Deflecting the Ex-Post Veto Player: The Strategy of the 14th Amendment *Dred Scott* Override

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Located at the beginning of the 14th Amendment's first section, the Citizenship Clause reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." With this language (ratified in July 1868) the U.S. Constitution acquired its first explicit account of what made for American citizenship: birth or naturalization. References to "citizens" did appear earlier in the Constitution, as in the Eleventh Amendment (ratified in 1795), which referred to citizens in States. But the Citizenship Clause provided the first *definition* of who could be a citizen – and, appropriately for a federal polity, it encompassed both national and state citizenship.

What are the political origins of this constitutional milestone? The answer offered by many is that the Clause was about superseding a shocking Supreme Court decision. *Dred Scott v. Sandford* [60 U.S. (19 How) 394] (1857) has long been seen as the Citizenship Clause's target. The Citizenship Clause is, in other words, a congressional override of a Court decision, undertaken via the Article V amendment process and orchestrated by the Republican party at a moment of political dominance. This paper hardly disagrees with that answer. But it does reframe the Citizenship Clause as *strategic* -- and not solely as expressive or declarative.

Because *Dred Scott* outraged Republicans from the moment that the Court handed down its several opinions, the Citizenship Clause override has seemed obviously a case of closing the books on the past – part of the transitional justice of developing a new democracy. In the controlling opinion of *Dred Scott* Chief Justice Roger Taney famously denied citizenship to African-Americans: "We think they are... not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore

claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States..." For many scholars the Citizenship Clause thus represents new language for a new regime – the new order fostered by revolutionary political and social change during the Civil War. The break from the past had built over the course of the Civil War. Several federal efforts to counteract Taney's opinion occurred during Lincoln's first presidency, followed by Emancipation and the constitutional abolition of slavery via the Thirteenth Amendment. Then Republicans moved to directly overrule *Dred Scott* with constitutional text.[1] Akhil Reed Amar, for instance, writes of the Citizenship Clause, "As every schoolchild learns (or should learn), this sentence was put in the Constitution to repudiate in the most emphatic way the vile holding of *Dred Scott*..."[2] Another scholar writes that the "language of this first sentence was explicitly designed to overturn the Supreme Court's definition of citizenship articulated in *Dred Scott*... Congress took careful aim at *Dred Scott*'s definition of citizenship."[3]

The break from the past inherent in the *Dred Scott* override has, however, obscured the forethought that was also in the override. The prospective motivation in the override comes through on a close reading of several sources -- the Congressional Record for both the enacting Congress (the 39th Congress) and the previous Congress, with attention to differences between the House and the Senate, as well as the first judicial discussion of the *Dred Scott* override, in the *Slaughterhouse Cases* (83 U.S. [16 Wall.] 36 [1873]), and observations about the 14th Amendment that can be found in the diaries and correspondence of Chief Justice Salmon P. Chase.

By connecting such readings to the conflicts of divided government during Andrew Johnson's presidency one can see that the Citizenship Clause resulted – more than has

been appreciated -- from sudden doubt among Senate Republicans about the *future* effects of judicial review on African-American citizenship. Senate Republicans of the 39th Congress -- anxious to reduce uncertainty about the fate of African-American citizenship -- removed one possible outcome from any future involvement by the Supreme Court in defining African-American citizenship. They foreclosed a judicial resuscitation and application of *Dred Scott* to any new fact situation arising out of the profound social and political changes of the Civil War.

In other words, there was an intricate intertwining of judicial review and citizenship definition at this turning point in American political development. There is the obvious sense in which this is true, namely, that *prior* judicial review generated the target of citizenship definition. But there is a non-obvious sense as well, drawn out in this article and one that has not been fully recognized before, namely, that the uncertainty of *future* judicial review was *also* targeted.

To substantiate these suggestions, I first sketch the *kind* of strategic situation which congressional Republicans faced during the 39th Congress. I then map the historical evidence onto that formalization, tracing the strategy of the *Dred Scott* override. I conclude the article with reflections on what the case study teaches.

The Supreme Court as Potential Ex-Post Veto Player

My basic claim is that the *Dred Scott* override was intended, by those who enacted it, to address the Supreme Court's *potential* role as an "ex-post veto player" in the definition of American citizenship. This is more than just a restatement of the historical facts. This more formal language can help one to draw out the *Dred Scott* override's strategic features.

What is meant by the term veto player? A veto player is an actor who must agree to a policy change in order for it to occur. The player's agreement is *necessary* (though not sufficient given the multiplicity of veto players in a democratic polity.) Without the player's agreement, there is no change in policy. The policy status quo thus prevails; some alternative to it is effectively blocked, i.e. vetoed.

Veto players can be individuals (think here of the president who enjoys enough support in the House and Senate to sustain his formal veto of a bill). Veto players are also collectivities, e.g. a legislature, a court, a committee.

Such *collective* players of course comprise individuals – and the individuals within the collective player may have diverging policy preferences. They can also operate under different sorts of decision rules, such as simple majority or qualified majority (e.g. a supermajority rule of some sort.) The divergent preferences within the collective veto player may therefore boil down to a majority and a minority preference. In that case the collective veto player has *two* policy preferences, as opposed to the single preference of the individual veto players. But, at any given moment, only *one* policy preference governs the collective veto player due to its majority decision-making rule.

Collective veto players have an additional characteristic: majorities and minorities within collective veto players *can trade places*. That possibility exists because decision-makers in the collective veto player can be replaced according to some rule or procedure, such as regularly scheduled elections, term limits, the requirement that a vacancy caused by death or resignation must be filled, or the like.

Any policy *change* at one point in time, $\mathbf{T^1}$, thus faces the prospect – though hardly the certainty – of some effort at $\mathbf{T^2}$, a later point in time, of a different and new majority within

the collective veto player, seeking to overturn the policy that was changed earlier, and thus to return the policy to the status quo ante at T^{-1}, that is, the policy in effect before the change at T^{1}. This is what is meant by an ex-post veto player: a collective veto player can, ex-post, that is after a policy change, unravel the policy change.

Moreover, if a collective player is a judicial body, then a new majority in the judicial body can -- when it emerges at T^{2} -- rely on a precedent of the body's own making (the policy at T^{-1}) to overturn the new policy that was made at T^{1} and thereby *return* policy to the status quo ante at T^{-1}. But by that point the enacting coalition at T^{1} may no longer exist. Or reassembling a similar and new enacting coalition may be very difficult. Moreover, the new enacting coalition may be paralyzed by the prospect of yet another reaffirmation of the precedent in a review of its new enactment. In that respect, the ex-post veto player's veto is sticky.

If an enacting coalition at T^{1} sees this difficulty it will want to figure out how to preemptively deflect the possibility of a veto from an ex-post veto player. The solution may include making the new policy forged at T^{1} *veto-proof*. In a system with judicial review, such as the American system, the only sure way to make a policy veto-proof is to *constitutionalize* it. Judicial review cannot invalidate constitutional text in the U.S. It can invalidate statutory application of constitutional text – but not the text itself.

Let me turn next to telling the story of how the Republican party came to appreciate that it would need to take account of the Supreme Court in redefining American citizenship. The main turn in their thinking was very important – and quite simple, so simple that contemporary scholars have not really appreciated it. *They had to take* Dred Scott

seriously. Initially, though, they did not take *Dred Scott* seriously at all. We think that they must have taken the case supreme seriously because they overrode it with the Citizenship Clause. But in fact taking the case seriously was a process that was incubated in the Senate. There, ironically, the lawyer who won *Dred Scott*—Maryland's Democratic Senator, Reverdy Johnson – was the person who eventually forced his Republican colleagues to take the case seriously.

Taking *Dred Scott* Seriously

The legal academic consensus is certainly correct that the Citizenship Clause overrode Chief Justice Taney's decision in *Dred Scott*. But the Clause did not, in fact, emerge from a long period of preoccupation among Republicans over what to do about *Dred Scott* -- a period of alarm and unease that in time led to coherent, purposive action across the two congressional wings of the Republican party. That view of what happened simply does not find adequate support in a careful reading of the Congressional Record and other relevant sources, for example the diaries and correspondence of Chief Justice Salmon Chase.

When one actually consults these sources in order to trace the making of the Citizenship Clause, one sees that the Citizenship Clause came instead from a *concession* that emerged – unexpectedly -- amid deliberative dynamics that were and are unique to the United States Senate. In the 39th Congress, the Senate's lopsided Republican majority acknowledged and responded to a controversial claim brought by a colleague in the Democratic minority – someone who happened to also be one of the prominent losers of the Civil War. The today little-known Senator Reverdy Johnson, Democrat of Maryland, clashed often, over two Congresses, the 38th and the 39th, with the majority. He insisted that

Dred Scott was good law – and in the 39th Congress he announced that *Dred Scott* was good law unless and until the Constitution was amended to overrule it.

Many members of the Senate Republican majority viscerally disliked the holding in *Dred Scott* and, as becomes clear below, in the 38th Congress they said as much. They preferred not to accord it any weight at all. But they eventually responded to Johnson by writing a definition of citizenship that would inhibit any force which the decision might *later* have in American public life.

Below I recover Johnson's formative influence through both closely reading the Congressional Record. Think of this case study as an extended double-take on specifics and details that others have not previously remarked.

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

As a further step in the exposition, I show that the recognition of Reverdy Johnson's claim concerning the status of *Dred Scott* was not considered an obvious step to take outside the Senate: neither in the House, nor, most interestingly, in the Supreme Court. The silence beyond the Senate reinforces the hypothesis *that it was a sudden recognition in the Senate of the ex-post veto player problem* which generated the Citizenship Clause.

In a conclusion I return to the implications of this case study. This article builds, first, on a renewed interest in the agency and influence of congressional figures. Congress is

after all full of entrepreneurs, not just names attached to yeas and nays. Not all of Congress, of course, is composed of talented and skillful figures. But as Mayhew, Schickler, Strahan and others have underscored, both the Senate and the House attract people who devise new and unanticipated uses of their institutional resources during their terms in office. They are not nervous careerists who only hew cautiously to constituent opinion so as to assure lengthy but undistinguished career paths.[4] They are instead active and innovative legislators. Johnson and his colleagues fit the description.

A second implication has to do with the power of political settings. The first constitutional-textual definition of American citizenship owes as much to discovery of a major strategic issue in a legislative setting -- as it does to the impact of Civil War, Emancipation, and the constitutional abolition of slavery. The bicameralism of the "old" Constitution helped to generate America's first constitutional-textual definition of citizenship.

Indeed, the continuity of received institutions is a central feature of this moment in American political development. That is the third lesson of this case study. Despite the Civil War -- or perhaps because of it -- members of the Senate proved institutionally conservative.

In the 38th Congress, Senate Republicans initially took the view that *Dred Scott* was so deeply illegitimate that it should be ignored. There was, indeed, considerable suspicion of judicial review among Republicans – and largely because of *Dred Scott*. In his first inaugural address Abraham Lincoln put the suspicion in a memorable formulation: "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the

instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[5]

But by moving away during the 39th Congress from their prior stance concerning the validity of *Dred Scott* – that is, by responding to and moving toward Reverdy Johnson's insistence on the stately continuity of American constitutional evolution – Senate Republicans did something quite significant. They effectively validated and entrenched the institution of judicial review no matter how controversial its results. *Dred Scott* may indeed have been a "vile holding" – as Amar says with considerable force about Chief Justice Roger Taney's opinion for the Court. Republicans came to believe, though, that it was not a holding which they could ignore simply because they hated it. Through that realization, judicial review was given new life. So, too, was a new definition of American citizenship.

Reverdy Johnson in the 39th Congress

Elected to the Senate for a second time by the Maryland state legislature (he previously served as a Whig in the 29th-31st Congresses), Reverdy Johnson took his seat in a body that had become top-heavy with Republicans. The Senate had 52 members sitting in it during the 38th Congress. The Republican majority was about 64%.[6] Since the Senate was physically grouped together in a relatively small space (on the floor of an otherwise spacious hall) the chamber was not entirely a hospitable place for the man who had been one of the two lawyers arguing against *Dred Scott*. Republicans in the chamber were certain to know that Johnson was responsible in part for Dred Scott – and to have strong views about that fact.

Just how much did Republicans hate *Dred Scott*? There is no careful study which parses the various strands of Republican political thought concerning the decision. But sheer outrage is certainly a major theme of the initial Republican reaction.

On March 7, the Pittsburgh Gazette editorialized (to take one of many similar examples),[7]

> "We shall treat the so-called decision of that Court as an utter nullity. It is not law, and it has no binding force upon either the people or the government. It is not an authoritative interpretation of the Constitution, nor is it, legally, a decision entitled to any weight whatever. It is simply a demagogical stump speech from the hustings of the supreme bench..."[8]

Much of the Republican reaction that insisted on the decision's "utter nullity" takes on further meaning in the context of two claims which were wheeled out by supporters of the Supreme Court when the decisions were handed down. First, Democratic newspapers treated resistance to the controlling opinion by Taney as treasonable. Second, they argued that the majority decisions rendered the Republican party itself illicit. The Philadelphia Pennsylvanian announced that *Dred Scott* "'sweeps away every plank of their platform and crushes into nothingness the whole theory upon which the party is founded.'" The New Orleans Picayune held that the Taney decision "'puts the whole basis of the Black Republican organization under the ban of the law.'" Small wonder that Republicans abhorred *Dred Scott:* the decision from Taney more or less implied that the Republican party ought not to exist.[9]

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

> "'It was the forcible presentation of the southern view of our Constitution...that contributed more than anything else to bring about the decision that was made in this case...Those who were opposed to him (and I happened to be one of them) felt the force of his arguments and foresaw what their effect would be on a majority of the Court.'"[10]

A great constitutional lawyer, Johnson must have quickly grasped the full, epoch-making significance of Taney's decision. Taney of course wrote it himself. But very likely Johnson gave him some, possibly much of what he needed to write it. In a sense, Johnson was a contributing author.

It was not inevitable that Reverdy Johnson and the Senate's Republicans would collide over *Dred Scott*. But when they did there was real excitement on the floor of the Senate. Johnson's blindness may have added to the drama. Johnson's first – and surely unexpected -- defense of *Dred Scott* came on April 1, 1864, when the Senate moved to replace language in an act establishing territorial government in Montana that referred to

"white male inhabitants" with the phrase "free male citizen of the United States." Sen. Willard Saulsbury, Sr. (D-DE) objected, claiming that the language would permit black office-holding. But Johnson had a more fundamental objection: "...if the object...is to put it beyond all doubt that Africans in the Territory shall be permitted to exert all the political rights that under the bill will be exercised by white men," then the bill, Johnson claimed, "had better say 'all black men,' instead of saying 'all citizens,' because the Supreme Court has decided, and that question was directly before the court in the *Dred Scott* case, that a person of African descent is not a citizen of the United States."[11]

At this point Charles Sumner (R-MA) cut in: "...I hope that Congress, in its legislation, will proceed absolutely without any respect to a decision which has already disgraced the country and which ought to be expelled from its jurisprudence."[12] Johnson responded with a defense of the decision and lengthy, vivid praise of Taney, ending with the charge that Sumner's view was dangerous:

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

Sumner responded:

> "...the *Dred Scott* decision was as absurd and irrational as...a reversal of the multiplication table, besides shocking the moral sense of mankind...I enter a standing protest against that atrocious

> judgment, which was false in law and also false in the history with it sought to maintain its false law."[13]

Sumner said he personally liked Taney and admired him. But the decision had "endangered" the Court's "authority." Johnson would not let go, returning to lavish praise of Taney and claiming that the *Dred Scott* decision was appealing to "very well-judging men." Johnson preferred "holding to the opinion of Taney than holding to the opinion of the honorable member."[14]

The tension was broken when Sen. John Parker Hale (R-NH) said that it came as a surprise to him that the Senate had become a court of errors. He was "compelled to differ with my honorable friend from Massachusetts. He says that the *Dred Scott* decision was a disgrace to the Supreme Court of the United States. I do not believe that I think any better of the decision than he does: I think it was an outrage upon the civilization of the age and a libel upon the law; but I do not think it was a disgrace to the Supreme Court of the United States." Feelings must have been running high for Hale's remarks produced laughter.[15]

Feelings again ran very high in the wake of Taney's death.[16] On February 23, 1865 the Senate took up an appropriation for a bust of the late Chief Justice Taney, to be placed in the Supreme Court's courtroom. Charles Sumner objected fiercely:

> "If a man has done evil during life he must not be complimented in marble....Let a vacant space in our court-room testify to the justice of our Republic. Let it speak in warning to all who would betray liberty."[17]

Lyman Trumbull (R-IL), who reported the appropriation from the Committee on the Judiciary, which he chaired, agreed that the Court decision "was wrong," but urged Sumner

to relent. John Parker Hale (R-NH), who in 1864 had been conciliatory towards Reverdy Johnson, announced, "I am opposed to this being done...because whatever Judge Taney may have been – he may have been as a good a judge as the Senator from Maryland think him to have been... - he will be known to posterity...by the *Dred Scott* decision...I am not willing to pass an appropriation to do honor to the *Dred Scott* decision..."[18]

Henry Wilson (R-MA) also opposed a bust: "The people, the loyal people of our struggling country, condemn that *Dred Scott* decision as a violation of the spirit of the Constitution of their country." Wilson then attacked Taney personally: "He sank into his grave without giving a cheering word...to the country he had vainly sought to place forever by judicial authority under the iron rule of the slave-masters."[19]

Reverdy Johnson had to respond. He answered a charge which Hale earlier made that the Court deliberately held over its decision until after the 1856 election in order to prevent immediate electoral rebuke. This wasn't the purpose of the delay. The delay was rooted in legal considerations only. He underscored that Taney hardly acted alone; a majority of the Court was in concurrence. Additionally, Sumner was wrong in arguing, as he had earlier, that Taney misused his authorities in the opinion. Finally, Johnson could not help but point out that the judges on the Court collectively knew a lot more about the law than Sumner, Hale, and Wilson.[20]

Wilson would have none of it: "The Senator from Maryland should remember that...the loyal people of the United States have pronounced the *Dred Scott* opinion inhuman, unchristian, and unconstitutional."[21]

At this point, Ben Wade (R-OH) dismissed the case as "a political case...politicians bent on the subjugation of the North and the enslavement of mankind got up the suit."[22] Here

he was giving voice to the strand in abolitionist and Republican political thought which held that the litigation in *Dred Scott* resulted from a deep plot to engineer a pro-slavery ruling from the Supreme Court. Johnson had already brushed up against this idea. In 1858 William Seward, then U.S. Senator from New York, charged that Johnson and his co-counsel, Senator Henry S. Geyer (Whig-MO), had taken fees as part of the plot – and Johnson felt compelled to state publicly that he had not, in fact, accepted a fee.[23]

Wade's depiction of the litigation as a "political case" was in fact quite incorrect (and perhaps Wade knew that.) Johnson rightly responded, "The Senator is wholly mistaken. The court in Missouri decided that he had a right to sue, and his counsel brought up the case." To this, Wade responded, "...my opinion" is "as reliable as that of *the feed attorney* in the case." [emphasis added]

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

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

JOHNSON: "I did volunteer."

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

JOHNSON: "I would rather take the court's opinion than yours on that point."[24]

Not content to elaborately insult Johnson, Wade then announced that his constituents in Ohio would be outraged that their government's money would go for a bust to honor Taney. They preferred instead to double the appropriation for the bust and use it instead to hang Taney in effigy.[25]

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

> "As I listened to the Senator I was a reminded of a character known to the Roman church who figures at the canonization of a saint, under the name of... *the Devil's Advocate.* [italics in original.] The Senator may not perform precisely the same function, but the earnestness with which he advocates a cause which has as its inspiration the very spirit of evil suggests the parallel."[26]

To sum up, Reverdy Johnson distinguished himself during the 38th Congress by passionately defending *Dred Scott* and his old friend and fellow Marylander, Chief Justice Roger Taney. Charles Sumner took, in fact, to calling Reverdy Johnson the Devil's Advocate for *Dred Scott* and the Chief Justice.

Making the Citizenship Clause

Having established that Johnson unsettled the Senate during the 38th Congress, I turn now to the origins of the Citizenship Clause. I want to first emphasize that the addition of the Citizenship Clause came unexpectedly and toward the end of the making of the 14th Amendment. *The Citizenship Clause was an afterthought, incubated in the Senate*, in other words. It was in the Senate that Republicans suddenly saw the ex-post veto player problem.

Until the Senate addition, the development of the 14th Amendment was about making a party platform for the 1866 elections. An easy way to see this is to notice the 14th Amendment's structure. No other amendment to the Constitution has a similar "platform"

structure. But the 14th Amendment does: it has five planks. By proposing this five-part 14th Amendment, congressional Republicans devised a general Reconstruction platform on which the party could run in the 1866 national and state elections.

A particularly telling detail is Section 4 of the 14th Amendment, which explicitly promises to pay for veterans' pensions even if it requires deficit spending: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." There had been rival efforts by President Johnson and the Republicans to tap veterans organizations' electioneering energy in advance of the 1866 elections. But Republicans won the contest by promising to embed "payments of pensions and bounties" in the Constitution itself.[27]

As James Blaine later observed of activists drawn from the veterans' movements, "From their ranks came many of the most attractive and most eloquent speakers, who discussed the merits of the Constitutional amendment before popular audiences as ably as they had upheld the flag of the Union." Blaine regarded their role as essential: "Not even the members of Congress, who repaired to their districts with the amendment as the leading question, could commend it to the mass of voters with the strength and with the good results which attended the soldier orators who were inspired to enter the field."[28]

As a fragile, recently formed set of political parties the Republican parties in Congress very much required a policy answer to presidential Reconstruction – to what President Andrew Johnson referred to as "my policy." President Johnson readmitted ex-Confederate states during the months between his accession and the gathering of the 39th Congress. To

meet this accomplishment, and to begin reversing it, Republicans could – and did – play an Article V trump card: a proposed amendment to the Constitution.

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

But before Republicans even got to the point of having the 14th Amendment platform for the 1866 elections, they of course developed the amendment's contents. The five-part structure of the 14th Amendment originated in March with Robert Dale Owen—a former member of Congress, Ordnance Commissioner for Indiana during the Civil War, pamphleteer on behalf of emancipation, and commissioner of the American Freedmen's Inquiry Commission appointed by Secretary of War Stanton.[29]

Robert Dale Owen arrived in Washington in late March, at a time when Republican began to worry that come the 1866 elections Johnson's reconstruction policy would be on offer to the country without more of a congressional Republican response than the 1866 Civil Rights Act. Owen approached Thaddeus Stevens with a 5-part amendment proposal – thus devising the basic structure of the Amendment.[30]

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

By late May this had evolved into the language of the middle column, which was H. Jt. Res. No. 127. Notice that the provision in Section 2 for eventual black suffrage was gone. Instead, Owen's apportionment penalty for disfranchisement in Section 3 moved up to

become Section 2 in H. Jt. Res. 127. The hole for Section 3 that was thereby left open was now filled by a provision for excluding ex-rebels from politics.

Table One About Here

The Citizenship Clause

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

The move that started the process of inserting the Citizenship Clause came on May 23rd, 1866, after Sen. Jacob Howard (R-MI) reported H. Jt. Res. 127 and spoke on it for two hours. When Howard finished, and after one amendment on another section of the draft was offered, Sen. Ben Wade rose and offered an amendment to Section One.

Here is where one sees that Reverdy Johnson's claim -- that *Dred Scott* was still the law of citizenship – evidently made a strong impression on Wade. Johnson had repeated the claim, moreover, in an arresting way earlier in the 39th Congress.

Johnson repeated his claim about *Dred Scott* in late January, 1866. The Senate was then considering the Civil Rights Act of 1866, as reported from and amended by the Judiciary Committee. The Act strikingly and elaborately defined citizenship: "... all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary

servitude..shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens* [emphasis added], and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[31]

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

> "The particular question before the Senate is the amendment suggested by the honorable chairman of the Judiciary Committee...By that amendment he proposes to define citizenship. Nobody is more willing to admit that it is very desirable that such a definition should be given. Since the decision in the case of Dred Scott, as the Senate are aware, a person of African descent, whether born free or not, whether free by birth or free by after events, is not, within the meaning of the Constitution of the United States, a citizen."

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

> "If the Supreme Court decision is a binding one and will be followed in the future, this law which we are now about to pass will be held of course to be of no avail, as far as it professes to define what citizenship is...My own opinion, therefore, *is that the object*

> *can only be safely and surely attained by an amendment of the Constitution*... [emphasis added] I am very much afraid that, so far from settling the question by this legislation, we shall find that if the legislation is adopted the matter will be just as open to controversy as it was before."[32]

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

> "In the first section of the proposition of the committee the word 'citizen' is used. That is a term about which there has been a good deal of uncertainty in our Government. The courts have stumbled upon the subject, and even here, at this session, it is still regarded by some as doubtful. I regard it as settled by the civil rights bill, and indeed, in my judgment, it was settled before. I have always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States; *but by the decisions of the courts there has been a doubt thrown over that subject;* [emphasis added] and if the Government should fall into the hands of those who are opposed to views that some of us maintain, those who have been accustomed to take a different view of it, they may construe the provision in such a way as we do not think it liable to construction at this time, unless we fortify and make it very strong and clear....

> In the first clause of the amendment which I have submitted, I strike out the word 'citizens' and require the States to give equal rights and protection of person and property *to all persons born in the United States or naturalized under the laws thereof.* That seems to me to put the question beyond all doubt." [Emphasis added]

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

> "I think it better to put this question beyond all doubt and all cavil by a very simple process, such as is the language of the first section of the amendment I have offered. I do not know that the corresponding section reported by the committee would leave the matter very doubtful; but that which I have proposed is beyond all doubt and all cavil."[33]

Debate continued, however, on issues unrelated to the "beyond all doubt" idea expressed by Wade. Eventually a large number of amendments were offered. To handle and resolve all of the amendments, the Senate Republicans met in a series of closed caucuses over the course of 3 days. Within a week they adjusted their differences to the point of appointing a 5-man committee which reported back the final draft of the Amendment. The caucus tweaked it but approved it within an hour.[34]

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

> "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This

> has long been a great desideratum in the jurisprudence and legislation of this country."[35]

Senator James R. Doolitle (R-WI) immediately sought to amend the Citizenship Clause in order to exclude Indians. Several of his co-partisans resisted. Reverdy Johnson rose to support the idea.

But before Johnson got around to the question of Indian exclusion he thought it appropriate to speak more generally. Here one can notice valuable commentary on what had transpired with respect to the definition of citizenship:

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

> born within the United States, *independent of any new constitutional provision on the subject*, creates the relation of citizen to the United States."[36] [Emphasis added.]

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

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

> "I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that negroes shall be citizens of the United States... that is evidently the object."[37]

Preference Change and Uncertainty

Why did the Senate Republican caucus come to accept the idea that Section One of the 14th Amendment required the addition of the Citizenship Clause in order to assure African-American citizenship? There is no direct evidence to answer the question, such as speeches outside Congress, or diaries, or interviews with newspaper reporters. But considerable leverage on the question can be gained by recognizing the sudden uncertainty about the future status of Republicans' preferred policy in a system of judicial review.

By preference change I mean a process by which actors update and revise their beliefs about a salient issue. The setting of the Senate, moreover, promoted reflection on what members were saying in their speeches and colloquies – particularly if they made important points with flair and distinction. And Johnson was doing just that. At bottom Johnson was making an argument about the status of *judicial review*. In doing that he was talking about an institution which he knew uniquely well.

Johnson argued that the Senate should be faithful to judicial review and the rule of law:

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

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

Dred Scott from being cited in any judicial review of a statutory enactment of African-American citizenship.

Today judicial review is common, deeply woven into American politics and law. Then, though, experience with judicial review was newer and more controversial. Lincoln had addressed judicial review in his first Inaugural – and had treated it as politically dangerous to the republic.

But Lincoln was not there; Andrew Johnson was. Republicans in the 39th Congress Senate were in a different political context from the 38th. Over the course of the first session of the 39th Congress all congressional Republicans had come to realize that President Andrew Johnson no longer represented them. He was not, in fact, a Republican. President Johnson instead appeared bent on weakening the congressional Republicans party during the 1866 elections as a prelude to the 1868 presidential election.[38]

Uncertainty about the future can be a potent source of preference formation, that is, of updating of one's beliefs about a salient issue. Republicans were deeply uncertain about the future, not least because of the fiercely divided government that had emerged between them and President Johnson.

They also had an expert on judicial review among them telling them what to do in order to achieve one of their basic goals: African-American citizenship. If anyone in the 39th Congress Senate was an authority on judicial review it was, of course, Reverdy Johnson. In an era when politicians' experience with judicial review was far less than today, his forecast of what might happen if *Dred Scott* were not constitutionally overturned via Article V definition of citizenship must have seemed all too plausible to his Senate Republican colleagues.

So Senate Republicans updated their views of *Dred Scott.* In the 38th Congress, Charles Sumner announced his "hope that Congress, in its legislation, will proceed absolutely without any respect to a decision which has already disgraced the country and which ought to be expelled from its jurisprudence."[39] In the 39th Congress, Sumner was quite silent. He did not object to Sen. Ben Wade's plan to tacitly and euphemistically recognize the weight of *Dred Scott* so as to place African-American citizenship "beyond all doubt" through an Article V amendment of the United States Constitution.

Silences Beyond the Senate

Another way to appreciate how Senate Republicans came to appreciate the ex-post veto player problem – and to thus shape the national law of citizenship so as to deflect the ex-post veto player -- is to ask: *outside* the Senate was there spontaneous concern about the precedential danger posed by *Dred Scott*? Did other key actors – the President, House leaders, the Chief Justice (and successor to Roger Taney) – similarly articulate the idea that the decision might require an Article V amendment of the Constitution to be overridden?

We already have a partial answer from the earlier discussion of the 14th Amdendment and its "platform" 5-part structure, which (to recall) included a clear promise to the burgeoning veterans' organizations coming onto the political scene in 1866. For the great majority of Republicans the whole point of the 14th Amendment was to provide a program around which to rally electorally. Still, did anyone else see what Sen. Reverdy Johnson -- and eventually Sen. Ben Wade and other Senate Republicans -- saw?

The issue might have come up in President Andrew Johnson's veto message, when he vetoed the Civil Rights Act of 1866 (subsequently overridden.) President Johnson might

have thought to argue in the message that due to *Dred Scott* only a constitutional amendment would suffice for definition of citizenship, not the Civil Rights Act—but President Johnson did not mention or even allude to *Dred Scott*. The supposed unconstitutionality of the statute for President Johnson was in what he considered its destruction of federalism.[40]

It might have come up in early May, in the House debate over the 14th Amendment, but there was no reference at all to *Dred Scott* during debate.[41] Nor did it come up when Thaddeus Stevens presented the new Senate draft, with its Citizenship Clause, to the House on June 13th. He merely stated:

> "A few words will suffice to explain the changes made by the Senate in the proposition which we sent them.
>
> The first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States."[42]

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

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

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

Chase then considered key elements of the proposed amendment:

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

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

> "I do not myself think that any of the proposed amendments will be likely to have injurious effects, unless it be the sweep of the disfranchisement: but I repeat that I fear the undertaking of too much; *and I add that it seems to me that nothing is gained sufficiently important and unattainable by legislation,* to warrant our

> friends in overloading the ship with amendment freight." [Emphasis added][43]

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

After the insertion of the Citizenship Clause did Chase notice what had happened and remark on it? No: writing in early June to his daughter Chase predicted that Congress would report the "Reconstruction programme...now before the Senate," adding, "My opinion is that it covers too much ground, & proposes several propositions which are either already in the Constitution, or unnecessary to the main object, reorganization of the Union by the restoration on just terms of the States in rebellion. *Still I see nothing which will do harm in the plan if adopted."* [Emphasis added] Since Sections 2-4 were clearly not "already in the Constitution," Chase must have been referring to Article One when he wrote that the "programme...proposes several propositions which are...already in the Constitution." But these superfluous "propositions" were unlikely to "do harm...if adopted."[44]

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

In summary, there seems to be fairly strong circumstantial evidence that it was in the Senate where the ex-post veto player problem was discovered. Outside the Senate, in contexts and in the minds of key figures who might well have spontaneously connected the need for a definition like the Citizenship Clause and the case, there is no evidence at all of a concern with the precedential moment of *Dred Scott*. The idea that it had precedential force which required high constitutional response by Congress was Sen. Reverdy Johnson's idea. That idea came, because of the Senate's interpersonal dynamics, to affect the thinking of Johnson's Senate Republican colleagues, and thus informed the making of the Citizenship Clause – but it only affected Johnson's Senate colleagues.

Conclusion

In identifying and recovering Reverdy Johnson's previously unrecognized influence on the constitutional law of American citizenship, this article offers a new interpretation of the Citizenship Clause. No previous scholarship makes the claim I make. The reason has been that no one has been looking for Reverdy Johnson – and how he happened to frame the possibility that the Supreme Court might act as an ex-post veto player.

Until now scholars have instead been inclined to see Republicans as significantly and continuously worried about *Dred Scott* from the moment it was handed down.[45] Thus the insertion of the Citizenship Clause has been portrayed as a decisive and long-gestating act of constitutional statesmanship. But the Citizenship Clause resulted more than we have known from the discovery of a startling possibility by Senate Republicans – that they had to worry about the Supreme Court and whether the Supreme Court would, at some future point, undermine the citizenship gains of the Civil War *by declaring* Dred Scott *a relevant*

precedent that bore on African-American citizenship after the War. and the receptivity of his Senate Republican colleagues to his arguments and claims amid a political environment charged with political conflict and uncertainty.

In offering its new account of the Citizenship Clause, this article is of a piece with the renewed interest among congressional scholars in congressional entrepreneurship. It also emphasizes the role of a political setting created by the Constitution of 1787 – the United States Senate. The "old" Constitution and its bicameralism – as much as Reconstruction's unprecedented and turbulent circumstances -- helped to produce America's first constitutional-textual definition of citizenship.

The third lesson of this case study is the institutional conservatism of the Senate during the 39th Congress. Republicans updated their beliefs about *Dred Scott* – but in a traditionalist direction, away from their initially more subversive stance toward judicial review. In the 38th Congress, Senate Republicans took the view that *Dred Scott* must be ignored. By adopting Reverdy Johnson's vision of American constitutional evolution in the 39th Congress, Senate Republicans stabilized the institution of judicial review no matter how divisive or shocking its results.

In doing that they preserved a key feature of the national institutional context that we now take for granted -- and that today defines contemporary American citizenship. For better or worse, Americans do in fact look to judicial review for the handling of basic political questions. Abraham Lincoln would likely be unhappy. But in listening to Reverdy Johnson and inserting the Citizenship Clause into the 14th Amendment after it came to the Senate from the House, Lincoln's own Senate co-partisans and

contemporaries reluctantly, quietly, but nonetheless clearly re-legitimated an institution and a process that they once doubted very deeply.

By the same token, Senate Republicans also took great care to secure African-American citizenship from the institution which had shown itself capable once already of attacking black citizenship. The remedy for a dangerous Court in the future was new constitutional text, so they fashioned just that remedy. If the price of black citizenship was tacitly entrenching the Court's authority, better to do that than to risk one possible but wholly unacceptable outcome of future encounters between African-American citizens and America's highest court – namely, that *Dred Scott* might perversely acquire an unforeseeable precedential potency that no Republican in 1866 wanted it to ever have.

ENDNOTES

[1] For a sketch of persistent Republican concern, see Richard L. Aynes, "Unintended Consequences of the Fourteenth Amendment," in David E. Kyvig, ed., Unintended Consequences of Constitutional Amendment (Athens: University of Georgia Press, 2000), pp. 110-140, at pp. 113-115.

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

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

[4] David R. Mayhew, America's Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich (New Haven: Yale University Press, 2000); Eric Schickler, Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress (Princeton: Princeton University Press, 2001); Randall Strahan, Leading Representatives: The Agency of Leaders in the Politics of the U.S. House (Baltimore: Johns Hopkins University Press, 2007).

[5] Abraham Lincoln, Inaugural Address, March 4, 1861. From John T. Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: http://www.presidency.ucsb.edu/ws/?pid=25818.

[6] Kenneth C. Martis, The Historical Atlas of Political Parties in the United States Congress 1789-1989 (New York: Macmillan Publishing Company, 1989), p. 117.

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

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

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

[10] Steiner, Life of Reverdy Johnson, p. 38; p. 10 for the start of his friendship with Taney. Fehrenbacher, Dred Scott Case, pp. 288 and 294 on briefing and argument.

[11] Congressional Globe 38th Congress, First Session, vol. 34, pt. 2, p. 1362.

[12] *Ibid*, p. 1363.

[13] *Ibid.*

[14] *Ibid*, p. 1364.

[15] *Ibid.*

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

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

[18] *Ibid*.

[19] *Ibid*, p. 1014.

[20] *Ibid*, p. 1015.

[21] *Ibid*.

[22] *Ibid*, p. 1016.

[23] Walker Lewis, Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney (Boston: Houghton Mifflin Company/The Riverside Press Cambridge, 1965), p. 528.

[24] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[39] *Ibid*, p. 1363.

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

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

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

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

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

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

TABLE ONE:
Bicameral Evolution of the Fourteenth Amendment, Spring 1866

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

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

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