitution into greater and greater service.").

became, in a sense, the common denominator of constitutional argument. But just as values change in different numeral systems,[483] constitutional meaning turned on underlying and unfixed premises about the very nature of the Constitution itself. Efforts to ascertain "fixed" and "objective" views of original textual meaning, then, tacitly rest on superimposed assumptions about constitutional ontology—often without grappling with the past on its own terms.

Historical debates about citizenship rights bring this point into stark relief. As conceived by its framer, John Bingham, the Privileges or Immunities Clause did not embrace a nationalistic understanding of citizenship rights. Yet, plenty of others took a different view. In doing so, they invoked the phrase "privileges or immunities of citizens of the United States." But their interpretive method was mostly nontextual, viewing the Fourteenth Amendment as merely restating preexisting fundamental law.[484] "[T]hrowing aside the letter of the Constitution," Pennsylvania Representative John Broomall asserted, "there are characteristics of Governments that belong to them as such."[485] On this way of thinking, American fundamental law reflected a broader web of rules and principles, grounded in a freestanding national social contract—that is, one that predated the Constitution. For Senator Charles Sumner and his allies, the Reconstruction Amendments merely restated "[t]he principles of the Declaration."[486]

If one accepts this nationalistic perspective, then the implications might go well beyond the issue of citizenship rights. Indeed, the Founders were well aware of what it would mean to recognize a freestanding national social contract. As Jonathan Gienapp observes, "The nature of the polity and the meaning of the Constitution were inextricably entwined."[487] For those, like Pennsylvania jurist James Wilson, who thought that the Declaration of Independence had heralded the creation of a national polity, Congress had inherent power to address national issues.[488] Notably, states'-rights advocates often did not disagree.[489] They simply denied national sovereignty or insisted that it was derived from and limited by

483. As one of my t-shirts reads: "There are only 10 types of people in the world: Those who understand binary and those who don't."

484. *See* Farber & Muench, *supra* note 16, at 269-70.

485. CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (remarks of Rep. Broomall); *see also id.* at 1119 (remarks of Rep. Wilson) ("I assert that we possess the power to do those things which Governments are organized to do.").

486. *Id.* at 651 (remarks of Sen. Sumner). The debate was not over whether the Declaration of Independence *as a text* was part of American fundamental law. Rather, the debate was over the nature and origins of sovereignty.

487. Gienapp, *supra* note 30, at 1793.

488. *See id.* at 1795-1806.

489. *Id.* at 1809 ("They conceded that the scope of the national government's authority was indeed determined by the nature of the preceding political compact.").

the written Constitution. Perhaps, then, crediting a freestanding national social contract ought to carry other implications, like inherent national powers.[490]

What all of this indicates is that incorporating history into constitutional interpretation requires confronting questions of constitutional ontology.[491] If our rights jurisprudence rests on the underlying theory of nationalists like Charles Sumner, what does that mean for American constitutionalism more broadly? Should we implicitly rely on a freestanding national social contract when reading the Fourteenth Amendment but let it magically disappear when interpreting the Commerce Clause? Doing so may make sense if constitutional meaning flows from the time-bound original meaning of the text. But for most of our history, constitutional interpretation reflected a richer, more complex interplay of social-contractarian and constitutional ideas.

Needless to say, these ways of thinking are lost on the Supreme Court today. Current doctrine reflects a jumbled blend of different perspectives—thoroughly nationalistic in most respects, but not entirely. And perhaps consistency is overrated. Maybe it is okay to rely heavily on nationalists like Sumner in defense of *Brown v. Board of Education*,[492] even if we do not take nationalism as far as it might logically go. Maybe our Constitution—that is, our governing system of fundamental law[493]—is in some sense unprincipled, or at least multiprincipled, reflecting an ongoing process of accommodation among competing ontological perspectives.[494] The key point, though, is that these sorts of underlying disagreements cannot be elided by focusing on the original meaning of the text. Constitutional ontology is always there, whether acknowledged or not.

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490. *See, e.g.*, *id.* at 1794-95 ("These feats of high sovereignty implied that the national government had been vested, from the beginning, with many (if not, perhaps, all) inherent national powers."); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1070 (2014) ("The historical evidence also suggests that Wilson and the other leading nationalists at the convention . . . were deeply committed to the doctrines of implied and inherent national powers.").

491. *See* Gienapp, *supra* note 324, at 941.

492. *See, e.g.*, McConnell, *supra* note 439, at 984-85.

493. *Cf.* Mary Sarah Bilder, *The Emerging Genre of the Constitution: Kent Newmyer and the Heroic Age*, 52 CONN. L. REV. 1263, 1267 (2021) ("[I]n 1787 the Constitution was still as much a system of government as it was a document.").

494. *Cf.* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (describing an interpretive approach that "tend[s] to favor small steps and close attention to both experience and tradition"); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 689 (1994) (describing an interpretive approach that relies on "tradition and incremental change," not "abstract theory").

CONCLUSION

From the Founding until the Civil War, jurists widely embraced a ternary theory of citizenship, based on the idea that the United States was not only a unitary nation but also a federation of states. On this view, Americans were *state* citizens, *national* citizens, and *general* citizens, with the latter reflecting a status dating back to colonial times. Although it had competitors, this ternary approach was especially popular among those who opposed the expansion of slavery into Missouri, those who challenged the Negro Seaman Acts, and those who fought against the Fugitive Slave Acts. It was also reflected in *Dred Scott*'s infamous debate over the linkage between, and access to, different forms of citizenship.

Alongside this ternary view of citizenship, Americans also recognized three buckets of citizenship rights: *local* citizenship rights, which were tied only to state citizenship; *general* citizenship rights, which were at various times linked to all three forms of citizenship; and *national* citizenship rights, which were tied only to national citizenship. During the Antebellum period, controversies about general citizenship rights usually addressed how these rights were protected under Article IV and their distinction from local citizenship rights. After the Civil War, the terms of the debate changed, and Republicans quickly began viewing general citizenship rights as being somehow tied to national citizenship. And it was in this context that Representative John Bingham drafted the Fourteenth Amendment to secure the "privileges or immunities of citizens of the United States."

But while capable of illuminating historical debates, recovering the ternary view of rights does not offer simple answers to modern questions. Indeed, it helps to reveal even deeper historical divisions and modern interpretive problems related to the nature of the Constitution itself. Republicans agreed that the Fourteenth Amendment secured general citizenship rights, but the nature of those rights remained contested. Even as the federative idea of general citizenship was fading, some Republicans held onto the notion that certain fundamental rights could be common to all United States citizens without being fully nationalized. Others like Charles Sumner, however, viewed these rights as "national in character" and "necessarily placed under the great safeguard of the Nation."[495]

History alone cannot tell us which view was correct. But it does offer a chance to see our constitutional system in a new light, revealing the contingency and contestability of assumptions that we now often take for granted. Viewed historically, our written and putatively fixed Constitution might appear less textual and more unsettled than we often appreciate, with a more profound connection

495. CONG. GLOBE, 42d Cong., 1st Sess. 651 (1871) (remarks of Sen. Sumner).

to underlying social and political views than we might care to admit. Ways of thinking about rights, federalism, and sovereignty, after all, turned on the nature of the union. And as Republicans during Reconstruction quickly found out, that was something that even the Civil War could not settle.[496]

496. *See generally* CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS (2017) (examining continued debates after the Civil War over the nature of the Union and the constitutionality of secession).