Switchman of American Citizenship:

Senate Distinctiveness, *Dred Scott,* and Ironies of the Citizenship Clause

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Lauren Kluz-Wisniewski, Swarthmore College 2008, developed vital research into law journals and the congressional debates of the Reconstruction that led to co-authorship of an earlier conference paper on the extent of popular and elite preoccupation with *Dred Scott* in 1866. Her research and discussion with me of the 14th Amendment's origins have been exceptionally valuable. Comments on the previous paper by Richard Aynes, Pamela Brandwein, Jeff Grynaviski, and Michael Vorenberg also proved very helpful for formulation of this paper. Any and all errors in this paper are entirely my responsibility.

Located at the beginning of Section One of the 14th Amendment, the Citizenship Clause reads "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This is the first time that the Constitution defines citizenship.

But there is more to the Citizenship Clause than that singular fact. The language of the Clause also encodes a little-known moral compromise which informed the Clause's insertion into the draft of the 14th Amendment. To a degree that has not yet been noticed the Clause *accommodates* the antebellum law of slavery. It is regularly remarked that the Clause *overrides* the *per curiam* decision in *Dred Scott v. Sandford* [60 U.S. (19 How) 394] (1857). The Citizenship Clause certainly does that. But my claim is different: the Clause *also* represents a little-known concession to *Dred Scott.*

Slavery was the constitutional evil of the 19th century: widely (but of course not universally) considered monstrous, it was firmly buttressed by American law and institutions.[i] Section One's acknowledgement of this constitutional evil inhered in the Senate's grudging but nonetheless distinct recognition, in 1866, of the lingering precedential authority of *Dred Scott.* Roger Taney's elaborate statement that only whites could be American citizens (and that therefore slavery was constitutional) was potent enough, in fact, to require an Article V amendment of the Constitution.

The Senate came to that understanding of the case, and of what was required in response, because of the active legislative participation of Sen. Reverdy Johnson (D-MD), one of the great constitutional lawyers of the antebellum slave republic and one of the four lawyers who argued the case before the Supreme Court. Jack Balkin has pointed out that fidelity to constitutional evil is a live political possibility if there is both constitutional evil *and* reverence for a constitution among that constitution's interpreters. The Senate of the

38th and 39th Congresses was confronted by this possibility -- of fidelity to constitutional evil – precisely because one of their members included such a distinguished constitutional lawyer. As Balkin points out, “one gains a decisive rhetorical advantage against one’s opponents if one can show that they are not being faithful to the Constitution.” That advantage may persist, moreover, even if one argues for a kind of constitutional interpretation that others initially recognize as legitimating “serious injustices.”[ii]

During the 38th Congress, Sen. Reverdy Johnson exemplified devotion to the law and jurisprudence to which American slavery had given rise. He demanded that his colleagues honor the *per curiam* decision in *Dred Scott* and show reverence for its author, Chief Justice Roger Taney. His Republican colleagues very sharply resisted Johnson’s view of both the case and the man, as we shall see. But, in the next Congress, they assented to the idea that *Dred Scott* had some precedential weight and that they could not ignore it – and their concern about its authority led to the Citizenship Clause. In doing that they backed off from their earlier response that honoring *Dred Scott* in any way was to impermissibly compromise with constitutional evil.

Johnson had to urge them, to be sure, to make this concession. They did not come to it on their own. In the 39th Congress, Johnson promoted the idea that *Dred Scott* could not be overruled except through constitutional amendment. But the harshness (and that is not too strong a word, as will see) of Republicans’ earlier reaction to Reverdy Johnson’s views now largely dissolved.

Some of the Republican concession may have been rooted in the emergence of divided government. Republicans in the 39th Congress Senate were in a different political context from the 38th. Not only was Lincoln dead, but over the course of the first session of the 39th Congress all congressional Republicans had come to realize that President Andrew

Johnson no longer represented them. He was not, in fact, a Republican. President Johnson instead appeared bent on weakening the congressional Republicans party during the 1866 elections as a prelude to the 1868 presidential election.[iii]

But another factor is the dynamic of Senate interactions. By the 39th Congress, Reverdy Johnson's second Congress, the Senate's distinctiveness helped to reconstitute Johnson's standing in the chamber. Johnson got on much better with his Republican opponents, despite the Senate being – or perhaps because -- the Senate was quite top-heavy with Republicans, and despite Johnson's membership in a minority that was outnumbered nearly 3-to-1.[*]

The Senate's relatively nonmajoritarian character, which comes from its procedural protection of debate, of individual or factional obstruction, and of individual capacity to re-frame policy matters via non-germane amendment, forces Senators to take each other quite seriously. Its intimacy, due to its size, and the length of Senate terms also promote relatively deep personal knowledge of both co-partisans and party opponents.[iv]

During the Civil War and after, due to the Confederate secession, these features of Senate distinctiveness were particularly pronounced. The Senators' seats were closely grouped together. Reverdy Johnson's seat was located in the front row, toward the center, allowing him to easily step forward, despite his blindness, into the well and address his colleagues. There were opportunities in such physical intimacy to get to know and to persuade colleagues and change their preferences. Through frequent and apparently commanding participation in debate, Johnson and his arguments were not only likely to be heard but also likely to force his Republican opponents *to think* about what he was saying.[v]

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[*] The Senate had 39 Republicans, 11 Democrats (of which Johnson was one), 3 Unconditional Unionists, and 1 Unionist.

Moreover, if divided government had strongly motivated the concession to Reverdy Johnson's views, then one would expect that *other* actors -- besides those in the Senate -- would *also* conceive the idea that something like the Citizenship Clause was necessary to overrule *Dred Scott*. But, as we will see in some detail below, this idea did *not* occur to other players in the congressional development of the 14th Amendment.

Instead, all of the cognitive connection between the precedential strength of *Dred Scott* and the need to overrule it with something like the Citizenship Clause happened in the Senate. Evidently worried about such potency if Republicans were to lose ground and Democrats to regain influence over national institutions, Sen. Benjamin Wade (R-OH), conceded Johnson's claim that *Dred Scott* was, in effect, good law unless and until constitutional amendment overruled it. Now Congress would act to place black citizenship "beyond all doubt and all cavil," in Wade's formulation. Wade induced his Senate Republican colleagues to hold off on debating and approving the 14th Amendment draft reported from the House until the Senate Republican caucus inserted new language – what became the Citizenship Clause.[vi]

Thus, when the first Supreme Court case implicating the 14th Amendment was handed down, the *Slaughterhouse Cases*, Justice Samuel Miller wrote in his *per curiam* decision:

> "…it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision…had never been overruled; and, if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but

> were incapable of becoming so by anything short of an amendment to the Constitution.
>
> To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship...the 1st clause of the 1st section was framed...and it overturns the *Dred Scott* decision..."[vii]

But here we return again to the touch of constitutional evil in the Citizenship Clause. Contemporary legal commentary accepts what Justice Miller announced and what the Senate did at face value, and even treats the constitutional override as an act of constitutional statesmanship. Akhil Reed Amar, for instance, writes of the Citizenship Clause, "As every schoolchild learns (or should learn), this sentence was put in the Constitution to repudiate in the most emphatic way the vile holding of *Dred Scott*..."[viii] Another scholar writes that the "language of this first sentence was explicitly designed to overturn the Supreme Court's definition of citizenship articulated in *Dred Scott*... Congress took careful aim at *Dred Scott*'s definition of citizenship."[ix] A somewhat earlier illustration of this view of the connection between the Citizenship Clause and *Dred Scott* comes from an opinion written by (then) Associate Justice William Rehnquist. In *Sugarman v. Dougall* [413 U.S. 634 (1973)], Justice Rehnquist wrote that, "It is unnecessary to venture into a detailed discussion of what Congress intended by the Citizenship Clause of the Fourteenth Amendment. The *paramount* reason was to amend the Constitution so as to overrule *explicitly* the *Dred Scott* decision."[x] [emphasis added]

Yet what the Senate did in early, summer 1866 -- and what Justice Miller said when he wrote the *per curiam* in the *Slaughterhouse Cases* -- were quite peculiar. Why? The answer has to do with a persistent and strong theme in Republican political thought of the Civil War and the Reconstruction: *that* Dred Scott *was inherently and wholly invalid.*

In March 1857, when the Court handed down *Dred Scott*, its opponents treated the decision as quintessentially illegitimate. On March 7, the Pittsburgh Gazette editorialized (to take one of many similar examples),[xi]

> "We shall treat the so-called decision of that Court as an utter nullity. It is not law, and it has no binding force upon either the people or the government. It is not an authoritative interpretation of the Constitution, nor is it, legally, a decision entitled to any weight whatever. It is simply a demagogical stump speech from the hustings of the supreme bench, got up in legal phrase [sic] to suit the necessities of the Buchanan administration."[xii]

Much of the Republican reaction that insisted on the decision's "utter nullity" takes on further meaning in the context of two claims which were immediately wheeled out by supporters of the Supreme Court. First, Democratic newspapers treated resistance to the decision as treasonable. Second, they argued that the decision rendered the Republican party itself illicit. The Philadelphia Pennsylvanian announced that *Dred Scott* "'sweeps away every plank of their platform and crushes into nothingness the whole theory upon which the party is founded.'" The New Orleans Picayune held that the decision "'puts the whole basis of the Black Republican organization under the ban of the law.'" Small wonder that Republicans abhorred *Dred Scott:* the decision more or less implied that the Republican party ought not to exist.[xiii]

In short, if something was invalid to begin with, why would Article V definition of citizenship in 1866, nearly a decade after the invalid act, need to expressly take account of it? This is what Johnson accomplished: he nudged a Senate that was controlled by Republicans toward the view that *Dred Scott* was far from a dead letter and indeed that as

late as 1866, and despite all the intervening events, the decision for the Court was equivalent, as a matter of constitutional-legal status, to an Article V definition of American citizenship.

But Johnson's accomplishment was also personal as well as constitutional. We do not ordinarily think that constitutional text which defines citizenship also takes account of and reflects a lawyer's pride in his participation with the winning side of an enormously contentious and dramatic lawsuit. In this instance it does.

Johnson's written brief in the *Dred Scott* litigation has not survived, nor is there a full record of his oral argument to the Supreme Court. So we cannot know whether Johnson – through his briefs and oral argument -- directly shaped Chief Justice Taney's thinking and exposition of the constitutional issues. But oral argument in the case took 12 hours over 4 days. The two men had been personal friends in frequent contact since 1815. One of the opposing lawyers, counsel for Dred Scott himself, did think that Johnson strongly affected the outcome:

> "'It was the forcible presentation of the southern view of our Constitution...that contributed more than anything else to bring about the decision that was made in this case...Those who were opposed to him (and I happened to be one of them) felt the force of his arguments and foresaw what their effect would be on a majority of the Court.'"[xiv]

As one of the great constitutional lawyers of the ante-bellum slave republic, Johnson plainly influenced the Supreme Court's statement of the law of American citizenship in *Dred Scott*. Taney of course wrote the *per curiam* opinion himself. But very likely Johnson gave him some, possibly much of what he needed to write it.

In a sense, Johnson was present at the creation twice. A former Attorney General of the United States and one of the most prominent lawyers of the ante-bellum slave republic, he was on the winning side in *Dred Scott* – and thus helped to develop the first major statement of citizenship in American political development. A decade later he helped to formulate the second major statement of American citizenship.

It was not inevitable that Reverdy Johnson would be there, in the Senate. But Abraham Lincoln needed, for military reasons, to keep Maryland in the Union.[xv] He succeeded, which is why Reverdy Johnson was in a position to make the crossing from being a prominent ante-bellum constitutional lawyer to shaping post-bellum constitutional law.

Overview of Discussion and Implications

Below I recover Johnson's influence through both closely reading the Congressional Record and embedding the evidence yielded by the Record in an appreciation of the Senate's legislative distinctiveness: its small size and its relatively nonmajoritarian character. Think of this case study as an extended double-take on specifics and details that others have not remarked. The facts which survive into the present about Johnson's role are circumstantial, even somewhat slender; this paper knowingly risks placing too much weight on the available data.

But the risks are worth taking for two reasons. As we will see, *outside the Senate* the issue of overruling *Dred Scott* was not a live issue at all. Thus this case speaks to the interest among congressional developmentalists in tracing individual agency and entrepreneurship as vital factors in congressional politics.[xvi] And, by recovering the impact of Senate distinctiveness on the Citizenship Clause this study links the formal-legal development of American citizenship to American bicameralism.

Moreover, by looking at this critical moment in American political development with the sensibility of a congressional scholar, this case study reports something new – and thereby corrects a misconception that is widespread in legal academia. No one has previously linked Reverdy Johnson and his brief for taking *Dred Scott* seriously, on the one hand, to the making of the Citizenship Clause on the other. The consensus view, instead, is that the Article V overrule of *Dred Scott* resulted from a *general* Republican concern over the case's precedential potency.

During a seventeen year period which Lauren Kluz-Wisniewski and I searched, between 1991 and 2008, there were at least 126 law review or legal periodical articles featuring the supposition that Republicans as a party were alive to the task of constitutionally overruling *Dred Scott* via Article V amendment.[xvii] There were, in contrast, only 8 articles in the same time period (1991-2008) that offered alternative accounts – and none of these discusses Reverdy Johnson's role.[xviii]

The consensus view that Republicans were collectively worried about *Dred Scott* and eager to overrule it constitutionally, via an Article V process, proves to be conceptually anachronistic. The development of judicial supremacy shapes our thinking without our being fully cognizant of it. Judicial supremacy is the idea that the Supreme Court dispositively defines the Constitution's meaning.[xix] Its "taken-for-granted" character today invites us to imagine that Reconstruction Republicans, as a congressional party, must have wanted to take care of the ante-bellum judicial legacy at the earliest opportunity. Thus two legal scholars, wholly fancifully, have asserted that "the Reconstruction Congress frequently stated that the purpose of constitutional reform was to cure, as they called it, 'Dred-Scott-itus.'"[xx]

The real story, however, is both a Senate story and a story about one man's persistence in getting his Senate colleagues to pay attention to his jurisprudential views – and *not* the story that the Republican party as a whole worried about *Dred Scott* and was itching to overrule it. To be blunt, Akhil Reed Amar and Justice Rehnquist are simply wrong.

To develop my account, I proceed by first describing Reverdy Johnson's assertion during the 38th Congress of the high constitutional validity of *Dred Scott.* I then trace (1) the insertion of the Citizenship Clause into the draft of Section One that came to the Senate from the House (2) the role played by Sen. Ben Wade, and (3) the link between his role and Reverdy Johnson's claim, some months earlier in the 39th Congress, that only a constitutional amendment would suffice to overrule *Dred Scott.* I also treat Reverdy Johnson's statement of satisfaction over the insertion of the Citizenship Clause.

As a further step in the exposition, I show that the recognition of Reverdy Johnson's claim concerning the status of *Dred Scott* was not considered an obvious step to take outside the Senate: neither in the House, nor, most interestingly, in the Supreme Court. Showing that lack of obviousness about whether *Dred Scott* could only be overturned via Article V further reinforces the hypothesis that it was the personal chemistry of the Senate which produced deference among the Senate Republican caucus to Johnson's claim.

Fourth, I return to the question of fidelity to constitutional evil. What was implied by such fidelity emerged and disturbed the Senate at the time of the seating of Sen. Hiram Revels (R-MS). In Winter, 1870, when Hiram Revels, the first African-American member of the Senate, presented his credentials to the Senate there was a discussion over whether he could be seated at all. Democrats claimed that he could not be seated because he had not been a U.S. citizen long enough to be United States Senator. Because the Senate had earlier conceded *Dred Scott*'s validity in the Citizenship Clause, Hiram Revels' citizenship

dated only to the 14th Amendment, not the constitutionally required 9 years. Opponents of black office-holding thus clearly grasped how the concession of 1866 gave them a strong argument in seeking to deny the seating of Hiram Revels. They understood the peculiarity of what the Senate did.

In a conclusion I return to the implications of the case study – to how it speaks to themes of entrepreneurship and individual agency in the literature on Congress and to how the kind of congressional developmental scholarship which I offer clarifies the law of citizenship in America.

Reverdy Johnson's Faith In His Own Handiwork

Elected to the Senate during the Civil War, Johnson took pains during the 38th Congress to justify his fellow Marylander Chief Justice Roger Taney's *per curiam* opinion in *Dred Scott* as good law. Reverdy Johnson's first defense of *Dred Scott* came on April 1, 1864, when the Senate moved to replace language in an act establishing territorial government in Montana that referred to "white male inhabitants" with the phrase "free male citizen of the United States." Sen. Willard Saulsbury, Sr. (D-DE) objected that the language would permit black office-holding. But Johnson had a more fundamental objection: "…if the object…is to put it beyond all doubt that Africans in the Territory shall be permitted to exert all the political rights that under the bill will be exercised by white men," then the bill, Johnson claimed, "had better say 'all black men,' instead of saying 'all citizens,' because the Supreme Court has decided, and that question was directly before the court in the Dred Scott case, that a person of African descent is not a citizen of the United States."[xxi]

At this point Charles Sumner (R-MA) cut in: "…I hope that Congress, in its legislation, will proceed absolutely without any respect to a decision which has already disgraced the

country and which ought to be expelled from its jurisprudence."[xxii] Johnson responded with a defense of the decision and lengthy, vivid praise of Taney, ending with the charge that Sumner's view was dangerous:

> "…it is no light thing to assail the Chief Justice of the United States or that high tribunal. We have an interest, jurisprudence has an interest, justice has an interest, the nation has an interest in maintaining the character of that tribunal against all unjust reproach."

Sumner responded:

> "…the *Dred Scott* decision was as absurd and irrational as…a reversal of the multiplication table, besides shocking the moral sense of mankind…I enter a standing protest against that atrocious judgment, which was false in law and also false in the history with it sought to maintain its false law."[xxiii]

Sumner said he personally liked Taney and admired him. But the decision had "endangered" the Court's "authority." Johnson would not let go, returning to lavish praise of Taney and claiming that the *Dred Scott* decision was appealing to "very well-judging men." Johnson preferred "holding to the opinion of Taney than holding to the opinion of the honorable member."[xxiv]

The tension was broken when Sen. John Parker Hale (R-NH) said that it came as a surprise to him that the Senate had become a court of errors. He was "compelled to differ with my honorable friend from Massachusetts. He says that the *Dred Scott* decision was a disgrace to the Supreme Court of the United States. I do not believe that I think any better of the decision than he does: I think it was an outrage upon the civilization of the age and a

libel upon the law; but I do not think it was a disgrace to the Supreme Court of the United States." Feelings must have been running high for Hale's remarks produced laughter.[xxv]

Feelings again ran very high in the wake of Taney's death.[xxvi] On February 23, 1865 the Senate took up an appropriation for a bust of the late Chief Justice Taney, to be placed in the Supreme Court's courtroom. Charles Sumner objected fiercely:

> "If a man has done evil during life he must not be complimented in marble....Let a vacant space in our court-room testify to the justice of our Republic. Let it speak in warning to all who would betray liberty."[xxvii]

Lyman Trumbull (R-IL), who reported the appropriation from the Committee on the Judiciary, which he chaired, agreed that the Court decision "was wrong," but urged Sumner to relent. John Parker Hale (R-NH), who in 1864 had been conciliatory towards Reverdy Johnson, announced, "I am opposed to this being done...because whatever Judge Taney may have been – he may have been as a good a judge as the Senator from Maryland think him to have been... - he will be known to posterity...by the Dred Scott decision...I am not willing to pass an appropriation to do honor to the Dred Scott decision..."[xxviii]

Henry Wilson (R-MA) also opposed a bust: "The people, the loyal people of our struggling country, condemn that Dred Scott decision as a violation of the spirit of the Constitution of their country." Wilson then attacked Taney personally: "He sank into his grave without giving a cheering word...to the country he had vainly sought to place forever by judicial authority under the iron rule of the slave-masters."[xxix]

Reverdy Johnson had to respond. He answered a charge which Hale earlier made that the Court deliberately held over its decision until after the 1856 election in order to prevent immediate electoral rebuke. This wasn't the purpose of the delay. The delay was rooted

in legal considerations only. He underscored that Taney hardly acted alone; a majority of the Court was in concurrence. Additionally, Sumner was wrong in arguing, as he had earlier, that Taney misused his authorities in the opinion. Finally, Johnson could not help but point out that the judges on the Court collectively knew a lot more about the law than Sumner, Hale, and Wilson.[xxx]

Wilson would have none of it: "The Senator from Maryland should remember that…the loyal people of the United States have pronounced the Dred Scott opinion inhuman, unchristian, and unconstitutional."[xxxi]

At this point, Ben Wade (R-OH) dismissed the case as "a political case…politicians bent on the subjugation of the North and the enslavement of mankind got up the suit."[xxxii]

But Wade's depiction was in fact incorrect (perhaps Wade knew that, as we shall see) so Johnson responded, "The Senator is wholly mistaken. The court in Missouri decided that he had a right to sue, and his counsel brought up the case." To this, Wade responded, "…my opinion" is "as reliable as that of the feed attorney in the case."

JOHNSON: "Will the Senator permit me to ask on what authority he says I was a feed attorney in that case?"

WADE: "I do not know that the Senator was a feed attorney…if he volunteered, so much the worse."

JOHNSON: "I did volunteer."

WADE: "I am sorry for it; I was in hopes you were only induced to embark in so bad a cause by an enormous fee."

JOHNSON: "I would rather take the court's opinion than yours on that point."[xxxiii]

Not content to elaborately insult Johnson, Wade then announced that his constituents in Ohio would be outraged that their government's money would go for a bust to honor

Taney. They preferred instead to double the appropriation for the bust and use it instead to hang Taney in effigy.[xxxiv]

Sumner had the last word – and it was one that lucidly took note of the role that Johnson had by now so conspicuously taken upon himself:

> "As I listened to the Senator I was a reminded of a character known to the Roman church who figures at the canonization of a saint, under the name of… *the Devil's Advocate.* [italics in original.] The Senator may not perform precisely the same function, but the earnestness with which he advocates a cause which has as its inspiration the very spirit of evil suggests the parallel."[xxxv]

To sum up, Reverdy Johnson distinguished himself during the first Congress in which he served as Senator by defending *Dred Scott* and his old friend and fellow Marylander, Chief Justice Roger Taney. Charles Sumner took, in fact, to calling Reverdy Johnson the Devil's Advocate for *Dred Scott* and the Chief Justice. Why was Johnson so active, indeed passionate? It is very likely that he saw in the case his own greatest accomplishment as a constitutional lawyer. Today we cannot know how much Johnson's brief and argument in the case influenced the content of the *per curiam* opinion. But it must have had at least some influence. Johnson's zeal for defending *Dred Scott* and Chief Justice Taney must have come in part from pride and faith in what he, Johnson, had done to determine *the* great ante-bellum statement of the law of American citizenship.

<u>Making – and Changing -- the Citizenship Clause</u>

Having established that Johnson unsettled the Senate during the 38th Congress, I turn now to the origins of the Citizenship Clause. I want to first emphasize that the addition of

the Citizenship Clause came unexpectedly and toward the end of the making of the 14th Amendment. *The Citizenship Clause was an afterthought, incubated in the Senate*, in other words.

Until the Senate addition, the development of the 14th Amendment was about making a party platform for the 1866 elections. An easy way to see this is to notice the 14th Amendment's structure. No other amendment to the Constitution has a similar "platform" structure. But the 14th Amendment does: it has five planks. By proposing this five-part 14th Amendment, congressional Republicans devised a general Reconstruction platform on which the party could run in the 1866 national and state elections.

A particularly telling detail is Section 4 of the 14th Amendment, which explicitly promises to pay for veterans' pensions even if it requires deficit spending: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." There had been rival efforts by President Johnson and the Republicans to tap veterans organizations' electioneering energy in advance of the 1866 elections. But Republicans won the contest by promising to embed "payments of pensions and bounties" in the Constitution itself.[xxxvi]

As James Blaine later observed of activists drawn from the veterans' movements, "From their ranks came many of the most attractive and most eloquent speakers, who discussed the merits of the Constitutional amendment before popular audiences as ably as they had upheld the flag of the Union." Blaine regarded their role as essential: "Not even the members of Congress, who repaired to their districts with the amendment as the leading question, could commend it to the mass of voters with the strength and with the good results which attended the soldier orators who were inspired to enter the field."[xxxvii]

As a fragile, recently formed set of political parties the Republican parties in Congress very much required a policy answer to presidential Reconstruction – to what President Andrew Johnson referred to as "my policy." Johnson readmitted ex-Confederate states during the months between his accession and the gathering of the 39th Congress. To meet this accomplishment, and to begin reversing it, Republicans could – and did – play an Article V trump card: a proposed amendment to the Constitution.

Origins and Evolution of the Five-Part Structure and Its Contents

But before Republicans even got to the point of having the 14th Amendment platform for the 1866 elections, they went through a process of developing the amendment's contents. The five-part structure of the 14th Amendment originated in March with Robert Dale Owen—a former member of Congress, Ordnance Commissioner for Indiana during the Civil War, pamphleteer on behalf of emancipation, and commissioner of the American Freedmen's Inquiry Commission appointed by Secretary of War Stanton.[xxxviii]

Robert Dale Owen arrived in Washington in late March, at a time when Republican began to worry that come the 1866 elections Johnson's reconstruction policy would be on offer to the country without more of a congressional Republican response than the 1866 Civil Rights Act. Owen approached Thaddeus Stevens with a 5-part amendment proposal – thus devising the basic structure of the Amendment.[xxxix]

The first column of Table One displays Owen's proposed language. Note in the row for Section One that there is no definition of citizenship. Instead it is a civil rights section. Section 2 is a black suffrage section and Section 3 is an apportionment section. Section 4 deals with war debt, and Section 5 is the enforcement section.

By late May this had evolved into the language of the middle column, which was H.R. No. 127. Notice that the provision in Section 2 for eventual black suffrage was gone. Instead, Owen's apportionment penalty for disfranchisement in Section 3 moved up to become Section 2 in H.R. 127. The hole for Section 3 that was thereby left open was now filled by a provision for excluding ex-rebels from politics.

Table One About Here

The Citizenship Clause

As for Section One in H.R. 127, notice again, in the row for Section One, that there is no definition of citizenship, just as there was no such definition in the Owen draft. That definition of citizenship was added in the Senate. The final language of the 14th Amendment, in the rightmost column of the table, contains the Citizenship Clause, which is italicized and underlined.

The move that started the process of inserting the Citizenship Clause came on May 23rd, 1866, after Sen. Jacob Howard (R-MI) reported H.R. 127 and spoke on it for two hours.

When Howard finished, and after one amendment on another section of the draft was offered, Sen. Ben Wade rose and offered an amendment to Section One. He proposed to strike the word "citizens." Here is where one sees that Reverdy Johnson's claim -- that *Dred Scott* was still the law of citizenship – had made a strong impression on Wade. He had repeated the claim, moreover, in an arresting way earlier in the 39th Congress.

Johnson repeated his claim about *Dred Scott* in late January, 1866, when the Senate was considering the Civil Rights Act of 1866, as reported from and amended by the Judiciary Committee. It strikingly and elaborately defined citizenship.

The Civil Rights Act of 1866 reads:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[xl]

Reverdy Johnson objected to this sort of statutory definition. In his view, the Civil Rights Act did not supersede *Dred Scott.*

> "The particular question before the Senate is the amendment suggested by the honorable chairman of the Judiciary Committee...By that amendment he proposes to define citizenship. Nobody is more willing to admit that it is very desirable that such a definition should be given. Since the decision in the case of Dred Scott, as the Senate are aware, a person of African descent, whether

> born free or not, whether free by birth *or free by after events,* is not, within the meaning of the Constitution of the United States, a citizen."

After briefly summarizing the holding for the Court, Johnson continued:

> "If the Supreme Court decision is a binding one and will be followed in the future, this law which we are now about to pass will be held of course to be of no avail, as far as it professes to define what citizenship is...My own opinion, therefore, *is that the object can only be safely and surely attained by an amendment of the Constitution*...I am very much afraid that, so far from settling the question by this legislation, we shall find that if the legislation is adopted the matter will be just as open to controversy as it was before."[xli]

Although several months had intervened, Wade seemed to be answering this idea when he stood up to offer his amendment on May 23, 1866.

> "In the first section of the proposition of the committee the word 'citizen' is used. That is a term about which there has been a good deal of uncertainty in our Government. The courts have stumbled upon the subject, and even here, at this session, it is still regarded by some as doubtful. I regard it as settled by the civil rights bill, and indeed, in my judgment, it was settled before. I have always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States; *but by the decisions of the courts there has been a doubt thrown over that*

> *subject;* and if the Government should fall into the hands of those who are opposed to views that some of us maintain, those who have been accustomed to take a different view of it, they may construe the provision in such a way as we do not think it liable to construction at this time, unless we fortify and make it very strong and clear....
>
> In the first clause of the amendment which I have submitted, I strike out the word 'citizens' and require the States to give equal rights and protection of person and property *to all persons born in the United States or naturalized under the laws thereof.* That seems to me to put the question beyond all doubt." [Emphasis added]

After a brief interjection from Sen. William Pitt Fessenden (R-ME), Wade continued:

> "I think it better to put this question beyond all doubt and all cavil by a very simple process, such as is the language of the first section of the amendment I have offered. I do not know that the corresponding section reported by the committee would leave the matter very doubtful; but that which I have proposed is beyond all doubt and all cavil."[xlii]

Debate continued, however, on issues unrelated to the "beyond all doubt" idea expressed by Wade. Eventually a large number of amendments were offered. To handle and resolve all of the amendments, the Senate Republicans met in a series of closed caucuses over the course of 3 days. Within a week they resolved their differences to the point of appointing a 5-man committee which reported back the final draft of the Amendment. The caucus tweaked it but approved it within an hour.[xliii]

On May 30th Sen. Howard re-introduced the Amendment. Noting the Citizenship Clause, he said,

> "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country."[xliv]

Senator James R. Doolitle (R-WI) immediately sought to amend the Citizenship Clause in order to exclude Indians. Several of his co-partisans resisted. Reverdy Johnson rose to support the idea. But before he got around to that he thought it appropriate to speak more generally:

> "...while I am up, and before I proceed...I will say a word or two upon the proposition itself; I mean that part of section one which is recommended as an amendment to the old proposition as it originally stood.
>
> The Senate are not to be informed that very serious questions have arisen, and some of them have given rise to embarrassments, as to who are citizens of the United States, and what are the rights which belong to them as such; and the object of the amendment is to settle that question...*I know no better way of accomplishing that than the way adopted by the committee...*that would seem to be not only a wise but a necessary provision. If there are to be citizens of the United States entitled everywhere to the character of citizens of the United States there should be some certain definition of what citizenship is... I am, however, by no means prepared to say, as I

> think I have intimated before, that being born within the United States, *independent of any new constitutional provision on the subject*, creates the relation of citizen to the United States."[xlv]
> [Emphasis added.]

In other words, Reverdy Johnson congratulated himself. His Republican colleagues who had earlier criticized his view of *Dred Scott* – this may have been the point of his oblique reference to "embarrassments" -- had in large measure come around to his view concerning *Dred Scott*. Johnson had argued that *Dred Scott* was good law until it was overruled via constitutional amendment. Without an Article V amendment of the Constitution *Dred Scott* had precedential potency, so he suggested in January, that might lead to subsequent judicial invalidation of the Civil Rights Act of 1866, which defined citizenship by statute. It must have been with some satisfaction that Johnson heard his erstwhile nemesis Ben Wade propose – months after Johnson's statement on the floor of constitutional amendment claim – an amendment to Section One of the 14th Amendment that would put "beyond all doubt and all cavil" the question of who was entitled to United States Citizenship. A week later, Reverdy Johnson had the further satisfaction of pointing out that the insertion of the Citizenship Clause "was not only a wise *but a necessary* provision." [Emphasis added.]

As Saulsbury of Delaware remarked during that same debate, somewhat bitterly,

> "I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that negroes shall be citizens of the United States... that is evidently the object."[xlvi]

<u>Why Did Reverdy Johnson's Opponents Concede the Point?</u>

Why did the Senate Republican caucus come to accept the idea that Section One of the 14th Amendment required the addition of the Citizenship Clause in order to place "beyond all doubt and all cavil"? There is no direct evidence to answer the question. But it seems plausible to think that the small size of the Senate – its intimacy and thus a context which fostered interpersonal persuasion – was the decisive factor.

One way to appreciate this is to look at Figure One, which shows the layout of the Senate floor. Johnson's seat, you will notice, is toward the upper left.

Figure One About Here

The layout of the Senate floor shows how remarkably small and intimate the setting on the floor was. The chamber itself was new and considerably grander – with higher ceilings and larger galleries -- than the previous chamber. But on the floor Senators were still in close physical contact. The setting promoted reflection on what members were arguing – particularly if they argued a point with flair and distinction.

Another way to appreciate the role that the Senate's distinctiveness played in the making of the Citizenship Clause is to ask: *outside* the Senate was there spontaneous concern about the precedential danger posed by *Dred Scott*? Did other key actors – the President, House leaders, the Chief Justice and successor to Roger Taney – similarly articulate the idea that the decision might require an Article V amendment of the Constitution to be overridden?

To some extent, we already have an answer in the earlier discussion of the 14th Amdendment and its "platform" 5-part structure, which (to recall) included a clear promise to the burgeoning veterans' organizations coming onto the political scene in 1866. For the

great majority of Republicans the whole point of the 14th Amendment was to provide a platform around which to rally.

Still, did anyone else see what Sen. Reverdy Johnson -- and eventually Sen. Ben Wade and other Senate Republicans -- saw?

The issue might have come up in President Andrew Johnson's veto message, when he vetoed the Civil Rights Act of 1866 (subsequently overridden.) President Johnson might have thought to argue in the message that due to *Dred Scott* only a constitutional amendment would suffice for definition of citizenship, not the Civil Rights Act—but President Johnson did not mention or even allude to *Dred Scott.* The supposed unconstitutionality of the statute for President Johnson was in what he considered its destruction of federalism.[xlvii]

It might have come up in early May, in the House debate over the 14th Amendment, but there was no reference at all to *Dred Scott* during debate.[xlviii] Nor did it come up when Thaddeus Stevens presented the new Senate draft, with its Citizenship Clause, to the House on June 13th. He merely stated:

> "A few words will suffice to explain the changes made by the Senate in the proposition which we sent them.
>
> The first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States."[xlix]

What about outside the House, the Senate, and the White House – in particular on the Supreme Court? One key actor outside Congress who might have been especially concerned about the precedential force of *Dred Scott* was Chief Justice Salmon P. Chase, nominated by Lincoln on December 4, 1864 (after Taney's death at age 87 on October 12th).

Writing to his Court colleague, Associate Justice Stephen J. Field, on April 30th, Chase divulged that he had sought to intervene in the amendment-making process.

> "What do you think of the plan of reconstruction or rather of completing reconstruction presented by the Committee of Fifteen? To me it seems all very well provided it can be carried; but I am afraid that it is, as people say, rather too big a contract. So far as I have had opportunity of conversing with Senators and Representatives I have recommended to confine Constitutional Amendments to two points, (1) No payment of rebel debt and no payment for slaves, and (2) No representation beyond the constituent basis. And, as so many were trying their hands at form – I drew up these two amendments according to my ideas...And I proposed further that the submission of this article to the States should be accompanied by a concurrent resolution..."

Chase then considered key elements of the proposed amendment:

> "(1) Prohibiting the States from interfering with the rights of citizens (2) Disfranchising all persons voluntarily engaged in rebellion... and (3) ... granting express legislative power to Congress to enforce all the new constitutional provisions."

On the critical question of what he thought specifically about them, he wrote:

> "I do not myself think that any of the proposed amendments will be likely to have injurious effects, unless it be the sweep of the disfranchisement: but I repeat that I fear the undertaking of too much; *and I add that it seems to me that nothing is gained sufficiently important and unattainable by legislation,* to warrant our friends in overloading the ship with amendment freight." [Emphasis added][1]

Chief Justice Chase's thought here -- that "nothing is gained sufficiently important and unattainable by legislation" through Section One – speaks of course to whether *Dred Scott* was salient to politically well-informed people in 1866. Senators Howard, Johnson, and Wade would soon be concerned about placing black civil rights "beyond all cavil." But Chief Justice Chase was evidently *not* thinking about civil rights from within that framework. H.R. 127 was fine as it was.

After the insertion of the Citizenship Clause did Chase notice what had happened and remark on it? No: writing in early June to his daughter Chase predicted that Congress would report the "Reconstruction programme...now before the Senate," adding, "My opinion is that it covers too much ground, & proposes several propositions which are either already in the Constitution, or unnecessary to the main object, reorganization of the Union by the restoration on just terms of the States in rebellion. *Still I see nothing which will do harm in the plan if adopted."* [Emphasis added] Since Sections 2-4 were clearly not "already in the Constitution," Chase must have been referring to Article One when he wrote that the "programme...proposes several propositions which are...already in the

Constitution." But these superfluous "propositions" were unlikely to "do harm…if adopted."[li]

If the Chief Justice saw a connection between the Citizenship Clause and *Dred Scott* he was not telling his daughter about it. Remarkably, it is not even clear that Chief Justice Chase was thinking about either the Senate debate or the significant insertion of the Citizenship Clause. He seemed to regard the 14th Amendment entirely as a party platform.

In summary, there seems to be fairly strong circumstantial evidence that the Senate's distinctiveness as a chamber incubated the idea that the Citizenship Clause was necessary and that it overrode *Dred Scott* – which otherwise, without the override, had precedential weight that would continue to affect the law of citizenship. Outside the Senate, in contexts and in the minds of key figures who one would think might well have spontaneously connected the need for a definition like the Citizenship Clause and the case, there is no evidence of a concern with the precedential moment of *Dred Scott.* The idea that it had precedential force which required high constitutional response by Congress was Sen. Reverdy Johnson's idea – an idea that came, because of the interpersonal dynamics of the Senate, to affect the thinking of his Republican colleagues, and to inform the making of the Citizenship Clause.

The Consequences of Concession: The Contested Seating of Hiram Revels

I have argued that the insertion of the Citizenship Clause in late May 1866 was a *concession* – a partial (but for Johnson satisfying) concession by Senate Republicans to Reverdy Johnson's claim that *Dred Scott* was good law which defined the citizenship status of African-Americans unless and until it was overridden by Article V amendment of the Constitution. In the 41st Congress, however, Senate Republicans had occasion to rue the

concession. They found then that their Democratic opponents were quick to point out that they had made a grant of some magnitude.

In Winter, 1870, Hiram Revels arrived in Washington to present his credentials to the Senate. He was a black preacher educated in the North who (as the cunning of history would have it) had served as chaplain to a black Union Army regiment raised in Maryland.[lii] After the war he moved to Mississippi and became politically active there. He had been elected to the Senate by the Mississippi legislature to claim the seat previously held by Jefferson Davis. When he presented his credentials and sought to claim his seat, a debate that casts light on the concession of 1866 occurred.[liii]

The first move in the deliberation was the claim that *Dred Scott* was actually still unrepealed. Thus Revels was not even a citizen. Sen. Garrett Davis (D-KY) objected:

> "…it is considered almost sacrilege to read from…the Dred Scott case…Well, I view the matter very differently…I say that Revels is not a citizen under your legislation…He is not a citizen by one of the most learned, argumentative, powerful, and conclusive opinions that was ever written upon that bench."[liv]

This was a weak argument, and Senator James Nye (R-NV) explained why:

> "Sir, I never expected to hear read in the Senate of the United States…the Dred Scott decision…What, sir, the Dred Scott decision authority in the United States! Sir, it has been repealed by the mightiest uprising which the world has ever seen…it is too late for the honorable Senator…to rescue that decision from the oblivion to which it is condemned."[lv]

But Sen. George Vickers, Democrat of Maryland soon figured out how to rescue *Dred Scott* and bring it to bear on whether Hiram Revels "has been a citizen of the United States for nine years." (Reverdy Johnson resigned in 1868 so he was not there.) If Revels had not been a citizen for 9 years he could not, under Article 1, Section 3, take the Senate seat:

> "No person shall be a Senator who shall not have…been nine years a Citizen of the United States…"

Asserting that the *Dred Scott* decision "stands unrepealed, and is the adjudicated law of the land," and thus not giving away Davis's claim, Vickers went into a long exposition and defense of the case. But then he shifted onto the ground that his mention of whether Revels had been a citizen for 9 years took him to:

> "I am not apprised whether…the civil rights bill or the fourteenth amendment made these people free from birth; in other words, *that this law and this amendment had a retroactive operation.*"[lvi]
>
> [Emphasis added.]

He then tacked back to *Dred Scott.* After asserting at some length that it was consistent with the views of "fathers of the Constitution," he unleashed his main and rather powerful point:

> "It was the conviction and judgment of the Republican party, in the force and legality of the decision…that brought them to the ordeal and necessity of a civil rights bill and constitutional amendment….Why was the civil rights bill passed? Why was the fourteenth amendment proposed and accepted? If these people were…citizens, why did you declare by your civil rights bill and your constitutional amendment that they are citizens of the United

> States? Would it have been necessary to do this? Would it not have been a work of supererogation? Where was the necessity if they were already citizens?... After the civil rights bill was passed and when it passed there were serious objections to it. It was doubtful in the minds of many whether grants by legislative enactment could make a citizen of the United States; whether it did not require a constitutional amendment to make them such; and the better opinion was that it did require it, because by the Constitution they were not made citizens. You proceeded on the very ground that it was absolutely requisite that the amendment should be made which made the party now claiming his seat a citizen of the United States from the time of its approval only; from that time he became a citizen; *and as nine years have not lapsed*, how can we, upon our oaths and in view of the decisions of the Supreme Court...say that in our opinion he was a citizen of the United States before the passage of the civil rights bill or of the fourteenth constitutional amendment?"[lvii] [Emphasis added]

There were two moves to get out of this trap, and Sen. John Scott (R-PA) took them both. First, *Dred Scott* did not settle anything when it was handed down. African-Americans were therefore in principle able to be citizens before the decision, and after.

Scott effectively took the antebellum Republican position about *Dred Scott* in other words – and the position that Hale, Sumner, and Wade held in the 38th Congress: *Dred Scott* was not good law.

As a corollary, and second, both the Civil Right Act of 1866 and the 14th Amendment were "declaratory law" which is why they used the "present tense:" "'all persons' 'are citizens of the United States' … These were…declaratory acts, not enactments simply to take effect in the future, but declaring what was the sense of Congress and of the people at the date of their enactment."[lviii]

In the end of course Hiram Revels was seated, and he became the first African-American to be seated in Congress. Republicans did not – indeed they could not -- concede that they had made a concession in 1866. Recognizing the force of what Vickers said – that they had come to an important conceptual compromise in 1866 -- would have prevented the seating of Hiram Revels on a principled basis. So, when Vickers confronted them with their own history they rehearsed the view that *Dred Scott* was not good law – and they also developed an explicitly textual reading of the Citizenship Clause.

For our purposes, what the episode and the debate show are that the concession to Johnson during the 39th Congress was very much alive in the minds of Senate Democrats, and not least in the mind of Reverdy Johnson's fellow Marylander, George Vickers. His extended argument was one that Johnson himself might have made had he still been in the Senate.

Conclusion

Today many read the Citizenship Clause and rejoice that it overruled *Dred Scott*. But to do so equates *Dred Scott* and Article V amendment as constitutional equals. Before the 39th Congress, in the 38th, Republican members of the Senate were utterly loath to give any validity at all to *Dred Scott*, much less to consider it on a par with an Article V amendment. To treat *Dred Scott* as *that* valid would have meant getting sucked into – in Sumner's phrase – "the very spirit of evil."

By the 39th Congress, however, Senate Republicans had had time to think about the matter. Johnson had after all argued that they should be faithful to judicial review and the rule of law:

> "...it is no light thing to assail the Chief Justice of the United States or that high tribunal. We have an interest, jurisprudence has an interest, justice has an interest, the nation has an interest in maintaining the character of that tribunal against all unjust approach."

This was a powerful stance to take. Coming from a former Attorney General and one of the great constitutional lawyers of the age – from a key participant in the litigation – it demanded being taken seriously. In the 39th Congress, Reverdy Johnson, the Devil's Advocate, argued as well for the idea that only a constitutional amendment would block *Dred Scott* from being cited in any judicial review of a statutory enactment of African-American citizenship.

Today judicial review is common, deeply woven into American politics and law. Then, though, experience with judicial review was still new and very controversial. If anyone in the 39th Congress Senate was an authority on judicial review it was, of course, Reverdy Johnson. In an era when politicians' experience with judicial review was far less than today, his forecast of what might happen if *Dred Scott* were not constitutionally overturned via Article V definition of citizenship must have seemed all too plausible to Republican colleagues.

Johnson's Republican colleagues did not, to be sure explicitly and wholeheartedly agree with Johnson. But they recognized what he was saying – and so they amended H.R. 147 and inserted the Citizenship Clause which is there today.

In thus identifying and recovering Reverdy Johnson's previously unrecognized influence on the constitutional law of citizenship, this paper offers a new interpretation of the Citizenship Clause. No previous scholarship makes the claim I make. The reason has been that no one has been looking for Reverdy Johnson.

Until now scholars have been inclined to see Republicans as significantly and continuously worried about *Dred Scott* from the moment it was handed down.[lix] Thus the insertion of the Citizenship Clause has been portrayed as a decisive act of constitutional statesmanship. To recall, Akhil Reed Amar writes of the Citizenship Clause, "As every schoolchild learns (or should learn), this sentence was put in the Constitution to repudiate in the most emphatic way the vile holding of *Dred Scott*..."[lx] Fanciful, but rather revealing, is the supposition of two writers that "the Reconstruction Congress frequently stated that the purpose of constitutional reform was to cure, as they called it, 'Dred-Scott-itus.'"[lxi]

To us, today, such interpretations make a lot of sense. But they make sense to us today because we have become accustomed to judicial supremacy – to what Reverdy Johnson argued for, in fact. We readily believe that the Supreme Court dispositively defines the Constitution's meaning.[lxii]

But our modern sensibility does not reckon with the great depth of Republican hostility to *Dred Scott*. As the Pittsburgh Gazette had editorialized in 1857, "We shall treat the so-called decision of that Court as an utter nullity. It is not law, and it has no binding force upon either the people or the government. It is not an authoritative interpretation of the Constitution, nor is it, legally, a decision entitled to any weight whatever." Similarly, in the 38th Congress, Reverdy Johnson's views earned him denunciation and quite elaborate insult.

The connection between *Dred Scott* and the Citizenship Clause is, then, a political invention, forged from the materials of legislative deliberation and from how the Senate's distinctiveness heightens the dynamics of persuasion and debate. It resulted -- more than we have known -- from Reverdy Johnson's persistence.

It was picked up later, as we have seen, by the Supreme Court, in the *Slaughterhouse Cases*. Interestingly, Justice Samuel Miller, conscious as he was of the gravity of interpreting the 14th Amendment for the first time, actually referred to "the celebrated *Dred Scott* case." He saw – and evidently took -- an opportunity to sketch a stately process of constitutional evolution: (1) *Dred Scott* to (2) the 14th Amendment to (3) his judicial interpretation for the Court of Section One. Doing so gave him an advantage in containing the quite passionate demands in the *Slaughterhouse* briefs which he read and in the oral argument for the widest possible interpretation of Section One.[lxiii]

But *in May 1866* taking *Dred Scott* seriously was a concession *by Senators to another Senator*. The lack of awareness among other constitutional actors underscores the institutional location and origin of the concession. President Johnson did not refer to *Dred Scott* when he vetoed the Civil Rights Act of 1866. When Thaddeus Stevens presented the Citizenship Clause to the House he seemed unaware of what had informed its insertion into Article One. Chief Justice Salmon P. Chase, Roger Taney's successor, did not notice or remark on what the Senate had done. To him, at that moment, the 14th Amendment was still a party platform for the 1866 elections. These striking silences reinforce the hypothesis that the chemistry of the Senate produced the concession by the Senate Republican caucus to Reverdy Johnson's claims.

By bringing together, on the one hand, the sensibility of a congressional developmental scholar and (on the other) the preoccupations of constitutional lawyers, we can see the

Citizenship Clause with new eyes. We see that it encodes a certain fidelity to the constitutional law of the antebellum slave republic. We see, too, that Reverdy Johnson was a switchman in the development of the American law of citizenship – present twice at key moments in its formation. Finally, we see how American bicameralism critically influenced – in a way that could not have been foreseen at the close of the Civil War – the formal-legal development of American citizenship.

Table One: Bicameral Evolution of the Fourteenth Amendment, Spring 1866			
	Owen Amendment (in House)	*H.R. 127*	*Senate (and Final) Version*
Section One	No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.	No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.	*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.* No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section Two	From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.	Representatives shall be apportioned among the several states which may be included in the Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.	Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
Section Three	Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.	Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representative in Congress and for electors for President and Vice-President of the United States.	No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive and judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.
Section Four	Debts incurred in aid of insurrection or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any state nor by the United States.	Neither the United States nor any State shall assume or pay any debt or obligation already incurred, in aid of insurrection or of war against the United States, or any claim of compensation for loss of involuntary service or labor.	The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section Five	Congress shall have power to enforce by appropriate legislation the provisions of this article.	The Congress shall have power to enforce by appropriate legislation the provisions of this article.	The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Sources: Column One: Robert Dale Owen, "Political Results From the Varioloid: A Leaf of History," Atlantic Monthly June 1875, pp. 660-670; Column Two: The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on 13th, 14th, and 15th Amendments (Richmond: Virginia Commission on Constitutional Government, 1967), p 218, reproducing Congressional Globe May 23, 1866, S.p. 2764; Column Three: U.S. Constitution

FIGURE 4-3. Seating changes from the Thirty-seventh Senate to Thirty-eighth Senate, first session

Movement ----
New member: Thirty-eighth Senate, first session ★

Allan G. Bogue, The Earnest Men: Republicans of the Civil War Senate (Ithaca: Cornell University Press, 1981), p. 151.

ENDNOTES

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[i] For more see Mark A. Graber, Dred Scott and the Problem of Constitutional Evil (New York: Cambridge University Press, 2006).

[ii] J. M. Balkin, "Agreements with Hell and Other Objects of Our Faith," Fordham Law Review 65 (March 1997): 1703-1738, pp. 1703-1706, phrases at 1705 and 1706 respectively.

[iii] Among other sources, see Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement (Chicago: University of Chicago Press, 2004), ch. 2.

[iv] On these sorts of differences that size makes, see Ross K. Baker, House and Senate (New York: W.W. Norton, 1989), esp. ch. 2.

[v] See Allan G. Bogue, The Earnest Men: Republicans of the Civil War Senate (Ithaca: Cornell University Press, 1981), Part 1, esp. pp. 30-31 and 129-131.

[vi] See discussion at pp. 21-23, below.

[vii] 83 U.S. (16 Wall.) 36 [1873], at 83 U.S. 73.

[viii] Akhil Reed Amar, "Intratextualism" Harvard Law Review 112 (February 1999): 747-827, at 768.

[ix] Michael P. O'Connor, "Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause" Kentucky Law Journal 93:3 (2004-2005): 659-736, at pp. 698 and 700.

[x] 413 U.S. 652, in dissent.

[xi] Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (New York: Oxford University Press, 1978), p. 417.

[xii] http://history.furman.edu/benson/docs/papgds57307b.htm, The Dred Scott Case (1867), Secession Era Editorials Project, Nineteenth Century Documents Project.

[xiii] Fehrenbacher, Dred Scott Case, p. 419.

[xiv] Bernard C. Steiner, Life of Reverdy Johnson (Baltimore: The Norman, Remington Co., 1914), p. 38; p. 10 for the start of his friendship with Taney. Fehrenbacher, Dred Scott Case, pp. 288 and 294 on briefing and argument.

[xv] James M. McPherson Tried By War: Abraham Lincoln as Commander in Chief (New York: The Penguin Press, 2008), pp. 25-28, 30-31, 49.

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xvi David R, Mayhew, America's Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich (New Haven: Yale University Press, 2000).

xvii The search instruction in Lexis-Nexis Academic/Legal was: Dred Scott w/15 Amendment. This generated a list of 144 articles which were scanned to ascertain whether they contained what we call the *Dred Scott* claim. 125 of these made the claim; 8 offered another causal account, and the rest (11 in all) coded differently upon examination. To the list of 125 we added a 126th article which made the claim and which we happened to find serendipitously. Our search suggests that 126 is the smallest number of articles which offer the claim, and it likely also suggests that 8 is the smallest number of legal periodical articles that offer a different historical account. We also found many monographic sources which either make the claim or offer an alternative, but we do not include them in our count. Our list of sources with relevant extracts are available on request.

xviii One highlights Judge Minor Wisdom's famous claim that *Brown v. Board* finally invalidated *Dred Scott* (Allen D. Black, "Judge Wisdom, the Great Teacher and Careful Writer," Yale Law Journal 109 (April 2000): 1267-1272, at 1269); another that Congress intended to constitutionalize the Civil Rights Act of 1866 (Jack Wade Nowlin, "The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis," Kentucky Law Journal 89 (Winter 2000/2001): 387-476, at 449); and yet another stresses that events rendered *Dred Scott* a dead letter, i.e. that there was no intent to overrule *Dred Scott* worth remarking (Louis Fisher " Nonjudicial Safeguards for Religious Liberty," University of Cincinnati Law Review 70 (Fall 2001): 31-94, at 35-36.)

xix A subtle and instructive introduction is Christopher L. Eisgruber, "Judicial Supremacy and Constitutional Distortion," in Sotirios Barber and Robert P. George, eds., Constitutional Politics: Essays on Constitution Making, Maintenance, and Change (Princeton: Princeton University Press, 2001), pp. 70-90.

xx Lea VanderVelde and Sandhya Subramanian, "Mrs. Dred Scott," Yale Law Journal 106 (January 1997): 1033-1122, fn. 3. The phrase "Dred Scott-itus" nowhere appears in the record of debate for the 39th Congress.

xxi Congressional Globe 38th Congress, First Session, vol. 34, pt. 2, p. 1362.

xxii *Ibid*, p. 1363.

xxiii *Ibid.*

xxiv *Ibid*, p. 1364.

xxv *Ibid.*

[xxvi] This episode is also recounted, though not as fully, in Fehrenbacher, Dred Scott Case, pp. 578-579.

[xxvii] Congressional Globe, 38th Congress, 2nd Session, Vol. 35, pt. 2, p. 1013.

[xxviii] *Ibid.*

[xxix] *Ibid*, p. 1014.

[xxx] *Ibid*, p. 1015.

[xxxi] *Ibid.*

[xxxii] *Ibid*, p. 1016.

[xxxiii] *Ibid.*

[xxxiv] *Ibid*; also, Fehrenbacher, Dred Scott Case, p. 578, and H.L Trefousse, Benjamin Franklin Wade: Radical Republican from Ohio (New York: Twayne Publishers, Inc., 1963), pp. 239-40.

[xxxv] Congressional Globe, 38thth Congress, 2nd Session, p. 1017.

[xxxvi] Mary R. Dearing, Veterans in Politics: The Story of the G.A.R. (Baton Rouge: Louisiana State University Press, 1952), ch. 3.

[xxxvii] James G. Blaine, Twenty Years of Congress: From Lincoln to Garfield. With a Review of The Events Which Led to the Political Revolution of 1860. Vol. II (Norwich, Conn.: The Henry Bill Publishing Company, 1893), pp. p. 233.

[xxxviii] Richard William Leopold, Robert Dale Owen: A Biography (Cambridge: Harvard University Press, 1940), chs. 21-22.

[xxxix] See also Earl M. Maltz, "The Fourteenth Amendment as Political Compromise – Section One in the Joint Committee on Reconstruction," Ohio State Law Journal 45: 4 (1984): 933-980, at 948-949.

[xl] Text available online at http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1866.html

[xli] The Reconstruction Amendments' Debates, pp. 127-128, reproducing Congressional Globe 39th Congress, 1st Session, January 30, 1866, Senate page 504.

[xlii] The Reconstruction Amendments' Debates, reproducing Congressional Globe, 39th Cong., 1st Sess., May 23, 1866, Senate page 2768.

[xliii] Joseph B. James, The Framing of the Fourteenth Amendment Illinois Studies in the Social Sciences: Volume 37 (Urbana: The University of Illinois Press, 1956), ch. 10, "Senate Parley," esp. pp. 138-141.

[xliv] The Reconstruction Amendments' Debates, p. 223, reproducing Congressional Globe 39th Cong., 1st Sess., May 30, 1866, Senate page 2890.

[xlv] *Ibid*, p. 226, reproducing Congressional Globe 39th Cong., 1st Sess., May 30, 1866, Senate page 2893.

[xlvi] *Ibid*, p. 229, reproducing Congressional Globe 39th Cong., 1st Sess., May 30, 1866, Senate page 2897.

[xlvii] Andrew Johnson, Veto Message, March 27, 1866, at John T. Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database.) Available at: (http://www.presidency.ucsb.edu/ws/?pid=71978).

[xlviii] The Reconstruction Amendments' Debates, pp. 211-218.

[xlix] "Speech on the Fourteenth Amendment, June 13, 1866, in Congress," in Beverly Wilson Palmer, ed.; Holly Byers Ochoa, assoc. ed., The Selected Papers of Thaddeus Stevens Volume 2: April 1865-August 1868 (Pittsburgh: University of Pittsburgh Press, 1998), p. 157.

[l] "To Stephen J. Field," [April 30 1866], in, John Niven, ed., The Salmon P. Chase Papers Vol. 5 – Correspondence, 1865-1873 (Kent, OH: Kent State University Press, 1998), pp. 88-89.

[li] "To Janet Chase" [June 5, 1866], in Niven, ed., Chase Papers Vol. 5, pp. 102-105, at 104.

[lii] Philip Dray, Capitol Men: The Epic Story of Reconstruction Through the Lives of the First Black Congressmen (Boston and New York: Houghton Mifflin Company, 2008), p. 61.

[liii] For an interesting discussion of this moment, see Richard A. Primus, "The Riddle of Hiram Revels," Harvard Law Review 119 (April 2006): 1681-1734.

[liv] The Reconstruction Amendments' Debates, p. 426, reproducing Congressional Globe, 41st Cong., 2nd Sess., Feb. 23, 1870, Senate page 1510.

[lv] Reconstruction Amendments' Debates, p. 428, reproducing Congressional Globe, 41st Cong., 2nd Sess., Feb. 24, 1870, Senate page 1513.

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lvi Reconstruction Amendments' Debates, p. 429, reproducing Congressional Globe, 41st Cong., 2nd Sess., Feb. 25, 1870, Senate page 1557.

lvii Reconstruction Amendments' Debates, p. 431, reproducing Congressional Globe, 41st Cong., 2nd Sess., Feb. 25, 1870, Senate page 1560.

lviii Reconstruction Amendments' Debates, p. 431, reproducing Congressional Globe, 41st Cong., 2nd Sess., Feb. 25, 1870, Senate page 1565.

lix Richard L. Aynes, "Unintended Consequences of the Fourteenth Amendment," in David E. Kyvig, ed., Unintended Consequences of Constitutional Amendment (Athens: University of Georgia Press, 2000), pp. 110-140, at pp. 113-115.

lx Amar, "Intratextualism," p. 768.

lxi VanderVelde and Subramanian, "Mrs. Dred Scott," fn. 3.

lxii Eisgruber, "Judicial Supremacy and Constitutional Distortion."

lxiii See the plaintiffs' briefs for the *Slaughterhouse Cases* in Philip Kurland and Gerhard Casper, eds., Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law Vol. 6 (Arlington, VA: University Publications of America, Inc., 1975); also, see Christine Jordan, "Justice John Campbell: Last of the Jacksonians," The 1980 Supreme Court Historical Society Yearbook/History Journal, pp. 123-142, esp. pp. 132-139, available online as a PDF download at http://www.supremecourthistory.org/publications/supremecourthistory_publications_archives.htm Former Supreme Court Justice John Campbell wrote several of the plaintiffs' brief. More generally, for introduction to enduring curiosities of the case, see Richard L. Aynes, "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the *Slaughterhouse Cases"* Symposium on the Law of Freedom Part I Chicago Kent Law Review 70: 2 (1994): 627-688.