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Fragmented Citizenship in a Fragmented State: Ideas, Institutions, and the Failure of Reconstruction

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Ideas, Institutions, and the Failure of Reconstruction

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Abstract

In the United States, citizenship as a theory has been constantly subject to contestation and disagreement. However, because recognition by a political institution is necessarily prior to any more substantive notion of citizenship, the state plays a key role in the regulation and definition of citizenship. Research in American Political Development (APD) suggests that political institutions and ideas often conflict, and define state institutions as constantly in flux and constantly developing (rather than in equilibrium) as different ideas and governing authority vie for permanence and durability within the institutional structure. Scholars of APD have pointed out that institutional structure allows for endogenous development as political entrepreneurs and social movements exploit the frictions created by institutional misalignments. Ideational development in the polity marks a shift in authority, but because the state is so fragmented, old ideas never die. In light of these theoretical characterizations of the relationship among institutions, ideas, and entrepreneurial actors, this thesis examines citizenship as an idea during and after Reconstruction (1863-1876). This thesis suggests that the contestation over the meaning and content of citizenship status between the Republican-led Congress, the president, state governments, social movements like the KKK, and the judiciary that took place during Reconstruction not only leads to an endogenous explanation for its failure, but also sheds light on how the fragmented state leads to a fragmented and inevitably unsettled definition of U.S. citizenship.

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Introduction

Rethinking Reconstruction's Failure: Developmental Citizenship and Institutional Change

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In July, 2014, I sat in the gallery of a courtroom in the Albuquerque courthouse of the United States District Court for the District of New Mexico and watched families being split apart. I sat quietly as fathers who had crossed the border with Mexico illegally to be with their families were ordered back to Mexico by a judge. The families sat near me in the gallery: a grandmother, weeping quietly; a mother in resolute shock; the children largely unaware of the gravity of the situation. I watched men brought before the judge in orange jumpsuits and chains speak in short sentences through a translator, explaining to the judge they knew what they had done was wrong and that they promised to not return illegally. They were not citizens, despite desperately wanting to be. They had crossed the border to find work so they could bring money home to their families. Their children were citizens, and the mothers were likely green-card holders. But here was a federal district judge, an official of the American state, enforcing the boundaries of American citizenship, and telling these men they were not within those boundaries. My curiosity about the interaction between the American state and the meaning of citizenship in the United States had been piqued.

With the 2015 decision in *Obergefell v. Hodges*[1] the Supreme Court agreed that denying the right to marry to same-sex couples was an unconstitutional act, thus granting gay couples a right previously denied to them. Mary Bonuato began her oral argument on behalf of the petitioners in *Obergefell* with rhetoric of how the denial of a right to a certain class of persons relegates them to an inferior status: "If a legal commitment, responsibility and protection that is marriage is off limits to gay people as a class, the stain of unworthiness that follows on individuals and families contravenes the basic constitutional commitment to equal dignity."[2] Bonuato continued her argument by invoking

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[1] 576 U.S. ____ (2015).

[2] *Obergefell v. Hodges* 576 U.S. ___ (2015) Oral Argument Transcript. 14-556. April 28, 2015, 4.

the Fourteenth Amendment: "Indeed, the abiding purpose of the Fourteenth Amendment is to preclude relegating classes of persons to second-tier status."[3] Bonuato's invocation of one of the Reconstruction Amendments in reference to tiers of persons in the United States raises more questions about the nature of citizenship. Specifically, it opens the door to understanding how and why the boundaries of citizenship in the United States can be contested by the state. We must ask how the institutions of American governance have shaped the meaning of U.S. citizenship. How have these institutions defined the meaning and content of that status?

Attempting to answer this question leads to an unusual realization. In his canonical work *Civic Ideals*, Rogers Smith shows how citizenship has been defined differently throughout U.S. history.[4] He suggests that American political cultures is comprised of several, conflicting understandings of citizenship that ebb and flow between each other. One definition of citizenship becomes more popular for a period of time, only to be supplanted by another. Smith documents how these multiple traditions of citizenship have fluctuated through U.S. history. Through his work, I began to understand how and why these traditions — civic republican, liberal democratic, and ascriptive — explained how the state might grant rights to make gay couples fuller citizens, but also simultaneously deport men who had crossed the the border to find work. Smith's work gave me an opportunity to explore a more comprehensive account of how and why the state manipulates the boundaries of citizenship.

Smith offers a compelling account of when and where different traditions of citizenship are more dominant than others, but is less helpful at explaining why dominant traditions differ over time. While the state could clearly hold different definitions of the content of citizenship at different times, when I saw the judge's decision to send home a man willing to work and earn a peaceful living for his family, I saw a rejection of civic republican values and inclusionary liberal values. When I saw the Supreme Court find bans on same-sex marriage unconstitutional a year later, I saw an endorsement of a liberal democratic tradition of citizenship. Smith's insight into multiple traditions

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[3] Ibid.

[4] Rogers M. Smith. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* (New Haven: Yale University Press, 1997).

potentially lacks explanatory power for this comparison. I saw tension between state institutions on deciding who was to be a citizen, and what being a citizen means. Luckily, Stephen Engel and others have suggested one common link between these two situations where the state exerts its power to define citizenship.[5] Both called upon the fundamental prior concept of recognition. These accounts of citizenship all take for granted the state's ability to *recognize* a person as a citizen. Regardless of what being a "citizen" means, a person cannot be a "citizen" without being recognized in the eyes of the state. As historian of sexuality Margot Canaday has shown, throughout the early to mid-twentieth century the state crafted policies that "crystallized homosexual identity, fostering a process by which certain individuals began to think of their sexuality in political terms, as mediating and mediated by their relationship to the state."[6] These policies were implemented to define who qualified as a citizen. Understanding citizenship as constituted, developed, and shaped by the state's recognition allowed me to begin to investigate the relationship between state institutions and ideas about citizenship.

Researching the interactions between citizenship as a developmental idea and the state requires an analytical lens that can account for institutional, ideational, and policy change over time. American Political Development (APD), a subfield of political science, offers just such a lens. At base, APD rejects the traditional assumption in political science that the normal condition of the polity is a stable equilibrium. Politics is *not*, APD argues, a condition of "punctuated equilibrium," where political stasis is sometimes disrupted by a shock to the system, such as a war, economic crisis, or famine, that forces political institutions to quickly readjust to address the shock, then reassume its condition of stasis. Rather, scholars of APD have shown that political change is always happening. Of course, shocks to the system do cause political institutions to change, but they are not the only sources of change. The analytical tools that APD scholars have developed to analyze political change provide a way to understand how citizenship can be defined by the state differently over time and even at the same time by different state institutions.

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[5] Stephen Engel. "Developmental Perspectives on Lesbian and Gay Politics: Fragmented Citizenship in a Fragmented State." *Perspectives on Politics* 13, no. 2 (2015): 287-311; Engel, Stephen. *Fragmented Citizens: Changing Recognition of Gay and Lesbian Lives*. (New York, NY: NYU Press, 2016. Forthcoming. Manuscript on file with Author).

[6] Margot Canaday. *The Straight State : Sexuality and Citizenship in Twentieth-Century America*. (Politics and Society in Twentieth-Century America. Princeton, N.J.: Princeton University Press, 2009), 10.

In this thesis, I investigate Reconstruction to understand this developmental relationship between state recognition of citizens and the changing meaning of citizenship. Mary Bonuato suggested in her argument before the Supreme Court in *Obergefell* that the Fourteenth Amendment plays a role in defining citizenship. Though at the beginning of my research it was not yet clear *what* that role is, unpacking that amendment — the the text, the process of ratification, and subsequent early challenges to its implementation — offered me a starting point. As political scientist Megan Ming Francis has pointed out, Reconstruction is presumed by scholars to be one of the "major periods in which the governing institutions of the United States were constructed and transformed."[7] This claim is no doubt true. Consequently, scholarship investigating Reconstruction abounds. Nevertheless, more recent work on the period that employs a developmental lens has shed light on the political forces at issue in Reconstruction. Political scientist Richard Valelly, for example, has argued that Reconstruction has much in common with the civil rights movement in the 1960s. Namely, he observed that a "sudden, large increase in rates of black voting and office-holding has taken place *twice* over the course of American political evolution."[8] The United States is, in fact, the only democracy in the world to enfranchise a group as large as its black population during Reconstruction, and then subsequently *disenfranchise* them soon after. The title of Valelly's book, *The Two Reconstructions: The Struggle for Black Enfranchisement*, suggests first that there are two periods in U.S. history where black enfranchisement has been a key issue. But it also reflects an ebb-and-flow of citizenship traditions.

Bridging the Gap Between Ideas and Institutions

Since Aristotle, voting has been understood to be an important element of citizenship. If voting rights are granted to an identity group and then taken away, then citizenship as an idea in the state has changed over time. In addition, it points out that citizenship development in the United States is *not* teleological or whiggish — it does not proceed uniformly toward an ideal end goal.

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[7] Megan Ming Francis. *Civil Rights and the Making of the Modern American State*. (New York, NY: Cambridge University Press, 2014), 16.

[8] Richard M. Valelly. *The Two Reconstructions : The Struggle for Black Enfranchisement*. (American Politics and Political Economy. Chicago: University of Chicago Press, 2004), 1.

Rather, citizenship in the United States is, just as Smith points out, subject to contestation across time and plagued by repeated invocations of ascriptive hierarchy. Reconstruction, a formative time for citizenship in the United States, therefore proved ripe for investigating from a developmental perspective. As Smith has argued, the multiple (three) traditions of citizenship in American political culture are

> visible not only in this complex, contested Reconstruction history, but also in the sharply divergent ways in which it has since been viewed….A multiple traditions perspective suggests instead that it was politically and intellectually reinvigorated white racism— and attachments to ascriptive hierarchies more generally— that played the most decisive role in stirring the largely successful opposition to these changes.[9]

Smith's argument shows multiple definitions of citizenship in contest, but he is less helpful at bridging the gap from ideas of citizenship to their institutional uptake.

Political scientist Brian Glenn explains how scholarship in the realm of American Political Development has often fallen into two separate camps.[10] The first is made up of scholarship known as "historical institutionalism." Scholars in this area study (1) "how actors make their way through the institutional setting," (2) "how institutions themselves change over time" and what mechanisms cause those changes, and (3) " the mechanisms of path dependency and positive (or negative) feedback loops."[11] The second camp is composed of "ideational scholars." These scholars have reminded us that "ideas matter for members of the cultural school, especially ideas about the nature of American identity, about 'us' and 'them' and about what 'we' the people owe each other versus what we owe outsiders."[12] Unfortunately, according to Glenn, "members of the two schools have learned little from one another."[13] APD scholarship rarely bridged the gap between them. This tendency leaves unexplored the intersection between ideas and institutions. As a result, not only have opportunities for analysis been overlooked, but current studies that exist solely in one camp or the other very likely remain incomplete. Indeed, work that bridges the two schools is demanding because

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[9] Smith (1997), 346.

[10] Brian Glenn. "The Two Schools of American Political Development." *Political Studies Review* 2 (2004): 153-65.

[11] Ibid:153.

[12] Ibid: 156.

[13] Ibid: 161.

the "researcher must not only effectively capture all of the institutional and ideational variables involved, but also provide a convincing explanation of how they interact with one another."[14] However, this increased workload is not without its rewards. Bridging the ideational and institutional divide results in scholarship that is more valuable and comprehensive.

Operating from the hypothesis that institutions tend to have a relationship to political ideas, I attempt to bridge this gap. I argue that scholars cannot fully account for the development of the American state without paying attention to debates over citizenship and how they have interacted with institutional development. I trace the intersection of new political ideas about citizenship proposed during Reconstruction with political institutions of federal and state governments to see how they interact. This investigation has lead to a multi-pronged argument. My overarching argument is this: in the United States, ideational conversation is not ended by institutional action. The American state is a fragmented entity. Federalism and separation of powers abound by intentional constitutional design. As a result, I argue, dissenting political ideas can find voice outside the dominant institutional framework, like in social movements or state governments. In the United States, citizenship as a theory has been constantly subject to contestation. Because recognition by a political institution is necessarily prior to any more substantive notion of citizenship, the state plays a key role in the regulation and definition of citizenship. However, research in American Political Development suggests that political institutions and ideas often conflict, and define state institutions as in flux and developing (rather than in equilibrium) as different ideas and governing authority vie for permanence and durability. Scholars of APD have pointed out that fragmented institutional structure allows for endogenous development as political entrepreneurs and social movements exploit the frictions created by institutional misalignments. Orren and Skowronek argue that insofar as political change is "accompanied by the accumulation and persistence of competing controls within the institutions of government, the normal condition of the polity will be that of multiple, incongruous authorities operating simultaneously."[15] Seeing this condition as a "normal" part of the

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[14] Ibid: 162.

[15] Karen Orren and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004), 108.

polity allows for a more robust account of institutional change, because it can produce "contradictions for agents, entrepreneurs, and leaders to exploit and alternative for them to imagine."[16] Ideational development in the polity may mark a shift in authority, but because the state is so fragmented, old ideas never die. During Reconstruction, the fragmented American polity offered myriad institutional pathways for dissenting and older political ideas that prioritized state citizenship to return and fight once more for dominance. Put another way, I argue that Rogers Smith's multiple traditions ebb and flow across time precisely because the institutional arrangement in the American state allows for it.

This principle argument, however, has several constitutive elements. First, I suggest that this frame of analysis reveals a hole in the literature on Reconstruction. Until now, scholars of Reconstruction had attributed its failure to exogenous explanations— a new political climate resulting in a partisan shift in Congress, or the Compromise of 1877. Of particular note is historian Eric Foner's explanation for Reconstruction's failure, the economic crash of 1873.[17] I suggest here, though, that the ideational contestation over citizenship during Reconstruction that shaped political institutions reveals that these exogenous explanations are incomplete. Rather, this thesis points to an endogenous explanation for Reconstruction's failure. Reconstruction failed not only because exogenous shocks altered political calculus or eliminated those politicians most supportive of Reconstruction policy. Rather, the new ideals of national citizenship that Reconstruction embraced were under strain from the start, strain that was created by the existing constitutional design itself. This argument fits the insights of APD, which highlight endogenous factors for explaining institutional change.

Second, the overarching argument sheds light on citizenship as an idea in the United States. Ideational scholars have studied citizenship in the United States with the intent to discover what *being a citizen* means. Does being a U.S. citizen mean the "right to have rights"? Does it mean the right to vote? Does it call upon a notion of civic responsibility and active participation in the polity?

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[16] Ibid, 116.

[17] Eric Foner. *Reconstruction: America's Unfinished Revolution, 1863-1877*. (Updated Edition ed. New York, NY: Harper Collins, Harper Perennial Modern Classics, 1988).

What of economic freedom and the right to own property? My analysis reveals that perhaps there is a reason pinpointing the "true" content of U.S. citizenship has been hard to pin down. Namely, perhaps there is an institutional reason. The fragmented nature of the state leads to constant ideational contestation. As a direct result of this, citizenship as an institutionally-defined idea is subject to change over time, so it is perpetually unsettled.

Overview of the Analysis

The chapters that follow examine how and why Republicans in the wake of the Civil War sought to remake the definition of citizenship in the United States by implementing institutional change. To the Republicans, the Civil War was at least in part a product of an ideational divide over the proper definition of citizenship between the North and the South. In the United States, citizenship is two-fold. "Content" or "meaning" of citizenship aside, each inhabitant of the United States owes allegiance to two competing sovereigns— the state in which they reside, and the nation as a whole. One is both a citizen and inhabitant of, say, Arkansas, Massachusetts, or Colorado, in addition to being a citizen of the United States. The dispute over which should be prioritized was, in part, at issue in the Civil War. In very general terms, Southern Democrats preferred state citizenship over national citizenship. They believed states should be the primary protectors of the rights of its citizens. On the other hand, Northern Republicans argued that this lexical ordering of citizenship— state before national— was one of the causes of the slavery problem. They viewed their victory in the Civil War to mean that their vision of the national government, *not* the states, as the primary protector of the rights of its inhabitants — that national citizenship should be prioritized over state citizenship — had won. Republicans wanted to give the national government the power to protect the rights of its citizens from infringement by both private individuals and state government. I argue this dispute over citizenship shaped the direction and ultimate failure of Reconstruction.

The first chapter explains in detail the theory behind the analysis. It examines the literature that argues for certain conceptions of citizenship over others, as well as the literature that offers several definitions of citizenship in the U.S. Building on the work of Shane Phelan, Judith Shklar,

Margot Canaday, and Stephen Engel, it explains why it is important to understand citizenship in the context of political institutions, which in turn necessarily define and shape it. Understanding citizenship as recognition forces a reorientation towards questions about the state and institutions. The chapter uses the scholarship of APD to argue that the state's fractured and fragmented nature allows for several important avenues of political change. Ideas, it is argued, can take hold and fight for dominance because of the unique nature of the U.S. polity.

The second chapter investigates the purpose of the Fourteenth Amendment by beginning with a close reading of the ratification debates to determine the intended institutional affect on citizenship. Arguably, the purpose motivating the passage of the Fourteenth Amendment "was not to create new rights, but rather to incorporate into the Federal Constitution the fundamental rights that individuals already possessed under general constitutional theory, but that the states had failed to enforce adequately."[18] In other words, citizenship was just not the elaboration of rights, but was also realized through the enforcement that came from recognition and regulation by governing authority. Reconstruction marked a turning point in notions of state power: the federal government, not the states, was now the "main protector of citizens' rights," and, as such, the federal government took on new responsibilities to recognize citizens specifically and distinctly beyond the capacities of state governments.[19] Richard Aynes suggests that even those who have a narrow view of the purpose of the Fourteenth Amendment must concede that it was designed to establish a distinct set of "privileges and immunities of citizens of the United States.[20] The Reconstruction Amendments, it seems, were designed at least in part to affirm national citizenship over state citizenship.[21] This chapter examines the ideas behind the Republican vision for the country, and explains how it manifested itself in the Reconstruction Amendments.

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[18] Stephen J. Heyman. "The First Duty of Government: Protection, Liberty and the Fourteenth Amendment." *Duke Law Journal* 41, no. 3 (1991): 509.

[19] Eric Foner. "The Supreme Court and the History of Reconstruction— And Vice-Versa." *Columbia Law Review* 112, no. 7 (2012):1587

[20] Richard Aynes. "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases." *Chicago-Kent Law Review* 70, no. 627 (1994): 628, citing Charles Fairman. *What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U. L. Rev. 49, 77 (1950): 77.

[21] Smith (1997), 327-337.

The third chapter investigates the institutional friction that occurs within the American federal system: the disagreement that arises between state governments, popular understandings, and the national government. State governments and popular sentiment had differing understandings of the true content of U.S. citizenship from Congress. As a result of this institutional disagreement, the Republicans in Congress operated from a point of weakness from the start, despite their numerical majority. This contrasts sharply with their apparent hegemonic position that resulted in the passage of the three Constitutional Amendments and multiple pieces of legislation from 1863 to 1875. Republicans faced a constant siege from ideational dissenters who held on to antebellum ideas of citizenship. The first challenge came during the passage of the Thirteenth and Fourteenth Amendments. Despite their majority in Congress and victory in the Civil War, Republicans had to employ dubious constitutional maneuvering to get the amendments passed. Specifically, they did not count southern state representation to get the Thirteenth Amendment through Congress, but they *did* account for southern states to pass the necessary three-fourths of the states threshold for ratification. And with the Fourteenth Amendment, they turned Southern states into military districts for ratification purposes to ensure it could pass the required state-ratification threshold.

The next challenge came from the executive branch in the form of President Andrew Johnson. Johnson was not sympathetic to the Republican project of union and national citizenship. He championed states' rights and believed that the federal government should not be the primary enforcer of civil rights. To eliminate this threat at achieving full institutionalization of their vision, Republicans promptly impeached Johnson. The third threat was a two-pronged attack. It came simultaneously from two more zones that dissenting political ideas can find voice in the institutional framework: state governments and the people themselves via social movements or civil society organizations. State governments resisted the Republican project by institutionalizing Black Codes and election laws that limited the franchise of freedmen. The Ku Klux Klan, a southern social movement, also held to dissenting ideas of citizenship and terrorized freedmen and Republicans throughout the south. The Republicans responded to these threats by enacting three pieces of legislation and one more constitutional amendment in the early 1870s: the Enforcement Act of 1870, the Enforcement Act of 1871, the Ku Klux Klan Act of 1871, and the Fifteenth Amendment. Despite

these vigorous attempts by Republicans to entrench their vision for national citizenship, there was still, to use the words of Richard Valelly, "incomplete institutionalization."[22] This is exhibited by the states to enact miscegenation laws that prohibited the "mixture" of white people of European descent and blacks of African descent.[23]

Until 1873, the Republicans had been largely successful at quashing attacks from those with dissenting ideas of citizenship. Chapter four discusses an attack they could not overcome. It came from the Supreme Court in 1873 in the form of the *Slaughterhouse Cases*.[24] The Republicans had taken action to ensure the federal judiciary would be on their side to help bolster their project and further institutionally embed their vision. They had manipulated the federal circuit courts to enable them to appoint more Republican judges, and to ensure most southern states would be in one circuit. In addition, they then stripped the Supreme Court of habeas jurisdiction. Despite this active manipulation, and the general approval and enforcement of national citizenship in the lower federal courts during Reconstruction, the Supreme Court was still able to exploit their position and deal a fatal blow to the Republican vision for national citizenship. That attack came in 1873 with the *Slaughterhouse Cases*. Despite more expansive lower court rulings, a bare majority of the Supreme Court "strained to read constitutional protections of citizenship and personal rights in appallingly narrow ways."[25] The court used this case to pick up antebellum ideas of state citizenship and ascriptive hierarchy and put them once again on the path to dominance. Justice Miller's majority opinion re-articulated many of the ideas that President Johnson, state governments, and indeed some social movements had held. The *Slaughterhouse Cases* in 1873 "virtually scratched [the Privileges or Immunities Clause] from the constitution."[26] Justice Miller declared in the opinion that the Fourteenth Amendment had "not fundamentally altered traditional federalism; most of the rights of

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[22] Valelly (2004), 701-71.

[23] Martha Hodes. "The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War." *Journal of the History of Sexuality* 3, no. 3, Special Issue: African American Culture and Sexuality (1993): 403.

[24] 83 U.S. 36 (1873).

[25] Smith (1997), 330.

[26] Ibid, 78. Internal quotations omitted.

citizens remained under state control, and with these the Amendment had 'nothing to do.'"[27] Due to the Supreme Court's unique position in the polity, however, they could not be reigned in by the Republicans. As a result of this case and the Court's subsequent decisions of *United States v. Cruikshank*[28] and *The Civil Rights Cases of 1883*,[29] the Republican project, and Reconstruction generally, failed.

American Political Development and Endogenous Sources of Change

The field of American Political Development has produced several mechanisms for explaining change over time. This project not only employs these mechanisms for examining development of the American state during Reconstruction, but it also reaffirms their applicability as explanatory mechanisms of the development of American politics. These concepts can be best understood with reference to the language of "exogeneity" versus "endogeneity." Again, APD as a discipline is tasked, in part, with explaining institutional and ideational change the absence of an external crisis or "exogeneous shock" to the political arrangement. Though many types of endogenous change are at issue in the analysis that follows, I highlight four key mechanisms here. These four mechanisms, "layering," "critical junctures," the "reassociation of ideas for antithetical ends," and "recalibration," are especially relevant in this project, and they will be referenced throughout in order to provide an evaluative scaffold form much of the political history discussed.

The first, "layering," helps to explain why the Republican project was doomed from the start. Layering involves "'the grafting of new elements onto an otherwise stable institutional framework. Such amendments . . . can alter the overall trajectory of an institution's development.'"[30] Layering one policy arrangement onto another can cause confusion, and the resulting frictions shift the path of

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[27] Eric Foner. *Reconstruction: America's Unfinished Revolution, 1863-1877*. Updated Edition ed. (New York, NY: Harper Collins, Harper Perennial Modern Classics, 1988), 529.

[28] 92 U.S. 542 (1875).

[29] 109 U.S. 3 (1883).

[30] Daniel Béland. "Ideas and Institutional Change in Social Security: Conversion, Layering, and Policy Drift." *Social Science Quarterly* 88, no. 1 (2007): 22, citing Kathleen Thelen. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan. (*Cambridge: Cambridge University Press, 2004), 35.

institutional development. Applying this notion to the Reconstruction context can help explain why the Republican project failed. At the close of the Civil War, the Republicans established a new vision for the country that involved "grafting" several new constitutional amendments and many grand pieces of legislation onto the already-established institutional framework. This layering of policy arrangements is reflected in Chapter 3. As the Republicans attempted to wrangle the country to adopt their vision for citizenship, antebellum ideas that held sway previously did not, of course, just disappear. These older ideas remained vital and challenged the new ideational move in the meaning of citizenship precisely because it was layered on top of an existing set of institutional arrangements that might not fully (or rather, in this case, did not) support this nationalist vision.

The second key concept, critical junctures, explains why the Supreme Court's 1873 decision in *The Slaughterhouse Cases* was so crucial. Megan Ming Francis's recent book *Civil Rights and the Making of the Modern American State* chronicles how the actions of civil rights organizations, in particular the NAACP, altered the path of state building in political and constitutional development.[31] Francis points out that scholars tend to mistake the key turning point in the 1960s civil rights movement as the Supreme Court case *Brown v. Board of Education* in 1954.[32] Rather, she argues that *Brown* in fact was a product of an arduous litigation strategy by the NAACP. Francis suggests that this litigation strategy resulted in an important turning point for the civil rights movement. This turning point was the Supreme Court's decision in *Moore v. Dempsey.*[33] This case, she argues, would never even have reached the Supreme Court had it not been for the NAACP's "tremendous organizational effort."[34] *Moore* was, then, a "critical juncture" in the development of the American state. Critical junctures begin path-dependent processes. As such, *Brown* operated in the wake of *Moore*. This same principle can be seen in Reconstruction. As is argued in Chapter 4, *Slaughterhouse* was similarly a critical juncture. It was the turning point for the Republican vision, and the subsequent cases *United States v. Cruikshank* and *The Civil Rights Cases* operated in its wake.

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[31] Francis (2014).

[32] 347 U.S. 483 (1954).

[33] 261 U.S. 86 (1923).

[34] Francis (2014), 27.

The third concept, the purposive reassociation of ideas to achieve antithetical ends, plays on an initially unintuitive idea about institutional and ideational development. Nevertheless, it explains how *Slaughterhouse* reached the Supreme Court in the first place. As further explicated in Chapter 4, the attorney for the plaintiff was an ex-Confederate official and was a staunch advocate of states' rights. He was staunchly against Reconstruction and the Republican project. And yet, the argument he put before the Supreme Court relied on an expansive reading of the Fourteenth Amendment. He wanted to use the recently-ratified Fourteenth Amendment to protect the rights of white butchers in Louisiana. Perhaps the Framers of the Amendment would have supported the theoretical reading of the Amendment, but the fact that it was being used to protect white butchers from state regulation of their trade may have seemed odd to them. This practice of harnessing an old idea for new purposes is what Skowronek has referred to as "reassociation of ideas" which enables the achievement of ends antithetical to the original idea.[35] Framing the attorney's argument in this way helps to reveal the overlapping nature of political traditions in the United States, and understand the complexity of institutional development.

Finally, this project reaffirms the key insight of APD, namely that achieving stable and lasting political change is extremely difficult. Skowronek and Orren define political development as "a durable shift in governing authority."[36] A "durable shift" is a political change that lasts— it is "durable" because it is resilient to future attempts for change. Political scientist Stuart Chinn argues that moments of reform or institutional change are often succeeded by "a recurrent and clearly patterned process of 'recalibration,' where recently enacted reforms are recalibrated in light of the continuing influence of *preexisting* institutions and rights."[37] If the study of APD is heavily focused on "change over time," what does it have to say when there is no change? Indeed, scholars of APD have been so focused on *change* that the have overlooked the fundamental lack or difficulty of change. Chinn points out that studies of politics change in American history "largely fail to provide

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[35] Stephen Skowronek. "The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition." *American Political Science Review* 100, no. 3 (2006): 385-401.

[36] Karen Orren and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004), 123.

[37] Stuart Chinn. "Institutional Recalibration and Judicial Delimitation." *Law & Social Inquiry* 37, no. 3 (2012): 536.

any systematic treatment of the incongruities between intended reforms and postreform conditions."[38] In the remainder of this project, I begin to investigate why key moments of institutional change are followed by these moments of "recalibration" that often revert institutional reforms to their old state. I suggest that it may be a feature of the institutional structure itself.

This thesis exposes a deep irony behind the Republican project of Reconstruction. Not only that, it also explains why that irony was able to occur. Despite vigorous attempts by the Republicans to enact institutional change and embed their vision for national citizenship in the polity, they still failed. Even three constitutional amendments and numerous sweeping acts of legislation were not enough to sustain their vision. This was possible because of the heavily fragmented nature of the U.S. polity itself. In sum, this suggests that the contestation over the meaning and content of citizenship status between political institutions that took place during Reconstruction not only leads to an endogenous explanation for its failure, but also sheds light on how the fragmented state leads to a fragmented and inevitably unsettled definition of U.S. citizenship.

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[38] Stuart Chinn. *Recalibrating Reform: The Limits of Political Change*. (New York, NY: Cambridge University Press, 2014), 7.

Chapter 1

Towards Developmental Citizenship: Institutional Structure and Citizenship as Recognition

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A precise definition of what U.S. citizenship means has been actively debated over the course of U.S. political history by legal scholars and political scientists. Why has defining this concept been so difficult, and what role have governing institutions played in trying to give that concept coherent and consistent meaning? It is often unclear what a citizen is, what being a citizen means, and who gets to decide who is a citizen and who is not. Indeed, there are multiple examples in U.S. history where people were considered citizens, and yet clearly were denied rights. For example, with the passage of the Nineteenth Amendment in 1920, women, who had been largely disenfranchised, were granted the right to vote, a right some scholars define as a "gateway" right to other rights. However, prior to 1920, women were still considered citizens. That is to say women fell within the purview of the state's acknowledgment. They were entitled to state protection from outside invasion, and they were allowed to reside within the borders of the area under control of the state. Similarly, after the ratification of the Reconstruction Amendments, black men were legally entitled to vote, but their participation was (and continues to be) limited through the use of qualifying measures such as grandfather clauses, poll taxes, literacy tests, and whites-only primaries. Although the Fifteenth Amendment was ratified in 1870, poll taxes were not fully outlawed until 1966.[1]As such, citizenship cannot be reduced to a cluster of rights. Nevertheless, political scientists, political theorists, and legal scholars have often defined citizenship in terms of responsibilities, rights, or recognition. These definitions are sources of contention. Additionally, normative theorists are also at odds with empiricists as the former conceptualized what the status should mean while empiricists attempt to trace how its meanings have changed over time. The debate over the content of U.S. citizenship rages, and this project aims to assess this debate with particular attention to how and why the lack of conceptual lucidity persists in the U.S. over time.

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[1] *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966).

To answer the question of why citizenship remains an open concept, this thesis turns to an examination of the constitutional structure, or the horizontal and vertical relations between governing institutions in the U.S: separation of powers and federalism. How have these types of institutional design influenced how and why the meaning of citizenship shifts over time and remains openly contested? This chapter delves into the theory that might indicate how institutions influence ideas such as citizenship, and the chapters to follow examine how different governing institutions – Congress, state legislatures, state courts, and the federal judiciary – have shaped the meaning of citizenship. The thesis concentrates its examination of how political institutions affect political ideas on one period when the concept of citizenship was open for robust debate at all levels of governance, namely the Reconstruction Era from about 1863 to 1876.

This thesis contends that the institutional design of the polity fosters perpetual ideational contestation, i.e., debate over the idea of citizenship. Ideas may experience periods of durability, during which debates about them might appear settled, but these periods are temporary because a settled definition is impossible. While a new notion of national citizenship was entrenched in the Constitution via the Fourteenth Amendment, was supported by the passage of Civil Rights Acts during Reconstruction, and was the cornerstone of a newly ascendant Republican party, it was challenged from the outset by an older states' rights and anti-nationalist sentiment that the Civil War hardly vanquished. Perhaps, as suggested in later chapters, the deepest irony is that the Republicans' apparent successful implementation of a new notion of national citizenship is revealed, upon closer inspection, to illustrate how weak their position actually was, and how durable older notions of citizenship remained, always already available to challenge the Republican vision. And indeed the difficulty faced by the Republicans flowed from the very institutions in which they were situated. In other words, the institutional design of U.S. governance keeps alternative ideas alive and permits them to be picked up, deployed, and developed by elected officials, judges, and the people themselves. This project examines the case of citizenship in the context of these considerations to explore why citizenship remains an open concept.

This chapter begins with an examination of the scholarly debate about the meanings and content of citizenship. The analysis is limited to political theory and political development work that

focuses on the United States, since the case history that this thesis examines is confined to the United States. This chapter draws heavily on Rogers Smith's examination of citizenship as a contested idea that changes over time. It contends that definitions of citizenship that are grounded mostly or entirely in either liberal rights or republican responsibilities fail to capture the breadth and depth of U.S. citizenship. Rather, Smith's multiple-traditions theory more accurately describes the overlapping and often contradictory traditions that influence the meaning and content of citizenship. Smith's analysis supports the claim that citizenship is not a settled concept and is constantly subject to contestation.

Nevertheless, Smith is less helpful when considering why and how certain notions of citizenship gain dominance at particular periods. Why does a conception of citizenship grounded in liberal rights resonate at one moment while more limited notions of citizenship, where those limits are often grounded in ascriptive notions of prejudice, ascend at other times? Under what circumstances do these limited notions of citizenship that reify existing systems of racial and gender discrimination, that often seem so durable, give way? While Smith offers a way to categorize and trace the many different conceptions of U.S. citizenship over time, he does not offer a clear explanation of why or how these multiple traditions persist or change over time. This project responds to that gap via an analysis of institutional design: the fragmented nature of U.S. governance – federalism and separation of powers – and the ways that system may empower distinct actors at the state or federal level or across the federal branches goes some way to explain why one tradition may become durable or may falter.

Once the limits of liberal and republican notions of citizenship are defined, the chapter evaluates the notion that citizenship is better understood as a form of recognition. This definition of citizenship-as-recognition captures the state's role in the regulation of citizenship. Importantly, this project is not a normative; it does not attempt to settle the debate among citizenship theorists as to whether citizenship is best defined as a rights-based status, a responsibilities-based notion, or a status conferred by institutional recognition. Instead, it takes as its premise that state recognition is necessarily prior to the exercise of rights or responsibilities.[2] As such, for citizens to exercise rights

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[2] Stephen Engel. *Fragmented Citizens: Changing Recognition of Gay and Lesbian Lives*.)New York, NY: NYU Press, 2016.) (Forthcoming. Manuscript on file with author).

or responsibilities – for liberal citizenship or republican citizenship to be enacted – the individual must first be recognized by governing authorities and other community members of being capable of such action. In short, recognition is a necessary procedural condition of citizenship, and it is prior to the substantive content of citizenship status, which may include an emphasis on either (or both) rights and responsibilities.

This definition focuses less on the content of citizenship—what is conferred upon an individual subject to the polity's gaze, such as rights or responsibilities—and more upon the status itself of the individual's relationship with the state. By defining citizenship this way, the analytical lens turns away from the citizen herself and toward the governing institutions and their role in constituting the citizen. This move has at least two implications. First, it, leaves unexamined stateless conceptions of citizenship, such as cosmopolitan citizenship and citizenship-as-practice. These contentions, while valuable in recognizing that citizenship may be constituted in individual action or community recognition, overlook the fundamental role that the state and its institutions plays in defining the parameters of civic life. Second, since the aim of this thesis is to explore the relationship between institutional and ideational development – how governing institutions have affected the meaning of the idea of citizenship over time – citizenship as recognition reorients the analysis away from the individual claiming a status and toward the institutional power that ultimately confers the status. Linking citizenship, via recognition, to institutions enables that exploration. Put differently, by defining citizenship in terms of governmental institutional recognition, I can examine how institutional design and capacity can alter ideational development and thereby evaluate the state's role in constructing identity and, thus, citizenship.

Given my aim to assess how institutions have altered the definition of citizenship, I ground this exploration in scholarship in American Political Development (APD) as this field's analytical tools are explicitly focused on tracing institutional and ideational change over time. Furthermore, much APD research provides ways to comprehend the polity as fragmented, which helps when grappling with why multiple traditions of citizenship may exist simultaneously and may be in tension with one another. Specifically, APD rejects the notion that the standard condition of the polity is one of equilibrium. Rather, institutions and ideas conflict, and the state consequently is continuously

developing as different ideas and governing authority vie for permanence and durability within and across various institutions that exert power over citizens.

Scholars of APD have pointed out that the polity as made up of multiple distinct and often conflicting governing orders enables endogenous development. Either radical or gradual shifts are not only the result of some exogenous shock, such as either an election that alters the partisan makeup of government or a war or economic crisis. Instead, political entrepreneurs – such as elected officials or more popular actors such as social movements –exploit the frictions and opportunities created when governing orders are in tension.[3]

Ideational development in the polity marks a shift in authority, but because the state is so fragmented, older ideas may never die, lying in wait either to be taken up by another institutional actor or by the people themselves. As will be suggested in Chapters 3 and 4, such seemingly non-dominant ideas may find repose either formal institutions – such as courts, legislatures, or the executive branch bureaucracy at the federal or state level – or informal institutions such as social networks and other groups that foster social movement. Political ideas that differ from the durable dominant notions at a given moment can hibernate while other, possibly oppositional, ideas are employed in formal institutional rules. The constitutional structure allows for ideational circulation. It keeps clashing ideas in play often within but also outside the formal institutional structures of governance, thus making a settled notion of citizenship – a stable equilibrium of the idea itself – impossible. In short, the institutions of the U.S. state are fragmented, separated, and disjointed. This analysis reveals just how fragile ideational durability is in the U.S. polity. Understanding our institutional design in this way can help us uncover if, how, and why a settled notion of citizenship not only eludes us but, in fact, never can and purposively never should be attained.

The Problem with Citizenship in the United States

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[3] Karen Orren and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004).

Rogers Smith posits that U.S. citizenship "often simply means that the person is legally recognized as having American nationality and is able to carry a U.S. passport."[4] However, the term "citizen" has often carried with it much more demanding qualifications, and the content of citizenship has been a subject of fierce debate in political theory. As Kymlicka points out, citizenship is "intimately linked to ideas of individual entitlement on the one hand and of attachment to a particular community on the other."[5] The stability of a modern polity depends not only on its basic institutions, but also on the health and character of its citizens. An accurate definition of citizenship, then, becomes a "necessary supplement to earlier theories of institutional justice."[6]

Arguably the most dominant definition of citizenship conflates citizenship status with rights. T. H. Marshall and Judith Shklar are among the more formative theorists who have contributed to this liberal conception.[7] Marshall suggests that citizenship rights occupy one of three categories: civil rights, political rights, and social rights. For many, this accords with their own definition of citizenship, which is often colloquially understood to be "the right to have rights."[8] Judith Shklar similarly suggests that citizenship in America has two defining marks, the equality of political rights and the "overt rejection of heredity privileges."[9] Rights-centric theories of citizenship are often blanketed under the term "liberal democratic" notions of citizenship. Kymlicka, however, argues that standard liberal rights-based theories have unacceptable limits on tolerance, so we must supplement

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[4] Rogers M. Smith. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* (New Haven: Yale University Press, 1997), 13-14.

[5] Will Kymlicka and Wayne Norman. "Return Of The Citizen: A Survey Of Recent Work On Citizenship Theory." *Ethics* 104, no. 2 (1994): 352.

[6] Will Kymlicka. *Contemporary Political Philosophy: An Introduction*. Second ed. (Oxford, England: Oxford University Press, 2002), 286.

[7] T. H. Marshall. *Class, Citizenship, and Social Development; Essays*. (Garden City, N.Y.: Doubleday, 1964) and Shklar, Judith N. *American Citizenship: The Quest for Inclusion*. (Cambridge, Mass.: Harvard University Press, 1991). See also Marshall, T.H. "Citizenship and Social Class," in *The Citizenship Debates: A Reader.* Shafir, Gershon ed., (Minneapolis, University of Minnesota Press. 1998), 93-112.

[8] *Trop v. Dulles* 365 U.S. 86 (1958).

[9] Judith N. Shklar. *American Citizenship: The Quest for Inclusion*. (Cambridge, Mass.: Harvard University Press, 1991), 1.

these traditional rights-based principles with a theory of minority rights.[10] Critics of rights-based theories generally, however, suggest that they lead to an unhealthy passivity of citizens.

Accordingly, many commentators argue that we need to "supplement (or replace) the passive acceptance of citizenship rights with the active exercise of citizenship responsibilities and virtues."[11] For these civic republican theorists, citizenship suggests not only rights, or perhaps even no rights at all: citizenship suggests civic responsibility and participation. Liberal democratic theorists have suggested what Kymlicka refers to as a "more deliberative model," but civic republican theorists remain unconvinced.[12] Without citizens who display characteristics of willing and active political participation, democracy may crumble in response to illiberal forces. Civic republicans suggest that civic participation is intrinsically rewarding and, as such, is the hallmark of a citizen. They locate citizenship in "the activity of ruling and being ruled in turn."[13] Civic republicans argue that a citizen is not just a person subject to the laws of the state, nor is it a consumer of rights, but is "an active member on the public deliberation and decision-making that produces law and policy."[14] Here is where the idea of a "good citizen" or an "ideal citizen" finds its place.

However, critics have argued that these theorists sometimes struggle to explain why and how civic participation can become lackadaisical among citizens. Additionally, liberal and feminist critics point out that this account of citizenship offers grounds for unacceptable exclusions from the polity. Due partly to these critiques, civic republican theories have failed to reach doctrinal dominance in contemporary understandings of citizenship.

A different school of thought sees citizenship in terms of personal empowerment. For some, to be a citizen involves an existential refusal of subjection, which in turn means that a citizen "seeks

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[10] Will Kymlicka. *Multicultural Citizenship: A Liberal Theory of Minority Rights.* Oxford Political Theory. (Oxford New York: Clarendon Press, Oxford University Press, 1995).

[11] Kymlicka and Norman (1994), 288.

[12] Ibid, 292.

[13] Shane Phelan. *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship*. (Philadelphia, PA: Temple University Press, 2001), 13.

[14] Ibid.

mastery over whatever pushes him or her back into subjection."[15] This suggests a broader, but ultimately context-free, claim that citizenship asserts "the mastery of humankind over all environments."[16] In this vein, Castles and Davidson suggest citizenship implies a more inward and abstract notion that citizenship means "acts that establish rule of law and not men."[17]

None of these single definitions of citizenship, however, has gained dominance or universal acceptance in the literature. This seems at least partly because, as competing theories argue, each theory runs into serious conceptual problems. Normative rights-centric models can lead to passive and lackadaisical populace, and responsibility-centric models do not account for the fundamental problem that one cannot exercise responsibilities without rights. More generally, and, as is important here, none accurately and comprehensively describes what it means to be a citizen in the United States. Recent developments in political theory have brought this conundrum to the center of attention. Feminist and communitarian theorists have challenged liberal descriptions of citizenship, while liberals in turn challenge civic republicans. In short, as Peter Reiseneberg has said, "there is no single office in which [citizenship's] essence is defined. It has no central mission, nor is it clearly an office, a theory, or a legal contract."[18]

In 1862, for example, when Attorney-General Edward Bates researched what is the true content of citizenship in the United States, he found the effort "fruitless."[19] The concept of citizenship was, he wrote, "now as little understood in its details and elements, and the question as open to argument and speculative criticism as it was at the beginning of the Government."[20] What was then over eighty years of exercising citizenship under the Constitution had "not sufficed to teach

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[15] Stephen Castles and Alastair Davidson. *Citizenship and Migration: Globalization and the Politics of Belonging*. (New York, NY: Routledge, 2000.), 26.

[16] Ibid.

[17] Ibid, 27.

[18] Peter Riesenberg. *Citizenship in the Western Tradition: Plato to Rousseau. (*Chapel Hill, NC. University of North Carolina Press, 1992) quoted in Phelan, Shane (2001), 11.

[19] Bates quoted in Patricia Lucie. "On Being a Free Person and a Citizen by Constitutional Amendment," *Journal of American Studies* 12 (1978): 355. In Cott, Nancy F. "Marriage and Women's Citizenship in the United States." *American Historical Review* 103, no. 5 (1998): 1445.

[20] Ibid.

us either the exact meaning of the word, or the constituent elements of the thing we prize so highly."[21] Nancy Cott points out that in *Dred Scott v. Sanford*, Justice Taney, writing for the majority, could dismiss the fact that blacks did indeed vote in some Northern states as evidence of their citizenship.[22] Similarly, if white women were given the title of citizen, then the content of U.S. citizenship could not include those things denied to them, like as office-holding, and jury and military service.[23] In his *Dred Scott* dissent, Justice Curtis wrote that, under the Constitution of the United States, citizenship is "not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error."[24] Cott also argues that during the nineteenth century, only a minimal definition of citizenship, "meaning the individual's allegiance and nation's reciprocal guarantee of protection," gained any sort of universal acceptance.[25] A dichotomous understanding of citizenship as either a liberal claim on rights or a republican expectation of responsibilities does not help us understand how and why the meaning of citizenship may shift over time.

Rogers Smith's work traces how notions of citizenship have changed in the United States across time. He uncovers a constant battle among definitions of citizenship. He notes that different traditions contend with one another: a liberal tradition that focuses on rights, a republican tradition that focuses on responsibilities, and an ascriptive discriminatory tradition that invokes hierarchy. At distinct times, one tradition may be more influential among political elites than another. He claims ascriptive hierarchies are rampant in U.S. citizenship laws.[26] Smith suggests a single definition of citizenship, such as a liberal theory, a civic republican theory or a citizenship-as-practice theory, fails to capture the distinct if overlapping traditions that constitute American political culture. His multiple-traditions thesis holds that "the definitive feature of American political culture has been not

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[21] Ibid.

[22] 60 U.S. 393 (1857).; Nancy F. Cott. "Marriage and Women's Citizenship in the United States." *American Historical Review* 103, no. 5 (1998): 1445.

[23] Cott (1998), 1445.

[24] *Dred Scott v. Sandford* 60 U.S. 393 (1857).

[25] Cott (1998), 1446.

[26] Smith (1997).

its liberal, republican, or 'ascriptive Americanist' elements but, rather, this more complex pattern of apparently inconsistent combinations of the traditions, accompanied by recurring conflicts."[27] His detailed history of the concept of citizenship lends strong support to the view that the idea has always been contested. As the battles between liberals and civic republicans intensify, especially after they are joined by communitarian, feminist, cosmopolitan, and citizenship-as-practice theorists,

> it has become clear that the concept of citizenship has lost none of its power, but that its place in our common life is not a settled one. Citizenship is a powerful political ideal as well as a legal status. The debates in political theory have in many ways been irrelevant to these current struggles, because theorists have weighted the merits of republican versus liberal citizenship as modes of participation and identification while debates in policy and law have focused on legal status. All of these venues have important insights to offer about citizenship, and it behooves us to consider them together rather than in isolation.[28]

Finally, Smith rejects a teleological definition of citizenship. Rather than showing that ascriptive or illiberal moments in American citizenship laws are nothing more than temporary deviations from the unending teleological progression towards some liberal notion of citizenship, his analysis shows convincingly that Americans do share a "*common* culture but one that is more complexly and multiply constituted than is usually acknowledged."[29] The American political tradition is, in fact, necessarily defined by inconsistent, overlapping, and conflicting beliefs. His argument lends strong support to the view that citizenship as a concept in the United States has always been contested. As a result, to claim that there is a singular meaning of citizenship or that citizenship has a content or meaning toward which American political development is progressing would be to deny the patterns of American political development itself.

Citizenship as Recognition

Since disagreement persists among normative citizenship theorists over what the dominant content of U.S. citizenship should be, i.e., rights or responsibilities, this thesis takes a different route to uncover how citizenship has come to have distinct meanings over time. If Smith is correct in

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[27] Rogers Smith. "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America." *The American Political Science Review* 87, no. 3 (1993): 558.

[28] Phelan (2001), 4.

[29] Smith (1997), 558.

suggesting that our understanding of citizenship changes over time and continues to be contested, then we can ask: what creates this condition, or more precisely, how do our political institutions foster this ideational contestation? Defining citizenship as following from institutional recognition helps to orient analysis toward this question.

Political theorist Iris Marion Young offers one entry point in understanding what citizenship as recognition connotes. She contends that the person or citizen is at least in part "constituted by another's gaze."[30] While the subject requires recognition as a human capable of activity, she writes, the subject also "receives from the dominant culture only the judgment that she is different, marked, or inferior."[31] Queer theorist Shane Phelan also calls attention to the distinction between the citizen and "strangers," who are distinct from full citizens yet nonetheless members of the community. These "strangers" ride the line between "us" and "them" because they have qualities of citizenship in certain contexts, but not in others. Phelan illustrates this notion by referencing the circumstances of the gay, lesbian, bisexual, and transgender communities, whose members are "not currently citizens in the full political sense," because heterosexuality is a prerequisite for full modern citizenship and inclusion in the polity.[32]

More specifically, political theorist Judith Shklar reminds us that citizenship is not a notion that can be analyzed or discussed outside of social and political context. She writes that "[w]hatever the ideological gratifications that the mnemonic evocation of an original and pure citizenry may have, it is unconvincingly and ultimately an uninteresting flight from politics if [citizenship] disregards the history and present actualities of our institutions."[33] In other words, citizenship itself needs to be understood in the context of political institutions; citizenship would be an empty concept without institutions. Shklar's efforts to "historicize citizenship," rather than see it as an ideal towards

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[30] Engel, (2016), 25.

[31] Iris Marion Young. *Justice and the Politics of Difference.* (Princeton, NJ: Princeton University Press. 1990), 60.

[32] Phelan (2001), 5.

[33] Shklar (1991), 9.

which rights movements progress, remind us to understand citizenship in a political context and then examine how that context has changed over time.[34]

By defining citizenship in this way, "the operative center of citizenship changes from the individual claiming citizenship to the set of institutions that recognize or confer citizenship status."[35] Necessary for the exercise of both rights and responsibilities, therefore, is the prior notion of recognition and acknowledgement. Phelan argues that law guaranteeing equal protection and political participation rights are the "sine qua non for citizenship, both because they enact or deny state acknowledgement of individuals and because such rights are a prerequisite for meaningful participation."[36] To be deprived the protection of these laws means being barred from participation in political institutions. Being denied this is the same as being denied the "acknowledgment that is the heart of citizenship."[37] Accordingly, recognition by political institutions (especially, though not limited to, the state) is a prerequisite to claiming rights, responsibilities, or duties.[38]

Nancy Cott a similar method of analysis in her study of marriage and women's citizenship in the United States. She points out that throughout much of U.S. history, by marrying a foreign national, women born in the United States were deprived of their citizenship status. She argues that we must recognize marriage as an institution that "helps to found both men's and women's identity in the polity."[39] The institution of marriage was, perhaps not coincidentally, one highly regulated by the state: it "has thus been the vehicle for the state's part in forming and sustaining the gender order—or, it might be said, in forming and sustaining gender itself."[40] Because, then, marriage affects citizenship and is an institution constituted by the state, the state has had a hand in regulating citizenship through marriage. Marriage itself, though, involves a bond between persons. Citizenship

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[34] Engel (2016), 25.

[35] Ibid.

[36] Phelan (2005), 5.

[37] Ibid, 17.

[38] Ibid, 15.

[39] Cott (1998), 1442.

[40] Ibid.

as an idea, then, represents "not only the bond between an individual and the state but also a bond between one individual and many others."[41]

Examining citizenship as defined through processes of institutional recognition has enabled numerous scholars to gain new insight into citizenship in the United States. Indeed, scholars have shown how the state constitutes identities. For example, in her influential study of sexuality and citizenship in the United States, Margot Canaday contends that the state "did not merely implicate but also *constituted* homosexuality in the construction of a stratified citizenry."[42] Her study examines how state institutions defined and treated sexual identities during several periods in U.S. history. She reveals how the state was highly influential in the formation of sexual identity. It did this by crafting citizenship policies that "crystallized homosexual identity, fostering a process by which certain individuals began to think of their sexuality in political terms, as mediating and mediated by their relationship to the state."[43] Necessary for her analysis is an understanding of citizenship as status. She says that there are no formal categories of first or second-class citizens. Rather, she agrees with Nancy Cott that citizenship can be "delivered in different degrees of permanence or strength."[44]

Additionally, Canaday endorses Rogers Smith's multiple-traditions thesis but adds sexuality to the list of ascriptive traditions in American citizenship policies. In the United States, homosexuality was sometimes defined as "outside" of citizenship through formal legal exclusion, but more often someone suspected of "sexual perversion" (as it was defined but the state) was not formally excluded from citizenship status, but would lose certain rights. Citizenship is, Canaday argues, thus best conceptualized by an approach that involves "'threshold questions' regarding access to the nation-state…alongside… 'questions about the nature and quality of citizenship as practiced within the political community.'"[45] Her study reveals that state institutions were undeniably active in

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[41] Ibid, 1440.

[42] Margot Canaday. *The Straight State : Sexuality and Citizenship in Twentieth-Century America*. Politics and Society in Twentieth-Century America. (Princeton, N.J.: Princeton University Press, 2009), 4.

[43] Ibid, 10.

[44] Nancy F. Cott. "Marriage and Women's Citizenship in the United States." American Historical Review 103, no. 5 (1998): 1441.

[45] Ibid, 9. Citing Linda S. Bosniak. "Universal Citizenship and the Problem of Alienage." *Northwestern University Law Review* 94, no. 3 (2000): 963-84.

the construction of sexual identity through their regulation of citizenship policies. Both homosexuality and citizenship arose in tandem with the development of the federal bureaucracy. The timing, she argues, was not coincidental: "Rather, homosexuality and citizenship are both a type of status that is configured (even, to some extent, conferred) by the state."[46] In other words, the consideration of citizenship as recognition and regulation in the context of the state was both essential and the undeniable conclusion of her project.

Citizenship is, therefore, necessarily constituted in relation to a political context. Engel teases out Phelan's definition by explaining that full citizenship relies not only on the ability to claim or exercise rights or responsibilities, but prior acknowledgment or recognition.[47] Recognition is, then, the necessary element for other definitions of the content of citizenship. Without recognition by institutions, other accounts of citizenship are rendered moot. To rephrase Phelan, recognition by institutions is the sine qua non of citizenship.

And yet, as political scientist Elisabeth Cohen has pointed out, there currently is a dearth of investigations into how institutions, especially state institutions, have interacted with qualities of citizenship. Rights, for example, require "specific political systems to make them legible."[48] Cohen argues that "[r]ecognizing administrative rationality as a peer of liberalism and normative theories of citizenship is crucial because it draws the state into the picture…"[49] And, as is shown convincingly in the work of Cott, Canaday, Phelan, and Engel, the state's regulatory apparatuses play a crucial role in defining, altering, and conferring citizenship.

Therefore, in the search for how the meaning of citizenship has changed over time in the United States, an analytic reorientation from the individual making rights, duties, practice, or responsibility claims to state institutions is necessary.[50] Because, as Engel writes, citizenship is a relationship that links the individual to the state, it can, "if conceptualized as constructed through

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[46] Cott (1998), 255.

[47] Engel (2016), 7-8, 25-26.

[48] Cohen (2009), 7. See also James C. Scott. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed.* (New Haven: Yale University Press, 1998).

[49] Cohen (2009), 8.

[50] Engel (2016), 35-37.

regulatory recognition, direct analytic focus to the state as one source of power over that individual."[51] Engel explains that doing so brings to the fore the idea that institutions exert power over the individual and provides an opening to use developmental scholarship, which focuses on ideational and institutional change, to analyze how citizenship in the U.S. has changed over time.[52] Evaluating citizenship in a political context turns us away from normative claims about what citizenship *should* mean to what citizenship content the state confers through recognition.

Institutions, Ideas, and Political Development

Re-conceptualizing citizenship as constituted in the process of recognition turns analysis toward the institutions that do the recognizing. Adam Sheingate argues that institutions are often understood as instruments of stability.[53] Indeed, rational choice institutionalists contend that political institutions produce stability through "'regulative, normative, or cognitive mechanisms' that limit, constitute, or constrain the range of alternatives actors confront."[54] And yet, this conception provides little opportunity to engage questions of institutional change or how institutional contexts may interact with ideas and alter the ideas, such as citizenship, over time.[55] Indeed, ideas are mostly treated as epiphenomenal of interests, with little to no political power or value of their own.[56] When evaluating studies that employ these assumptions of rational choice institutionalism, Robert Lieberman points out that they are "limited in their capacity to account for the substantive course of politics" because they are bound by the limitations of reductionism, excessive reliance on the affects

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[51] Ibid.

[52] Ibid. 36.

[53] Adam D. Scheingate. "Political Entrepreneurship, Institutional Change, and American Political Development." *Studies in American Political Development* 17 (2003): 185.

[54] Ibid, citing Elisabeth S. Clemens and James M. Cook, "Politics and Institutionalism: Explaining Durability and Change," *Annual Review of Sociology* 25 (1999): 441-466.

[55] Daiel Béland. "Ideas and Institutional Change in Social Security: Conversion, Layering, and Policy Drift." *Social Science Quarterly* 88, no. 1 (2007): 20-38.

[56] Robert Lieberman. "Ideas, Institutions, and Political Order: Explaining Political Change." *American Political Science Review* 96, no. 4 (2002).

of exogenous factors, and unnecessary emphasis on order and structure.[57] They are, in a word, not *developmental*. They lack the long-lens understanding of historical institutionalists.

If we are to capture an account of U.S. citizenship as an idea that is influenced by institutional recognition, we must look elsewhere. Speaking to this objective, Lieberman exhorts scholars to "find a way to treat ideas as analytically consequential in accounts of political action, policy development, and institutional change, [and they must do so] without falling into the characteristic traps…[such as] the ad hockery with which institutional accounts usually appropriate ideas as explanatory factors."[58]

Ideational approaches on their own, however, run into similar limitations as the institutional approaches. They are plagued by the possibility of positing a "single, overwhelming, and, above all, stable set of ideas as the driving force in politics."[59] Another problem present in ideational accounts is exhibited by the works that "emphasize political ideas as central causal factors but give short shrift to the political settings in which ideas become influential and to the causal mechanisms that influence the section among ideas in concrete political choices."[60] Lieberman thus posits that any convincing and accurate theory of political or institutional development must bridge the gap between ideational and institutional approaches to political science, and must incorporate each element with equal weight. This project attempts to blend these elements as Lieberman suggests.

In order to blend ideational and institution elements successfully, this projects draws insight from American Political Development. APD scholarship dismisses the assumption that the state is composed of "stable, orderly institutions and regularized behaviors."[61] It contends that institutional design is never created in the absence of a preexisting political climate. Since this preexisting climate was historically established, "political outcomes tend to be dysfunctional" and the institutional

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[57] Ibid: 697.

[58] Ibid, 699.

[59] Ibid.

[60] Ibid, 700.

[61] Engel (2016), 28.

arrangements that arise "come to coexist often in direct conflict with each other."[62] This incomplete displacement of one institutional arrangement by another can create tension within and between state institutions.

APD is not concerned with "snapshots" of political circumstances. Rather, it is focused on the longer view of political dynamics; it aims to uncover how politics are constructed in and over time. APD scholars are concerned with processes of policy, institutional, and ideational change that tend to be slow, nonlinear, and non-rational. Brian Glenn points to two separate schools of APD. This project not only draws from both schools, but explicitly aims to bridge these schools. The first school is made up of what Glenn refers to as "historical institutionalists." Broadly, these scholars suggest that the goals that "political actors choose to pursue, and those that they are able to pursue effectively, are shaped by the institutional arrangements through which they and other political actors must operate."[63] The other school is made up of "ideational scholars," who hold the belief that "ideas underpin broad swaths of significant policies in American politics."[64] These two schools bear a noticeable resemblance to Lieberman's two methods for explaining political change: institutional and ideational. Glenn's work shows that Lieberman's criticisms, though not directly applied to APD directly, still hold. If we are to use APD's analytical perspective to construct a convincing account of the intersection between citizenship and institutions, we must not continue separating analysis of institutions from analysis of ideas. And so, this project bridges this gap by investigating how institutional design affects political ideas, such as citizenship, by providing space for them to stay in play, to never fall out of contention even if they are non-dominant. Crucially, this project suggests that using the historical lens of APD allows us to understand how the institutional structure affects the play of political ideas.

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[62] Paul Frymer. "Review: Law and American Political Development." *Law and Social Inquiry* 33, no. 3 (2008): 780.

[63] Brian Glenn. "The Two Schools of American Political Development." (*Political Studies Review* 2. 2004): 154.

[64] Ibid, 158.

Skowronek and Orren define political development as "a durable shift in governing authority."[65] In turn, they define a governing authority in APD as "the exercise of control over persons or things that is designated and enforceable by the state," and a shift as "a change in the locus or direction of control, resulting in a new distribution of authority among persons or organizations within the polity at large or between them and their counterparts outside."[66] They even call out citizenship specifically, which is at issue here, as an idea that builds and turns on the "distribution of authority."[67]

A key insight that APD offers us, that is of special relevance here, is that the polity is "fractured." Orren and Skowronek point out that the institutions in a polity are not created at the same time. They necessarily arise in a preexisting political context. Rather, they are created "at different times, in light of different experiences, and often for quite contrary purposes."[68] Thus, the search for political equilibrium is flawed. Rather, the state is made up of many regulatory bodies, who address varying issues with varying jurisdiction, that were created at different times and with different motives. These regulatory bodies do then, conflict with one another concurrently, or with themselves non-concurrently. This is how the polity can be described as fragmented.

Engel suggests that the fragmentation of the polity is actually a product of how it is constructed: "[a]s new policies are layered upon those in place, the juxtaposition and lack of integration creates the 'interplay of multiple institutions [which is] a source of both tensions and opportunities.'"[69] This political complexity provides opportunities for actors to push for, in the rhetoric of APD, shifts in governing authority, where durable shifts — arrangements that appear to hold over long spans of time — constitute political change. While rational choice approaches to political science often suggest "clean separations — between parts, between inside and outside— and

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[65] Karen Orren, and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004), 123.

[66] Ibid.

[67] Ibid.

[68] Orren and Skowronek (2004), 112.

[69] Engel (2016), 12. Citing Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004), 136.

places those separations at the foundations of political analysis," Orren and Skowronek suggest that these notions are limited in their capacity to capture the overlapping, fragmented, and internally contradictory aspect of a polity that developmental research like APD attempts to elucidate.

Attention to the fragmented state of the polity, to the notion that its institutions are hardly ever in a state of coherent or consistent equilibrium leads to the supposition that endogeneity is a "feature of APD research, not a malady."[70] That claim draws attention to the need to differentiate between exogenous and endogenous sources of institutional change. This distinction is important because, political scientist James Mahoney and Kathleen Thelen point out, shifts that occur endogenously "often unfold incrementally," and are not accounted for when only "exogenous shocks that bring about radical institution reconfigurations" are analyzed.[71] Traditional approaches to institutional change, such as those that emphasize "critical junctures," focus heavily on exogenous forces – that is, forces that occur beyond the bounds of the polity itself and that include such shocks as wars, depressions, or public health crises. Change thereby "typically involves a dynamic of 'punctuated equilibrium."[72] Long periods of institutional stability are, in this model, disrupted by moments in which opportunities for significant institutional reform appear. These junctures are "critical" because, political scientist Paul Pierson writes, they place institutional arrangements on "paths or trajectories, which are then very difficult to alter."[73]

APD scholars, utilizing the idea that the polity itself is fractured and composed of multiple distinct governing authorities that are not necessarily aligned with one another, offer a model of change that need not rely exogenous shocks as the only possible causal mechanisms. They challenge the notion that these shocks force critical junctures by suggesting that such accounts say nothing about the properties that makes an institution more susceptible to this type of force. Second, they

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[70] Ibid.

[71] James Mahoney and Kathleen Thelen. "A Theory of Gradual Institutional Change." In *Explaining Institutional Change: Ambiguity, Agency, and Power*, edited by James Mahoney and Kathleen Thelen. (New York, NY: Cambridge University Press, 2010), 2.

[72] Paul Pierson. *Politics in Time: History, Institutions, and Social Analysis*. (Princeton, NJ: Princeton University Press, 2004), 134, citing Krasner, 1989; Collier and Collier 1991.

[73] Pierson (2004), 135.

contend that political institutions are not only altered by exogenous shocks that force them to emerge, adapt, or break down. Instead, they also "evolve and shift in more subtle ways across time."[74] This type of development arises as a result of endogenous forces within the institutional structure. In the chapters that follow, I examine the fractured polity during the Reconstruction era. This analysis reveals that political change can and does indeed arise from endogenous forces within the institutional structure.

Dominant ideas can and do achieve dominance within political institutions. This does not, however, negate political development. Though it seems acknowledging that durability of political ideas in the polity directly conflicts with development, Orren and Skowronek point out that it does not. The more durable the ideational shift, "the more resistant the arrangement is reconstructs should be to subsequent alteration."[75] The relationship between ideational durability within the polity and political development is more complex. Specifically, the more extensive the institutional rearrangement, prompted by either exogenous factors, endogenous factors, or both, the more durable it is.

Developmental Citizenship in the American State

The projects takes it as a given that citizenship in the United States continues to be subject to contestation and proceeds to ask why. The answer is that the idea remains in flux because the constitutional structure of governing institutions permits it. If institutional design enables ideas to remain in contention, or at least provides the spaces through which non-dominant ideas of citizenship may rest in repose until taken up to challenge and perhaps unseat more durable notions, then the question that remains is how does such change occur. What are the mechanisms?

If citizenship is grounded first in the notion of recognition, then institutional design will influence whether and how citizenship is consistently conferred. Ideas that have been rejected by the governing authority may remain dormant in institutional crevices, ready to reappear and vie for ideational dominance once again if context permits. A heavily fractured polity—such as the United

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[74] Ibid.

[75] Orren and Skowronek (2004), 130.

States—allows for at least two possible explanatory mechanisms of change over time: first, elite political entrepreneurs, such as elected representatives or judges, may exploit such "frictional gaps" among different governing institutions for ideationally transformative purposes, and second, social movements or the people themselves may exploit these frictions and tensions and bring a disregarded conception of citizenship one again to the fore.

Scheingate describes the actors who exploit these frictional gaps as "political entrepreneurs."[76] These political entrepreneurs are those "whose creative acts have transformative effects on politics, policies, or institutions."[77] His work suggests that political entrepreneurs are individuals. However, single individuals are not the only ones to have "transformative effects" on politics. In the U.S. polity, states offer opportunities for political entrepreneurs to exploit. Legal theorist Heather Gerken points out that federalism offers a place where dissenting ideas can find voice outside the dominant framework. She suggests that federalism allows for minorities to rule without sovereignty by allowing dissenting voices to find voice.[78] Federalism acts as a mechanism for dissenters to exercise power. In this way, states offer a zone for non-dominant political ideas to become institutionalized and establish a foothold from which they can fight again for dominance.

Similarly, as Reva Seigel argues, social movements operate in similar ways: "[s]ocial movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees."[79] She employs the concept of "constitutional culture" to explore how "changes in constitutional understanding emerge from the interaction of citizens and officials."[80] It both "licenses and limits change" by constantly challenging the distinction between

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[76] Adam D. Scheingate "Political Entrepreneurship, Institutional Change, and American Political Development." (*Studies in American Political Development* 17, 2003): 185-203.

[77] Ibid, 185.

[78] Heather Gerken. "Forward: Federalism All-The-Way-Down." *The Harvard Law Review* 123, no. 4 (2010): 6-74.

[79] Reva Siegel. "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA." *California Law Review* 94 (2006): 1.

[80] Ibid, 3.

politics and law by people and officials the "resources to question and to defend the legitimacy of government, institutions of civil society, and the Constitution itself."[81]

The American constitutional order, Siegel writes, needs "forms of citizen participation to ensure its continuing authority," and citizen engagement through social movements is part of the constitutional culture that uphold the Constitution's democratic legitimacy.[82] Siegel emphasizes, however, that constitutional culture requires two conditions on those who advocate constitutional change. The first is the "consent condition," which requires that a social movement does not violate accepted understandings of how citizens and officials interact when their Constitutional views diverge – for example, it would prohibit violence. The second condition is the "public value condition," which requires that advocates and social movements "justify new constitutional understandings by appeal to older constitutional understandings that the community recognizes and shares."[83] Social movements, therefore, act in similar ways to the individuals who normally qualify as political entrepreneurs by harboring old ideas that could be disfavored in formal institutional structure, and reasserting them in attempts to make them dominant once again. As such, this thesis takes the term "political entrepreneur" to include *both* individuals and groups, who take the form of social movements. Both act as temporary strongholds of old, unfashionable, or losing political and constitutional ideas, and exploit the frictional gaps in the formal institutional structure to bring them back into play. The chapters that follow will examine the work of individual political entrepreneurs such as members of Congress or particular Justices on the Supreme Court as well as social movement actors, such as abolitionists and political party members, and state governments.

Sheingate argues that treating political entrepreneurs and their innovative actions more seriously can bear fruit in the study of institutional change. First, it forces greater attention to how institutional structure itself shape opportunities for change. Second, entrepreneurship focuses attention "on the boundaries between institutions and the complex characteristics of the American

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[81] Ibid, 5.

[82] Siegel (2006): 20.

[83] Ibid, 34.

political system as a whole."[84] Third, understanding political entrepreneurship makes an endogenous account of political change possible. An endogenous account of change that takes entrepreneurship into account is one that does not rely on "the occurrence of some critical juncture or exogenous shock that disturbs an institution in equilibrium."[85] In other words, Sheingate's investigation of political entrepreneurship presents us with a method for investigating endogenous change.

First, though, we must understand *how* the institutional structure in the polity can affect the ideational context and, thus, how a settled definition of citizenship may be impossible. Scheingate provides helpful insight here, too. The most important determinant for how susceptible institutional structure is to the actions of political entrepreneurs, Scheingate suggests, is *complexity*. Complexity describes a "system of multiple, overlapping, and heterogeneous components connected together in a dense network of interrelated links.'"[86] When Scheingate describes "complexity" within political institutions, he is referring to the same characteristics as Orren and Skowronek when they describe the American polity as "fragmented."[87] The consequences of having a complex (or fragmented) institutional structure are threefold. First, they are rampant with uncertainty that presents *opportunities* for acts of innovation on the part of political entrepreneurs. By uncertainty, Scheingate is referring to the difficulty of predicting intended and unintended outcomes, which are caused by the ripple and feedback effects that are characteristic of complex system. Because of these factors, he writes, "complex systems are often in flux, system components are related through reciprocal causation, and single events can have large aggregate effects. As a result, it is impossible to predict *ex ante* how change in one component will impact other parts of the system. Yet it is precisely this uncertainty that presents entrepreneurs with speculative opportunities."[88] Similarly, Mahoney and Thelen argue that endogenous institutional change occurs when "problems of rule interpretation and

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[84] Ibid, 186.

[85] Ibid.

[86] Ibid, 191. Quoting James March and Johan Olson. "The New Institutionalism: Organizational Factors in Political Life," (*American Political Science Review* 78, 1984): 734-749.

[87] Orren and Skowronek (2004).

[88] Scheingate (2003): 191.

enforcement open up space for actors to implement existing rules in new ways."[89] More specifically, as discussed earlier, Orren and Skowronek contend that a polity is rife with internal contradictions and overlapping authority relations, and this condition opens up opportunities for political entrepreneurs, agents, and other leaders, either individual or groups. Such a polity provides contradictions for these agents and entrepreneurs to exploit, and "alternatives for them to imagine."[90]

Second, Scheingate posits, their inevitable heterogeneity provides the *resources* for the opportunities to be exploited. Third, the "multiple and overlapping character of components within complex systems can produce ambiguous relations among actors and institutions."[91] With increased complexity comes blurred boundaries between system components: "[h]ierarchies are flattened as networks spanning institution replace rigid orders differentiated along functional lines. Put another way, increasing complexity render the boundaries separating components less clearly defined and more permeable: rising complexity lowers entry barriers"[92] As an example of a highly complex institutional system, Sheingate uses the United States: "the common observation regarding the fragmentation of the American political system can be described in terms of complexity. Separated powers, federalism, bicameralism, congressional committees, and executive agencies together constitute a complex system of multiple and overlapping sources of authority."[93] If the American system is extremely complex, then, as has been shown, it is very susceptible to the actions of political entrepreneurs. If the political entrepreneurs, both individuals and groups in the form of social movements, take advantage of the openings presented to them by the complexity of the American system, then creating a new institutional arrangement and, thus, political development, will follow with ease.

Scheingate's work, then, lends strong support to the view that the structure of the American system may in fact be institutionally structured to foster a definition of citizenship in the United

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[89] Mahoney and Thelen (2010), 4.

[90] Orren and Skowronek (2004), 116.

[91] Scheingate (2003): 192.

[92] Ibid: 202.

[93] Ibid: 191.

States that is in flux and changes over time or means different things at one time depending on the governing institution that is recognizing the individual as citizen. The only settled definition of citizenship we may be able to find, then, is the procedural or developmental one. This definition rejects teleology and is depleted of substantive content, such as rights or responsibilities. This definition is, namely, that of citizenship-as-recognition.

To investigate how state institutions have affected what might be meant by or included in the status of citizen, the following chapters will focus on one particular generative moment in the redefinition of citizenship by the state: Reconstruction. During Reconstruction, which covers 1863-1877,[94] three amendments to the U.S. Constitution – the Thirteenth, Fourteenth, and Fifteenth – actively contemplated the meaning and parameters of citizenship and how citizens would be recognized by the state.

Conclusion

What citizenship means has vexed scholars and political leaders alike. Normative theorists have described citizenship in terms of rights, responsibilities, duties, and practice. However, just the fact that this debate over the content of citizenship continues with its current strength suggests something else may be at work. In the United States, the institutional structure may actually be predisposed to make a resolution of this debate impossible. As has been shown by Adam Sheingate, the more complicated the institutional structure in a polity, the more susceptible it is to the work of political entrepreneurs who can exploit the frictional gaps to produce shifts in governing authority and, thus, political change. Additionally, if we recognize that citizenship is regulated by institutions and thus employ the narrow and logically prior definition of citizenship, that of citizenship as institutional recognition, we can begin to understand how and why citizenship has continued to be such a fiercely contested concept.

To investigate this claim, this project draws insight from American Political Development. APD scholars have noted that complex interplay and overlap between political institutions gives rise

[94] See Eric Foner. *Reconstruction: America's Unfinished Revolution, 1863-1877*. Updated Edition ed. (New York, NY: Harper Collins, Harper Perennial Modern Classics, 1988.) However, due to the lag time of litigation, I may stray slightly beyond these boundaries.

to "unexpected and unforeseen frictions."[95] This friction is important for political change and political development in two ways. First, endogenous political change is a result of this friction. Second, endogenous factors are more likely to cause political change if this friction exists. The endogenous factor most pertinent to this study is that of ideational context, specifically that of citizenship. The work of political entrepreneurs who bring differing ideas back into play serves as one example of how this friction can allow for political change.

The work of political entrepreneurs and institutional friction is what will be explored in the following chapters. By investigating the moments of incomplete displacement of "governing authority," the subsequent examples will illuminate how state institutions have affected the definition of citizenship in the United States. Though such moments are temporary the "institutions they produce have consequences that skew political debates and outcomes for decades, if not centuries."[96] Based on what has been shown here, if we find institutional disagreement over definitions of citizenship, both concurrently and across time, then a developmental citizenship that is constantly in flux will have been strongly supported, and the larger claim about a constitutional structure that makes this outcome inevitable will be validated.

This suggests that institutional disagreement over the meaning and content of citizenship has two dimensions. First, different state institutions can simultaneously disagree over what citizenship is. Second, a state institution can define citizenship differently at different times. The lens of APD suggests that when different doctrines conflict "unexpected and unforeseen frictions may continuously arise."[97] This project investigates this institutional disagreement – as it is made manifest in the earliest attempts by Congress, the Supreme Court, the states, and the people, to interpret the Fourteenth Amendment– and its resulting friction and unforeseen consequences, in order to uncover how and why a settled notion of citizenship eludes U.S. democratic development.

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[95] Engel (2016), 12.

[96] Frymer (2008): 787.

[97] Engel (2016), 26.

Chapter 2

To Preserve the Union: Reconstruction, Congress, and Citizenship

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Reconstruction, the years between 1863 and 1876, when Southern political institutions and state constitutions were redesigned in the aftermath of the United States' Civil War, broke open the idea of citizenship for consideration by multiple political actors at the federal and state level. Citizenship as a political idea was unsettled, undefined, and up for grabs during and after the Civil War. Historian Eric Foner considers Reconstruction to have left an indelible impact on contemporary Americans precisely for this very reason. Issues that agitate U.S. politics, especially ones that relate to citizenship, including how the political community is defined, how are rights conferred, the respective powers of the state and federal governments, and the "relationship between political and economic democracy," are all Reconstruction questions.[1] As we have seen, the definition of citizenship in the United States is subject to contestation even if it appears durable during particular periods. As long as questions of citizenship, rights, freedom, and democracy persist in our society, "so too will the necessity of an accurate understanding of Reconstruction."[2]

The primary purpose of Reconstruction, namely to outlaw slavery and reposition the newly freedmen for some form of acknowledgment by the polity, was addressed through three amendments to the United States Constitution. First, slavery was prohibited explicitly by the Thirteenth Amendment. Second, the Fourteenth Amendment conferred citizenship status on African-Americans, which brought them within the polity's acknowledgment insofar as they might have civil rights, e.g., the rights to enter into contracts or serve on juries. It also altered the balance of powers between state and national governments to prevent another civil war grounded in a states' rights claim. Third, the newly freed slaves and free blacks were acknowledged to have political rights, namely the right to vote, by the Fifteenth Amendment.

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[1] Eric Foner. *Reconstruction: America's Unfinished Revolution, 1863-1877*. Updated Edition ed. (New York, NY: Harper Collins, Harper Perennial Modern Classics, 1988), xli.

[2] Ibid, xlii.

These three Amendments differed radically from notions of citizenship embraced during the antebellum period. Prior to Reconstruction, the individual states "defined the status and secured the rights of the inhabitants of the United States."[3] They did this, legal historian Robert Kaczorowski writes, through their state legal institutions, statutes, and courts. However, some antebellum legal theorists contended that the ability to secure the rights of inhabitants of the United States (as distinct from the rights of inhabitants of the several states) should lie not with the states, but with the national government. Kaczorowski explains that the debate over whether the national or state governments "possessed ultimate authority to determine the status and enforce the rights of American inhabitants" resulted in a fierce national political debate that ultimately culminated with the secession of the South in 1861.[4] As a result, the Civil War was a partisan war. Republicans advocated emancipation and Union, but Democrats stood for lenience with Confederate secessionists and slavery.[5] The Republican ideals of Union, national sovereignty, and emancipation were ultimately victorious in battle. Consequently, Reconstruction policy was ultimately controlled and implemented by congressional Republicans.

These northern Republicans favored national protection of rights over state protection of rights because they held that state protection of rights had failed. The Republican-controlled 39th Congress of 1865-1867 sought to establish national protection of citizens' rights, and thereby prioritizing national citizenship over state citizenship. The political context of antebellum and Civil War-era civil rights deprivations compelled Congress to "take effective measures to secure the fundamental rights of American citizens."[6] Their efforts resulted primarily in the Fourteenth Amendment. However, Republican idealist notions of "social harmony" ultimately failed.[7] Between 1893 and 1911, political scientist Richard Valelly points out, Congress formally abolished 94 percent

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[3] Robert J Kaczorowski. "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War." *The American Historical Review* 92, no. 1 (1987): 50.

[4] Ibid.

[5] Ibid: 52.

[6] Ibid.

[7] Richard M Valelly. *The Two Reconstructions : The Struggle for Black Enfranchisement*. American Politics and Political Economy. (Chicago: University of Chicago Press, 2004), ix.

of the election statutes passed during Reconstruction.[8] Republican efforts failed in other ways, too. Historian Eric Foner argues that the depression of 1873 explains why Reconstruction's aims were never fully realized. The depression, Foner writes, "marked a major turning point in the North's ideological development."[9] The depression, which "rudely disrupt[ed] visions of social harmony," resulted in "widespread tension between labor and capital."[10] The Republican ideals of equal rights and dignity of labor "gave way before a sense of the irreducible barriers separating the classes and a preoccupation with the defense of property, 'political economy,' and the economic status quo."[11] For Foner, then, the Republican project to institutionalize a new vision of national citizenship over state citizenship and equal rights collapsed with the economic downturn of the 1870s.

This chapter puts forward an alternative explanation. The Republican vision to reshape the balance of powers between the state and federal governments, and reorient the tiers of citizenship was redefined because of the constitutional structure of political institutions, which the various Reconstruction Amendments did not substantively alter. In other words, the separated and fragmented nature of the polity permitted disagreement about the meaning of these Amendments among and within political institutions to persist, opening space for the original aims of the Republicans to be challenged and ultimately displaced. Political scientists James Mahoney and Kathleen Thelen argue that when analyzing institutional change, most scholars point to "exogenous shock that bring about radical institutional reconfigurations," but they ignore or overlook the importance of endogenous changes that "often unfold incrementally."[12] If that claim is applied to the collapse of Reconstruction ambitions, Foner is no doubt correct that the economic depression of the 1870s, which was an exogenous shock to the political system, altered the path of institutional development. Nevertheless, Foner's explanation does not examine endogenous sources of change

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[8] Ibid.

[9] Foner (1988), 517.

[10] Ibid.

[11] Ibid.

[12] James Mahoney and Kathleen Thelen. "A Theory of Gradual Institutional Change." In *Explaining Institutional Change: Ambiguity, Agency, and Power*, edited by James Mahoney and Kathleen Thelen. (New York, NY: Cambridge University Press, 2010), 2.

that may follow from the design of political institutions themselves. Specifically, Foner overlooks that the polity is set up in such a way to permit older political ideas to be brought back into a policy or constitutional conversation even when another idea appears dominant. In short, he ignores a key insight of American political development, namely that the polity is constituted by multiple orders potentially in tension. This chapter aims to articulate the Republican definition of citizenship and how it differed from definitions that had been dominant before the Civil War. This chapter begins the story of how congressional Republican ideals of Reconstruction fell victim to the structure of the polity itself. As will be further explain in the chapters that follow, Republicans were unable to maintain their dominance in a fragmented institutional context where opposition forces could gain and build a foothold and challenge the Republican project from the start.

This chapter explores Reconstruction and the Fourteenth Amendment to shed light on how it was intended to alter the meaning of U.S. citizenship. To begin the examination of institutional conflict over citizenship, this chapter looks exclusively at Congress and the ideas about citizenship that permeated its understanding. The Republican-controlled 39th Congress endorsed a Republican definition of citizenship that reflected their vision for the future of the country. Representative John Bingham and the other drafters of the Fourteenth Amendment sought to use the national government to protect the rights they believed states were infringing upon. Their understanding of the Fourteenth Amendment prioritized national citizenship over state citizenship. These various framers, but Representative John Bingham in particular, had a clear idea about how they intended to alter citizenship when they drafted and ratified the Fourteenth Amendment. This is shown by their floor speeches in the House of Representatives in the 39th Congress, prior to the ratification of the Fourteenth Amendment. Once ratified, this Republican idea of citizenship pushed forward by Bingham achieved a brief period of, to use the rhetoric of APD, durability, namely during the years 1868-1873. Orren and Skowronek use the term *durable* to describe a shift in "governing authority," such as an ideational shift, that is "not fixed," but that has achieved "stability or change in any given historical instance [that] must be regarded as contingent."[13] Achieving durability in governing

[13] Orren and Skowronek (2004), 123.

authority, as manifested in political ideas, is the "constant object of political conflict."[14] Durability of their preferred idea of citizenship was the object of Reconstruction-era radical Republicans during ratification of the Fourteenth Amendment. As will be shown in this chapter, Republicans succeeded at establishing a period of brief durability for their political ideas between 1868-1873. A shift that can call itself "durable," Orren and Skowronek write, is one that lasts at least half a century.[15] This ideational shift, however, because it lasted for less than a decade, was not durable. The shift was broad, as it was reflected in many institutions, but it was not deep, because it failed to displace old ideas. It must not be forgotten that a durable shift in governing authority is not immune to ideational challenges for future governing authority. Rather, the more durable the shift, the harder it will be to displace. A durable shift merely "set[s] the conditions for subsequent politics."[16] Over these six years, the Republican project to prioritize national citizenship over state citizenship achieved the higher ground. Importantly, though, opposing ideas were manifesting themselves elsewhere in other political institutions, particularly at the state level and in the state and federal judiciaries, and finding voice to challenge the Republican project from the start. As will be shown in later chapters, the crucially formative moment for political development in the U.S. came from the Supreme Court in 1873, when it became clear that the Republican shift was crumbling under the ideational attacks.

This chapter begins with an explanation for why our analysis of citizenship in the American polity begins with Reconstruction. Next, it investigates the Reconstruction-era Republican Party and shows how their motto "Free Labor, Free Soil, Free Men" captures a vision of nation, union, and U.S. citizenship. Third, it shows how the Republican vision was captured in the Reconstruction project, namely in the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. It explains the intended meaning of the Fourteenth Amendment by investigating one of its principal drafters, Representative John Bingham. Bingham's life story, beliefs, and floor speeches indicate that he intended the Fourteenth Amendment to prioritize national citizenship over state citizenship. The final section shows how the Republican-driven project to prioritize national citizenship over state

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[14] Ibid.

[15] Ibid, 129.

[16] Ibid, 123.

citizenship achieved dominance in the polity by being taken up in several other institutions. However, the developmental moment the Republicans achieved was a broad, but not deep shift. Accordingly, it was a shift, but not a *durable* shift, because opposing ideas were manifesting themselves elsewhere.

Reconstruction and Citizenship

Reconstruction marked a turning point in the development of the American polity. Our investigation in whether there is indeed a structural reason that explains why a settled definition of U.S. citizenship continues to elude narratives of democratic development in the United States begins with Reconstruction precisely because one of the animating aims of Reconstruction, if not *the* primary aim, was the reconceptualization of who counted as a citizen and what the relationship between the citizen and the government would be. Historian Eric Foner writes that the specific questions that agitated the country during Reconstruction were "how our society would respond to the destruction of slavery. What system of labor would replace slave labor? What system of race relations would replace the race relations of slavery? What would be the role of former slaves in American life?"[17] More broadly, however, the fundamental question the country faced was "who was entitled to American citizenship, and what rights were those citizens to enjoy?"[18] Arguably, there is no other time in American history where the concept of citizenship was as much up for grabs. Legal scholar Bruce Ackerman suggests that Reconstruction marked a turning point not just in constitutional development, but also specifically in the definition of U.S. citizenship. For Ackerman, the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, known together as the Reconstruction Amendments, was a period of "higher lawmaking."[19] The struggle over the Fourteenth Amendment specifically, he writes, was "the greatest constitutional moment in American

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[17] Eric Foner. "The Supreme Court and the History of Reconstruction— And Vice-Versa." *Columbia Law Review* 112, no. 7 (2012): 1585-1686.

[18] Ibid, 1586.

[19] Bruce Ackerman. *We the People (2): Transformations.* (Cambridge, MA: Belknap Press of Harvard University, 1998).

history."[20] During this period, as was also the case during the Founding of the republic after the Revolutionary War nearly a century earlier, "constitutional law became the preeminent language through which American debated and defined their national identity."[21] Specifically, it was the conflict over civil rights and state power in the wake of a shattering civil war that led congressional Republicans in the 39th Congress to reject the apparent assumption by the original Framers of the Constitution that states could be relied upon to adequately protect the rights of their citizens. Rather, congressional Republicans, specifically the Framers of the Fourteenth Amendment sought to redefine citizenship by incorporating a "right to protection by state government into the Federal Constitution."[22]

At no other point in history was the content and meaning of U.S. citizenship this up-for-grabs. The Civil War and the subsequent reconstruction of the Union offers a unique opportunity for insight into the institutional conflict over citizenship, so, since we are investigating if the American polity is structured to keep citizenship an unsettled concept, it is fitting that our story begins here.

The Dignity of Labor and the Pursuit of Happiness

In 1857, the Supreme Court of the United States handed down a fateful decision. In *Dred Scott v. Sandford*[23] the Court declared that Congress was powerless to abolish slavery and that black people could never become citizens of the United States. In the aftermath of this decision, the country fought the Civil War, one of the bloodiest wars in its history. The question of slavery and who was a member of the political community established the context for Reconstruction. As a result of this crisis, Congress and the states enacted a series of statutes and constitutional amendments that for the first time in U.S. history "established as a matter of federal law the principle of equal rights

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[20] Ibid, 160.

[21] Ibid.

[22] Steven J Heyman. "The First Duty of Government: Protection, Liberty and the Fourteenth Amendment." *Duke Law Journal* 41, no. 3 (1991): 526.

[23] 60 U.S. 393 (1857).

for all citizens regardless of race."[24] Why, though, did Congress not stop with the Thirteenth Amendment and its categorical abolition of slavery and involuntary servitude? What was the purpose behind the Fourteenth Amendment? Did it suggest something broader about the political agenda of the radical Republicans and the direction they wanted to push the nation after the Civil War? The conflict over slavery forced the nation to confront the meaning of U.S. citizenship, and to decide whether a citizen owed primary allegiance to a state or to the nation as a whole.

The Republicans were the self-proclaimed party of "Free Labor, Free Soil, Free Men."[25] The Republicans, Carl Schurz, a leader of the Republican party said to a Milwaukee audience on May 26, 1860, "stand before the country, not only as the anti-slavery party, but emphatically as the party of free labor."[26] The goal of the Republican party was to make labor honorable.[27] Foner summarizes their platform.

> For the concept of "free labor" lay at the heart of the Republican ideology, and expressed a coherent social outlook, a model of the good society. Political anti-slavery was not merely a negative doctrine, an attack on southern slavery and the society built upon it; it was an affirmation of the superiority of the social system of the North—a dynamic, expanding capitalist society, whose achievements and destiny were almost wholly the result of the dignity and opportunities which it offered the average laboring man.[28]

The roots of antebellum Republican ideology can be largely traced backed to Protestantism, which suggested that the pursuit of wealth was a way of serving God, and labor, "which had been imposed on fallen man as a curse, was transmuted into a religious value, a Christian duty."[29] Republican ideology itself, though, had evolved and adapted to fit modern society. Though its roots were indeed in Protestantism, by emphasizing social mobility and economic growth, Republicans "reflected an

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[24] Foner (2012): 1587.

[25] Eric Foner. *Free Soil, Free Labor, Free Men.* (New York, NY: Oxford University Press, 1970).

[26] Ibid, 11, quoting Carl Shurz, *Speeches of Carl Shurz* (Philadelphia 1865), 108.

[27] Foner (1970), 11.

[28] Ibid.

[29] Ibid, 12-13.

adaptation of that [Protestant] ethic of the dynamic, expansive, capitalist society of the ante-bellum North."[30]

There were, of course, several strands of Republicanism in antebellum America. Of particular note are the radicals. Though it is difficult to define the radicals precisely, Foner cautiously categorizes radicals as those who had a "persistent refusal to compromise with the South on any question involving slavery."[31] Broadly, although the radicals shared the dignity of labor component with their conservative and moderate counterparts in the Republic party, they had strong beliefs not only about labor and slavery, but also about the direction of the Union more broadly. Radical Republicans attempted to embed the notion of "equality among Americans (a principal not mentioned in the original Constitution) into our laws and social reality."[32] For most Republicans, the preservation of the Union after the Civil War was an end in itself, and to maintain it they attempted to temper anti-slavery rhetoric. Radicals, however, contended that the Union was a means. They held, according to Foner, that the Union "had been established for the noble purposes of securing the right of all Americans to life, liberty, and the pursuit of happiness, and that the founders had intended that slavery should one day cease to exist in the nation."[33]

Foner points out that it is important to recognize just how revolutionary the Republican agenda was. Prior to the war, slavery was "an intrinsic part of the Constitution and federal law," and both northern and southern states "practiced widespread discrimination against black Americans, slave and free."[34] And, under the original Constitution, the States, and *not* the federal government, held the primary responsibility for "both defining and protecting American" rights.[35] After the Revolutionary War, the rights that had been previously conferred (or, as was more often the case, *not*

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[30] Ibid, 13.

[31] Ibid, 104.

[32] Foner (2012): 1587.

[33] Foner (1970), 139.

[34] Foner (2012): 1856.

[35] Kurt T. Lash. *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship*. (New York, NY: Cambridge University Press, 2014), 67.

conferred) by the British crown transferred to the newly independent states. As a result, State laws determine which rights and privileges to grant to their citizens, and those citizens expected the "equal enjoyment of those privileges and immunities secured to them by their state's constitution."[36] However, prior to the ratification of the Constitution of 1787, it was not at all clear what would become of these rights when a citizen of one state traveled to another state. A remedy to this conundrum was included in Article IV of the Articles of Confederation, and a "streamlined version" became Article IV of the Federal Constitution in 1787: "The Citizens of each state shall be entitled to all the Privileges and Immunities of Citizens of the several States."[37]

During the first half of the nineteenth century, the meaning of this clause was hotly debated.[38] However, as the country entered the period of the Civil War, Constitutional theorist Kurt Lash argues, the jurisprudence of the Privileges and Immunities Clause of Article IV was "theoretically clear and surprisingly stable."[39] The cases of *Corfield v. Coryell* (1823),[40] *Campbell v. Morris* (1797),[41] *Livingston v. Van Ingen* (1812),[42] *Abbot v. Bayley* (1827),[43] and *Baker v. Wise* (1861)[44] all embrace the same principle: the privileges and immunities of Article IV referred to a "limited (if especially important) set of state-secured rights."[45] In other words, no court read this provision as protecting any national rights, substantive or otherwise. It is for this reason that prior to the Civil War, the states

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[36] Ibid, 21.

[37] Ibid, 22; U.S. Constitution. art. IV § 1, cl. 1.

[38] Lash (2014), 20-47.

[39] Ibid, 35.

[40] (6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. 1823).

[41] 3 H. & McH. 535 (MD. 1797).

[42] 9 Johns. R 507 N.Y. (1812).

[43] 23 Mass. (6 Pick.) (1827).

[44] 57 Va. (16 Gratt.) (1861).

[45] Lash (2014), 36.

"served as the traditional guardians of life, liberty, and property, and through their institutions, statutes, and court decisions, defined the status and rights of different groups of state residents."[46]

However, the stability of antebellum understanding of Article IV presented a major problem for the Republicans. Limiting the scope of the privileges and immunities clause had, as Lash notes, the effect of "maximizing the scope of state regulatory autonomy, a states' right result that protected the policy-making power of both free and slave states alike."[47]

It is in this vein that the Supreme Court decided *Dred Scott v. Sandford.* In the Opinion of the Court, Chief Justice Taney relied on the antebellum reading of the Privileges and Immunities Clause of Article IV (the Comity Clause). By holding that slave owners had a constitutional right to carry the slaves, as property, into any territory, Chief Justice Taney appeared, at least to the Republicans, to be laying the groundwork for the nationalization of slavery.[48] This rejection of the power of the federal government was seen by the Republicans as the cause of the Civil War because it opened the door to expanded state rights.[49] Additionally, the reading of the Comity Clause reflected in *Dred Scott* had a strongly limiting power on the federal government. *Dred Scott* therefore proved problematic for the Republicans in two ways. First, it opened the door to the nationalization of slavery. Second, it relied on skewed reading of the Comity Clause that Republicans believed led to an inevitable but inappropriate expansion of state rights. However, there was a solution.

The new American states after the Revolutionary War enjoyed the sovereign right to confer rights upon its citizens. The adoption of the Federal Constitution in 1787, however, added a new layer. Under this new constitution, citizens of the United States were granted rights both as citizens of the United States and as citizens of the state in which they resided. Federalism created for inhabitants of the United States a form of dual-citizenship. As the Virginia Supreme Court of Appeals wrote in 1811, the Constitution "clearly recognises the distinction between the character of a citizen

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[46] Robert J. Kaczorowski. *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, N.Y.U. Law Review 61, no. 863 (1986): 871.

[47] Ibid, 37.

[48] Ibid, 42.

[49] Michael Kent Curtis. *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* (Durham, NC: Duke University Press, 1986), 41.

of the United States, and of a citizen of any individual states; and also of citizens of different states."[50] Individuals living in the United States were considered to be both citizens of the nation and citizens of a state. The citizen, legal historian Robert Kaczorowski writes, owed allegiance to both the nation and the state, and "both the national and the state governments theoretically possessed the constitutional authority and obligation to enforce and protect the fundamental rights of citizenship."[51] However, prior to the Civil War, the states functioned as the "primary guarantors of the fundamental rights of American citizens," party due to the limited reading of the Comity Clause.[52] Kurt Lash points out that the "privileges and immunities *qua* US citizens were simply not the same as one's privileges and immunities *qua* state citizen."[53] In other words, the privileges and immunities one was granted by being a citizen of the United States did not vanish when crossing state lines. Importantly, there was an key difference between one's status as a citizen of a state and as a citizen of the U.S. as a nation. Prior to the Civil War, the prior was prioritized over the latter.

Though the privileges and immunities of U.S. citizenship were quite narrow and limited, they were entirely distinct from those granted by individual states. This point carried particular weight in antebellum America because of the incorporation and creation of new territories that were not yet under the control of a state government. These "rights of national citizenship" were often discussed in the context of U.S. treaties of cession. These agreements, Lash explains, promised the inhabitants of newly acquired territory that, "once they were fully admitted into the Union, they would enjoy all the privileges and immunities of US citizens."[54] Similar language appeared in the Treaty of Guadalupe Hidalgo in 1848 and the Treaty with Stockbridge Tribe of Indians in 1843. There was, therefore, a common understanding in antebellum American law that there existed "rights and immunities" or "privileges and immunities" of national citizenship that different completely from the privileges and immunities of state citizenship. The conflict over slavery forced the nation to address

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[50] Lash (2014), 47-48, citing *Murray v. M'Carty*, 16 VA (2. Munf) 393, 398 (1811).

[51] Kaczorowski (1986): 872.

[52] Ibid.

[53] Lash (2014), 48.

[54] Ibid, 48.

head on the question whether a citizen owed their "primary allegiance to the national or state government, and which of these governments had primary authority over the status and rights of the individual."[55] A heavy-handed endorsement of state allegiance and state power was causing problems for the Republicans. It followed, then, that they should endorse national citizenship and national power.

That is what the Civil War and Reconstruction-era Republicans did. As Foner argues, they emerged during the winter of 1860, also known as the "secession winter," as the united defender of the Union. Foner argues that the Republicans, but the radicals in particular, "abandoned their commitment to states rights and adopted an unqualified Unionism, once it became apparent that they would further the antislavery cause."[56] The Republicans, it must be noted, were not enemies of federalism. They did not want the federal government to usurp or supplant state power entirely. They held, however, that the States "must be kept within their proper orbit, an orbit that would keep them from colliding with the rights of the individual."[57] Republicans insisted that state secession could not be recognized because it was "inconsistent with the '*nationality*' of the United States."[58] Particularly, Republicans "of all factions" were in agreement that the United States was a nation, and not just a league of sovereign states.[59] The Republican position during and after the Civil War was, Foner writes, that the Union

> should be revered and defended not only for itself, but also because of the purposes for which it had been created. high among these purposes was the spread of freedom, which, in the 1850's, meant the confinement of slavery. To preserve the Union by undermining this purpose would be to subvert the foundations of the Union itself. The goals of Union and free soil were intertwined, and neither could be sacrificed without endangering the other.[60]

The preservation of the Union and allegiance to it *as* a Union was the Republican cause. They favored a unified and cohesive nation over a league of friendship among sovereign states, at least

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[55] Kaczorowski (1986): 872.

[56] Foner (1970), 224.

[57] Curtis (1986), 41.

[58] Foner (1970), 224.

[59] Ibid, 225.

[60] Ibid, 225.

partially because this league gave the states too much say over the citizenship rights of its inhabitants, and the states were not using this authority for good. For the Republicans, but especially the radicals, giving the national government power over citizenship rights was the means to securing their ultimate goal of "free soil, free labor, free men." Their project was, therefore, to prioritize national citizenship over state citizenship— to tip the balance of the dual-citizenship status of Americans towards U.S. citizenship, in lieu of state citizenship.

John Bingham, Congress, and the Fourteenth Amendment

The project of the radical Republicans took the form of the Thirteenth, Fourteenth, and Fifteenth Amendments, known together as the Reconstruction Amendments. The motivating purpose behind these amendments, but the Fourteenth Amendment specifically, was to embed Republican ideas about citizenship into the polity, namely by prioritizing national citizenship over state citizenship. As has been shown, Republicans saw the prioritization of state citizenship as the enemy of abolition and the dignity of labor, as well as the reason for the Civil War. It was in this context that the Fourteenth Amendment was drafted. After the Civil War, some congressional Republicans embraced a natural law theory of American constitutionalism— that the national government had always possessed the power to protect the natural rights of U.S. citizens.[61] Legal scholar Robert Kaczorowski argues that because they believed that national citizenship was primary, and "state citizenship derivative," the Framers of the Fourteenth Amendment believed that "Congress possess primary authority to secure the civil rights of United States citizens."[62]

The author of the Section 1 of the Amendment was John Bingham, a congressman from Ohio. Bingham was a Republican, and his views on the Fourteenth Amendment confirm that it was meant to alter the definition of U.S. citizenship by giving Congress the power to protect infringements on rights, thus conferring and recognizing national citizenship status, and prioritizing

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[61] Kaczorowski (1986): 890.

[62] Kaczorowski (1986): 867.

the nation over the states. By seeking to alter the definition of citizenship, upend the balance of power, and catalyze political change, Bingham was acting as an elite-level political entrepreneur.

In a recent notable biography on John Bingham, legal scholar Gerard Magliocca shows how Bingham and "the abolitionist dream that was his life's pursuit were both rooted in the emerald hills of western Pennsylvania and eastern Ohio."[63] Until the age of twelve, John Bingham lived in the small town of Mercer, Pennsylvania. After the death of his mother in 1827, he moved to Cadiz, Ohio at his father's wishes. His family, friends, community, and faith were all aligned, Magliocca writes, "in their fervor for abolitionism, devotion to God, and hostility to the Democratic Party."[64] In 1835, Bingham enrolled in Franklin College, which in 1849 merged with Marshall College to become what is now Franklin & Marshall College. Bingham worked as a lawyer after he moved back to Cadiz in 1840, but he was "eager to make contacts and establish a reputation," so he quickly involved himself in politics.[65] He worked on Whig campaigns for many years while he worked as an attorney, but he did not become a candidate himself until 1846, when he ran for prosecutor of Tuscarawas County and won with 55 percent of the vote.[66]

Parts of Bingham's background and some statements he made during early debates over the Fourteenth Amendment have lead critics to question whether he truly was an abolitionist, and whether he intended the Fourteenth Amendment to radically alter the federal balance. Indeed, Bingham made no recorded public statements about slavery until 1848.[67] However, as Magliocca notes, a letter Bingham wrote to Salmon P. Chase, a leader of what would become the Republican Party, in 1845 dispels any doubt we may have about his abolitionist sentiments. In it, Bingham requests assistance from Chase to advance the antislavery cause:

> We try to be as active as possible, in efforts to advance the cause, though we labor under many discouragements. The counties of Scioto, Lawrence, Jackson, Gallia, and Meigs, are

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[63] Gerard N Magliocca. *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment*. (New York and London: NYU Press, 2013), 5.

[64] Ibid, 10.

[65] Ibid, 20.

[66] Ibid, 29.

[67] Ibid. 27.

> collectively, perhaps as inveterately Proslavery, as the same number of contiguous counties anywhere else in the State. If there be any portion of the Ohio field demanding a greater share of anti-slavery Labor than any other, it would seem that these central frontier counties embrace that portion, and yet we have been wholly neglected….I pray you if possible, send us a laborer for a short time this fall, one who has a missionary spirit, whose heart and soul is in the cause; who will be willing to address small meetings or large ones, who will go from neighborhood to neighborhood, from one appointment to another for a few days until this half-dead community shall begin to wake up and show signs of life.[68]

As this letter, Bingham's background, and his future public statements denouncing slavery should make clear, John Bingham was a staunch abolitionist. Indeed, on March 14, 1854, during his first run for Congress, Bingham addressed a gathering in Cadiz. A Democratic newspaper reported him as pronouncing that he had now gone "completely over to the abolitionists."[69]

John Bingham had unusual Constitutional views for the antebellum era. They oozed skepticism of states' rights, and presumed a strong national government. He believed (prior to any proposal of a draft of the Fourteenth Amendment) that Congress had "broad authority to regulate the territories under Article Four, Section Three,… and that this included the authority to ban slavery."[70] He also believed that states were "equal in many respects, but they were 'unequal in the right to do wrong,' and thus did not have an equal right to bring slaves in the territories."[71] Bingham believed that the original thirteen states had an unbridgeable right to have slavery since they predated the Constitution, but that states admitted *after* ratification did not have such a right. In other words, he believed that federal courts could invalidate laws in some states that were constitutional in the original thirteen. Specifically, he believed that the Northwest Ordinance of 1787 did not apply to the original thirteen states, but did grant Congress the power to oversee state laws in other states. Though the Supreme Court disagreed in 1850 in *Strader v. Graham,*[72] saying that the Northwest Ordinance no longer applied once a territory became a state, Bingham argued that the Court's holding was

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[68] Letter from John A. Bingham to Salmon P. Chase et al., Aug 6, 1845, 1 (Pennsylvania Historical Society), cited in Magliocca (2013), 29.

[69] *Cadiz Democratic Sentinel*, July 12, 1854, cited in Magliocca (2013), 40.

[70] Magliocca (2013), 53.

[71] Ibid, 54, quoting *Congressional Globe*, 34th Cong., 3d Sess. app., 137.

[72] 51 U.S. 82, 95 (1850).

"irrelevant because the principles of the ordinance were adopted in the Bill of Rights."[73] Bingham's invocation of Bill of Rights is the key point here. He concluded that "[t]he Act of 1789 adopting this ordinance, as also the amendment incorporating its great principles in the Constitution, were 'statute *restrictions* upon the institution of new States' perpetual obligation."[74] This view, Magliocca notes, is basis for holding that the Bill of Rights applied to the states *as well as* the federal government. It seems Bingham believed this was possible through Article IV's Comity Clause. Bingham was convinced that the original Constitution imposed an obligation on the states to protect the rights enumerated in the Bill of Rights. It was on this view that Bingham based the first draft of the Fourteenth Amendment.

After he was reelected to Congress in 1865, Bingham confronted head-on the concerns facing the country. General Lee's surrender in April, 1865, which marked the official end of the Civil War, had raised massive questions about the future of the country. Arguably the most important question involved the conditions that were to be imposed upon the conquered southern states as the cost of readmission to the Union. Bingham, like most Republicans, felt that "the South should be compelled to do more to protect the freed slaves."[75] He dismissed the claim that the former Confederate States could retain the rights they had prior to the war, as states with significant autonomy. One of Bingham's primary concerns was to guarantee that every "natural born citizen of the United States" was "entitled to all the privileges and immunities of citizens."[76] So, when Bingham returned to Congress in December of 1865 for the 39th Congress, he proposed an initial draft of what would eventually become the Fourteenth Amendment.

However, Bingham's solo effort was quickly institutionalized when he was appointed to the Joint Committee on Reconstruction in 1866. In January of 1866, he spoke to Congress: "The Party of the Republic proposes only to take security for the future," and ensuring this security meant refusing the "horrid blasphemy…that this is a Government of white men," and securing "equal and exact

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[73] Magliocca (2013), 55.

[74] Ibid, citing *Congressional Globe*, 34th Cong., 3d Sess. app., 137 (1857).

[75] Magliocca (2013), 109.

[76] Ibid, citing *Cincinnati Daily Commercial*, Sept. 19, 1865.

justice to all men."[77] Bingham's solution, Magliocca writes, was a constitutional amendment that would "give Congress and the federal courts the authority to enforce fundamental rights."[78] Specifically, Bingham proposed an amendment that would give Congress the power to pass "all laws necessary and proper to secure to all persons—which includes every citizen of every State— their equal personal rights."[79] Additionally, to prevent rights of citizens of one state not being respected by another state, Bingham wanted 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."[80] In short, Bingham desired an amendment that would massively empower Congress to recognize, define, and defend the rights of citizens against encroachment by state governments.

Into this amendment, Bingham poured his "basic theory of citizenship, natural rights, and constitutional government."[81] Specifically, Bingham rejected Justice Taney's theory from *Dred Scott* that national citizenship was derivative of state citizenship. Rather, he contended that national citizenship and the privileges that came with it existed outside of state citizenship. The first draft gave Congress the power to pass "all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights of life, liberty, and property."[82] By doing so, Bingham sought to prioritize national citizenship over state citizenship into the Constitutional structure. Specifically, Bingham believed that the Comity Clause "pointed away from state-secured rights and toward the rights of national citizenship."[83] Thus, this first draft represented a nuanced, albeit unusual constitutional theory: that the Comity Clause bound the states to protect and ensure

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[77] *Congressional Globe*, 39th Cong., 1st Sess. 156-159 (1866).

[78] Magliocca (2013), 112.

[79] *Congressional Globe*, 39th Cong., 1st Sess. 158 (1866).

[80] Ibid.

[81] Lash (2014), 82.

[82] *Congressional Globe*, 39th Cong., 1st Sess. 14 (1865).

[83] Lash (2014), 87.

rights that were listed in the federal Bill of Rights.[84] Importantly, Bingham believed that this new amendment gave Congress no new powers. He believed that Congress *already possessed* these powers under the Comity Clause. However, the failure of the states to respect the rights they were already constitutionally bound to protect "justified the addition of an amendment that authorized congressional enforcement of enumerated constitutional liberty."[85] Bingham addressed Congress:

> And sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. The House knows, sir, the country knows, the civilized world knows, that the legislative, executive, and judicial officers of element States within this Union within the last five years, in utter disregard of these injunctions of your Constitution in utter disregard of that official oath which the Constitution required they should severally take and faithfully keep when they entered upon the discharge of their respective duties, have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.[86]

Bingham, then, believed strongly that the states were bound to uphold the Bill of Rights both because national U.S. citizenship was already more important, and to help protect it.

There was, however, strong disagreement over what precisely Bingham's proposal meant. Democratic Congressman Andrew Jackson Rogers thought that the effect of Bingham's proposed amendment was to "take away the power of the States; to interfere with the internal policy and regulations of the States: the centralize a consolidated power in the Federal Constitution which our fathers never intended should be exercised by it."[87] Additionally, radical supporters of Bingham's proposal relied on theories of unenumerated federal power that had foundations in *Prigg v. Pennsylvania*[88] to define and protect any and all common law civil rights in the states. Some other Republicans insisted that Bingham's "Article IV-based draft would do nothing more than authorize federal enforcement of the Comity Clause of the Article IV as *traditionally* understood,"[89] while

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[84] Ibid, 88.

[85] Ibid, 91.

[86] *Congressional Globe*, 39th Cong., 1st Sess. 1034 (1866).

[87] *Congressional Globe*, 39th Cong., 1st Sess. app. 134 (1866).

[88] 41 U.S. 539 (1842).

[89] Lash (2014), 98.

Republican Congressman Robert Hale of New York was not convinced. Hale argued that Bingham's proposed amendment "threatened to 'utterly obliterate State rights and State authority over their own internal affairs,'" so the balance of federalism would be disrupted.[90] Yet other Republicans assumed that the proposed amendment referred not to Article IV and the Bill of Rights, but "to the same common law state-protected rights discussed in antebellum cases and treatises."[91]

Bingham's views themselves, however, seemed to have evolved. Though he initially claimed that Article IV protected a "national set of rights," which included the Bill of Rights,[92] as Lash points out, he later adopted the more common view that the first eight amendments "constituted the American Bill of Rights."[93] This may partially explain why Bingham produced a revised second draft of the Fourteenth Amendment after Congress moved to postpone the full consideration of the amendment until April 1866. When Bingham and the other members of the Joint Committee on Reconstruction began to reconsider the amendment, they did so cautiously, since they were fully aware that varying interpretations and theories of federalism, national power, natural and civil rights, and, thus, citizenship existed in and outside Congress. On April 21, 1866 the Joint Committee on Reconstruction began to look again at Bingham's proposal, but they did so "fully aware of their colleagues' objections to national control of common law civil rights."[94] Concerns about overreaching federal power through enforcement of civil rights ultimately lead to the demise of Bingham's first draft. In other words, Bingham's project to institutionalize national citizenship over state citizenship was being met with skepticism and objections.

The language that Bingham proposed as a second draft survived debate unedited and ultimately became Section One of the Fourteenth Amendment:[95]

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[90] Ibid, 100, citing *Amending the Constitution: Federal Power and State Rights*, N.Y. Times, Feb. 27, 1866, 2

[91] Lash (2014), 103.

[92] Lash (2014), 93.

[93] *Congressional Globe*, 42nd Cong., 1st Sess. app. 84 (1871).

[94] Lash (2014), 145.

[95] Lash (2014), 145.

> No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any States 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.[96]

This second draft reflected Bingham's ultimate goals to prioritize national over state citizenship by protecting the substantive liberties listed in the Bill of Rights from state infringement. Here Bingham used language about national citizenship that was not new. Specifically, it used the language "of national citizenship and antebellum legal treaties [such as the Louisiana Cession Act] recently discussed in widely published statements and congressional speeches."[97] This language reflected Bingham's overall constitutional theory, which legal scholar Richard Aynes suggests has four parts: the (1) national citizenship; (2), Bill of Rights; (3) compact, and; (4) enforcement theories.[98] The first theory, the national citizenship theory, we have already seen. It holds that "the Privileges and Immunities Clause [the Comity Clause] of Article IV, Section 2 protects rights of national rather than state citizenship."[99] This is the theory reflected more precisely in Bingham's first draft. Bingham believed, as did many other Republicans, that state infringement on rights was an unconstitutional, or at very least improper, violation, since there existed rights of national citizenship that should be held out of the reach of the states. The second part of Bingham's theory, the Bill of Rights theory, argues "the privileges and immunities of U.S. citizens include, at a minimum, the provisions of the Bill of Rights."[100] The third component, the compact theory, holds that "even before the adoption of the Fourteenth Amendment, the Constitution prohibited states from abiding the first eight Amendments."[101] The fourth and final component, the enforcement theory, holds that the Fourteenth Amendment "provides the enforcement power absent from Article IV, Section 2.[102] In sum, then, it

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[96] U.S. Const. amend. XIV, § 1.

[97] Lash (2014), 147.

[98] Richard Aynes. "On Misreading John Bingham and the Fourteenth Amendment." *Yale Law Journal* 103, no. 1, (1993): 57-104.

[99] Ibid, 69.

[100] Ibid, 70.

[101] Ibid, 71.

[102] Ibid.

seems that Bingham may have believed his proposed amendment was redundant, since it reiterated and elucidated what he believed was already in the Constitution. However, because others in Congress did not share his constitutional theory, the amendment, which was intended to "enforce the Bill of Rights against the states," was necessary to nationalize citizenship, promote the Republican agenda, and prevent another civil war.[103]

Senator Trumbull, a moderate Republican and chair of the Judiciary Committee, supported Bingham's proposed amendment. American citizenship, he claimed, "would be little worth if it did not carry protection with it."[104] Representative James Wilson of Iowa agreed. The federal government, he claimed, must have the power to protect civil rights, since they were derivative of, and necessary for the exercise of, natural rights. If the national government did not do this, then the "Constitution fails in the first and most important office government."[105] Therefore, as legal scholar Stephen Heyman argues, the 1866 debates "make clear that the Framers understood the Civil Rights Act and the Fourteenth Amendment to incorporate a fundamental right to protection by the government, with a corresponding obligation on the states to afford such protection."[106]

Reconstruction, therefore, marked a turning point in notions of state power: the federal government, not the states, was now the "main protector of citizens' rights," and, as such, the federal government took on new responsibilities to recognize citizens specifically and distinctly beyond the capacities of state governments.[107] Richard Aynes suggests that even those who have a narrow view of the purpose of the Fourteenth Amendment must concede that it was designed to establish a distinct set of "privileges and immunities of citizens of the United States.[108] The Republican purpose of the Reconstruction Amendments, but the Fourteenth Amendment specifically, then was to "preserve their

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[103] Ibid.

[104] *Congressional Globe*, 39th Cong., 1st Sess., 1757 (1866).

[105] Ibid, 1118.

[106] Heyman (1991): 554.

[107] Foner (2012): 1587.

[108] Richard Aynes. "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases." *Chicago-Kent Law Review* 70, no. 627 (1994): 628 citing Fairman, Charles. *What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U. L. Rev. 49, 77 (1950): 77.

Civil War victory over state sovereignty and slavery, …[and to] establish in law the primacy of United States citizenship and with it the primacy of Congress's authority to secure the rights of American citizens."[109] The Reconstruction Amendments were, therefore, designed at least in part to recognize and affirm national citizenship over state citizenship.[110] It was through these amendments, as well through the Civil Rights Act of 1866, that Republicans in Congress imposed upon the nation their view of national supremacy: "sovereignty centered in the nation the primacy of citizens' alliance to the nation, the primacy of national citizenship, and the primacy of national authority to secure and enforce the civil rights of United States citizens."[111]

Durability of Citizenship: 1868- 1873

Reconstruction-era Republicans succeeded at tipping the scales in favor of the Union, and prioritizing national citizenship over state citizenship. Not only had the Reconstruction Amendments, which reflected their constitutional vision, been ratified, but also other political institutions endorsed similar visions for national citizenship. Authority had been redistributed. As will be discussed in Chapter 4, due partially to action taken on the part of Republicans to harness them to their advantage, both federal and state courts, but especially lower federal courts, decided cases that endorsed Republican understandings of the new Amendments. The Department of Justice also began enforcing the federal primary authority over citizenship. Republican ideas about citizenship had, therefore, won the day. To use the rhetoric of APD, Republicans had achieved a shift in governing authority. However, as Orren and Skowronek make clear, no shift in governing authority, such as this one, is permanent precisely because no shift in governing authority occurs in a political vacuum. Rather, political development is the story of multiple governing authorities, each failing to entirely displace the other. The more complete the displacement, the more durable the shift; the less complete the displacement, the less durable the shift. The more fractured the polity, the more difficult it becomes

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[109] Kaczorowksi (1986): 877.

[110] Rogers M. Smith. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. (New Haven: Yale University Press, 1997), 327-337.

[111] Kaczorowski (1986): 884.

to displace the old institutional arrangement. Orren and Skowronek claim that a "durable shift" is a shift "in authority that hold on for a half-century, in the same polity, and within some broader context of years, without getting reversed or deflected by other events, are, prima facie, durable in a way that shifts that hold for a decade or less are not."[112]

Given that the U.S. polity is heavily fractured, it would, therefore, be extremely unlikely that the shift the Republicans achieved a high level of displacement. So, unsurprisingly, they failed to entirely displace the old institution arrangement. The shift the Republicans achieved was broad because it was reflected in several political institutions, but it was not deep: they did not vanquish other opposing political ideas. Rather, the opposing ideas – in this case Democratic ideas of citizenship, federalism, and national and state power – lay dormant for several years while the Republican-driven shift exercised what little durability it had, waiting their chance to fight again for dominance. The dearth of depth in the Republican-driven shift is the reason it had little durability—it lasted less than a decade.

The shift in governing authority that resulted from the actions of Reconstruction Republicans lasted until 1873. Between 1868 and 1873, state and federal judiciaries, as well as the Department of Justice adopted ideas about citizenship that accorded with those of the Republicans. Prior to 1873, Kaczorowksi writes, "all federal courts and most state appellate courts evaluating the Civil Rights Act of 1866 adopted the Republican theory of the thirteenth amendment and found the Act to be constitutional."[113] Additionally, federal judges and legal officers, "interpreted the fourteenth amendment as a delegation of primary authority to enforce civil rights, regardless of the source of infringement," thus partially the Republican view, which indicated just how little durability this shift had.[114] For example, in *United States v. Rhodes*,[115] Supreme Court Justice Noah Swayne, sitting as a Circuit Court Justice, articulated the Republican theory of congressional rights-enforcement authority. Prior to the Reconstruction Amendment, Justice Swayne explained, "the power to [define

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[112] Orren and Skowronek (2003), 129.

[113] Kaczorowski (1986): 900.

[114] Ibid, 917.

[115] 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151).

the status and rights of citizens] belonged entirely to the states."[116] The amendments, however, "reversed and annulled the original policy of the constitution."[117] He reasoned that these amendments conferred upon all inhabitants of the United States a common status and a uniform set of rights as U.S. citizens. "What the several states under the original constitution could have done [to define the status and secure the rights of U.S. citizens], the nation has done by" Reconstruction Amendments.[118] By upholding the Thirteenth Amendment in this case, Justice Swayne was "[e]mbracing the Republicans' nationalist theory of constitution interpretation."[119]

Additionally, Kaczorowski notes that every federal judge who considered the constitutionality of the Civil Rights Act of 1866, another Republican project, upheld it.[120] In *In re Turner*, Justice Salmon Chase upheld the statue and argued that the Thirteenth Amendment "establishes freedom as the constitutional right of all persons in the United States."[121] Similarly, In *United States v. Hall*,[122] future Supreme Court Justice William B. Woods articulated ideas about the Fourteenth Amendment and its relation to national citizenship that were identical to those of the Republicans:

> By the original constitution citizenship in the United States was a consequence of citizenship in a state. By [the citizenship clause] this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, *without reference to state constitutions or laws*, entitled to all the privileges and immunities secured by the constitution of the United Sates to citizens thereof.[123]

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[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] Kaczorowski (1986): 901.

[120] Ibid, 902.

[121] 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247).

[122] 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

[123] Ibid.

And in *Georgia v. Stanton*,[124] the Supreme Court refused to overturn the Reconstruction Amendments, citing their lack of jurisdiction over political questions. Federal judges, Kaczorowski notes, uniformly interpreted the Fourteenth Amendment as a "constitutional delegation of congressional authority to secure the fundamental rights of citizens," which would not have been possible prior to the amendment.[125] Though there was no grand ringing endorsement, the judiciary between 1868 and 1873 did uphold Republican ideas about citizenship, federalism, and national and state power, suggesting that the Republican-driven project constituted a shift in governing authority that had at least a modicum of durability.

The Department of Justice (DOJ) also endorsed the Republican understanding of the Reconstruction Amendments. Since they were now armed with "judicially sanctioned legal authority to secure citizens' rights," DOJ attorneys began a crusade against the Ku Klux Klan in 1870.[126] Hundreds of Klansmen were prosecuted, convicted, and imprisoned by, importantly, federal courts between 1870 and 1873 for "violating citizens' rights to life and property, to freedom of speech and assembly, to keep and bear arms, to equal protection of the laws, and to vote."[127]

However, as was noted, the shift in governing authority that resulted from the Republican project did not entirely displace the old regime. Differing ideas about citizenship remained during this period, but they were articulated outside of the dominant narrative. All the while, President Andrew Johnson and other Democratic opponents to the Republican ideology "vehemently insisted upon the primacy of state citizenship."[128] Proponents of the primacy of state citizenship included President Andrew Johnson,[129] Illinois Representative Anthony Thornton,[130] Indiana Representative

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[124] 73 U.S. 50 (1868).

[125] Kaczorowski (1986): 919.

[126] Ibid, 920.

[127] Ibid, 920-921.

[128] Ibid, 903.

[129] *Congressional Globe*, 39th Cong., 1st Sess., 1679 (1866).

[130] Ibid, 1156.

Michael Kerr,[131] and Maryland Senator Reverdy Johnson.[132] Similarly, the dissent in *State v. Washington*[133] "stands out for its clear and comprehensive articulation of the Democratic Conservative critique of the Republican theory of congressional civil rights enforcement" and national citizenship.[134] Justice Crokett, writing in dissent, said that if the Reconstruction Amendments have the power the Republicans claim they do, then Congress "has the supreme authority over all our civil rights, and may at its discretion change, modify, or abolish all State laws relating to personal security or the acquisition and enjoyment of private property, and substitute others in their stead, on the pretext that it is necessary to do so in order to secure personal freedom to all."[135] Justice Crockett believed that the federal government having the primary power to secure rights, thus rejecting state citizenship, was an impermissible violation of federalism. Under these powers, Congress may "define tenures of property, regulate the laws of descents, provide appropriate remedies for violation of every right of property, and practically supersede all State laws on these important subjects."[136] If Congress exercised these powers, "the States government had as well be abolished," since they would have no operative value, Crocket concluded.[137] Justice Crockett was, here, rejecting the Republican idea of citizenship. Importantly, however, he was dissenting, because during this period it was the Republican idea, that of the primacy of national citizenship, held sway. Though there was a shift in governing authority that resulted from the Republican project to reaffirm the Union and prioritize national over state citizenship, it did not, therefore, entirely, displace the old ideational context. This is because the fractured polity allows for old ideas to stay in play, in, for example, judicial dissents. The polity allows for these ideas to come back into play, thus producing

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[131] Ibid, 1268.

[132] Ibid, 1775-1780.

[133] 36 Cal. 658, 672 (1869).

[134] Kaczorowski (1986): 907.

[135] *State v. Washington* 36 Cal. 658, 672 (1869). J. Crockett, dissenting.

[136] Ibid.

[137] Ibid.

change endogenously rather than exogenously. These ideas about citizenship were relegated behind the dominant idea until 1873, when another ideational shift occurred.

Conclusion

On the eve of the Civil War, contrasting political ideas abounded. These ideas applied to slavery, state power, national power, federalism, and citizenship. After the surrender by the southern states, Republicans in Congress sought to embed a narrower and consistent set of political ideas that followed from the victory of and definition of Union into the fabric of the Constitution. They wanted to ensure "Free Labor, Free Soil, Free Men." This slogan represented an endorsement of the dignity of labor and natural rights. Preserving but refining the Union was a necessary part of their project. They sought to prioritize national citizenship over state citizenship for two reasons. First, they believed prioritization of states' rights was the evil that caused the Civil War, and, second, it was still allowing impermissible infringements on civil and labor rights, which was a hindrance to the maintenance and preservation of natural rights. Their project took the form of what we know today as the Reconstruction Amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments tipped the balance of federalism away from the states and towards the national government, and marked a shift towards the prioritization of national citizenship. As has been shown, this is evident through the work of John Bingham specifically, the drafter of Section 1 of the Fourteenth Amendment.

The Republican project in the terminology of APD, produced a durable shift in governing authority insofar as Republican ideas were broadly accepted by Congress and judicial authority (and inasmuch as opposition to them by the executive resulted, in part, in impeachment). The political ideas of Republicans achieved dominance, and a new concept of national citizenship had been implemented. However, it was not a durable shift. Due to the fractured nature of the American polity, dissenters that rejected the primacy of national citizenship were allowed to harbor their ideas in other ways. As has been explained, because political change never happens in a vacuum, the Republican project was not immune to challenge. Eric Foner has argued that the project of Reconstruction was eventually derailed by the economic downturn of the 1870s, an exogenous shock. However, as has

been foreshadowed here, there may be another reason. Specifically, the Republican project for national citizenship fell victim to the constitutional design of the fractured polity. Their ideas did indeed achieve dominance for a short period, between 1868 and 1873. Opposing ideas about the future of the nation, federal power, and citizenship lay in repose, however, waiting for their moment to return to the spotlight and fight again for dominance. Dissenting ideas of citizenship soon lay siege to the Republican project. They sought to deconstruct what the Republicans had built, and embed a different idea in the dominant institutional framework. Reconstruction-era Republicans did not have the final word on the subject of U.S. citizenship — far from it. The Republican ideas merely found solid footing for a brief period.

Chapter 3

Incomplete Institutionalization of the Shift: Challenging Reconstruction Constitutionalism

In the midst of Reconstruction, the Republicans tried desperately to complete their project to establish the federal government as the primary protector of citizenship rights. Implementing their new vision for the country required quite a bit of luck, and substantial work due to the fragmented and complicated nature of the institutions that make up the American state. With the passage of the Reconstruction Amendments, they had achieved a major milestone for the pragmatic and practical needs of reincorporating the southern states back into the Union, as well as a significant victory for institutionalizing their vision for national and state power, federalism, and citizenship. However, as highlighted in Chapter 1, Scheingate reminds us the American polity is a complex entity full of overlapping and conflicting institutions.[1] Because of this fragmentation, achieving fuller institutionalization and a durable shift in governing authority would require more than the Reconstruction Amendments – it would require multiple federal institutions, state institutions, and social movements to endorse the Republican view of citizenship and federal balance.

In fact, what appears to have been a string of Republican victories in the name of a new vision of citizenship, i.e., the passage of the Amendments, the passage of Civil Rights Acts to protect the newly freedmen, and the impeachment of an obstructionist president, together actually reveal that the Republican project was under siege from the start, so they never operated from a place of strength. It also reveals the degree to which the institutional structure of American governance challenges the rise, implementation, and entrenchment of new ideas. Achieving a shift in governing authority that could stand the test of time became significantly harder than Republicans anticipated, not only because pockets of ideational dissent remained and were growing, but also because the institutional structures of governance provided harbor for these contrary notions. Each attempt by Republicans to entrench their vision in the institutional structure was challenged. But, Reconstruction is not just a story of Radical Republicans slowly being displaced over time, challenged by more

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[1] Adam D. Sheingate "Political Entrepreneurship, Institutional Change, and American Political Development." *Studies in American Political Development* 17 (2003): 185-203.

moderate visions and ultimately unseated by exogenous shocks such as the Panic of 1873. Rather, the Radicals and their vision were challenged from the start given the institutional design in which they operated and which they did not remake. Republicans *layered* their policies upon old ones, which resulted in the frictions that proved problematic for them. They "'graft[ed]… new elements onto an otherwise stable institutional framework.'"[2] Republicans responded with multiple attempts to entrench their vision in the face of ideational opposition, each more desperate than the last. This story reveals a paradoxical picture: though the Republicans ideals were victorious on the battlefield in Civil War, they did not win after the Civil War. Reconstruction is not a story of triumphant Republicans instituting the vision that won the war. Rather, Republicans layered their constitutional vision on an institutional structure that would ultimately thwart their shift in governing authority. From the start, their vision was challenged— first by the President, and his obstruction was overcome via impeachment. Then their definition of national citizenship in the newly proposed Fourteenth Amendment failed, unable to secure the necessary support from three-quarters of the states. To meet that challenge, the Republican Congress employed procedural anomalies that call the legitimacy of the Amendment into question. In the face of this obstruction and as their electoral coalition began to crumble, the Republicans sought to guard their vision by ratifying the Fifteenth Amendment in 1870, and then passing a series of Enforcement Acts in 1870 and 1871. Finally, as the Supreme Court dealt a final blow to Radical vision in 1873 with its ruling in the *Slaughterhouse Cases*, the increasingly besieged Republican Congress attempted one last-ditch effort to entrench their vision in the institutional structure of the US polity by passing the Civil Rights Act of 1875. In short, once all of the institutional barriers to the new Republican vision of national citizenship are assessed, Republican efforts look far less like the actions of victors. Instead they reveal just how difficult it was to dislodge a resilient idea of citizenship so opposed and despised by the Radicals.

As was shown in the previous chapter, the Republicans did succeed at spreading their vision of citizenship across several institutions. Their vision for the prioritization of national citizenship over state citizenship was implemented horizontally— across the Department of Justice and parts of

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[2] Daniel Béland. "Ideas and Institutional Change in Social Security: Conversion, Layering, and Policy Drift." *Social Science Quarterly* 88, no. 1 (2007): 22, citing Kathleen Thelen. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan. (*Cambridge: Cambridge University Press, 2004), 35.

the federal judiciary. It also saw temporary partial institutionalization vertically— in some state judiciaries, legislatures, and bureaucracies. Yet Democrats continued challenge national citizenship by prioritizing state power and rejecting national power. Because of this ideational pushback and the actions its entrepreneurial proponents pursued, the Republican vision for citizenship and federal power amounts to what political scientist Richard Valelly has called "incomplete institutionalization."[3] Why was there incomplete institutionalization? What was happening in the states and at the popular movements during this time? Where were dissenting ideas harbored?

Whether it was explicit racism or if it was an externality of their belief in the primacy of state citizenship, Democratic efforts intended to deny blacks full membership of the political community. But after the Civil War, these older ideas about citizenship did not die— they reappeared and found voice in new places. Zones of ideational dissent about citizenship remained, and entrepreneurial actors seized them without challenge, so the Republican project crumbled. Specifically, during Reconstruction two features of the U.S. polity specifically created domains where the ideas about citizenship that conflicted with Republican visions could find voice: state governments and social movements. This argument attempts to bridge the divide between the two schools of American Political Development as Brian Glenn has described them.[4] The gap between "historical institutionalism" (the first school) and "ideational approaches" (the second) is narrowed by the broader argument in this chapter that ideational development in the polity is related strongly to institutional development over time. Though Republicans had achieved what might have appeared to be a durable shift in governing authority by altering the language of the Constitution itself, they layered this shift upon the existing systems of federalism and democracy. As a result, dissenting ideas exploited the frictional gaps and found strong footing to challenge the Republican-driven shift. As was explained in chapter one, it is a feature of the U.S. polity than these zones even exist— states and social movements both factor into the "complex" nature of the U.S. polity Adam Scheingate

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[3] Richard M. Valelly. *The Two Reconstructions : The Struggle for Black Enfranchisement*. (American Politics and Political Economy. Chicago: University of Chicago Press, 2004).

[4] Brian Glenn. "The Two Schools of American Political Development." *Political Studies Review* 2 (2004): 153-65.

describes.[5] The U.S. constitutional structure, in fact, relies on social movements to maintain democratic legitimacy so there is always a place where disfavored ideas can rest in repose and potentially unsettle the seeming dominant and durable ideas. Similarly, states can act, in the words of Supreme Court Justices Sandra Day O'Connor and Louis Brandeis, as "laboratories" for democracy and policy.[6] Importantly, it is a feature of the federalist system specifically that states can endorse and institutionalize non-dominant political ideas. As legal theorist Heather Gerken suggests, federalism promotes voice by offering a place where non-dominant ideas can be institutionalized outside of the national institutional arrangement.[7] Gerken reminds us that federalism "promotes choice, fosters competition, facilitates participation, enables experimentation, and wards off a national Leviathan."[8] She explains how a key component of the federalism system in the U.S. is its ability to allow what she has called "dissenting by deciding." This occurs when "would-be dissenters— individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome."[9] By providing places where old, minority, or disfavored ideas can find voice, the structure of the U.S. polity itself allows for the recirculation of political ideas.

After the Civil War, Republicans tried and failed to build what Orren and Skowronek call a durable shift in governing authority.[10] They did indeed succeed at building a shift— but not a durable one, because the vision Congressional Republicans had was under siege from the moment it began. This chapter analyzes how the states, social movements, and indeed the President acted as zones of ideational dissent by harboring non-dominant ideas about citizenship while the Republican-driven shift held sway. Gradually, ideas about citizenship that challenged Republican notions began to erode

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[5] Scheingate (2003): 185-203.

[6] *Printz v. United States* 521 U.S. 898 (1997); *New York v. United States* 505 U.S. 144 (1992); *Gregory V. Ashcroft* 501 U.S. 452 (1991); *U.S. Term Limits, INC. v. Thornton* 514 U.S. 779 (1995).

[7] Heather Gerken. "Dissenting by Deciding." *The Stanford Law Review* 56, no. 1745 (2005): 101-160, Heather Gerken. "Forward: Federalism All-The-Way-Down." *The Harvard Law Review* 123, no. 4 (2010): 6-74, Heather Gerken. "The Loyal Opposition." *The Yale Law Journal* 123, no. 6 (2014): 1958-1994.

[8] Heather Gerken. "Federalism as the New Nationalism: An Overview." *The Yale Law Journal* 123, no. 6 (2014): 1891.

[9] Heather Gerken. "Dissenting by Deciding." *The Stanford Law Review* 56, no. 1745 (2005): 104.

[10] Karen Orren and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004).

the dominance of the Republican ideas.. After the passage of the Fourteenth Amendment, there was constant ideational dissent from multiple places, and the political actors that held those ideas exploited the fragmented nature of the U.S. polity to attack the Republican project. The Republican project was challenged first by President Andrew Johnson, then by the states' refusal to pass the 14th amendment, then by popular social movements such as the KKK, and finally by the Supreme Court. The Republicans took action every time to eliminate the threat to their vision, but they ultimately fell victim to the federalist institutional structure of separated powers. The complicated, convoluted, fragmented, and overlapping nature of the U.S. polity makes ideational stability impossible. To illustrate this notion, this chapter begins with a discussion of what Richard Valelly calls "Reconstruction Constitutionalism," which refers to the Republican ideas described in the previous chapter—that national citizenship should be prioritized over state citizenship and that the federal government should take a more active role in protecting the rights of citizens from infringement by states and by other people. Second, I discuss the ratification process of the Fourteenth Amendment. A victorious and dominant Republican party that had just successfully eliminated a dissenting President Johnson might seem to have an easy time ratifying an amendment that reflected their vision for union and national citizenship. However, hamstrung at every turn, Republicans implemented some dubious constitutional maneuvering to get the Fourteenth Amendment ratified.

Third, this chapter discusses the impeachment trial of President Andrew Johnson. President Johnson was one of the most prominent ideational dissenters; he had to be impeached if Radicals were to entrench their vision. Fourth, Republicans realized their project was incomplete in the early 1870s. Zones of ideational dissent remained. I discuss a two-pronged attack the Republicans faced in the late-1860s and early 1870s. It came both from (1) the states in the form of Black Codes, and (2) from the people themselves in the form of political violence and intimidation. Southerners articulated their dissenting political ideas through a social movement: the Ku Klux Klan. The KKK contested emergent Republican conceptions of citizenship with violence and terror. The KKK served as a temporary stronghold of older notions of limited citizenship and collectively acted as a political entrepreneur by exploiting the frictional gaps in the formal institutional structure to bring the ideas back into play. To respond to these attacks and give further life to their project, the Republicans

pushed the Fifteenth Amendment through the ratification process, and passed three statutes that gave life to that Amendment and put it to work protecting the new rights of national citizenship from infringement in the states. These statutes were the (1) Enforcements Act of 1870, (2) the Enforcement Act of 1871, and (3) the Second Enforcement Act of 1871, also known as the Ku Klux Klan Act. Fifth, this chapter explains how incomplete institutionalization led to the downfall of the Republican project. This chapter focuses on one example that demonstrates there was incomplete institutionalization of the Republican project. Racial animus and the re-establishment of interracial marriage bans in state governments, after very brief periods where they were often considered to be violations of the Fourteenth Amendment between 1868 and 1871 show that the Republicans failed to fully embed their vision for union and national citizenship across the complex and fragmented U.S. polity. State laws regulating "miscegenation" ran directly counter to the more egalitarian ideals of the Republican party. These laws sought to preserve the "racial purity" of the white population, and they rejected the idea that non-whites could hold equal citizenship status to whites. Importantly, to justify the legitimacy of these laws, their proponents drew on states' rights arguments to justify their legitimacy, and condemned the Republican project to prioritize national citizenship over state citizenship. Finally, this chapter concludes with a discussion of the Civil Rights Act of 1875 which, I argue, was a final, desperate attempt by the Republicans to institutionally entrench their vision for Union national citizenship.

Republicans and Reconstruction Constitutionalism

With the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Republican-dominated Congress emancipated the slaves and proclaimed that national citizenship should now be prioritized over state citizenship. However, they did not stop there. In order to both fully institutionalize their vision and to more fully protect the ideals they had instituted, further action on the part of the federal government was necessary. Robert Kaczorowski writes that national authority over citizenship was now primary because "national rather than state citizenship now determined the

status and rights of individuals as citizens."[11] As a result, Congress, as opposed to state governments, was now authorized to secure the rights of citizens "in any manner that it deemed appropriate, consistent with the Constitution."[12] Political scientist Pamela Brandwein shows how the disagreement between Reconstruction-era Republicans and Democrats over what precisely was "the problem" of slavery animated Reconstruction constitutionalism.[13] Democrats saw "the problem" to be remedied by formal emancipation, but the Republicans were not so sure. Republicans dismissed the notion that "formal emancipation was a clean break with the past."[14] For them, slavery was still alive in the postwar South, even after the ratification of the Thirteenth Amendment. Racially motivated crimes were among the continuing threats of what Republicans believed to be "the problem" of slavery. Brandwein points out that some speeches by both Moderate and Radical Republicans, despite the formal (legal) prohibition of slavery, refer simultaneously to the end of slavery and to the continuation of it. Republicans, then, saw situations in which states and popular actions treated blacks poorly by limiting their social and political rights as part of "the problem" that Reconstruction was trying to remedy. They believed that simple formal emancipation as achieved in the Thirteenth Amendment was insufficient to remedy the problem.

The Republicans could not watch states enact statutes limited the social and political rights of blacks, both previously free and newly emancipated (states later did with poll taxes, literacy tests, grandfather clauses, as well as violence and intimidation) and do nothing. Unless rules were established that prohibited states from disenfranchising black men, southern states would gain a great advantage in political strength. Under a population-based apportionment scheme, black citizens would count for assessing the total number of representatives a state had in the House of Representatives. Thus, Brandwein notes, "Southern states would gain political power at the national

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[11]Robert J. Kaczorowski. *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*. (Dobbs Ferry, NY: Fordham University Press, 2005), 3.

[12] Ibid.

[13] Pamela Brandwein. *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*. (Durham, NC: Duke University Press, 1999).

[14] Ibid, 43.

level by using a black population that they were disenfranchising at home."[15] In general, Republicans believed that the political process needed protection from future abuse by ex-Confederates who "sought to accomplish by legislation what could not be accomplish on the battlefield."[16] Ex-Confederates may have accepted the legality of the Thirteenth Amendment and the formal emancipation it required, but, Representative Sydney Perham of Maine said, "they still believe that slavery is the best condition for the colored race, and it is but reasonable to suppose that as far as possible this idea would, if they were allowed to govern, be embodied in law, and carried out in their intercourse with the colored people."[17] Therefore, for both ideological and political reasons, declaring the national citizenship would now be prioritized over state citizenship in the Fourteenth and Fifteenth Amendments was not enough— they would also have to ensure citizenship continued to be defined this way by using the arm of the federal government to protect the new national citizenship from infringement.

However, as many noted, using the federal government in this way could destroy American federalism. As Kaczorowski writes, "the supremacy of national sovereignty so centralized power in the national government that the states as separate and autonomous political entities could have been destroyed."[18] Importantly, however, Republicans were no doubt aware of this concern and, consequently, made it clear that they did *not* want to destroy federalism. Brandwein cogently explains that answering the question "did Republicans intend to protect freemen's rights at the expense of traditional limits on federalism?" either negatively or affirmatively rather misses the point because it overlooks important nuances. She explains that if the "traditional federal system" refers to "state authority over civil rights (the nineteenth-century definition of civil rights and the Bill of Rights, *as practiced* before the war and as *defined by the Court* in *Barron* [*v. Baltimore* (1833)][19]," which held that the Bill of Rights did not apply to the states, then Republicans expressed the goal of

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[15] Ibid, 51.

[16] Ibid, 52.

[17] *Congressional Globe*, 39th Cong., 1st Sess. 1628: 2084.

[18] Kaczorowski (2005), 3.

[19] 32 U.S. 243.

changing it.[20] On the other hand, if the "traditional federal system" refers to "a *general notion of limited government*, then the Republicans wanted to keep this system."[21] Republicans did not want to do away with the principle of separation of powers in government by leaving some duties up to the states. What they did, however, was reorient it so the states could not tread on the rights of national citizenship as expressed in the Bill of Rights and through the Fourteenth Amendment.

Federalism itself was preserved, and robustly so, but Republicans imagined a new, reorganized federalism that redefined the "lines of jurisdiction between national and state authority."[22] Foner elaborates on this new boundary by explaining that Republicans believed that only when states failed to protect citizens' rights (of national citizenship) would federal action be necessary.[23] It became clear that the Republicans wished states to respect free speech, press, jury, and protection from cruel and unusual punishments. Without these guarantees, Republican Senator Charles Sumner of Massachusetts proclaimed, "emancipation will be only half done. It is our duty to see it wholly done."[24] Brandwein argues that Republicans interpreted Lincoln's belief in Unionism (the belief that a state cannot legally secede) in a unique and important way.[25] Namely, Republicans used it to legitimize federal oversight of matters that had belonged to the states before the war. The dilemma presented to them, however, was that most of the rights they sought to protect with federal power "had always been state concerns."[26] The Republican project to secure rights of national citizenship with the power of the federal government "raised the specter of an undue 'centralization' of power."[27] To counter these criticisms, the Republicans reiterated their stance on the improper use

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[20] Brandwein (1999), 57.

[21] Ibid.

[22] Kaczorowski (2005), 3.

[23] Eric Foner. *Reconstruction: America's Unfinished Revolution, 1863-1877*. (Updated Edition ed. New York, NY: Harper Collins, Harper Perennial Modern Classics, 1988), 259.

[24] *Congressional Globe*, 39th Cong., 1st Sess. 2394.

[25] Brandwein (1999), 48.

[26] Foner (1988), 251.

[27] Ibid.

of state power before and during the war. Improper exercise of state power, they said, was what caused the war in the first place.

Political scientist Richard Valelly describes this Republican project to institutionalize national citizenship over and above state citizenship as "Reconstruction constitutionalism."[28] This doctrine held that the constitution was not merely a set of limits on government, but was rather a "source of sovereign, positive, regulatory government able to establish and enforce national rights."[29] Adherents of this "nationalist sensibility," Valelly writes, envisioned a "potent *reserve power*" in the U.S. government for protecting the rights of national citizenship when they were being tread upon in the states.[30] For a time, the Republican vision appeared to be gaining traction. During the mid to late-1860s, national citizenship as embodied and pushed for by the Republicans in Congress took precedence by being embedded in multiple institutions. State and federal appellate judges, for example, "generally held that the citizenship and privileges and immunities clause of the Fourteenth Amendment incorporate natural rights, including Bill of Rights guarantees, as nationally enforceable rights of the newly defined American citizenship."[31] They also held that these rights were to be secured by national power. Prior to 1873, when there was a turning point in how judges defined citizenship (which will be discussed at length in the next chapter), both federal and state appellate court decisions "generally acknowledged that a revolution in federal citizenship had been wrought by the Thirteenth and Fourteenth Amendments" and the Civil Rights Act of 1866.[32] This is evident in cases like *United State v. Rhodes*.[33] Additionally, the Republican vision become embedded in the institutions of the U.S. Army and the Bureau of Refugees, Freedmen and Abandoned lands, otherwise know as the Freedmen's Bureau. Under the Freedmen's Bureau Act of July, 1866, and from a war powers argument, federal officers were instructed to enforce the Civil Rights Act of 1866, the ideals

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[28] Valelly (2004), 105.

[29] Ibid.

[30] Ibid.

[31] Kaczorowski (2005), 17.

[32] Ibid, 19.

[33] 27 F. Cas. 50, no. 16,151, (1866).

of the Thirteenth Amendment, and the Republican vision generally. Federal officers from the Freedmen's Bureau tasked with arresting persons who were charged with offenses against citizens "in cases where the civil authorities have failed, neglected, or are unable to arrest and bring such parties to trail…" and bring them to trial in the federal courts.[34] However, there was significant pushback against federal enforcement that hindered the ability of federal officers to protect the rights of national citizenship. This pushback came from every direction— the states, local governments, state courts, the people themselves, and the federal executive. The Republican project to embed their vision of national citizenship in the institutional structure of the U.S. polity, and thus create a durable shift in governing authority, was under siege.

Ratification of the Thirteenth and Fourteenth Amendments

The ratification process of the first two Reconstruction Amendments reflects this challenge. Upon learning that their vision was under attack, congressional Republicans implemented some highly unusual (or even suspect) constitutional maneuvering. To further bolster their vision and embed the prioritization of national citizenship, the Republicans proposed the Fourteenth Amendment. As was explained in the previous chapter, the Fourteenth Amendment itself reflected the Republican vision for union, federalism, and national citizenship. Ratifying the Amendment, however, was not an easy process. Congressional Republicans understood that their project was under siege from the start. Embedding their vision in the constitutional framework therefore required some defensive maneuvering— not the easy, smooth ratification that might appear to follow from a victorious and dominant Republican party. From 1861 until 1875, both houses of congress were held by Republicans.[35] Because of this, passing the Fourteenth Amendment and sending it to the states for ratification might appear easy. On the contrary, however. Republicans were challenged here, too.

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[34] Kaczorowski (2005), 24, citing U.S. Senate, "Violations of the Civil Rights Bill," 39th Cong., 2d sees., *Sen Exec. Doc.* No. 29 (Serial 1277), p. 12-13; the Freedmen's Bureau Bill is cited *14 U.S. States at Large 173*.

[35] However, from 1865-1867, both houses were dominated by the Unionist Party— Republicans under a different party name to appeal to Southern Democrats. See Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch, and Gavin Wright, eds. *Historical Statistics of the United States,* (Millennial Edition On Line. Cambridge, UK: Cambridge University Press 2006).

In 1864 and early 1865, Reconstruction was at its zenith. The second session of the Thirty-Eight Congress was indeed, as Foner puts it, a "historic occasion."[36] In 1865, the Senate approved the Thirteenth Amendment, which abolished slavery throughout the Union, with a vote of 38 to 6. However, it failed to garner the required two-thirds majority in the House of Representatives. But on on January 31, 1865, the Amendment passed this threshold in the House with a vote of 119 to 56 and it was forwarded to the states for ratification. Foner chronicles its passage:

> The vote set off wild cheering in the galleries, while Congressmen "joined in the shouting… [and] wept like children. The following morning [activist and abolitionist Edward] Atkinson dated a letter, "Year 1 of American Independence."[37]

When the Amendment was approved in Congress, delegates from 25 states were counted in the Senate, and delegates from 27 states were counted in the House. Importantly, house members and senators purporting to represent the defeated southern states, however, were *not* included in the floor votes for either chamber. On February 1, 1865, the Amendment was then forwarded to the states for ratification in accordance with Article V of the Constitution. On December 18, 1865, however, when Secretary of State William Seward proclaimed that the Thirteenth Amendment had been ratified because it had passed the requisite threshold of three-fourths of the states, the defeated southern states *were* included. At that time, he asserted there were 36 states in the Union.[38] Curiously, then, the southern states were simultaneously both counted and not counted in the ratification of the Thirteenth Amendment.

This occurred because the Southern states were not represented in Congress. Two weeks earlier, on December 4, 1865, when the Thirty-Ninth Congress met for the first time, the Republican majority, sensing a threat from the Southern states and their delegates, rejected admission of all but a single Southern state, Tennessee.[39] Indeed, as legal scholar Bruce Ackerman points out, by the end of its deliberations, the Thirty-Ninth Congress had "publicly declared that 'no legal state governments'

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[36] Foner (1988), 66.

[37] Foner (1988), 66, citing "George W. Julian's Journal— The Assassination of Lincoln, *IndMH*, 11 (December, 1915), 327; Edward Atkinson to John Murray Forbes, February 1, 1865, Atkinson Papers.

[38] Bruce Ackerman. *We the People (2): Transformations.* (Cambridge, MA: Belknap Press of Harvard University, 1998), 101.

[39] Ibid.

existed in the other ten states of the South."[40] Legal historian Akhil Amar explains that Congress continued to operate without widespread Southern representation until mid-1868. But in 1866, the Fourteenth Amendment was proposed.

The Fourteenth Amendment passed the Senate on June 8, 1866 and the House on June 13, 1866, by votes of 33-11 and 120-32, respectively. Importantly, however, this Article 5 hurdle would not have been cleared, Amar notes, had the eighty Southern members been present. The Fourteenth Amendment only passed through Congress because the Republicans excluded the Southern states from participating, not because the Republicans were necessarily dominant. On June 22, 1866, the text of the Fourteenth Amendment was forwarded to the states for ratification. But here, yet again, the Republicans were challenged. The states to whom the proposed Amendment was forwarded *included* the states whose members had been excluded from Congress. And so, by December, 1866, seven southern states had rejected the proposed amendment, but by February 1867, that number had climbed to ten.[41]

Despite their comfortable majority in Congress, Republicans were far from being wholly dominant. They were under siege. The tricky constitutional maneuvering they had used to exclude southern states from Congress in order to push forward their vision for union and national citizenship was not enough. The Republicans continued to be hamstrung by Democratic opposition from the South. To fight back, the Republicans employed yet more questionable constitutional maneuvering. Several options were proposed in Congress. They included three points that seemed "fully settled" among Republican leaders: (1) existing Southern governments should be replaced; (2) "rebels" (ex-Confederate leaders and Democrats) should hold no place in those new governments; and (3) "the negroes should vote."[42] More radical proposals were floated around, however, including "widespread disenfranchisement, martial law for the South, confiscation, and impeachment of the President."[43]

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[40] Ibid, citing Reconstruction Act, ch. 153, 14 *Stat*. 428-429 (1867).

[41] Curtis, Michael Kent. *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* (Durham, NC: Duke University Press, 1986), 152.

[42] Foner (1988), 272.

[43] Ibid.

First, Radical Republicans in Congress moved to seize the legislative initiative. Representative Thaddeus Stevens of Pennsylvania introduced a bill that would require the Southern government to hold constitutional conventions, "elected by manhood suffrage with the exception of former Confederates, who would be deprived of citizenship for five years."[44] Next, Republican James Ashley of Ohio proposed a yet more radical idea— sweeping away the Southern governments entirely. John Bingham, however, found these proposals too radical. They treated white Southerners as "alien enemies."[45] What was needed, the moderate Republicans argued, was not a hasty, forceful decimation of Southern power and autonomy in favor of Republican ideals. Rather, only a "prolonged period of federal control would enable loyal public opinion [to the Republicans] to sink deep roots and permit 'Northern capital and labor, Northern energy and enterprise' to venture South, there to establish 'a Christian civilization and a living democracy.'"[46] As Foner chronicles, Representative George Julian of Indiana suggested that the South should be "governed directly from Washington and only readmitted at 'some indefinite future time' when its 'political and social elements' had been thoroughly transformed."[47]

Julian's speech, Foner notes, struck a chord in Congress.[48] The Joint Committee on Reconstruction quickly approved a bill to transform the Southern states into military districts. For the moderates, military rule of the southern states was, as Curtis points out, a "distasteful constitutional anomaly."[49] Republicans, Curtis continues, only accepted it with substantial misgivings. John Bingham, however, had an idea. On February 12, 1867, Representative John Bingham proposed that the southern states be readmitted on the condition that they ratify the Fourteenth Amendment and establish black suffrage.[50] And so the Reconstruction Acts were born in the spring and summer of

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[44] Ibid, 273.

[45] Ibid.

[46] Ibid, citing *Cong. Globe*., 39th Cong., 2d sess, Appendix 78.

[47] Ibid.

[48] Ibid.

[49] Curtis (1986), 153.

[50] Foner (1988), 277.

1867. These statutes transformed the ten Southern states (all eleven, minus Tennessee) into five military districts and placed the Union army in control of their transition back to statehood.[51] Without explicitly decimating the southern state government, the Reconstruction Act of 1867 laid out steps for states to take to establish new governments that could be recognized by Congress. In effect, the Republicans in Congress were conditioning the readmission of each state to the Union upon that state's ratification of the Fourteenth Amendment.

Foner argues that the Reconstruction Act of 1867 reflected the circumstances of its creation. It did not arise out of purely ideological reasons. The Republicans were not riding a wave of support for their principles and Reconstruction generally. Rather, it reflected the pragmatic and practical necessity of "finding a program upon which two thirds of Congress could agree and the Northern electorate would support, and the deeply held beliefs and prejudices that places limits upon Congressional action."[52] Passing the Fourteenth Amendment was not an easy task because the Republicans faced significant obstacles and vehement opposition. By expelling the Southern states from Congress, and then conditioning their readmission both to Congress and the Union upon ratification of the Fourteenth Amendment and the Republican principles of national citizenship and federal power, the Republican Congress was employing creative and questionable constitutional maneuvering that did not reflect a place of strength. Rather, it showed the Republicans were operating from a place of weakness because their project was under siege.

The Vision Under Siege: The Impeachment of President Andrew Johnson

The next attack on the Republican project came not from the states, but from the President. On January 8th, 1867, Republican Senator George Williams of Oregon stood before the Senate and proposed that the President report any violations of the Civil Rights Act of 1866 to the Senate. His proposal was agreed to:

> Resolved: That the President be requested to inform the Senate if any violated of the act entitled "An act to protect all persons in the United States in their civil rights and furnish

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[51] Ackerman (1998), 110.

[52] Foner (1988), 277.

> the means of their vindication" [the Civil Rights Act of 1866] have come to his knowledge, and if so what steps if any have been taken by him to enforce the law and punish the offenders.[53]

And so, early in 1867 President Johnson reported to Congress. Generals Grant and Howard submitted to Secretary of War Edwin M. Stanton a list of 440 violations. Secretary Stanton, Kaczorowski notes, was the only member of President Johnson's cabinet who supported federal enforcement of national citizenship.[54] This was not the entire story, however. There would undoubtedly have been more than 440 violation had federal agents not been requested to only report violations of certain sections of the law— namely, section 4, 8, and 9.[55] Nonetheless, the 440 violations that were reported were condemned within the administration. The Secretary of the Navy, Gideon Welles, considered the reported violates to be "an omnigatherum of newspaper gossip, rumors of negro murders, neighborhood strifes and troubles…vague, indefinite party scandal and General Howard and his agents had picked up…"[56] Secretary of the Interior, Orville Browning, accused General Howard and his agents of collecting exaggerated claims in a "mean [and] malicious" attempt to force President Johnson to

> send out to the country, endorsed by him as facts, these prejudiced and in many instances false, and in almost all exaggerated statements, or place himself, by refusing to send them to Congress, in a position where they could falsifly [*sic*] but plausibly charge him with the suppression of the facts.[57]

As a result of these accusations and the President's own partisan leanings, the number of violations ultimately presented to Congress was a mere three. Kaczorowski suggests that by doing so, President Johnson wished to convey the message that "local authorities in the South were adequately securing freemen's rights and that the federal presence there was unnecessary."[58] Johnson's political ideas were becoming clear: he held a different idea about federal protection of citizenship rights than did

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[53] *Cong. Globe*, 39th Cong., 2d sess., p. 326.

[54] Kaczorowski (2005), 33.

[55] Kaczorowski (2005), Chapter 2, n. 27.

[56] Ibid, 33, citing Howard K. Beale, ed., *The Diary of Gideon Welles*, Vol. 3 (Boston, 1911): 42-44.

[57] Ibid, citing Orville H. Browning, *The Diary of Orville Hickman Browning*, Vol. 2 (Springfield, Ill., 1933): 130.

[58] Ibid, 33.

Republicans in Congress. Johnson and his administration, it seemed, were pushing back on the Republicans, thus becoming a significant obstacle to full institutionalization of the Republican vision.

For Republicans, Johnson embodied the first mortal threat to the durability of the shift in governing authority they had built. Racism, although important, was not, Kaczorowski argues, the sole factor determining Johnson and his administration's stance on federal rights enforcement and national citizenship. Rather, Johnson's political philosophy drew on ideas that preferred state citizenship to be prioritized over national citizenship. He championed states' rights and Democratic Conservative political ideas. The stance his administration took on federal rights enforcement rendered the "federal enforcement of the civil rights of Southern blacks and Republicans at the expense of the local authority of Southern Democrats antithetical to its political interests and political values."[59] The Johnson administration's stance discouraged federal officers from actively enforcing the Civil Rights Act of 1866 and promoting national citizenship. The attorney general "consistently refused to instruct" other federal officers about the duties and and responsibilities they had under the Civil Rights Act of 1866.[60] By leaving federal officers to act on their own, the attorney general induced inaction in federal rights enforcement. Johnson was a "remarkably activist" president.[61] By enacting executive orders and by allowing old provisions to collapse, Johnson "simply cleared away Congress's earlier Reconstruction policy."[62] Within the state apparatus, the Republican vision was operating from a weak, defensive position.

Republicans, then, needed to eliminate the threat. The Fourteenth Amendment itself acted as a campaign platform for the elections in 1866. Republicans hoped voters would see it as an alternative to Johnson's policy, and it seems they did. Republicans won massive gains in that election.[63] Political Scientist Rick Valelly shows how they moved to beat Johnson by drastically

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[59] Ibid, 38.

[60] Ibid, 39.

[61] Valelly (2004), 24.

[62] Ibid, 26.

[63] Ibid, 30.

expanding the party's electoral coalition to include southerners. Congressional Republicans managed to "forcefully" establish a "new, politically winning coalition that joined together about seven hundred thousand black southern men and the northern white male Republican electorate" to help preserve their dominance and protect their policies.[64] Doing so was in a way a method for the Republicans to make their shift in governing authority more durable. The "coalition of 1867-1868," as Valelly calls it, was created through land reform policy, use of the military to enable black suffrage in the South, the creation of "soldier-citizenship" for black men, "educational and religious emancipation," and mobilizing regional voters.[65]

The Republican Party responded to the threat that Johnson's hostility posed by "expanding its electoral coalition and building a cross-sectional organization."[66] Despite their efforts, Johnson continued to threaten the Republican vision. They had not eliminated the threat. Valelly points out that by this point, Republicans has run out of electoral options to use against Johnson. In order to protect their vision and further ensure national citizenship could be embedded in state institutions, Republicans impeached and tried Johnson in February of 1868. Johnson was brought up on eleven articles of impeachment. Nine hinged on Johnson's removal of Secretary of War Stanton, who had been appointed by Lincoln and was sympathetic with the Republican project, and the two others "charged the President with denying the authority of Congress and attempting to bring it 'into disgrace.'"[67] None of the charges, though, reflected the real reason Republicans sought to relieve Johnson of his duties: "his political outlook, the way he had administered the Reconstruction Acts, and his sheer incompetence."[68] By impeaching Johnson, the Republicans had eliminated the next threat to their vision of achieving a durable shift in governing authority.

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[64] Ibid.

[65] Ibid, 23-45.

[66] Ibid.

[67] Foner (1988), 335, citing Richardson, ed., *Messages and Papers*, 6:709-18; Thaddeus Stevens to Benhamid F. Butler, February 28, 1868, Butler papers; William L. King, *Lincoln's Manager: David Davis* (Cambridge, Mass., 1960), 260; Michael L. Benedict, *The Impeachment and Trial of Andrew Johnson* (New York, 1973), 26-34.

[68] Foner (1988), 335.

After the impeachment, however, Republicans realized that simply *declaring* national citizenship to be prioritized over state citizenship in the Thirteenth and Fourteenth Amendments was not enough. They faced yet more attacks, and would have to take further steps to ensure the enforcement of their ideals. The Republican project that began with the Reconstruction Amendments, therefore, took shape in the form of the Enforcement Acts of 1870 and 1871.

Extending the Republican Vision: Legislation of National Citizenship

The Enforcements Acts of 1870 and 1871 were enacted by the Republican Congress as a defense measure to protect their shift in governing authority against a two-pronged attack. The acts served as means for further embedding their vision for union and national citizenship in the institutional structure in the face of challenges from the states and from the people themselves. Until the mid-1870s, it largely manifested itself in attempts to use state power to limit the political and civil rights of blacks through Black Codes.The second prong of the attack, the attack from the people, took the form of popular social movements that vehemently opposed the Republican project. Specifically, the rise of the Ku Klux Klan as a social movement that used violence and intimidation to fight against the institutionalization of national citizenship reflects this attack. Both types of attacks on the Republican project were done in the name of state power (as opposed to national power), anti-Republicans, pro-Democrats, and pro-state citizenship. The unifying theme of these attacks was their rejection of federal protection of national citizenship in favor of a state's ability to define the meaning and parameters of its citizenship. Importantly, though, each type of attack was only possible because of the unique nature of the U.S. polity. Both federalism and social movements are necessary parts of the fragmented and complex American state.

1. Under Siege by the States: Black Codes and Election Laws

Decentralized power and overlapping jurisdiction is a feature of American state structure. Interestingly, however, it provides unique and robust opportunities for dissenting ideas to find voice in the polity, and reach a level of institutionalization that otherwise would be impossible. Legal scholar Heather Gerken points out that in America, we offer more to minorities than the rights to

speak and vote: we offer them federalism. Federalism, Gerken argues, can serve as a robust mechanism for minorities to institutionalize opposition and dissenting views.

By providing a mechanism for dissenting voices to find voice, federalism allows minorities to rule: they can exercise rule without sovereignty.[69] Gerken's describes federalism as a mechanism for dissenters to exercise power. She points first to the obvious examples: states in America, and to cities within those states. States have differing policies. Some states have polices distinctly different from what may come close to a national consensus on an issue. Gerken points out that when examining disputes between states and the federal government, courts often "turn to functional accounts that are keyed to the role states play in preserving a well-functioning democracy."[70] Though Gerken acknowledges that cities are often included in accounts of federalism, she asks why we have not moved farther. "Indeed, some think that localities represent *better* sites for pursuing federalism's values because they are closer to the people, offer more realistic options for voting with one's feet, and map more closely onto communities of interest."[71] We can thus look at these various local governing bodies as "governing separate and apart from the state, just as proponents of sovereignty envision states governing separate and apart from the nation. We can think of cities as meaningful exit options for minorities, just as we do with states."[72] Why not push federalism all the way down? Why not view a governing body such as a school board, a PTA, or a local zoning conference as sites ripe for inclusion in our federalism? Gerken's federalism all-the-way-down incorporates these small local bodies into a tally of our federalist institutions. These institutions, she says, rule without sovereignty.[73] The phenomenon she calls *dissenting by deciding* thus occurs: "would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decision making body and can thus dictate the outcome."[74] In the U.S. polity, therefore, dissenting

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[69] Gerken "Forward: Federalism All-The-Way-Down." *The Harvard Law Review* 123, no. 4 (2010): 6-74.

[70] Gerken (2014): 23.

[71] Ibid: 23.

[72] Ibid: 27.

[73] Gerken "Forward: Federalism All-The-Way-Down." *The Harvard Law Review* 123, no. 4 (2010): 6-74.

[74] Gerken (2005): 2.

ideas and minority rule can exist and can be institutionalized outside of the national government. Gerken's account of federalism points out that those who hold dissenting or different political ideas can exercise voice and rule outside of the national legislature, and, in fact, federalism guarantees this by offering institutionalization of those ideas.

During Reconstruction, the states did precisely that. The states acted as zones where ideas about citizenship that disaccorded with the Republican project of union, national power, and national citizenship could find voice and institutionalization. They did this by enacting legislation that rejected the Republican project, and exhibited a firm belief that state citizenship should be prioritized over national citizenship. Many states wanted to maintain control of their citizenry by defining its boundaries themselves. Laws limiting the political and economic rights of newly-freed blacks were one way for the states to do so.

As a response to the Civil War and the emancipation of slaves by the Thirteenth Amendment, many states passed Black Codes. These codes were a series of state laws that intended to define the newly-freedmen's "new rights and responsibilities."[75] Foner explains that the centerpiece of the Codes was "the attempt to stabilize the black work force and limits its economic option apart from plantation labor."[76] In other words, they intended to ensure that the black population could not compete with the white population for jobs. Near the end of 1865, Mississippi and South Carolina had enacted the first two and most severe Black Codes. Mississippi required all blacks to possess "written evidence of employment for the coming year."[77] Additionally, laborers who left their jobs before the contract expired would be required to forfeit wages already earned and then be subject to arrest by any white citizen.[78] South Carolina's Code was designed to "reinvigorate paternalism and clothe it with the force of law."[79] It barred blacks in the state from pursuing any occupation other

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[75] Foner (1988), 199.

[76] Ibid.

[77] Ibid.

[78] Ibid.

[79] Ibid, 200.

than farmer or servant, except by "paying an annual tax ranging from $10 to $100."[80] Virtually all former Confederate states enacted similar statutes. These laws, Foner points out, fulfilled rather completely the prediction of Radical Benjamin F. Flanders as Louisiana's legislature assembled: "Their whole thought and time will be given to plans for getting things back as near to slavery as possible."[81] The Black Codes were, then, an attempt by the states to limit the citizenship status of black Americans by trying to get as close as possible to re-instituting slavery.

The immediate negative response in the North to the Black Codes implemented in the South led some Southern states to modify the language, but not the underlying purpose, of their laws regulating the newly freed men.[82] By the end of 1866, most states had repealed the provisions in their laws that mentioned race specifically, thus, as Brandwein suggests, conforming to a model of "formal equality."[83] Importantly, however, "unequal enforcement of racially neutral language remained a problem."[84] States that had supposedly "neutral" laws were applied simply to confine the economic and civil rights of blacks. Southern states passed racially discriminatory, though facially neutral, laws which required "special head taxes, criminal punishments, restriction of weaponry, and denials of political or juridical representations and access to education," often with the tacit or express approval of the Johnson administration (prior to his impeachment).[85] Simply removing the racial language from the state statutes did not mean equal treatment of blacks in the South. To use the multiple-traditions language of Rogers Smith, despite appearing liberal and egalitarian, these laws were rife with ascriptive tendencies. Smith explains that agents from the Freedmen's Bureau sometimes checked "procedurally unfair and physically brutal punishments" that the Black Codes often imposed, but their role was constricted because their own policies "often aimed at similar goals of

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[80] Ibid.

[81] Ibid, 199, citing Benjamin F. Flanders to Henry C. Warmoth, November 23, 1865, Warmoth Papers.

[82] Foner (1988), 200.

[83] Brandwein (1999), 48.

[84] Ibid.

[85] Rogers M. Smith. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* (New Haven: Yale University Press, 1997), 303.

black contractual employment."[86] Even though it was their job to enforce the rights of national citizenship, many federal officers were affected by their racist tendencies. They were, Smith notes, "unable to accept that blacks would labor as readily as whites if properly rewarded."[87] As a result, federal officers tasked with enforcing the Republican project of union, equality, and national citizenship, actually aided the effort to repudiate the Republican shift by using state laws as a means of ideational dissent. This state strategy not only displayed "lack of genuine commitment of free labor principles," it also expressed "virulent racist white beliefs in black inferiority."[88] Congressional Republicans still believed that the newly-established rights of national citizenship as granted by Fourteenth Amendment continued to be denied, and they were correct. Thus, during Reconstruction, states, through the implementation of Black Codes affecting the economic and political rights of blacks, exploited the complicated and fragmented nature of the American state to express their belief that state citizenship should not become subservient to national citizenship.

2. Under Siege by the People Themselves: The Ku Klux Klan and Popular Racial Animus

The second prong of the attack in the mid to late-1860s came not from the states, but from within the states yet outside the complex and fragmented state itself. More specifically, the rise of the Ku Klux Klan, the "nation's most notorious terrorist movement," during Reconstruction sheds light on how the fragmented and complex nature of the U.S. polity itself offers yet another zone for ideational dissent, this time outside of the formal state structure.[89] Social movements are a necessary part of the U.S. polity. In the United States, "the people themselves" are relied upon to be the source of power and sovereignty. Legal theorist Larry Kramer reminds us that the United States, at the time of its founding, was the only country in the world "with a government founded explicitly on the consent of its people, given in a distinct and identifiable act, and the people who gave that consent

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[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] Michael Fitzgerald. "The Ku Klux Klan: Property Crime and the Plantation System in Reconstruction Alabama." *Agricultural History* 71, no. 2 (1997): 186.

were intensely, profoundly conscious of the fact."[90] The founders sought to "preserve popular control over the course of constitutional law."[91] In fact, popular sovereignty and the importance of "the people themselves" as an important actor (or set of actors) in the political process has so pervaded American political discourse that it is is often employed in rhetoric attacking political ideas to make them seem illegitimate. For example, Brandwein points out that during the ratification debates over the Fourteenth Amendment, Rep. Samuel J. Randall of Pennsylvania equated Southern secession and Republican reforms. Both were threats to the government and the Constitution, he argued, because "both were rejections of popular sovereignty doctrine."[92]

As a result, since the legitimacy of the government depends upon notions of popular sovereignty, social movements are a necessary part of the already complex and fragmented American polity. Teasing out the notion of popular sovereignty, Reva Siegel argues that conflict between social movements can create new forms of constitutional understanding.[93] Siegel employs the idea of a "constitutional culture" to demonstrate how social movements are linked to constitutional understanding. Constitutional culture, she writes, can be said to explore how "changes in constitutional understanding emerge from the interaction of citizens and officials."[94] Siegel suggests that constitutional culture shapes both popular and professional claims about the Constitution and "enables the forms of communication and deliberation engagement among citizens and officials that dynamically sustain the Constitution's democratic authority in history."[95] Constitutional culture links politics and law, to people, citizens, and officials. It provides the resources to explore the "legitimacy of government, institutions of civil society, and the Constitution itself."[96] Importantly, Siegel argues

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[90] Larry D Kramer. *The People Themselves: Popular Constitutionalism and Judicial Review*. (New York, Oxford.: Oxford University Press, 2004), 5.

[91] Ibid.

[92] Brandwein (1999), 33.

[93] Reva Siegel. "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Factors ERA." *California Law Review* 94 (2006): 1.

[94] Ibid: 3.

[95] Ibid.

[96] Ibid.

that constitutional culture is a normal feature of the democratic constitutional order in the United States. Popular understandings of political ideas play an important and necessary role in the American polity.

Seeing social movements through this lens sheds light on the dynamic of political ideas during Reconstruction. As the Republicans in Congress tried to embed national citizenship in the institutional structure and bolster their shift in governing authority, social movements, namely the Ku Klux Klan (KKK), acted as an ideational harbor for dissenting ideas— those of state citizenship, ascriptive hierarchy, and racism. As Southern state governments began to be captured by Republicans after 1867, the KKK emerged as a "terrorist wing of the Democratic Conservative parties of the South."[97] Their political purpose was to unseat the Republicans and to disenfranchise Southern blacks. Kaczorowksi explains that the "paramilitary structure" of the KKK made their usually violent intimidation of blacks and white Republicans "more systematic and effective."[98] In the late 1860s and early 1870s, the Klan's actions represented "the common concerns of Southern whites who wished to retain a racial hierarchy."[99] In effect, Foner argues, the Klan was a "military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy."[100] The Klan vehemently disagreed with the Republican project of Union and national citizenship, and took it upon themselves to restore the political and social structure in the South to its antebellum state by means of violence. Klan tactics ranged from property destruction, to whipping, maiming, castration, and murder. Their targets were blacks and white Republicans. Republican leaders barricaded and fortified their homes, and left their homes armed. When the law tried to stem the onslaught of Klan violence, its members terrorized law enforcement officers and judges, or intimidated or murdered witnesses. The primary enemy of the Klan was the Republicans,

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[97] Kaczorowski (2005), 42.

[98] Ibid.

[99] Hodes (1993): 403.

[100] Foner (1998), 425.

but "the Negro was the mainstay of that party."[101] Olsen argues that there existed very little room for accommodation between Klan principles and the Republican "egalitarian principles of Reconstruction."[102]

Klansmen ruled the south. The law appeared "impotent in the face of this terror."[103] The Republicans again faced a mortal threat— both to their project and to their supporters. Republicans viewed violence by the Ku Klux Klan as a continuing threat *of* the institution of slavery, and as a threat *to* the political process they sought to protect. Their vision for national citizenship was under siege in the South. In order to more fully institutionalize their vision and protect their shift in governing authority, the Republicans had to take action.

3. Stamping Out the Opposition: The Republican Response to the Two-Pronged Attack

The Republican response to the attack from the states in the form of Black Codes, and from social movements in the form of the KKK, was swift and deliberate. In 1870 and 1871, congressional Republicans enacted yet another constitutional amendment and three key pieces of legislation to try to eliminate the threats to their vision. Brandwein explains that Republicans developed and mobilized a distinction between "arbitrary (slave) power and (legitimate) established right in order to bring certain traditionally local matters under federal oversight"[104] They extended federal control of citizenship rights to beat back the two-pronged attack. The Republican response began with the ratification of the Fifteenth Amendment in March, 1870. It helped reify the federal government's protection of citizenship rights by establishing federal oversight of voting rights, but, crucially, it also played a significant part in Republican party-building.

Many congressional Republicans believed that nationwide black suffrage was not only important ideologically, but for pragmatic political reasons as well— it would ensure they had a

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[101] Otto Olsen. "The Ku Klux Klan: A Study in Reconstruction Politics and Propaganda." *The North Carolina Historical Review* 39, no. 3 (1962): 351.

[102] Ibid: 351-352.

[103] Olsen (1962): 342.

[104] Brandwein (1999), 49.

stable base of support in the electorate. They believed, however, that it could not easily be achieved by statute. Valelly points out that state-level Republican parties outside the South "varied widely in the openness to the idea, making it hard to proceed state by state."[105] Additionally, state election statutes could always be repealed by Democrats. The Republicans did not want to stand passively by as African Americans were "completely shut out from the political process, their citizenship rights were wantonly denied in the South and the legal process did not provide them with full equal protection."[106] This would "threaten the goal of perfecting American democracy" that equated to a strong, equal, and robust national citizenship that was sincerely held by key Republican leaders.[107] Giving the federal government the power to protect voting rights by passing the Fifteenth Amendment, then, was both a strategic and ideological commitment to national citizenship. After the Amendment was ratified on March 30, 1870, the true shape of the Republican project to institutionalize their vision for an egalitarian "free labor" democracy with a robust national citizenship began to take shape. For both political and ideological reasons, Republicans quickly beefed up the Fifteenth Amendment by enacting a series of Enforcement Acts that gave the federal government additional oversight of citizenship rights and status.

After the ratification of the Fifteenth Amendment in March of 1870, Valelly explains, Reconstruction constitutionalism "truly burst forth."[108] There were three Enforcement Acts: the Enforcement Act of 1870, the Enforcement Act of 1871, and the Enforcement Act of 1871 (the Ku Klux Klan Act). These acts, Foner notes, "embodied the Congressional response to violence."[109] Together, they extended the federal government's ability to ensure and protect national citizenship. Their result was to further entrench the Republican project in the institutional framework. The legislative debate over these acts reveals that they did indeed seek to extend the federal government's

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[105] Valelly (2004), 101.

[106] Megan Ming Francis. *Civil Rights and the Making of the Modern American State*. (New York, NY: Cambridge University Press, 2014), 19.

[107] Ibid.

[108] Valelly (2004), 106.

[109] Foner (1998), 454.

power to protect citizenship rights, and thus reifying the prioritization of national citizenship over state citizenship in the U.S. polity. Valelly points out that a critical aspect of the legislative debates concerned "the federal government's authority to act on behalf of or against *private* citizens."[110] Senator John Pool, a Republican from North Carolina, claimed that the federal government has the right to "enforce the rights of the citizens against all who attempt to infringe upon those rights."[111]

Consider the first act, the Enforcement Act of 1870. Passed on May 31, 1870, this act established "a criminal code on the subject of elections." It authorized further federal oversight of citizenship rights by forbidding state officials from discriminating among voters on the basis of race. It also authorized the President to appoint election supervisors, who had the power to remove cases involving electoral fraud, the bribery or intimidation of voters, and "conspiracies to prevent citizens from exercising their constitutional rights," to federal court, instead of leaving them in state court.[112] Section 1 of the act gave the federal government power to protect citizens' exercise of their new rights of national citizenship under the Thirteenth, Fourteenth, and Fifteenth Amendments by defining violation of those rights by *either* public officials *or* private citizens as felonies. The second Enforcement Act, also known as the Enforcement Act of 1871, protected similar provisions, but was more specifically targeted at Democratic practices in large Northern cities, as opposed to in the South.

As violence persisted, however, Congressional Republicans enacted "a far more sweeping measure," the Ku Klux Klan Act of April, 1871.[113] This act for the first time made certain crimes committed by individuals as offenses punishable by federal law, not only by state law:

> Conspiracies to deprive citizens of the right to vote, hold office, serve on juries, and enjoy the equal protection of the law, could now, if states failed to act effectively against them, be prosecuted by federal district attorneys, and even lead to military intervention and the suspension of the write of habeas corpus.[114]

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[110] Valelly (2004), 107.

[111] Ibid, citing Schwartz, *Statutory History*, 1: 444-445, 485.

[112] Ibid.

[113] Ibid.

[114] Foner (1988), 455.

This act marked a significant shift in federal power and federal balance. Prior Reconstruction laws like the Reconstruction Amendments, the Civil Rights Act of 1866, and the Enforcement Acts, had left private criminal acts within the realm of local law enforcement officials. Now, however, by making actions within states by private individuals federal crimes, this act "pushed Republicans to the outer limits of constitutional change."[115] These acts drastically increased the power of the federal government in the realm of rights-enforcement and reaffirmed yet again that the Republican project was to prioritize national citizenship over state citizenship. The Ku Klux Klan Act was quite effective at eliminating Klan violence. In total, between 1871 and 1884, 5,386 cases were brought under the Enforcement Acts.[116] Though the three Enforcement Acts together were targeted largely at Klan violence, they were later used to "combat non-Klan political intimidation, ballot-box stuffing, and other types of election fraud."[117] Together, the Enforcement Acts fortified the Republican project, and significantly reduced violence, intimidation, and election fraud in the states. They proved an effective means to respond to the Democratic attack on national citizenship from the states and from social movements.

Incomplete Institutionalization

However, despite the widespread federal prosecution of rights violations, the "disenfranchisement of the Negro proceeded apace."[118] By 1877, historian Everette Swinney notes, the voting power of black Americans had been "largely neutralized" and the Democratic party had regained control of the south.[119] As history shows, the Republicans failed to entirely displace the old regime. Their shift in governing authority was incomplete, and lasted less than a decade. Valelly

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[115] Ibid.

[116] Stephen Cresswell. "Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1980." The Journal of Southern History 53, no. 3 (1987): 422.

[117] Ibid.

[118] Everette Swinney. "Enforcing the Fifteenth Amendment, 1870-1877." *The Journal of Southern History* 28, no. 2 (1962): 205.

[119] Ibid.

explains that the electoral coalition the Republicans had built in 1867-1868 through their institutional embedding of national citizenship plainly continued to have life after the Compromise of 1877:

> Republicans maintained an active southern policy, as indicated by (1) the Republican platforms' emphasis on voting rights, (2) Republican-led Senate investigations of southern electoral fraud and intimidation, (3) the processing of contested southern elections cases, (4) the fostering of a new constitutional basis in Article 1 for federal electoral regulation, and (5) agreements and cooperation with biracial insurgencies such as the Virginia Readjusters—which, for a time, was an extraordinary experiment in biracial democracy. Indeed, the coalition's continuing existence generated a surprising turn in the Supreme Court's jurisprudence.[120]

And so, we ask, what happened? The Republican project was extensive, and they responded to several attacks that arose from multiple zones of ideational dissent. They passed three monumental constitutional amendments and several key pieces of legislation that successfully rejiggered the federal balance in favor of the national government, combatted political violence and electoral fraud, and prioritized national citizenship over state citizenship. Why, then, was their shift in governing authority not durable? Should there not have been more to the picture? Many promising Republican institutions emerged after 1868. Why did this institutional change not set black electoral incorporation on a better pathway to the future? Plainly there was "incomplete institutionalization."[121] Plainly, the Republicans failed to eliminate all zones of ideational dissent. Despite the apparent extensiveness of their project, they failed to fully embed their vision for union and national citizenship in the institutional framework of the American state. State miscegenation laws during Reconstruction illustrate this.

Miscegenation Laws Exhibit Incomplete Institutionalization

In the antebellum south, sexual liaisons between white women and black men, historian Martha Hodes explains, threatened the idea of racial slavery in a way that sex between black women and white men could not.[122] Sex between white men and black women was seen as more permissible,

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[120] Valelly (2004), 70-71.

[121] Ibid.

[122] Martha Hodes. "The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War." *Journal of the History of Sexuality* 3, no. 3, Special Issue: African American Culture and Sexuality (1993): 402.

likely due to socially constructed ideas of white male sexuality. However, when children were born to a white mother and a black father, not only were racial boundaries eroded, but "boundaries of slavery and freedom were eroded too, as free people of African ancestry endangered racial slavery."[123] Nonetheless, such liaisons were tolerated in the antebellum south, due in part, Hodes argues, to white ideology about the "sexual depravity of white women outside the planter classes."[124] Thus, white ideology about lower-class female sexuality could overshadow white ideology of black male sexuality. But after the Civil War and the demise of legal slavery with the Thirteenth Amendment, toleration for sex between white women and black men crumbled. "Mixture" of white people of European descent and blacks of African descent became a more serious taboo:

> Because it was the men among the former slaver population who gained suffrage rights and a measure of political power— and who therefore had the potential to destroy the racial caste system— whites focused on the taboo of sex between white women and black men with a new urgency.[125]

After the war, white alarm about black sexuality reached new and unprecedented levels. As a result, sex and politics became intertwined in the minds of southerners during Reconstruction.

In the postwar South, citizenship rights were equated with manhood. Hodes remarks that Southern white men wanted to withhold rights of national citizenship from black men because their exercise of suffrage and political participation, and equal status threatened the manhood of white men.[126] One way they could do so was to enact laws prohibiting interracial marriage. Kaczorowski reminds us that the concept of "equal rights" in the nineteenth century still permitted segregation. Consider schools: equal rights required states to provide schools for black children, but still allowed the state to segregate them. If they did not, however, courts held that black children must be admitted to schools established for white children. Analogously, laws prohibiting interracial sex and marriage were upheld so long as they applied equally to both races. The right to "an equality in state conferred

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[123] Ibid.

[124] Ibid: 403.

[125] Ibid.

[126] Ibid: 404.

rights was understood within the context of separate but equal."[127] Examining miscegenation laws during Reconstruction is important here because it provides an example of how incomplete institutionalization of the Republican project allowed dissenting ideas, through the complex and fragmented institutional structure of the American state, led to its repudiation and ultimate downfall.

Examining miscegenation laws in the mid 1860s reveals that Republicans appeared to have won here, too. State laws governing miscegenation (coming from the latin *miscere*, to mix, and *genus*, race) were largely eliminated during the mid to late-1860s. After the Civil War, many lawmakers both in and outside the former Confederacy "concluded that the combination of the end of slavery and the passage of Reconstruction civil rights legislation would render the remaining [miscegenation] laws inoperable."[128] Between 1860 and 1871, eight states repealed their laws banning interracial marriage: New Mexico (1866), Louisiana (1868), South Carolina (1868), Washington (1868), Mississippi (1870), Arkansas (1871), Illinois (1871), and Florida (1871).[129] As Reconstruction continued in full force during this period, laws banning interracial marriage were increasingly challenged in courts and declared unconstitutional. Altogether, historian Peggy Pascoe explains, in seven of the eleven former Confederate states, Republican principles of Union, national citizenship, and equality appear to have been institutionalized. These seven states either repealed miscegenation laws, removed them from state codes, or declared them unconstitutional in the courts.[130] On one level these challenges to miscegenation laws merely reflected the driving force of Reconstruction in the political climate. When radical Republicans were pushing for federal assertion of power over state actions, many southerners "feared that the Democrats' prediction that Republicans intended to make miscegenation [legalize interracial marriage] the law of the land might really come true."[131] Indeed, bans on interracial marriage and miscegenation laws were seen as

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[127] Kaczorowski (2005), 18.

[128] Peggy Pascoe. *What Comes Naturally: Miscegenation Law and the Making of Race in America.* (New York, NY: Oxford University Press, 2009), 40.

[129] Ibid.

[130] Ibid.

[131] Ibid, 41.

violations of the Constitution between 1868 and 1871. In and outside of the South, when local prosecutors brought interracial couples to court for violating state law, they "discovered that laws against interracial marriage faced significant new obstacles," including the key assumption that laws banning interracial marriage were a remaining product of slavery, a belief that marriage was a "contractual right of free citizens," and the possibility that the Fourteenth Amendment really did guarantee what it seemed: equal protection of the laws.[132]

Ultimately, though, the Republican project and the institutionalization of their ideas of citizenship began to crumble under siege, and state bans on interracial marriage reappeared. Brandwein shows that "northern Democrats used race and 'miscegenation' as political weapons against Lincoln and the Republicans."[133] This time, those weapons worked. In 1870, Indiana state statutes prohibited any person with at least one-eighth "negro blood" from marrying "any white women of this state."[134] In November, 1870, Thomas Gibson, a sixty year old laborer "having one eighth part of negro blood," came to trial in Evansville Criminal Court in Indiana for charges of being in a relationship with a "white" woman.[135] At the time, it seemed as though the judge would strike down Indiana's miscegenation statute. Gibson had a fierce attorney, Andrew L. Robinson. Robinson had been a Democrat, but became a free soil abolitionist Radical Republican after finding religion during the Mexican-American War.[136] The stakes in the *Gibson* case, Pascoe writes, would prove determinant for miscegenation laws across the country, because it would offer judges across the country unsympathetic to the Republican project "a template for using state police power to sidestep federal guarantees of civil rights" and national citizenship.[137] Pascoe continues by arguing that Robinson's argument that marriage, like Gibson's, were civil contracts protected under the

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[132] Ibid, 49.

[133] Brandwein (1999), 27.

[134] *Indiana Statutes*, 1870.

[135] Pascoe (2009), 47, citing Vanderburgh County Marriage Records, vol. 6, July 12, 1867-May 21, 1870, p. 536, Reel 1479312, Church of Jesus Christ of Latter-day Saints Family History Center, Salt Lake City, Utah.

[136] Pascoe (2009), 49.

[137] Ibid, 50.

contract clause of the Civil Rights Act of 1866 would seem to be good, binding law. But, when the case reached the state supreme court, it came before justices "absolutely unwilling" to uphold the marriage of a "negro" man and a "white" woman.[138] In the *Gibson* decision, Indiana Supreme Court Justice Samuel H. Buskirk wrote a vehement defense of miscegenation law by rejecting the Civil Rights Act of 1866 and other Reconstruction-era legislation. Buskirk wrote,

> We deny the power and the authority of Congress to determine who shall make contracts or the manner of enforcing them in the several states….[and] we utterly deny the power of Congress to regulate, control, or in any manner to interfere with the states in determining what shall constitute crimes against the laws of the state, or the manner or extent of the punishment of persons charged and convicted with the violation of the criminal laws of a sovereign state.[139]

In upholding Indiana's miscegenation statute in 1871, Justice Buskirk was not only claiming that state laws are more important that federal laws and rejecting the Republican project and national citizenship, he was providing both a pathway for the reinstitution of miscegenation laws across the country and an avenue for dissenting political ideas to find more robust voice. Because of the *Gibson* case in 1871, miscegenation laws came back on the books in dozens of states' laws during the next several decades.[140]

Some, however, still believed that federal courts would be more sympathetic zones to challenge state miscegenation laws by taking federal civil rights legislation more seriously. This, however, revealed just how strong the dissent from Republican ideas of citizenship remained. States-rights arguments that rejected the premise and prioritization of national citizenship abounded. During the 1870s, few interracial couples brought their cases to federal court. Only a handful succeeded in getting federal district courts to hear their cases. The outcome of their cases, Pascoe explains, demonstrates "just how much power the connection between marriage and states' rights could muster."[141] In all but one of these cases, federal judges "solved the conflict between state

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[138] Ibid, 55.

[139] *State of Indian v. Gibson* 36 Ind. 389 (1871).

[140] See Pascoe (2009), 63, for a map of states that had miscegenation laws in force in 1900.

[141] Pascoe (2009), 64.

miscegenation laws and federal civil rights laws by adopting states' rights arguments,"[142] thus rejecting the prioritization of national citizenship.

The Institutional Entrenchment Hail Mary: The Civil Rights Act of 1875

By the mid-1870s, the political climate had transformed. It looked entirely different than it did even five years before. What only a decade before had been a Republican congress trying, and partially succeeding, to defend itself from attacks from multiple places within and outside the state structure was now gone. The Republican majority in Congress was getting progressively smaller. After 1873 and the Supreme Court's decision in *The Slaughterhouse Cases*, which will be discussed the next chapter, it became clear that the Republicans were fighting a losing battle. The Forty-Third Congress in 1875 would be, because of the recent Democratic landslide victory the last time Republicans would control both the White House and both Houses of Congress for the near future. With political violence having erupted again in the South, and their party's power in Washington about to expire, the Republicans proposed a final desperate attempt to entrench their vision for free-soil, union, and national citizenship in the institutional structure. They wanted to make the shift in governing authority they had achieved last as long as it could. Benjamin Butler, then a Representative from Massachusetts, and other Republican stalwarts "devised a program to safeguard what remains of Reconstruction."[143] Their proposals included another Civil Rights Bill, another Enforcement Act that would expand the President's power to quash conspiracies aimed at intimidating voters and to suspend the writ of habeas corpus, a two-year army appropriation to limit the incoming House from curtailing the military's role in the South, a bill expanding federal court jurisdiction, and a subsidy for the Texas & Pacific Railroad.[144] Taken together, Foner suggests, the proposed package embodied a "combination of idealism, partisanship, and crass economic advantage typical of Republican politics."[145]

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[142] Pascoe (2009), 64.

[143] Foner (1988), 553.

[144] Ibid.

[145] Ibid.

The Civil Rights Act of 1875, however, was unlike previous Reconstruction legislation. Cognizant of the recent decision in *Slaughterhouse*, proponents of the bill sought to convince fellow legislators that it was a constitutional piece of legislation. The Court had decided that the privileges and immunities clause of the Fourteenth Amendment was not "as broad as the 'sands of the sea' or the common law, and that the amendment did not radically change the whole theory of federal-state relations."[146] As a result, proponents of the Civil Rights Act of 1875 sought to convince opponents that they were not relying on a "general, unspecified constitutional basis or on the privileges and immunities clause alone."[147] Instead, debate over the bill prior to its passage centered on the equal protection clause of the Fourteenth Amendment.[148]

Much of the project, however, was derailed by further attacks, including parliamentary maneuvers in Congress, an insurrection in Louisiana in September, 1874 that preoccupied and embarrassed President Grant, and division within the Republican party. Foner explains that even the Civil Rights Bill reflected the division within the Republican party. The proposed law represented an "unprecedented exercise of national authority, and breached traditional federalist principles more fully than any prevision Reconstruction legislation."[149] Ultimately, the Civil Rights Act of 1875 did become law after passing the 43rd Congress in February, and being signed by President Grant March 1. Nonetheless, the myriad hurdles necessary to clear in order to enact this final, last-ditch attempt by the Republicans to entrench their vision for national citizenship reflect the party's weakness. The inability of the Forty-Third Congress to agree on a policy for the South shows that the Republicans had lost and Reconstruction was doomed. They had succumbed to the attacks that arose from the Republican inability to fully entrench its vision across the complex and fragmented state. The shift in

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[146] Alfred Avins. "The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations." *Columbia Law Review* 66, no. 5 (1966): 895.

[147] Ibid.

[148] 2 *Congressional Record* 97, 340, 375-376, 378-380, 383-385, 405-407 (1873-1874).

[149] Ibid, 556.

governing authority they had achieved was short-lived, and was dying. Reconstruction itself, Foner writes, was doomed.[150]

Conclusion

Even at the beginning of Reconstitution, the Republicans operated from a place of weakness. The Union victory in the Civil War validated their project, and they held a majority in both houses of Congress, but they could not entrench their vision for union, federal power, and the prioritization of national citizenship over state citizenship. They faced the daunting and ultimately impossible challenge of institutionalizing their vision across the complex and fragmented American state. The Republican project was never easy precisely for this reason. The Republican project was under siege from the start. First, they had to overcome institutional hurdles to ratify the Thirteenth and Fourteenth Amendments. They had to employ questionable constitutional maneuvering in order to get the necessary numbers for ratification. Next, the Republicans faced an attack from President Johnson. They responded to this attack by impeaching him and replacing him with President Grant.

However, even though they held both Congress and the White House, Republicans could not give the shift in governing authority they had achieved even a modicum of durability. They faced yet more attacks. In the late 1860s and early 1870s, they faced a two-pronged attack: dissenting political ideas found voice in the states and in social movements. The states tried to recapture control of citizenship by passing Black Codes that limited the civil and political rights of blacks. The people created a social movement that used violence and intimidation to wreak havoc on the Republican project in the South. This movement, the Ku Klux Klan, and the Black Codes, were targeted by the Republicans with yet another constitutional amendment, the Fifteenth, and a series of Enforcements Acts in the early 1870s. Together, the Reconstruction Amendments and the Enforcements Acts gave massive power to the federal government to protect the rights of national citizenship.

Yet, it was still not enough. The complex and fragmented American state continued to provide zones for dissenting ideas to find voice. The Republican project was *layered* upon an already

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[150] Ibid, 563.

stable institutional arrangement.[151] It did not vanquish the old and replace it with something entirely new. The fact that the Republicans layered their ideationally-motivated policies and institutions on top of old ones explains why their project faced so much pushback from the start. And so, though state miscegenation laws were largely eradicated while the Republicans were at the height of their power, they reappeared. One fateful judicial decision in 1871*, Indiana v. Gibson*, provided grounds for the reestablishment of miscegenation laws. These laws and their proponents drew on states' rights arguments that necessitated a repudiation of national citizenship in favor of state control over citizenship rights. The Republican project was losing. In 1875, as their power was waning the, Republicans, plagued by internal contradiction and external threat, enacted the Civil Rights Act of 1875 as a final, last ditch attempt to give their shift in governing authority some durability. Ultimately, however, the Republican project was unsuccessful. It fell victim to the complex, overlapping, and fragmented American state. No matter how hard the Republicans tried to fight it, ideational dissent found voice both inside and outside the traditional state institutional apparatus. By 1873, it became clear the Republicans had lost. Ideational dissenters that favored states' rights and state control over citizenship gained traction, and ultimately found voice in the Supreme Court.

[151] Béland (2007): 22, citing Kathleen Thelen. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan.* (Cambridge: Cambridge University Press, 2004), 35.

Chapter 4

Repudiation of the Dominant Shift: The Reappearance of Dissenting Citizenship Ideas in the Courts

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As Congressional Republicans fought desperately during the late 1860s and early 1870s to bolster their ideational shift in governing authority— prioritizing national citizenship— the greatest threat to the vision was brewing. For a brief moment in the mid-1860s, it appeared as if the Republicans had successfully created a shift in governing authority that would, in the words of Orren and Skowronek, prove durable. The Republicans had embedded a vision for union, free labor, and national citizenship within the institutional framework— both vertically and horizontally. It was entrenched in constitutional text, protected from attacks by states and social movements, and shielded from the actions of an antagonistic president. Yet, as discussed in the previous chapter, this vision operated from a place of weakness and the opposing ideas of state citizenship and ascriptive hierarchy challenged it from within.

For a time it seemed as though the only threats the Republicans would face would be from the executive branch, the states, and from the people themselves in the form of social movements. The Republicans repeatedly tried to stamp out ideational dissent by passing several constitutional amendments, and they bolstered these with enforcement statutes. Nevertheless, the clearest and deepest challenge they would soon face was an attack they ultimately were unable to withstand. It came from the Supreme Court beginning in 1873. This chapter documents the story behind this attack congressional Republicans could not beat. The Supreme Court's decision in the *Slaughterhouse Cases of 1873*[1] sharply rejected the intended meaning of the Fourteenth Amendment, at least insofar as it was explicated in Chapter 2. In doing so, the Court rejected the new Republican vision of national, egalitarian citizenship in favor of the older antebellum state-centered, ascriptive definition of citizenship.

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[1] 83 U.S. 36 (1873).

The story documented in this chapter gets to the crux of the argument in this project as a whole. Had it not been for action taken by the Supreme Court in *Slaughterhouse*, the Republicans' vision may have been more deeply embedded, and they may have succeeded at creating a *durable* shift. As a result, because that vision of citizenship was a fundamental part of Reconstruction, Reconstruction as a whole may not have failed. Scholars who argue that Reconstruction's failure can be attributed exclusively to exogenous factors like a new political climate resulting in a partisan shift in Congress, the economic crash of 1873, or the Compromise of 1877, overlook the important interaction between institutional design and political ideas. Indeed, they overlook how a fragmented state enables oppositional ideas to gain traction. The interplay between differing conceptions of citizenship in political institutions during Reconstruction suggest that this interaction between ideas and institutions is crucially important for political development in the United States. That differing ideas of citizenship in the United States were actively disputed within and between political institutions during Reconstruction sheds light on how endogenous state change played a key role in its failure. Indeed, as Kaczorowski cogently explains, as far as the Republican project for national protection of citizenship rights was concerned, "Reconstruction ended long before the Compromise of 1877."[2] In other words, the failure of Reconstruction followed from the institutional design laid out in the Constitution itself.

More specifically, until 1873, ideas that state citizenship should be prioritized over national citizenship remained in dissent. As documented in the previous chapter, these ideas were voiced outside of the national institutional structure, in state governments and social movements, and within the structure of the federal government by the President and even to a small extent, as will be explained in this chapter, by the Supreme Court. Until 1873, however, these threats to the Republican position of ideational dominance in the institutional framework did not successfully gain a strong institutional foothold. Each threat was quelled by Republican defensive action. But, as Orren and Skowronek, and Sheingate remind us, the American state is an unusually complex or fragmented

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[2] Robert J. Kaczorowski. "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War." *The American Historical Review* 92, no. 1 (1987): 67.

entity.[3] Political ideas that have been rejected by the dominant governing authority find institutional crevices to remain dormant, ready to reappear and fight for ideational dominance once again if context permits. Because the United States is a heavily fractured polity, opportunities for political entrepreneurs to bring ideas to the institutional fore abound. Political entrepreneurs can exploit the "frictional gaps" between different governing institutions for ideationally transformative purposes.

In 1873, the Supreme Court and its Justices brought previously dissenting ideas to the helm. The Justices articulated ideas about citizenship that had to this point been in opposition— ideas about state citizenship that had been finding voice outside the dominant narrative, in state laws and social movements. Even as Republicans held both houses of Congress and the White House, ideas that citizenship in the United States should prioritize state over national citizenship found an institutional pathway to challenge the Republican vision. Justices on the Supreme Court in 1873 did something crucially important for state development in the U.S.: they picked up those dissenting ideas and put them on a path to dominance.

This judicial move proved formative. By stressing ideas of citizenship that emphasized state-over-nation, re-articulated ascriptive hierarchy, and rejected federal protection of citizenship rights, the Supreme Court struck a decisive blow to the Republican project. This chapter, then, suggests that a major turning point or critical juncture for the dominant conception of citizenship was the Supreme Court's ruling in the *Slaughterhouse Cases of 1873*. This case marked a shift in dominant citizenship doctrine in the United States. After this case, which read into the Fourteenth Amendment a different definition of citizenship than what its framers intended, the antebellum notion of citizenship decisively surfaced. As has been argued throughout this project, after the Civil War but prior to 1873, Republican ideas of national citizenship held sway. However, 1873 marked a return from a Republican, national and rights-based notion of citizenship under the Fourteenth Amendment, to the more state-centered and ascriptive understanding of citizenship.

This chapter reveals how the Supreme Court during the 1870s and 1880s waged, in Rogers Smith's words, the "mounting repudiation of Reconstruction egalitarianism and inclusiveness in

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[3] Karen Orren, and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004); Adam D. Scheingate. "Political Entrepreneurship, Institutional Change, and American Political Development." (*Studies in American Political Development* 17, 2003): 185-203.

favor of an extraordinarily broad political, intellectual, and legal embrace of renewed ascriptive hierarchies."[4] Though some Republicans continued to push institutionalization of national citizenship and racial equality, their ideational dominance in the polity was displaced. Because the Court exploited the opportunity inherent in the fragmented polity and picked up non-dominant ideas of citizenship, future legislators under this subsequent shift in governing authority were able to agree on "new legal system of racial and ethic subordination and exclusion."[5] The period following Reconstruction, namely the years 1876-1898, were thus, as Smith calls it, "the Gilded Age of Ascriptive Americanism."[6]

To uncover this story of political development, this chapter begins with a brief discussion of the Court's actions before 1873. Though Republican ideals of egalitarian, nationally enforced and protected citizenship remained dominant, it was becoming clear that they would face an attack from the Supreme Court they could not beat. Until 1873, though, the Court did not explicitly challenge Republican dominance. In fact, the Court, and the federal judiciary generally, largely enforced the Republican definition of national citizenship and federal power. Republicans enacted several pieces of legislation to ensure the federal judiciary would not be an institutional pathway for dissenting ideas about citizenship to challenge their project. By 1872, however, Republican actions to discipline the judiciary proved insufficient. In late 1872 the Court foreshadowed its rejection of national citizenship rights in its decision in *Blyew v. United States.*[7] And in 1873, the Justices jumped at the opportunity to attack the Republican-led shift in governing authority when a case ripe for the opportunity presented itself. This case, *The Slaughterhouse Cases,* its background, and the argument the Justices in the majority make are discussed in this chapter's second section. That the Court could challenge the Republican shift in governing authority despite its apparent support, as evidenced by its decisions prior to 1873, illustrates just how fragile shifts in governing authority are in the American

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[4] Rogers M. Smith. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* (New Haven: Yale University Press, 1997), 347

[5] Ibid, 348.

[6] Ibid, 347-409.

[7] 80 U.S. 581 (1872).

state. This fragility is caused at least in part, I argue, by the fragmented, complex, layered, and sometimes internally-contradictory nature of the American polity.

Third, I examine some of the Court's subsequent decisions that continue to reflect this post-*Slaughterhouse* definition of citizenship— one that contrasted sharply with Republican definitions. *United States v. Cruikshank* (1875)[8] and *The Civil Rights Cases* (1883)[9] are discussed in this section. *Cruikshank* involved charges brought under the Enforcement Act of 1870. The Court ruled that the Fourteenth Amendment did not incorporate the First and Second Amendments against the states. In doing so, they rejected national citizenship and the power of the federal government to regulate actions within states, including protecting the rights of blacks against private encroachment. *The Civil Rights Cases* expressly rejected the final last-ditch attempt by the Republicans to entrench their vision of national citizenship, the Civil Rights Act of 1875.

An Increasingly Hostile Court

While Reconstruction was in full-swing in the mid to late-1860s, the Republican ideals of union, free labor, and national citizenship were dominant. Republicans had successfully achieved a functional shift in governing authority through the passage of the three Reconstruction Amendments and several important pieces of legislation that increased the federal government's power to protect the rights of citizenship. As documented in the previous chapter, however, the Republicans were not free from challenge. Their project was under siege from the start— by President Johnson, then by the statutes and by the people themselves. The federal judiciary, however, was initially not a zone where dissenting ideas of state-centered ascriptive citizenship found voice. Indeed, for a time, bolstered by the Republican project to increase their jurisdiction and assist in enforcing national citizenship, the federal judiciary embraced ideas of national citizenship, free labor, union, and egalitarianism. This was no coincidence, however. Republicans took action to ensure the federal judiciary would be sympathetic to their project. They altered the makeup of the Supreme Court by constricting its membership, consolidating federal circuits, and stripping the Supreme Court of jurisdiction in select

[8] 92 U.S. 542 (1875).

[9] 109 U.S. 3 (1883).

cases. But as Reconstruction continued, the Republicans continued to face attacks, support for the Republican project in the judiciary started to wane and the Supreme Court started to exploit the inevitable frictional gaps that arose.

Prior to 1873, lower federal court decisions generally acknowledged and supported the Republican project. Its initial readings of the Reconstruction statutes and Amendments were "expansive."[10] They endorsed the idea that through Reconstruction, the Republicans sought to prioritize national citizenship over state citizenship. Kaczorowski notes that federal and even state appellate court decisions "generally acknowledged that a revolution in federal citizenship had been wrought by the Thirteenth and Fourteenth Amendments and the statutes enacted to enforce them."[11] This outcome was likely because the Republicans in Congress specifically manipulated the federal judiciary in order to solidify their shift in governing authority. Engel points out that Republicans used strategies both of "undermining judicial legitimacy and harnessing judicial power" to ensure the federal judiciary would not be hostile to Reconstruction policy and their project of national citizenship.[12] Many of Congress's actions toward the judiciary during the Civil War and Reconstruction were motivated by the same desire to entrench their vision for national citizenship and make durable their shift in governing authority as the impeachment of President Johnson and the dubious ratifications of the Thirteenth and Fourteenth Amendments.[13] In other words, the federal judiciary "was conceptualized as a threatening and conspiratorial opposition supporting Slave Power" and hostile to the entrenchment of national citizenship over state citizenship.[14]

In an effort to ensure the federal judiciary would be an ally to the Republican project, between 1862 and 1870, congressional Republicans passed five separate pieces of legislation that tinkered with its structure and jurisdiction. First, the 1862 Judiciary Act "re-configured the state

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[10] Smith (1997), 327.

[11] Robert J. Kaczorowski. *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*. (Dobbs Ferry, NY: Fordham University Press, 2005), 19.

[12] Stephen Engel. *American Political Confront the Court: Opposition Politics and Changing Responses to Judicial Power*. (New York, NY: Cambridge University Press, 2011), 219.

[13] Ibid, 199.

[14] Ibid.

composition of the judicial circuits."[15] Engel argues that this first act reveals a Republican hostility not towards judicial review itself or the judiciary as a "structurally undemocratic institution," but rather to the influence of "Southern Slave Power" on the bench.[16] This act consolidated all ex-Confederate and Southern states into just three federal circuits— down from five— thus limiting the influence of the tradition of appointing a justice from each circuit district. Major reform, however, came in 1866 with the Judicial Circuits Act. This act reorganized the federal circuits again, partially to account for newly admitted states, reduced the total number of circuits from ten to nine, and trimmed the membership of the Supreme Court from ten to seven. The 1866 Act prevented President Johnson from appointing judges who shared his hostile feelings towards the Republican Reconstruction policy to lower federal judgeships. Together, these two pieces of legislation had the effect of limiting Southern influence on the Supreme Court and "rout[ing] out opposition" to the Republican vision in the judiciary.[17]

Manipulation of the judiciary worked in other ways, too. It seems the Republicans in 1867 believed the lower federal judiciary might be a faithful ally (at least relative to southern state courts) to their project as a result of their manipulation through recent legislation: they passed the Habeas Corpus Act, which significantly expanded the jurisdiction of federal courts. Passed on February 5, 1867, this act amended the Judiciary Act of 1789. It gave federal courts the ability to review and grant petitions "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States."[18] Specifically, it granted federal courts jurisdiction over habeas corpus petitions for prisoners in the custody of states. This is noteworthy for two reasons. First, it extended the reach of the federal government into the protection of citizenship rights from state infringement, thus bolstering national citizenship. Second, it only happened after the Republicans had already taken deliberate action to harness the power of the judiciary in their favor.

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[15] Ibid, 200.

[16] Ibid. See also Alexander Bickel. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. (New Haven, CT: Yale University Press, 1962).

[17] Engel (2011), 201.

[18] *An Act to amend "An Act to establish the judicial Courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine,"* 39th Cong., sess. ii, chap. 28, 14 Stat. 385 (1867).

Republicans only granted more power to the federal judiciary *after* they had already taken action to turn that branch into an ally. At the same time, however, the Republicans stripped the highest federal court, the Supreme Court, of jurisdiction. Under the impression that the Supreme Court could use cases arising under the Habeas Corpus Act of 1867 to challenge the Republican Reconstruction vision by declaring Reconstruction legislation unconstitutional, Congress repealed the Supreme Court's jurisdiction to hear appeals under the act.[19]

But active manipulation of the judiciary did not end there. Structural manipulation continued in 1869 with the passage of another Judiciary Act. This act, also known as the Circuit Judges Act of 1869, fits the pattern of "eliminating a threatening opposition from its entrenchment in the federal judiciary."[20] The act increased the Supreme Court membership to nine justices and established a new intermediate circuit of appellate courts. It also gave Republicans control over appointments to the lower federal judiciary. Engel argues this act can also be understood as a measure by Republicans to harness the power of the judiciary to support their project.[21] The Republican actions to manipulate the judiciary in their favor were "driven by a desire to secure their partisan objectives," and they follow from their keen awareness that "they could not hold their status as the single constitutional (or even dominant) party and [their understanding] that they could use the judiciary, while they held presidential and congressional power, to promote their constitutional vision and entrench their interest against the Democratic alternative."[22]

Congressional Republican action to forcefully wrangle the Court was only partially successful. Lower federal judges "uniformly adopted the expansive understandings of the fourteenth amendment and the Civil Rights Act of 1866" that animated the Republican theory of national citizenship.[23] Additionally, as Kaczorowksi writes, despite the "the seemingly overwhelming adverse pressure and conditions in which they operated, the federal courts generally upheld the authority of

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[19] Engel (2011), 207.

[20] Ibid, 204.

[21] Ibid.

[22] Ibid, 205.

[23] Robert J. Kaczorowski. *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, N.Y.U. Law Review 61, no. 863 (1986): 935.

the federal government under the Enforcement Acts of 1870 and 1871."[24] Similarly, the fact that even unsympathetic Southern federal judges who were ideologically hostile to the prioritization of national citizenship largely upheld the constitutionality of Republican civil rights legislation during Reconstruction "demonstrates how strongly held their view that the judicial function was to implement Congress's will unless it was obviously unconstitutional."[25] Republican manipulation of jurisdiction and circuit consolidation, therefore, successfully harnessed the lower federal judiciary as an ally. Attacks on the Republican project did not come from the lower federal judiciary. But despite their victory in the Civil War and their ability to enact their project for union and national citizenship, congressional Republicans were far from a hegemonic delegation. Their calculated manipulation of the federal judiciary and constant defense from attacks from elsewhere in the polity suggest, somewhat counterintuitively, that the Republicans were always operating from a point of weakness.

Republicans sensed the Supreme Court could not so easily be disciplined as the lower courts. This sensibility is indicated by their 1868 jurisdiction-stripping. Additionally, although the lower federal courts tended to support and bolster the Republican project, historian Eric Foner notes the Supreme Court "tend[ed] to obstruct congressional Reconstruction policy."[26] Despite their deliberate efforts to entrench their vision in the polity, the Republicans would soon face a clear adversary in the Supreme Court.

In 1866, in *Ex Parte Milligan*,[27] the Supreme Court voided the wartime conviction of a man from Indiana by a military court established by Republicans, on the grounds that civilian courts were operating at the time. Writing for the majority, Justice David Davis insisted the case had nothing to do with the South, but nonetheless it "threw into question the legality of martial law and Freedmen's Bureau Courts," thus casting an air of doubt over the Republican project.[28] And in 1867 in *Cummings*

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[24] Kaczorowski (2005), 60.

[25] Ibid, 60.

[26] Engel (2011), 205.

[27] 71 U.S. (4. Wall.) 2 (1866).

[28] Foner (1988), 272.

v. Missouri,[29] the Supreme Court overturned the loyalty oath in Missouri's constitution for lawyers, ministers, and others.[30] Though, somewhat ironically, Foner notes, this was the first time a state constitution had been considered under federal judicial power. The case did indeed reflect an expansive national power and federal oversight of state action, but it, along with *Milligan*, "suggested that Republicans might soon face a hostile Supreme Court."[31]

An attack came first from the Supreme Court in 1872. It was, however, a tempered, stunted attack. Similar to other historians, Kaczorowski points out that by 1872, the national climate was "no longer favorable" to national civil rights enforcement and national citizenship.[32] Due at least in part to the Republican's manipulation of the federal judiciary, the Supreme Court's first opportunity to give its opinion on Republican civil rights legislation did not come until 1872. Kaczorowski notes that due to electoral shifts, the "political forces in Congress that produced the Reconstruction civil rights enactments were fragmented."[33] As documented, Democrats had managed to find voice for their ideas in state governments, social movements, and the people themselves. As a result they had "regained much of their respectability and power in national as well as local politics."[34] It was in this context that the Supreme Court heard its first challenge to Reconstruction civil rights legislation. The case originated in 1868 in Lewis County, Kentucky. Two white men, John Blyew and George Kennard, "brutally axed to death and mutilated the bodies" of several members of a black family.[35] The subsequent investigation results in charges of murder in Lewis County jail. However, United States Marshals removed them from state custody and placed them under federal arrest. Both defendants were tried for murder in United States District Court in Louisville, Kentucky, and found guilty and sentenced to death.

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[29] 71 U.S. 277 (1867).

[30] Foner (1988), 272.

[31] Ibid.

[32] Kaczorowski (2005), 108.

[33] Ibid.

[34] Ibid.

[35] Ibid.

The Court heard arguments on the proper limits of federal jurisdiction under the Civil Rights Act of 1866. The trial judge, Judge Bland Ballard, upheld federal jurisdiction by interpreting the congressional intent behind the law as "prescribing a concurrent jurisdiction over civil rights that permitted the states a role in establishing the conditions under which civil rights were to be exercised and enjoyed."[36] The Supreme Court deliberated on this question for more than a year. On April 1, 1872, the Court announced its decision. Its decision indicated unwillingness to endorse the Republican project, but a hesitancy towards attacking it outright. The Court, Kaczorowski notes, "sidestepped questions concerning the national government's authority over the administration of criminal justice."[37] Ultimately, the decision was a compromise between endorsing and launching a full-scale attack on the Republican project. The Court managed to sidestep the larger questions regarding what it believed to be the "proper" role of the federal government in regulating state laws, civil rights, and citizenship. In turn, it upheld the constitutionality of the Civil Rights Act of 1866, but it eliminated the jurisdiction given to the federal courts over criminal prosecution of whites for crimes against blacks.[38] Foreshadowing its future actions, the Court in *Blyew v. United States*,[39] Kaczorowski points out, "failed to affirm explicitly the broad legal theory of national civil rights enforcement authority applied by the lower federal courts."[40] Consequently, it left unanswered questions of the future of the Republican project and the prioritization of national citizenship over state citizenship. Unfortunately, however, there seems to be "no record explaining why" the Court left these questions unresolved.[41]

Throughout Reconstruction, therefore, the federal judiciary's relationship to the Republican project was directly tied to the actions of congressional Republicans. Through both circuit consolation and jurisdiction alteration, Republicans tried to harness the judiciary to support their

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[36] Ibid.

[37] Ibid, 113.

[38] Ibid.

[39] 80 U.S. 581 (1871).

[40] Kaczorowski (2005), 113.

[41] Ibid, 116.

project. It succeeded for a time, especially in the lower federal judiciary. The Supreme Court was a different story. Though Republican action made an outright assault on the Republican-driven shift in governing authority less likely, it could not seal all the frictional gaps. It became clear throughout Reconstruction that though the lower federal judiciary largely supported Reconstruction efforts and national citizenship, the Supreme Court would soon launch an attack on the Republicans they could not beat.

Tipping the Scales: *The Slaughterhouse Cases of 1873*

That attack came in 1873 on the heels of *Blyew*. In a key entrepreneurial move, the Supreme Court dealt a fatal blow to the Republican vision of national citizenship. Importantly, however, there was no single moment of "switching," where the Court decided to no longer support Reconstruction and national citizenship. As explained, the Court exhibited hostility all along, but Republican manipulation of circuits and jurisdiction postponed a full-scale assault from the Court. Rather, in 1873, the institutional hurdles the Republicans put in place to limit any hostile influence from the federal judiciary were all cleared in one formative case. This case, the *Slaughterhouse Cases of 1873*,[42] amounted to a categorical rejection of the Republican project to promote federal oversight of citizenship rights in the states.

Slaughterhouse was the first major Reconstruction-era Supreme Court decision. Though its facts did not involve Klansmen or a violation of the rights of black Americans, it "held implications for fewer (congressional and judicial) protections of black rights."[43] As legal scholar Richard Aynes remarks, the *Slaughterhouse Cases* are "simultaneously unremarkable and extraordinary."[44] It is an unremarkable case (or, more specifically, set of cases) because of the seemingly mundane matter at issue— whether butchers can be compelled to do business at a specific, central state facility. It is extraordinary, however, in its legal ramifications for larger issues of state and national power, the

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[42] 83 U.S. 36 (1873).

[43] Pamela Brandwein. *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*. (Durham, NC: Duke University Press, 1999), 61.

[44] Richard Aynes. "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases." *Chicago-Kent Law Review* 70, no. 627 (1994): 627.

Fourteenth Amendment, and citizenship. Aynes points out that in spite of the fact that three of *Slaughterhouse*'s "significant" legal conclusions have been rejected and "'everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause, the conclusion that the Privileges and Immunities Clause of the Fourteenth Amendment had no meaningful place in our constitutional scheme continues to live on."[45]

The dispute at issue in *Slaughterhouse* arose in Louisiana in 1869. When New Orleans was first settled in 1718 on the banks of the Mississippi, its geographic location presented many advantages for trade and commerce. Thomas Jefferson predicted that New Orleans "will forever be… the might mart of the merchandise brought from more than a thousand rivers….With Boston, Baltimore, New York, and Philadelphia on the left, Mexico on the right, Havana in front, and the immense valley of the Mississippi in the rear, no such position for the accumulation and perpetuity of wealth and power ever existed."[46] Indeed, by 1840 the city had become a massive trading center, the hub of commerce between Latin American, Europe, and goods traveling up and down the Mississippi River. However, the location also presented numerous disadvantages— notably, its climate and topography. New Orleans sits squarely in a vast swamp and marshland. In the nineteenth century, the average temperature was 54.4 degrees Fahrenheit in the winter, and 79.3 in the summer; average annual rainfall was over fifty inches, and the highest point in the city was just fifteen feet above sea level. The levees built to keep the river out of the city sometimes broke, inundating the city with water. Labbé and Lurie explain that throughout the nineteenth century, there were complaints about "pools of stagnant water standing in low-lying areas, in vacant lots, and under houses."[47] In this environment, drainage was a serious concern. Underground drainage did not exist, so the city depended largely on "irregularly graded ditches and canals to carry water away from inhabited areas."[48] Mosquito-infested swamps dotted the city and surrounding area. Exacerbated by the damp,

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[45] Ibid, citing Thomas B. McAffee. "Constitutional Interpretation— the Uses and Limitations of Original Intent." *University of Dayton Law Review* 12, no. 275 (1986): 282.

[46] Ronald Labbé, and Jonathan Lurie. *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment*. (Abridged Edition ed. Lawrence, KS: University Press of Kansas, 2005), 13.

[47] Ibid, 15.

[48] Ibid.

humid conditions were the unfortunate practices of waste disposal. It was common practice to "dispose of refuse by throwing it into one of the swamps or by dumping it onto a vacant lot."[49] Indeed, during the nineteenth century, inhabitants of New Orleans used the ground between the river and levee as a dumping ground for human waste, garbage, and dead animals. City-contracted waste collectors were unsupervised, so several days might pass before garbage and offals from local slaughterhouses were removed from the streets.[50] The physical conditions of New Orleans, the waste disposal practices of its inhabitants, and the "stubborn refusal" by city officials to address these problems are important elements to the background of the *Slaughterhouse Cases*.

The dispute at issue reveals some of the "political tensions" surrounding the rapid economic development of nineteenth-century America.[51] Along with the booming industry and manufacturing during this period, the meat-packing industry was developing a "modern corporate structure."[52] Complementing this centralization of control was an invigorated health and sanitation effort. In New Orleans, this was driven at least in part by its "very active" medical community.[53] Between 1796 and 1869, New Orleans was engulfed by thirty-six separate waves of yellow fever.[54] Doctors believed (incorrectly) that the disease was caused by breathing gases, referred to as "miasma," exuded by decaying animal and vegetable matter.[55] Scientific errors aside, Labbé and Lurie argue that this theory had the effect of "focusing attention on the relationship between good health and environmental cleanliness."[56] Medical professionals called for more stringent sanitary practices in the city to alleviate yellow fever.

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[49] Ibid, 16.

[50] Ibid.

[51] Kaczorowski (2005), 116.

[52] Ibid.

[53] Labbé and Lurie (2005), 16.

[54] Ibid.

[55] Ibid, 17.

[56] Ibid.

Plagued by deplorable sanitary practices and an ever-growing population, the city of New Orleans "found itself plagued with all the nuisances that accompany the business of providing meat to the markets of a growing metropolis through a system of private slaughterhouses."[57] Animals were herded through the streets, and slaughtering sometimes took place in the open within sight of the public. With an eye towards addressing the deplorable conditions of the city, the Louisiana state legislature passed the Slaughterhouse Act in 1869. Formally titled "An Act to Protect the Health and City of New Orleans, and to Locate the Stock Landings and Slaughter Houses," the act incorporated seventeenth individuals into the Crescent City Live Stock Landing and Slaughter House Company, then granted this company an exclusive right to maintain a single central slaughterhouse facility outside of the city to the south. This company would have the "sole and exclusive privilege" of "conducting the business of landing, keeping, or slaughtering animals for in the contiguous parishes of Orleans, Jefferson, and St. Bernard" for twenty-five years.[58] Importantly, however, all butchers, whether part of the corporation or not, would be allowed to use the facility.

The Act, however, posed a "direct threat to the interests of a large and coherent group of tradesmen who knew how to complain."[59] After exhausting the state court system, the butchers who were not part of the corporation challenged the state's action in federal court. The cases were heard by Justice Joseph Bradley and Judge William Woods on the Circuit in 1870. Bradley issued two opinions, siding with the butchers who challenged the statute. The corporation appealed and brought the case before the Supreme Court. It was argued first on January 11, 1872. Because Justice Nelson was not present, the case was reargued on February 3, 4, and 5, 1873.[60] The corporation was represented by Republican Senator Matthew Carpenter, former Pennsylvania Supreme Court Chief Justice Jeremiah S. Black, and Louisiana radical Republican politician Thomas Jefferson Durant.[61]

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[57] Ibid, 25.

[58] Ibid, 47-48.

[59] Ibid, 47.

[60] Aynes (1994): 632-633.

[61] Ibid.: 633.

The butchers were represented by former U.S. Supreme Court Justice (and Confederate Assistant Secretary or War) John A. Campbell, and J.Q.A. Fellows, a lawyer from Louisiana.[62]

Campbell, a staunch supporter of state's rights and former member of the Confederacy, argued that a group of white butchers should be protected from state infringement by a Reconstruction Amendment— showcasing how political ideas can be reassociated for antithetical ends.[63] Deep irony notwithstanding, Campbell presented arguments based on common law and the Thirteenth and Fourteenth Amendments. Labbé and Lurie draw attention to Campbell's apparent dual agenda. Indeed, his first goal was to represent his clients, the butchers, in court. But he was also on a larger crusade. He wanted to "employ the Constitution's new Reconstruction amendment as legal weapons to bring about Reconstruction's ultimate demise."[64] In fact, *Slaughterhouse* was only one of several cases in which Campbell represented clients resisting Reconstruction measures. His efforts contributed "significantly to the eventual failure of Reconstruction."[65] Accordingly, his arguments must be understood with reference to his dual purposes.

In his submitted briefs and oral argument before the Supreme Court, Campbell traced the history of monopolies in French and English common law, and argued the slaughterhouse produced a monopoly that if not "void at common law, could be so under both the thirteenth and fourteenth amendments."[66] Likening the slaughterhouse situation to slavery, he also suggested that the monopoly created a "servitude" prohibited by the Thirteenth Amendment.[67] To demonstrate this, he had to suggest that "involuntary servitude" covered much more than black chattel slavery. Specifically, he suggested it could be applied to protect the rights of southern white butchers. Again highlighting the irony of an ex-Confederate's position on Reconstruction, Campbell suggested that

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[62] Ibid.

[63] Stephen Skowronek. "The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition." *American Political Science Review* 100, no. 3 (2006): 385-401.

[64] Labbé and Lurie (2005), 126.

[65] Ibid, 127.

[66] Aynes (1994), citing *Slaughterhouse Cases,* 83 U.S. 44.

[67] Ibid.

the Louisiana state act is "even more plainly in the face of the fourteenth amendment" because it is a "more comprehensive exposition of the principles of the Thirteenth [amendment]."[68] He argued that the Reconstruction Amendments "forever destroyed" the traditional states-rights doctrine by granting more power to the federal government. To be a freeman in the United States under the new Reconstruction Amendments, Campbell suggested, meant protection of one's privileges and immunities under the Constitution. The privileges and immunities he had in mind were an immunity from compulsory work, imposed occupation, employment, or trade, the lawful pursuit of skills or materials necessary for trade, and the full enjoyment of the fruits of one's labor.[69]

In other words, Campbell had to liken the situation of the white butchers to black slaves. As Labbé and Lurie point out, he realized that this comparison "might be somewhat extravagant."[70] Nevertheless, he insisted that the butchers had been prohibited from "doing their usual or customary work, except upon the property and for the compensation and profit of" those who ran the slaughterhouse.[71] The slaughterhouse had barred the butchers from pursuing their chosen occupation and trade in the manner they liked and so, therefore, Campbell argued, the law forced upon the butchers a form of involuntary servitude prohibited by the Reconstruction Amendments. A former slaveowner himself, Campbell suggested that the basic motive behind the Amendments had been that "man has a right to labor for himself, and not at the will, or under the constraint of another."[72] He admitted that the Reconstruction Amendments altered the federal balance of power: "the sovereignty of the State government is reduced… to a very limited extend."[73] He continued: "life, liberty, property, privilege, immunity, civil, political and public rights have been placed upon a foundation

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[68] J.A. Campbell. "William Fagan et al. vs. State of Louisiana no. 470; Butchers Benevolent Association vs. Crescent City Live Stock Landing and Slaughter House Company nos. 476, 480, Plaintiffs' Brief Upon The Re-Argument." in *Landmark briefs and arguments of the Supreme Court of the United States*, Gerald Gunther, Casper Gerhard, Phillip Kurland, eds. (Washington: University Publications of America, 1975), 649.

[69] Labbé and Lurie (2005), 127-128.

[70] Ibid, 128.

[71] J.A. Campbell. "Plaintiffs' Brief Upon The Re-Argument." 547.

[72] Ibid, 548

[73] Labbé and Lurie (2005), 129-130.

that the [state legislatures] cannot subvert or destroy."[74] Campbell saw the Fourteenth Amendment as having altered the federal balance of power to ensure that liberty be safeguarded. The purpose of the Amendment was to "establish through the whole jurisdiction of the United States one people."[75] At least to an extent, Campbell was embracing the Republican theory of national citizenship.

Arguing on behalf of the company established by the Louisiana legislature to run the slaughterhouse, Thomas Durant relied heavily on precedent to furnish an argument that highlighted state power, namely the state police power. He cited *Prigg v. Pennsylvania*[76] to assert that "the police power of the State extends overall subjects within the territorial limits of the State, and has never been conceded" to the federal government.[77] Durant also called upon Chief Justice John Marhsall's opinion in *Gibbons v. Ogden*[78] to highlight the validity of state police power, something that "has never been denied," as they are "considered as flowing from the acknowledgment power of a State to protect its citizens."[79] He placed the statute squarely within a state's power to protect the health and well being of its inhabitants. With regard to the Fourteenth Amendment, Durant and his co-counsel suggested that by "all persons born or naturalized in the United States," the Amendment means "only the people of African descent, because all other people were already citizens of the United States."[80] Durant's argument called upon an expansive definition of state power, and seemed to argue for a reaffirmation of state citizenship over national citizenship.

The arguments on behalf of the parties presented the Court with an odd scenario that seemed to have turned the Reconstruction Amendments on their heads. Admittedly, the Reconstruction Amendments were ratified in response to the Civil War and targeted most directly at slaves and ex-slaves. It is worth reiterating, however, that their framers intended them to establish a national

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[74] J.A. Campbell, "Plaintiffs' Brief Upon The Re-Argument." 557.

[75] Ibid, 667.

[76] 41 U.S. 539 (1842).

[77] Labbé and Lurie (2005), 137.

[78] 22 U.S. 1 (1824).

[79] Labbé and Lurie (2005), 137.

[80] Ibid, 140.

citizenship generally. As discussed in Chapter 2, Republicans strove to prioritize national citizenship by giving the federal government the power to enforce civil and social rights violations. Republicans saw states' rights and the prioritization of state citizenship as the cause of the Civil War, so they sought to override it. But here, the parties in *Slaughterhouse* had rejiggered the framework for ends not quite antithetical, but partially so.[81] Understanding the decision in this way may help shed light on the narrowness of the decision— a 5 to 4 breakdown.

Ultimately, the Court rejected all of the petitioner's (Campbell and the butchers) arguments. Justice Samuel Miller, an abolitionist appointed by Abraham Lincoln in 1862, delivered the opinion for the Court on April 14, 1873. Kaczorowksi notes the opinion was a "curious and contradictory mixture" of "nationalist Republican assumption about Reconstruction and the need for national protection of civil rights that led to the adoption of the Fourteenth Amendment" combined with a "narrow conclusion that reflected the ideas of states' rights Democratic Conservatives concerning the scope of authority" the Fourteenth Amendment conferred upon the national government to protect civil rights and national citizenship.[82] After a summary of the statute, Miller addressed Campbell's argument. He took note that the act was argued to have created a monopoly, and conferred "odious and exclusive privileges upon a small number of persons at the expense of the great body of the community."[83] He reminded readers that the act was denounced for depriving "a large and meritorious class of citizens -- the whole of the butchers of the city -- of the right to exercise their trade."[84] But Miller subsequently dismissed Campbell's argument with one terse sentence: "But a critical examination of the act hardly justifies these assertions."[85]

Importantly, Miller pointed out, the act indeed determined where livestock were to be slaughtered, but it did not prevent anyone from practicing the trade of a butcher. The act only defined the location for slaughtering and forbade slaughtering elsewhere. He found it "difficult to see a

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[81] Skowronek, Stephen (2006): 385-401.

[82] Kaczorowski (2005), 122.

[83] *The Slaughterhouse Cases* 83 U.S. 36 (1873).

[84] Ibid.

[85] Ibid.

justification for the assertion that the butchers are deprived of the right to labor in their occupation."[86] Next, Miller turned to the power under which he believed the act to be a valid exercise— the police power. This power, he wrote, "must be from its very nature, incapable of any very exact definition or limitation," and indeed the slaughterhouse issue in this case, and the issues of health and hygiene it seeks to remedy are "among the most necessary and frequent exercises of this power."[87] Labbé and Lurie point out that Miller could have ended his opinion here. He had made the case that Slaughterhouse Act was a valid, even routine, exercise of Louisiana's police power. Remaining, however, was the question of whether the Act violated provisions of the Fourteenth Amendment.

To consider this question, Miller began with a quick reminder about the history of the Amendments. Even the "most cursory glance" at the three Reconstruction Amendments, Miller wrote, "discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning."[88] Miller explained that "fortunately" that history is "fresh within the memory of us all."[89] He concluded that when considering the history behind these Amendments "no one can fail to be impressed with the one pervading purpose found in them all."[90] That purpose was for Miller "the freedom of the slave race, the security and the firm establishment of that freedom, and the protection of the newly-made freeman and citizens."[91] Legal scholar Richard Aynes points out that in his opinion, Justice Miller nonetheless "begrudgingly acknowledged" that African Americans were not the only ones protected by this amendment.[92] When discussing the citizenship clause of the Fourteenth Amendment, Miller argued that it was designed to define citizenship and agreed that it was targeted to overrule *Dred Scott v. Sanford*. The clause

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[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] Ibid.

[92] Aynes (1994), 635.

> declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.[93]

That the Fourteenth Amendment intended to make all persons subject to the jurisdiction of the national government citizens of the United States is undisputed. But a second observation about the citizenship clause is "more important in view of the arguments of counsel in the present case."[94]

This observation involves the crucial distinction between state and national citizenship that the Republicans desperately sought to employ. Miller argued that the distinction between these two types of citizenship is "clearly recognized and established."[95] At issue, though, was which the Fourteenth Amendment protected. Did it protect the set of "privileges and immunities" of all citizens of the United States (including citizens of each state), meaning the rights that all citizens had under the Bill of Rights, or did it protect just the "privileges and immunities" that were granted by the original Constitution as citizens of the United States, as distinct from citizens of each state? Indeed, as the investigation into the drafting and ratification of the Fourteenth Amendment make abundantly clear, Republicans intended the Fourteenth Amendment to extend the Bill of Rights to each and every citizen of every state and reaffirm national citizenship *over* state citizenship. But this very same issue was now before the Supreme Court. What did the citizenship clause of the Fourteenth Amendment mean? To answer this question, Miller relied on *Corfield v. Coryell*,[96] a case from 1823. *Corfield* defined the "privileges and immunities" that were granted to citizens *of the United States* as distinct

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[93] *The Slaughterhouse Cases* 83 U.S. 36 (1873).

[94] Ibid.

[95] Ibid.

[96] 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

from citizens of the states. These privileges were excruciatingly narrow.[97] Indeed, *Corfield* was explicitly addressed by the framers of the Fourteenth Amendment as something they hoped to address with the Amendment. Nevertheless, Justice Miller decided that the Fourteenth Amendment guaranteed only these rights, and did not protect the broader rights from the Bill of Rights from state infringement. The second clause of the Fourteenth Amendment, Miller argued, "protects from the hostile legislation of the States the privileges and immunities of *citizens of the United States,* as distinguished from the privileges and immunities of citizens of the States"[98] To use the words of Richard Aynes, Miller suggested here that only a limited number of rights were protected by section 1, "each of which was already protected by the federal government and enforced against the state by the Supremacy Clause."[99] As such, because the rights claimed by the butchers in this case were rights protected by the states, were they to be privileges and immunities under Section 1 of the Fourteenth

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[97] Justice Washington described the "privileges and immunities" enjoyed by citizens of the United States *as* citizens of the United States: "The inquiry is, what are the privileges and immunities of citizens in the several states? 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. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.
The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." *Corfield v. Coryell* 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

[98] *The Slaughterhouse Cases* 83 U.S. 36 (1873).

[99] Aynes (1994), 636. However, as Aynes points out in a footnotes, there is one single possible exception to this claim. It might be Miller's inclusion of "rights he indicated were 'guaranteed by the Federal Constitution.'…The only examples he gave of these were '[t]he right to peaceable assemble and petition for redress of grievances, [and] the privileges o the writ of habeas corpus.' Though this reference has caused some to think that Miller was suggesting that the Bill of Rights constituted privileges and immunities under the Amendment [which would lead to a fundamental contradiction], these are more likely structural rights of the type Miller thought protected by the Supremacy Clause even if the Bill of Rights did not exist." Aynes (2004), 636, n. 57. Internal citations omitted.

Amendment, Miller reasoned, would "radically" change the "whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[100]

Miller inferred that the Fourteenth Amendment was, therefore, made to enforce "any law which shall abridge the privileges and immunities of *citizens of the United States*."[101] In other words, Miller arrived at the conclusion that the Amendment was intended only to protect privileges and immunities possessed by a person in their capacity as a national citizen, and did not alter the state-national citizenship dynamic from before the Civil War. And because these privileges and immunities are narrow, the Louisiana state law did *not* violate any rights belonging to the butchers. Whatever the, albeit narrow, privileges and immunities of U.S. citizens may be, the rights claimed by the butchers to have been violated by the Louisiana state legislature were not among them.[102] Next, Miller briefly addressed due process claim under the Fifth Amendment. His decision found no restraint that Louisiana placed on the trade of the butchers to amount to a deprivation of property that would trigger a due process violation. Finally and to an argument under the Equal Protection Clause. But here, Aynes notes, unlike his treatment of the Reconstruction Amendments as a whole, Miller "suggested an extreme racial limitation:"[103]

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other.[104]

As such, Miller found no valid claim before the Court.

Justice Miller's decision in *Slaughterhouse* gutted the privileges or immunities clause of the Fourteenth Amendment. Political scientist Howard Gillman suggests that Miller was hesitant to exploit the Court's newly expanded jurisdiction. He seemed not to want to "impose a federal trump on activities that had previously [prior to the Civil War and Reconstruction] been the exclusive

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[100] *The Slaughterhouse Cases* 83 U.S. 36 (1873).

[101] Ibid.

[102] William Novak. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. (Chapel Hill: University of North Carolina Press, 1996).

[103] Aynes (1994), 637.

[104] *The Slaughterhouse Cases* 83 U.S. 36 (1873).

domain of local government."[105] Miller proposed a rather ironic question: "was [the Amendment] intended to bring with the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?…All this and more must follow, if the proposition of the plaintiffs [Campbell and the butchers]…be sound."[106] Indeed, Miller posed this question as if the answer were a vehement and undeniable "no." Unfortunately, however, extending federal oversight of the civil rights to ensure their protection against state infringement was, in fact, precisely one of the motivating purposes behind the Amendment itself. As Foner points out, the conclusions drawn by Justice Miller about the the distinction between the privileges and immunities of state versus national citizens "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."[107]

The impact of the Court's decision in *Slaughterhouse* has been well documented. Foner notes that Justice Miller proceeded to "interpret [the Fourteenth Amendment] in so narrow a manner that his decision evoked cries of protest from many who had drafted and voted on it."[108] The case "quite controversially rejected the idea" that the Reconstruction Amendments had been intended to "change significantly the federal system or to elevate national citizenship above that of the states…"[109] Indeed, as Kaczorowski reminds us, the Republican framers understood the Reconstruction Amendments as "constitutionally revolutionary" because they delegated to Congress the authority to oversee the rights of citizenship— a "radical" change to the respective roles of the state and national governments.[110] Instead, the decision turned the privileges and immunities clause of the Fourteenth

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[105] Howard Gillman. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. (Durham, NC: Duke University Press, 1993), 65.

[106] Ibid.

[107] Foner (1988), 503.

[108] Eric Foner. "The Supreme Court and the History of Reconstruction— And Vice-Versa." *Columbia Law Review* 112, no. 7 (2012): 1593.

[109] Ibid: 1594.

[110] Robert J. Kaczorowski. "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War." *The American Historical Review* 92, no. 1 (1987): 67.

Amendment into a "dead letter."[111] Despite voluminous evidence to the contrary, the Court concluded that "Congress intended to retain primary citizenship in the states."[112] By "emasculat[ing] the fourteenth amendment's citizenship and privileges and immunities clauses," the Court "diminished the amendment's scope," "destroyed the national government's authority to secure directly citizens' fundamental rights," and generally rejected and repudiated the "Republican theory of citizenship and privileges and immunities of United States citizenship."[113]

Slaughterhouse marks a definitive moment in the development of American politics. Pamela Brandwein shows how the Court's decision in *Slaughterhouse* used arguments common among Northern Democrats during Reconstruction and successfully managed to embed those arguments in the dominant narrative for decades to come. Brandwein suggests that in presenting the distinction between state and national citizenship as "long resolved— hence, beyond the scope of legitimate contention— [Justice Miller] refused to acknowledge that dispute over the structure of federalism went beyond the question of federal authority over formal slave law."[114] Justice Miller refused to acknowledge that question regarding the proper bounds of state and federal authority over personal rights "also characterized slavery politics and were implicated in the Civil War."[115] Brandwein devotes much of her book to demonstrating that the Democrats' theories of state versus national power and sovereignty were "racialized." In fact, the primary dissent in *Slaughterhouse*, written by Justice Field, reflected quite closely the Republican views of federalism, the Civil War, slavery, and the Fourteenth's Amendment's endorsement of national citizenship. Field's dissent even "emphasized free-labor principles" that grounded the Republican ideology.[116] In other words, it is striking how closely the majority opinion in *Slaughterhouse* reflected the Democratic preference for the prioritization of state citizenship, while the dissent reflected what had been (barely) the dominant

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[111] Brandwein (1999), 61, citing Robert H. Bork. *The Tempting of American: The Political Seduction of the Law* (New York: Free Press, 1990), 37, 166.

[112] Kaczorowski, (1986): 937.

[113] Ibid.: 937-938.

[114] Brandwein (1999), 67.

[115] Ibid.

[116] Ibid, 68.

idea during Reconstruction, the prioritization of national citizenship. Indeed, Brandwein points out that Justice Bradley, who also joined Field's dissent, filed a separate dissent that "sounded very much like" John Bingham, the primary drafter of the Fourteenth Amendment and its national citizenship presumption.[117] But when the Supreme Court endorsed the Democratic theory of state power and slave history in its decision, it also "implicitly institutionalized their race theory."[118] This move struck the decisive blow to the slowly-crumbling Republican vision.

Until *Slaughterhouse*, congressional Republicans had narrowly, though successfully, quashed every attack on their dominance. The Court's move here, though, proved too much. Brandwein shows how *Slaughterhouse* had lasting implications for future questions of democracy, federalism, and citizenship. Justice Miller's act of rejecting Republican national citizenship and picking back up the Democratic theory of citizenship "worked to limit future judicial approaches to the problems of democracy in particular ways."[119] These ways included submerging "several dimensions of Republican slavery critiques," and "draining institutional memory" of traces that could have been employment by future movements to "support federal protections of individual rights where states had a history of abuses."[120] Not only did the Court reject the Republican definition of citizenship, but its actions had implications for the future of the Republican project— it rendered its return particularly difficult by closing off opportunities for political entrepreneurs to bring back national citizenship. Indeed, in 1900, when the Supreme Court "looked backward to the 'known conditions of affairs' that produced the Fourteenth Amendment… Miller's history was definitive."[121] Over time, Miller's version of the war's issues, the proper roles of state and federal power, and "his critique of 'the problem' with slavery took on an objective quality."[122] In fact, to this day *Slaughterhouse's* reading of the Fourteenth Amendment's privileges or immunities clause is still on the books. Despite

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[117] Ibid, 70.

[118] Ibid, 41.

[119] Ibid, 74.

[120] Ibid.

[121] Ibid.

[122] Ibid.

it now being widely agreed to have exhibited a fundamental misreading of the Fourteenth Amendment, *Slaughterhouse* has not been overruled. In the 2010 case of *McDonald v. City of Chicago*[123] Justice Samuel Alito declined to defend *Slaughterhouse*, but noted that many legal scholars consider the case to have been wrongly decided. Thus, as Foner writes, the "cramped reading of the Fourteenth Amendment survives."[124] *Slaughterhouse* was a critical "turning point in Reconstruction."[125] With the Court's decision in *Slaughterhouse*, then, all hope for Reconstruction was lost.

Re-Entrenching the Antebellum Vision: *Cruikshank* and *The Civil Rights Cases*

After *Slaughterhouse*, the Republican-led shift in governing authority was over, and the primacy of national citizenship was being quickly eroded by Democratic ideas of federalism and a preference for state citizenship. Actions the Republicans had taken to reconstruct the country at the close of the Civil War and to embed the project of union and national citizenship were being overturned, amended, and rejected. The Supreme Court continued to be the prime pathway for these ideas of state citizenship over national citizenship to return to dominance. After *Slaughterhouse*, Brandwein writes, the Supreme Court justices were working in a legal field that was characterized by three things: (1) "Court precedent that presented the content of national citizenship as essentially unchanged by the Civil War;" (2) "declining Republican strength;" and (3) minimal sanction for being inclined the weigh state jurisdiction more heavily than the democratic participation of black citizens."[126] Also notable was the "traditional fear of central [federal] power and its associated conceptualization of central power as the 'danger' to democracy."[127] Of course, as political scientist Megan Ming Francis points out, winning one Supreme Court case "does not amount to a new durable

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[123] 561 U.S. 742 (2010).

[124] Foner (1988), 1604.

[125] Kaczorowski (2005), 139.

[126] Brandwein (1999), 81.

[127] Ibid.

change in the national governing establishment."[128] It can, however, mark the end of one by creating an additional discursive shift that paves the way for the a new governing authority. The Supreme Court's decision in *Slaughterhouse* acted as a judicial precedent for decisions that "later halted efforts by the Grant administration to protect civil rights when it revived its policy of vigorous civil rights enforcement to combat the renewal of Southern terrorism in 1874."[129] In a way, then, *Slaughterhouse* not only ended one shift, but it began another— one a product of the context (the "legal field") that *Slaughterhouse* allowed. Because of *Slaughterhouse*, then, the brief era of the primacy of national citizenship was over, and later attempts to bring it back, like the Grant administration's actions in 1874, would not be tolerated. The elements the Court endorsed in its decisions after *Slaughterhouse* in 1873 "were packaged in a 'totality of remembrances, traditions and familiar ideas' that borrowed heavily from Northern Democratic slavery criticism."[130] Specifically, two more cases in the ensuing decade did substantial damage to what remained of Republican attempts to entrench their vision. These cases, *United States v. Cruikshank* (1875)[131] and *The Civil Rights Cases* (1883),[132] both reflect the change in ideational dominance that *Slaughterhouse* instigated.

United States v. Cruikshank (1875)

Two years after *Slaughterhouse*, the Supreme Court heard another case that dealt specifically with Reconstruction, the Republican project, and national citizenship. *United States v. Cruikshank* arose out of the bloodiest incident of Reconstruction. The incident, the Colfax Massacre, involved a "level of violence tantamount to a localized civil war."[133] It was a product of the confusion that followed the bizarre Louisiana gubernatorial election of 1872. The election results were widely disputed. Both Conservatives, led by incumbent governor Henry C. Warmouth, and Republicans, led

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[128] Megan Ming Francis. *Civil Rights and the Making of the Modern American State*. (New York, NY: Cambridge University Press, 2014), 22.

[129] Kaczorowksi (2005), 139.

[130] Brandwein (1999), 60.

[131] 92 U.S. 542 (1875).

[132] 109 U.S. 3 (1883).

[133] Kaczorowski (2005), 142.

by challenger William P. Kellogg, claimed victory in the election. For a brief time, Louisiana experienced the "political anomaly of having two governors and two legislatures claiming and exercising governmental authority."[134] Both governors appointed candidates to fill the positions of judge and sheriff of Grant perish. Both pair simultaneously claimed to be the legitimate officeholders and attempted to occupy the parish courthouse. The Republican-appointed candidates succeeded at occupying the courthouse, and reinforced it with armed supporters. But on Easter morning, April 13, 1873, a "'veritable army' of 'old time Ku Klux Klan'" led by the Conservative candidates stormed the courthouse after a three-week siege.[135] Federal investigators sent from New Orleans reported that Conservative white forces slaughtered several whites and almost three hundred black freemen, including dozens that had already surrendered.[136]

The Justice Department's reaction to the massacre, Kaczorowski notes, "reflected the administration's ambivalence towards civil rights enforcement."[137] After realizing the manpower required to round up and charge between 300 and 400 defendants, the attorney general balked. The attorney general was evidently "less interested in vindicating federal law and the dead victims of criminal violence by bringing offenders to justice than in merely discouraging future crimes."[138] Eventually, just 97 defendants were brought up on federal charges. Each defendants was accused of 32 violations of sections 6 and 7 of the Enforcement Act of 1870.[139] The first 16 counts charged that the white defendants had conspired to deprive a pair of black victims, "being citizens of the United States 'of African descent, and persons of color,'" of various rights protected by the Constitution of the United States, including many rights secured by the Bill of Rights.[140] These rights included the right of assembly, the right to keep and bear arms, the right to protection against deprivation of life,

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[134] Ibid.

[135] Ibid, citing James R. Beckwith to Williams, April 18, 1873 (telegram and letter), S.C.F., La., Beckwith to Williams, April 19, 1873, ibid.

[136] Kaczorowski (2005), 142; Smith (1997), 334.

[137] Kaczorowski (2005), 143.

[138] Ibid.

[139] Ibid.

[140] *United States v. Cruikshank* 92 U.S. 542 (1875).

liberty, and property without due process of law, the right to the full and equal benefit of all laws and proceedings for the security of persons and property, and the right to vote.[141] The two-month long trial resulted in only three convictions.

On appeal, the Supreme Court overturned the convictions of the men accused of slaughtering freedmen in the Colfax County courthouse on the grounds that sections 6 and 7 of the Enforcement Act of 1870, which prohibited two or more people from conspiring to deprive someone of their constitutional rights, could not be justified under Congress's powers. The Court affirmed and upheld Justice Bradley's stance on the case, which he expounded upon in his circuit opinion. Bradley believed that sections 6 and 7 of the Enforcement Act of 1870 could not stand if they were read to reach private violations of rights in the Constitution. The Court argued that the Reconstruction Amendments "only empowered the federal government to prohibit violations of black rights by *states*."[142] The responsibility to punish individuals for rights violations rested where it always had—with local and state authorities. Somewhat ironically, the decision did uphold the federal government's ability to protect the rights of national citizenship, but these had been defined so narrowly in *Slaughterhouse* that this reaffirmation was virtually meaningless. By holding that the Fourteenth Amendment did *not* apply to the states, the Court's opinion amounted to a "repudiation of original intent rather than an attempt to apply it."[143] The decision "rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light on acts of terror where local officials either could not or would not enforce the law."[144] The Supreme Court decided this all in the name of federalism and the prioritization of state citizenship.

Cruikshank operated in the wake of *Slaughterhouse*, and as a similar repudiation of the Republican project. Chief Justice Morrison Waite, writing the majority opinion in *Cruikshank*, merely "repeated [Justice] Miller's history" of the Reconstruction Amendments.[145] The decision was

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[141] Kaczorowski (2005), 143-144.

[142] Foner (1988), 531.

[143] Richard Aynes. "On Misreading John Bingham and the Fourteenth Amendment." *Yale Law Journal* 103, no. 1, (1993): 99.

[144] Ibid.

[145] Brandwein (1999), 79.

"widely publicized as a decisive blow to national civil rights enforcement authority."[146] Indeed, because of the decision, Democratic Conservatives who were hostile to the Republican vision "became increasingly confident that the permanent elimination of Enforcement Acts prosecutions was at hand."[147] The broader importance of *Cruikshank* for Reconstruction must be stressed. In it, like in *Slaughterhouse*, the Court was presented with questions concerning the power to enforce civil and political rights. The resolution of those questions, Kaczorowski writes, would "define anew the constitutional structure of the American federal union by determining the primacy of national or state authority over the fundamental rights of Americans."[148] By doing so, the Court would be "sanctioning or rejecting congressional Reconstruction."[149] *Cruikshank* simply continued the Supreme Court-driven "erosion of Reconstruction."[150]

The Civil Rights Cases (1883)

Nearly a decade after *Slaughterhouse*, the Court had not let up. Bolstered by its previous decisions and mounting popular support for state citizenship and the ascriptive hierarchy it produced, the Court continued to reject Republican Reconstruction actions that had attempted to embed the primacy of national citizenship. The period bookended by 1876 and 1898 Rogers Smith dubs "The Gilded Age of Ascriptive Americanism."[151] This was a result of the failure of Reconstruction, caused at least in part by Supreme Court action. But in 1883, the Supreme Court decided a case that sealed the fate of Reconstruction. It overturned the final, last-ditch attempt by the Republicans to embed national citizenship: the Civil Rights Act of 1875.

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[146] Kaczorowski (2005), 155.

[147] Ibid.

[148] Ibid, 174.

[149] Ibid.

[150] Smith (1997), 335.

[151] Smith (1997), 347.

This case, *The Civil Rights Cases of 1883*, was a consolidation of five similar cases that were decided together as one issue.[152] The cases concerned denials of services to blacks seeking entry to an inn, a hotel, better seats in a theater, and use of transit service. Justice Bradley's principal argument was much like Miller's in *Slaughterhouse*. It touched on the issue of state versus national citizenship, and again rejected the federal government's ability to enforce civil rights and protect a broad definition of national citizenship. The cases triggered the Civil Rights Act of 1875 and congressional power to pass the act under section 5 of the Fourteenth Amendment. The act provided that "'all persons…regardless of any previous condition of servitude' were to be provided access to all public accommodations, including inns, railroads, theaters, 'and other places of public amusement."[153] The Court denied that Congress had the power to pass the act.

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business….When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.[154]

Indeed, businesses had denied services to blacks, but Bradley argued that if Congress could regulate their conduct, it would amount to "tak[ing] the place of state legislatures" and "supersed[ing] them."[155] And, Bradley wrote, it would be "absurd to affirm that."[156]

Brandwein shows how *The Civil Rights Cases* were similarly influenced by Justice Miller's version of slavery history espoused in *Slaughterhouse*. Republicans had suggested that mobility, like access to hotels and transit services, were *civil* rights that ought to be protected by the federal government. But the Court disagreed. It identified mobility as a *social* right, and not one that the

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[152] *United States v. Stanley, United States v. Ryan, United States v. Nichols, United States v. Singleton, and Robinson v. Memphis & Charleston Railroad* 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

[153] Brandwein (1999), 86, citing *The Civil Rights Cases of 1883* 109 U.S. 3 (1883).

[154] *The Civil Rights Cases of 1883* 109 U.S. 3 (1883).

[155] Ibid.

[156] Ibid.

federal government could have any hand in regulating. The denial to blacks of access to theaters, inns, and public transportation was not "incident" to slavery. Smith points out that though the argument staunchly endorse states' rights, Bradley's opinion was laced with racism. Bradley "brusquely" dismissed claims that economic discriminations were "badges or incidents" of slavery in violation of the Thirteenth Amendment.[157] Indeed, Justice Bradley "expressly denied that race-based denial of access to public accommodations was a brand of slavery."[158] Brandwein points out that Bradley's views on the Fourteenth Amendment, Reconstruction, and slavery were "more Northern Democratic than Republican."[159] This set of cases, then, overturned one of the last vestiges of the Republican project to ensure the federal government had to ability to enforce national, egalitarian citizenship. This case not only entrenched the prioritization of state citizenship more deeply, but it opened the door for a new element of citizenship. Smith notes that Justice Bradley's opinion "might be read as a triumph of pro-business economic ideology, as owners were allowed to discriminate if they so chose, subject at most to state constraints."[160] The turn to a definition of citizenship dominated by economic freedom would be at the heart of dominant citizenship doctrine for decades to come.[161]

Conclusion

The Republican vision for "free soil, free labor, free men," union, and a national, egalitarian citizenship was finally dismantled by the Supreme Court. Until 1873, Republicans successfully fended off attacks— from the states, the President, and the people themselves— but the attack from the Supreme Court proved too much. Despite Republican action to limit the contrarian capability of the federal judiciary, by first rejiggering circuit courts, and partially stripping the Supreme Court of

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[157] Smith (1997), 375, citing *The Civil Rights Cases of 1883* 109 U.S. 3 (1883).

[158] Brandwein (1999), 86.

[159] Ibid, 71.

[160] Smith (1997), 375.

[161] See *Lochner v. New York*, 198 U.S. 45 (1905), Howard Gillman. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham, NC: Duke University Press, 1993.; Bernstein, David E. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*. Chicago, IL: University of Chicago Press, 2011.

jurisdiction, frictional gaps remained. For Republicans, Reconstruction was a story of defense and evasive action. From the very beginning, Republicans found themselves in a vulnerable position. They attempted to harness the federal judiciary for political purposes, and bring it to their defense. They hoped the judiciary would help bolster their vision. It did for a time. The lower federal judiciary interpreted Reconstruction Amendments and legislation expansively, giving the federal government power and leeway to enforce national citizenship and protect its infringement from both state and private infringement. But in 1873, a case presented itself to the Court that ultimately lead to the end of the Republican project, and Reconstruction itself.

It is less clear why and how the Court picked up the non-dominant ideas and put them on the path to dominance. However, the makeup of the Court and the voting breakdown of their decisions reflects the slowly eroding dominance of national citizenship. *Slaughterhouse*, for instance, was a 5-4 decision— the idea to put state citizenship back on a path to dominance just barely won. But by 1883, this notion of state citizenship was endorsed in *The Civil Rights Cases*[162] by an 8-1 margin, reflecting the further entrenchment of ideas of state-based ascriptive citizenship ideas. Importantly, however, the Supreme Court did not "switch" from supporting the Republican project to suddenly denouncing it in *Slaughterhouse*. No sudden jurisprudential shift emblematic of Justice Owen Roberts's in the post-New Deal decision of *West Coast Hotel v. Parish*[163] in 1937 that gave rise to the term "the switch in time that saved nine" occurred. Rather, true to form, the Republicans acted during Reconstruction to limit the Court's power in order to prevent it from doing something like *Slaughterhouse*. Republicans were painfully aware of the federal judiciary's capacity, but the Supreme Court's specifically, to challenge or even destroy their project, so they took offensive action to prevent it from being exercised. Specifically, congressional Republicans limited the Court's jurisdiction and consolidated federal circuits in an effort to control the judiciary and limit its capacity to exploit the frictional gap by bringing non-dominant citizenship ideas once again to the fore. These are not the actions of a hegemonic congressional delegation— they are the actions of a regime operating from a point of weakness.

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[162] 109 U.S. 3 (1883).

[163] 300 U.S. 379 (1937).

This chapter has highlighted at least three concepts that are reflected in the broader story of development in American politics. The first is what Skowronek terms the "reconstruction of meaning."[164] Skowronek postulates that the dominant strands in American political thought, such as Rogers Smith's multiple traditions, are not mutually exclusive. Rather, they interact with each other by exchanging ideas and purposes can be mutually constitutive. This interaction can be "a creative act of first-order significance, one that, for better or worse, alters the meaning of both [traditions]."[165] A political tradition, Skowronek, suggests, may be said to "bear on the development of the polity" when the "promulgation of alternatives is at once informed by received ideas and productive of purposes absent in prior formulations, and both effects should be manifest in the distinctive qualities on the composites arrived at."[166] The interaction between political traditions can result in "elements of what were contrary ideals can be insinuate into the newly formulated synthesis."[167] The argument by the butchers took full advantage of the opportunity to reassociate political ideas to ends antithetical to their original purpose. The attorney for the butchers, Campbell, was an ex-confederate official who was hostile to the Republican vision. Nevertheless, once the Reconstruction Amendments were instituted, he attempted to harness their language to his own purposes.

The next concept is that of "critical junctures." A critical juncture in political development is an event that limits the options for future events. In a way, a critical juncture sets the scene for path-dependency. The decision in *Slaughterhouse* was just such a moment. Up until the decision, the Republicans successfully had fended off all attacks from ideational dissenters. *Slaughterhouse*, however, offered a moment for radical change. In her account of the development of the NAACP's litigation strategy during the first half of the twentieth century, Megan Ming Francis argues that the Supreme Court's decision in *Brown v. Board of Education* in 1954[168] cannot properly be understood

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[164] Skowronek (2006), 388.

[165] Ibid.

[166] Ibid.

[167] Ibid.

[168] 347 U.S. 483 (1954).

without reference to *Moore v. Dempsey* in 1923.[169] This is because *Moore* established a "political-legal context" that represented an opportunity to "redirect both U.S. constitutional development and the future of civil rights struggles."[170] Prior to the 1920s and *Moore,* the federal government had "no role in state or criminal trials."[171] But *Moore* made clear that "states could not always be trusted to properly deal with matters of criminal procedure and that…the federal government could intervene."[172] *Moore* was, then, a critical juncture. This chapter has argued that *Slaughterhouse* operated in a similar manner. By establishing a new "political-legal context" more favorable to antebellum ideas of citizenship, *Slaughterhouse* set American constitutional and political development on a new path that enabled the Court's subsequent decisions in *United States v. Cruikshank* and *The Civil Rights Cases of 1883* to come more easily.

Finally, this chapter has highlighted the difficulty of political development in the United States. It has provided more evidence that the fragmented nature of the American polity makes "durable shifts" in governing authority difficult to accomplish and, therefore, highly unusual.[173] Political scientist Stuart Chinn has argued that key moments of reform or institutional change are followed by "a recurrent and clearly patterned process of 'recalibration,' where recently enacted reforms are recalibrated in light of the continuing influence of *preexisting* institutions and rights."[174] Indeed, as demonstrated by the Court's entrepreneurial actions in *Slaughterhouse,* the fragmented nature of the state makes institutional change possible. Crucially, however, the same feature that makes change possible also limits change. This is not to suggest that reform and development in American politics does not happen. Rather, the conditions in the aftermath of such moments of reform "demonstrate the stubborn resilience of older ideas, principles, and institutions that carried

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[169] 261 U.S. 86 (1923).

[170] Francis (2014), 165.

[171] Ibid.

[172] Ibid.

[173] Orren and Skowronek (2004).

[174] Stuart Chinn. "Institutional Recalibration and Judicial Delimitation." *Law & Social Inquiry* 37, no. 3 (2012): 536.

elements of the old order into the new."[175] The story this chapter has told is one that has closely reflected this point.

As a result of *Slaughterhouse,* therefore, Supreme Court cases from 1873 until 1883 "closed down inquiry among many generations of justice into what it mean to be included in the national collective. The meaning of national citizenship and the basis of public life were not reopened as legitimate judicial questions, except in minority opinions."[176] Indeed, the Court's decisions in the *SlaughterHouse Cases* and *Cruikshank* "reflected the changed political climate and the retreat from Reconstruction idealism."[177] This point sheds light not only on the end of national citizenship and the Republican project, but on the end of Reconstruction. This chapter has tried to show that Reconstruction's failure was not purely a result of exogenous factors— a new political climate resulting in a partisan shift in Congress, the economic crash of 1873, or the Compromise of 1877. These explanations for Reconstruction's failure overlook the important interaction between institutional design and political ideas. Ideational contestation over the meaning of citizenship in the wake of the Civil War happened within the institutional framework. This chapter has suggested that because of this interplay between ideas and institutions in the fragmented American state, Reconstruction was doomed from the start.

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[175] Stuart Chinn. *Recalibrating Reform: The Limits of Political Change*. (New York, NY: Cambridge University Press, 2014), 5.

[176] Brandwein (1999), 91.

[177] Aynes (1993), 102.

Conclusion

Fragmented Citizenship and Political Change

Citizenship as a concept was up for grabs during Reconstruction. The end of the Civil War offered a unique opportunity to reshape the country. Never before, and not since, has a comparable *carte blanche* been presented to policymakers in the United States. The Confederate states had lost on the battlefield and the North was pushing to remold the country into one that was not as susceptible to division. One thing was clear: chattel slavery would end. Beyond that, chances for institutional reforms seemed ripe for picking. Congressional Republicans certainly believed this. They held a majority in Congress and forced through three constitutional amendment and multiple transformative pieces of legislation in an effort to not only "reconstruct" the broken country, but ensure it would not break again. Their remedy called for a continuation of the federal power that had begun before, but also as a result of, the Civil War.[1] Republicans believed one of the primary causes for the Civil War was that states held too much power over their citizens. When Republicans looked at the inhabitants of the United States, they saw people who believed themselves to be state citizens first, and national citizens second. Prioritization of state citizenship was one of the evils that caused the Civil War to begin with. Flipping this lexical ordering of citizenship from state first, nation second, to national first, state second offered two benefits for the Republicans. First, doing so would require enhanced power by the federal government to protect the rights of citizens, which would result in a more unified citizenry. This would lower the likelihood of another civil war. Second, this enhanced federal oversight of civil and social rights would ensure slavery would end.

The apparent *carte blanche*, though, was not quite what it seemed. In fact, it was no *carte blanche* at all. From its very inception, the Republican project to fix the problems they believed caused the Civil War was met with fierce opposition. Embedding their vision for "free soil, free labor, free men" was much trickier than Republicans anticipated. They wanted to give the federal

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[1] Richard Franklin Bensel. *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*. (New York, NY: Cambridge University Press, 1990).

government primary oversight over the rights of citizenship and relegate state citizenship to the backseat. But, antebellum ideas of citizenship still existed and found ways to push back on the Republican project. To pass the Thirteenth and Fourteenth Amendments, Republicans had to use some dubious constitutional maneuvers — southern states were not counted at one point in the ratification process, but were counted at others. And to pass the Fourteenth Amendment, Republicans in Congress simply turned the Southern states into military districts to limit their influence. But next, Republicans were challenged by President Johnson, who vehemently opposed the Republican vision because he also held antebellum ideas of citizenship— the state citizenship should be prioritized over national citizenship. To reify their project and quash the opposition, Johnson was promptly impeached by Republicans.

All the while, though, antebellum ideas found other ways to challenge the Republicans. They found voice outside the dominant institutional framework, in state governments and social movements. States, where ascriptive, states' rights definitions of citizenship still held sway, enacted Black Codes and other laws to limit the citizenship rights of freedmen. Social movements too, a method where "the people themselves" can easily voice their ideas, found ways to challenge the the prioritization of national citizenship. The Ku Klux Klan went on a reign of terror in the South, lynching, disemboweling, or otherwise using means of violent intimidation against freedmen and Republicans who held different ideas of citizenship. Republicans responded to these threats by passing a series of Enforcement Acts in 1870 and 1871. These acts further extended federal oversight over citizenship and successfully quashed opposition for a time.

Despite Republican active manipulation of the federal judiciary to ensure it would be an ally to their project, the fatal blow to the Republican project of Reconstruction came in 1873 from the Supreme Court. The *Slaughterhouse Cases* in 1873 offered the Supreme Court an opportunity to bring back antebellum ideas of citizenship. Republicans had restructured the federal circuits, and stripped the Supreme Court of jurisdiction with an eye towards harnessing the judiciary for support. It was not enough, however: frictional gaps abounded. In *Slaughterhouse*, the Court rejected the reading of the Fourteenth Amendment intended by its framers — the reading that understood the Fourteenth Amendment as upending the antebellum concept of citizenship. Justice Miller's opinion

for the majority echoed Southern Democratic critiques of the Republican vision for national citizenship. The consequence was definitive — *Slaughterhouse* had dealt a blow to the Republican vision they could not recover from. *Slaughterhouse* set the antebellum definition of citizenship on a path to dominance once again. Accordingly, the Court entrenched the state-over-national citizenship doctrine further in *United States v. Cruikshank* in 1875 and *The Civil Rights Cases* in 1883. As a result of the Supreme Court's rejection of the the Republican idea of citizenship, Reconstruction was doomed.

Citizenship as Recognition and Political Change

This project has both drawn from and reinforced the idea that citizenship is necessarily constituted by a political context. Without recognition by the state, citizenship, no matter its content, cannot exist. Citizenship is, then, a category defined and delimited by the state. This is documented by Margot Canaday, Shane Phelan, Stephen Engel, Nancy Cott, Peggy Pascoe, and others.[2] If state institutions are subject to change over time, then citizenship must be as well. In this project, I have suggested that there may be a link between institutional change, and a developing concept of citizenship in the United States. This project has attempted to begin bridging the gap between the development political ideas and political institutions. This relationship has been significantly under-explored in the literature. As a result, many accounts of institutional change or ideational change remain incomplete. Political ideas and political institutions interact with one another in mutually constitutive and developmental ways. One can lead to the reshaping of another.

Understanding citizenship as constituted and defined by the state leads to several further insights. First, as has been most explicit in this project, it leads to an endogenous explanation for the

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[2] Margot Canaday. *The Straight State : Sexuality and Citizenship in Twentieth-Century America*. (Politics and Society in Twentieth-Century America. Princeton, N.J.: Princeton University Press, 2009); Shane Phelan. *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship.* (Philadelphia, PA: Temple University Press, 2001); Stephen Engel. "Developmental Perspectives on Lesbian and Gay Politics: Fragmented Citizenship in a Fragmented State." *Perspectives on Politics* 13, no. 2 (2015): 287-311; Stephen Engel. *Fragmented Citizens: Changing Recognition of Gay and Lesbian Lives*. (New York, NY: NYU Press, 2016, Forthcoming. Manuscript on file with Author); Peggy Pascoe. *What Comes Naturally: Miscegenation Law and the Making of Race in America.* (New York, NY: Oxford University Press, 2009); Nancy F. Cott. "Marriage and Women's Citizenship in the United States." *American Historical Review* 103, no. 5, 1998: 1440-1474.

failure of Reconstruction. It also, however, provides several other insights that may lead to further research. It may point to a more comprehensive account for the roots of Progressivism in the early twentieth century. This project may present at least a partial understanding of why the Progressives were so critical of the Constitution. Progressives took up many of the arguments about national citizenship used by the Radical Republicans during Reconstruction, but the institutional structure established by the Constitution had allowed their project to be thwarted. Woodrow Wilson, for example argued that the "problem at the heard to modern American politics…lay in the Framers' limited vision."[3] By seeking to extricate America from the control of the British monarchy, the framers of the Constitution instituted an institutional framework that appeared to harken back to a political model "drawn from their happier experience of an earlier day."[4] As Britain advanced toward a "modern state design that concentrated decision making and responsibility in a single representative body," America was stuck with a fragmented institutional system. The system the framers instituted, "forced future accommodations to change in the nation into an increasingly inhospitable frame."[5] Indeed, Wilson saw the Civil War as at least partially caused by the Constitution's inability to "provide for the irresistible growth and concentration of power" in the national legislature.[6] As other developing states centralized, America seemed stuck in limbo, trying to force an evolving economic and socio-political situation onto an unaccommodating institutional framework.

This project also points towards a fuller understanding of citizenship as a concept in the United States. Similar to Wilson's critique, citizenship as a concept appears to be perpetually unsettled and evolving as a result of the institutional structure. The lack of stable teleological or whiggish development seems to be, at least in part, explainable by the fragmented state. Each attempt to push towards some ideal of citizenship is tripped up by institutional hurdles, rather than simple ideological backlash. Indeed, one of the fundamental premises of APD is that Lockean liberalism is,

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[3] Karen Orren and Stephen Skowronek. *The Search for American Political Development.* (Cambridge, UK: Cambridge University Press, 2004), 43.

[4] Ibid, 43-44.

[5] Ibid.

[6] Ibid, 44.

in fact, not the dominant philosophy in American political culture. This project has opened a new window to understanding why. If, as I have argued, citizenship as a concept is perpetually unsettled and subject to contestation within and between political institutions that, in turn, shapes its meaning over time, then citizens themselves may get stuck in the frictional gaps. This result might point towards an more robust explanation for why, in colloquial terms, "second-class citizen" status abounds in the United States. Citizenship is delicate. Institutional makeup can help explain why citizenship can be granted, taken away, altered, expanded, narrowed, reframed, or otherwise changed for different groups of persons at different times. Normatively, the relative ease with which citizenship can change as a result of the institutional arrangement is double sided. On the one hand, it allows for liberalizing projects that attempt to expand citizenship to groups otherwise marginalized, such as happened during Reconstruction, the Progressive Era, the Civil Rights Movement, perhaps even during the era during which the Supreme Court was lead by Earl Warren, and most certainly in *Obergefell v. Hodges* in 2015. On the other, however, as has been seen, by the same mechanisms, it limits these projects by allowing illiberal challenges to gain a stronger foothold.

For example, it seems American democracy is not "alive and well," especially when the criminal justice system is taken into account. Political scientists Amy Lerman and Vesla Weaver explain how the rise of the carceral state in the United States has had profound effects on the democratic citizenship of large classes of people, but especially blacks.[7] In a 1994 interview, advisor to President Nixon John Ehrlichman (one of the Watergate co-conspirators) explained how the "war on drugs" was highly racialized:

> "You want to know what this was really all about?" he asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."[8]

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[7] Amy E. Lerman, and Vesla M. Weaver. *Arresting Citizenship: The Democratic Consequences of American Crime Control*. (Chicago and London: University of Chicago Press, 2014).

[8] Dan Baum. "Legalize It All: How to Win the War on Drugs." Harper's Magazine Online, April 2016.

That the "war on drugs" was a political tool used to "racialize" the "crime problem" or "criminalize" the "race problem" was not doubted, but rhetoric this stark provides a causal link between the two that had long been suspected.[9] It is no surprise, then, that the carceral state that resulted from these "crime" policies disproportionately affected blacks — that was their purpose. Lerman and Weaver argue that punishment (through carceral state policies) is an important aspect of the modern American state "because it transforms the social and economic relationships of its citizens."[10] In addition, they show that "criminal justice is important because it transforms citizens' relationships to the polity."[11] Custodial citizens, who are largely members of racial or ethnic minority groups, exist somewhere in limbo between "full citizens" (whatever this might mean) and non-citizens through their blurred relationship with the state. Indeed, their are able to vote and are entitled to formal equality before the law, but

> because of their race, their income, and the characteristics of their neighborhoods in which they live, these individuals are systematically more likely to be exposed to public institutions that deny them voice, treat them as suspect, do not respond to their needs, and are unaccountable to their complaints.[12]

As a result, their standing as citizens is stunted and limited. The point here is hardly definite or clear. However, the analysis in this project may provide grounds for further investigation between institutional design and the rise of carceral state policies that have limited citizenship standing for large classes of persons. Indeed, the fragmented state and perpetually unsettled definition of citizenship I have argued for might make policies like the racialized "war on drugs" less immediately objectionable because their true intent and impact can be hidden under layers of institutional overlap, deferred responsibility, and confusing rhetoric. In other words, ensuring that policies that violate some Lockean ideal definition of equal citizenship (by drawing from several traditions of citizenship, including ascriptive hierarchical notions) may be hard to guard against in the United States because

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[9] Naomi Murakawa. "The Origins of the carceral crisis: Racial order as 'law and order" in postwar American politics," in Joseph Lowndes, Joseph, Julie Novkov, and Dorian T. Warren, eds. *Race and American Political Development*. (New York, NY: Routledge, 2008).

[10] Lerman and Weaver (2014), 16.

[11] Ibid.

[12] Ibid, 28.

of the fragmented institutional design.[13] In turn, however, they may also be harder to implement across the board. But this might be precisely the point — the resulting frictions that occur between and within state institutions allow policies that affect citizenship to go unnoticed and unchallenged. Further research in the field of APD is needed to test this hypothesis, however.

Finally, the analysis contained in this project reaffirms a broader story about political development and political change in the United States. I have suggested that the multiple explanatory notions provided by the field of American Political Development employed most explicitly in this project, layering, path dependency, critical junctures, political entrepreneurship, and durable shifts, all accurately help depict the interaction between political ideas and institutions during Reconstruction. First, this supports the study of APD as a discipline. Second, however, it also raises several important insights into the discipline. Namely, there seems to be tension in some of fundamental ideas undergirding APD scholarship. One of the most insightful claims of APD is that politics is dynamic: the key element to explain in politics is not equilibrium, but change. Also, APD suggests that that this change is often (or even mostly) produced by dynamics internal to political systems rather than exogenous shocks— frictions created by the layering of new institutions or policies upon old ones; the creation of unintended consequences that political entrepreneurs may exploit to thereby foster new opportunities for further change. In other words, politics is *always* developing. Nevertheless, at the same time, APD posits that there are such definable moments that can be cast as "developments," or "durable shifts in governing authority." It seems, then, that there appears to be an internal tension between the definition of development as focused on durability and the definition of politics as focused on change. In other words, we must ask if the key insight of APD is that politics is never clearly in equilibrium then how can it be said to be durable?

The analysis contained in this project points towards a possible resolution to this apparent dilemma. Reconstruction resulted in a (not so) durable shift — we got the Reconstruction Amendments — but that only succeeds in resetting the ideals. Reconstruction ultimately failed to reset policies or law, for constitutional text is fungible at best, or ignored at worst. The durable shift

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[13] Rogers Smith. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* (New Haven: Yale University Press, 1997).

may be a resetting of the ideals, but not a resetting of lived experience. In fact, in terms of lived experience, Reconstruction ended up with the abandonment of the ideals, something that I have argued the constitutional structure of governance paradoxically enables. Perhaps the great irony of the design of American constitutional governance is that it enables the abandonment of the ideals in the constitutional text. This project has suggested just how much formal institutional changes cannot be taken as emblematic of durable shifts in governing authority. As Stuart Chinn has argued, political change cannot simply be "foisted upon the larger matrix of governance and fit seamlessly with preexisting constraints. Instead, a recalibration usually follows the enactment of major reforms because of three primary conditions."[14] First, "principles of reform are often articulated in broad, open-ended, and universalistic terms."[15] Second, "when major reforms are enacted, preexisting institutions and individual rights are usually disrupted and rearranged."[16] And third, "reformers consistently lack either the foresight or the political consensus and willpower to resolve all problems of recalibration upfront."[17] Politics may produce a durable shift in *some* element of the fragmented state, but due to the nature of the fragmented state, that durability does not, or indeed cannot, exist throughout. The development of politics as a whole does not stop, but it may reach points of durability in different institutions for brief moments. These points may be referred to as specific moments of development.

This definition of development, however, does not quite fit with that of Orren and Skowronek.[18] Development seems to be more nuanced. If we use the definition provided by Orren and Skowronek of development and the achievement of a "durable shift in governing authority," then development is not common in the United States.[19] This definition does not fit the evidence, as the American state has of course changed significantly since its founding. And so, the definition of

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[14] Stuart Chinn. "Institutional Recalibration and Judicial Delimitation." *Law & Social Inquiry* 37, no. 3 (2012): 539.

[15] Ibid.

[16] Ibid.

[17] Ibid: 539.

[18] Orren & Skowronek (2004).

[19] Ibid, 123.

development should be narrowed to account for the momentary periods where development in particular institutions at a particular time appears “sticky.” “Stickiness” is not to suggest that development has paused, but rather to account for how it might slow to a crawl in one institution for a short period, while change proceeds at a normal pace in other zones of the state. These moments are still worth analyzing, and require a more nuanced lens — one that account for the interplay between political ideas and institutions.

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