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Slavery, Free Blacks and Citizenship

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"Home is the place where, when you have to go there, they have to take you in."
-Robert Frost, *The Death of the Hired Man* (1915)

"Membership has its privileges."
-American Express advertisement

"In the eyes of government, we are just one race here. It is American."
-Justice Scalia, concurring, in *Adarand Constructors v. Pena*, 515 U.S. 200, 239 (1995)

I. INTRODUCTION

The most nettlesome issue in American constitutional law in the days surrounding the Civil War, before the passage of the Fourteenth Amendment, may have been how to address the status of native-born free blacks. The core issue was whether free blacks should be treated as free people who should be fully included in the polity or as the equivalent of free slaves who should not be fully included in the polity. The liberty and equality embodied in the Constitution suggest that free people who have aligned themselves with the American republic should be eligible to become citizens and members of the American polity. However, that was not necessarily true of free blacks in the

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days preceding the Civil War. That may not be surprising to some considering that the Constitution tolerated race-based slavery. A society that accepted slavery may have been unwilling to guarantee the acceptance of free people who bore the racial mark of slavery. However, American society was bound to address those issues again during the Civil War and its aftermath.

This brief essay focuses on whether and how the historical exclusion and subsequent inclusion of free blacks in the American polity reflects the substance of American citizenship. It considers what the formal exclusion of free blacks as citizens before the passage of the Reconstruction Amendments says about American citizenship and what the formal inclusion of free blacks as citizens through the Reconstruction Amendments says about the nature of American citizenship. The essay is organized as follows. Part I of the essay explores citizenship and membership by discussing belonging-based citizenship and rights-based citizenship. Part II describes how American and African American citizenship were constructed prior to the passage of the Reconstruction Amendments. Part III notes a few cases to explain how the Reconstruction Amendment's jurisprudence has developed in the wake of *Dred Scott v. Sandford*[1] and possibly led to a tilt toward a rights-based citizenship rather than a somewhat more robust belonging-based citizenship.

II. CITIZENSHIP AND MEMBERSHIP

A. Rights and Belonging

The content of American citizenship is elusive. Citizenship suggests being an equal member and full participant in a nation or polity.[2] However,

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1. 60 U.S. 393 (1857).

2. This has helped define citizenship for a long time. *See* Minor v. Happersett, 88 U.S. 162, 165–66 (1875) (noting that citizenship is membership in a nation); DAVID J. BREWER, AMERICAN CITIZENSHIP 12 (1905) (viewing citizenship and membership in a nation or tribe as interchangeable); BERNARD P. DAUENHAUER, CITIZENSHIP IN A FRAGILE WORLD 1 (1996) (linking citizenship and community membership); LUELLA GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 2 (1934) ("Citizenship, then, is membership in a nation or state[.]"); DORA KOSTAKOPOULOU, THE FUTURE GOVERNANCE OF CITIZENSHIP 1 (2008) ("Citizenship, which may be defined as equal membership of a political community from which enforceable rights and obligations, benefits and resources, participatory practices and a sense of identity flow, affects everyone."); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP 4 (1991) ("Citizenship as nationality is the legal recognition, both domestic and international, that a person is a member, native-born or naturalized, of a state."); JOHN S. WISE, A TREATISE ON AMERICAN CITIZENSHIP 3 (1905) ("[T]he term citizen, as it is commonly understood, implies membership

citizenship and membership are fluid concepts.[3] They can be fuzzy concepts because they can be conceptualized in many different ways.[4] Both entail rights and responsibilities that accompany being a part of an organization or entity. Citizenship and membership may be structured merely as a formal set of rights owed to the member by an organization accompanied by a formal set of obligations owed by the member to the organization.[5] This rights-based membership may be the least robust, but most definitive vision of citizenship and membership. Conversely, membership may be based on the more general notion of belonging to the organization in which one has membership.[6] Belonging may bring formal rights and obligations. However, it may also include fuzzy rights and fuzzy obligations to the other members in the organization and to the organization itself.[7] That is, citizenship and membership can be thought to define a relationship in which the citizen belongs to the community and is treated colloquially as "one of us." This vision of membership is arguably more robust than the mere rights-and-

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of a political body in which the individual enjoys popular liberty to a greater or less degree. It does not necessarily follow from this definition, that the grade or quality or privileges of citizenship must be identical in all citizens, even in republican governments.").

3. *See* Pauline Maier, *Nationhood and Citizenship: What Difference Did the American Revolution Make?*, *in* DIVERSITY AND CITIZENSHIP 45–47 (1996) ("[I]n exploring that subject, it is important to understand that the words 'nation' and 'citizen' have changed in meaning over time."); NÖELLE MCAFEE, HABERMAS, KRISTEVA, & CITIZENSHIP 13 (2000) (discussing how the meaning of citizen has changed over time); SHKLAR, *supra* note 2, at 9 ("I also want to remind political theorists that citizenship is not a notion that can be discussed intelligibly in a static and empty social space. . . . Citizenship has changed over the years[.]").

4. Citizenship subsumes many components that can be structured in various ways. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 20 (2006) ("Thus, status, rights, political engagement, and identity together define the contours of our contemporary understandings of citizenship as membership.").

5. *See* DAUENHAUER, *supra* note 2, at 4 (noting that citizenship "confers entitlements and immunities and imposes obligations"); MCAFEE, *supra* note 3, at 13 (noting that rights and obligations attend citizenship).

6. I borrow the notion of belonging from Kenneth Karst. *See generally* KENNETH L. KARST, BELONGING TO AMERICA (1989). Others have similarly considered the notion of belonging. *See, e.g.*, Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005) ("The focus of this essay is on what Professor Denise Morgan and I call 'Rights of Belonging,' those rights that promote an inclusive vision of who belongs to the national community and that facilitate equal membership in that community.").

7. *See* Noah M.J. Pickus, *"Hearken Not to the Unnatural Voice": Publius and the Artifice of Attachment*, *in* DIVERSITY AND CITIZENSHIP 63 (1996) ("Membership in the American polity is not, however, solely a matter of formal textual provisions governing eligibility and rights. United State citizenship also encompasses a notion of belonging to a political community.").

obligations vision of membership, but is less defined.[8] Rather than providing a determinate way to define citizenship, using membership as a lens provides a range of possible definitions of citizenship. The different conceptualizations of citizenship can lead to very different citizenship experiences for various citizens and can affect the type of society that is created.

A rights-and-obligations-based vision of citizenship may or may not be a particularly fulfilling one, though it may be a quite definitive version of citizenship. Legal rights and obligations may be explicitly defined and one may be a good citizen merely by abiding by the citizenship "contract."[9] However, the relationship between citizen and community and among citizens may become an arm's length relationship that is viewed not as a mutually reinforcing relationship, but as an relationship of convenience. Indeed, entry and exit from the relationship may be based purely on the tangible value of the association. For example, the confederate states were members of the Union, but believed that voluntary exit from the Union was or should have been allowed once the value of the relationship had diminished.[10]

A belonging-based citizenship may be indefinite, but quite fulfilling.[11] Citizens will have rights and obligations under this construction of citizenship. However, the nature of belonging may trigger somewhat uncertain moral rights and obligations in addition to reasonably clear legal rights and obligations that flow from formal citizenship.[12] Bonds of belonging may tend to create mutually reinforcing and beneficial

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8. *See* Nathan Glazer, *Reflections on Citizenship and Diversity*, *in* DIVERSITY AND CITIZENSHIP 85, 86 (1996) ("[S]omething more seems to be needed, aside from native birth, no accent, and presumed American citizenship, to be considered by a stranger a full American. The formal and informal indications of full citizenship and membership are insufficient.").

9. *See* Daniel Kanstroom, *Alien Litigation As Polity-Participation: The Positive Power of a "Voteless Class Of Litigants"*, 21 WM. & MARY BILL RTS. J. 399, 407 (2012) (suggesting that citizenship is narrower than general membership in a polity, and may be constructed around rights and obligations); Elizabeth G. Patterson, *Mission Dissonance in the TANF Program: Of Work, Self-Sufficiency, Reciprocity, and the Work Participation Rate*, 6 HARV. L. & POL'Y REV. 369, 375 (2012) (discussing a rights and obligations vision of citizenship).

10. *See* DAVID HERBERT DONALD, LINCOLN 267 (1995) (discussing secession of southern states prior to Civil War); EMORY M. THOMAS, THE CONFEDERATE NATION 1861-1865, at 41–43(1979) (discussing secession).

11. Belonging can spur society-enhancing behavior. *See* Pickus, *supra* note 7, at 64 ("Citizens have to regard belonging as itself important if talk of civic virtue is to find an attentive audience.").

12. *See* BREWER, *supra* note 2, at 6–11 (noting that the law does not catalog or enforce all of the moral duties and obligations that parties owe to one another in a relationship).

relationships between and among the citizen, fellow citizens and the community. This belonging-based citizenship is fluid and unclear, but may be more robust from the citizen's perspective than the rights-based version of citizenship. It is a conception of citizenship that may firmly tie the citizen to the community and the community to the citizen. The essence of belonging-based citizenship may not be found explicitly in the Constitution or statutes, but instead may be written on the hearts and in the minds of the community's citizens or members.[13]

Though citizenship and membership can be defined as either rights-based or belonging-based, any type of membership may include aspects of both. Indeed, the four examples of membership noted below illustrate this point. Each type of membership has a rights-based element and a belonging-based element, though each element has a somewhat different prominence in each type of membership.[14]

B. Illustrations of Membership

1. Faculty Membership

For many, faculty membership is a prized possession. After tenure, faculty membership comes with the security and enhanced freedom to pursue one's academic work. However, faculty membership can be defined largely as employment. Being a faculty member comes with certain rights against one's school and certain obligations owed primarily to the institution itself rather than directly to other members of the institution. Certainly, there may be varying fuzzy rights—often tied to seniority—that can be exercised, such as a right to a larger office or to a preferred schedule of classes. In addition, more serious but still fuzzy obligations may be owed to fellow members of the faculty, such as the obligation to mentor junior faculty members or to read their draft articles. Yet more fuzzy obligations may be owed to students, including the obligation to write letters of recommendation. The rights and

13. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 432–33 (2006) The ideal of the autonomous individual capable of meaningful choice and informed decision making is a core operative concept in modern constitutional law, central to contemporary accounts of individual liberty and democratic self-government. . . .The psychological skills of citizenship so defined encompass both heart and mind: basic cognitive abilities as well as the integrated psychological capacities for personal self-reflection and emotional self-mastery.

Id.

14. For an old and fascinating discussion of obligations owed to parties in different relationships, see BREWER, *supra* note 2, at 3–8.

obligations are fuzzy. However, they relate to duties thought to be owed by a faculty member.[15]

The essence of faculty membership, at least from an employment perspective, arguably is an arm's length relationship that can be temporary or longstanding at the option of the parties to the relationship. Certainly, the relationship may be valuable to both sides and may not be defined to the letter. However, the relationship may be fairly easily broken, particularly before tenure has been granted. Though belonging to a faculty—separate from the employment aspects—may be important to some faculty members and may tend to bind the faculty member to the institution, a feeling of belonging may not be a key component of the underlying relationship. When analogized to citizenship, citizenship of this type would reflect a rights-based citizenship that exists largely for the convenience of the citizen and the state.

2. Club Membership

Club membership tends to be voluntary, though membership in some clubs may be hereditary or may be a perquisite of the member's job or position. Nonetheless, club membership often will to be unrelated to employment and may be less important to one's livelihood than employment-based faculty membership. The voluntary nature of the association with a club and the usual need to seek club membership before it is offered may suggest that club membership is belonging-based from the member's perspective.[16] Of course, if the club requires an application and acceptance by a significant portion of the club or its leadership, membership may also be belonging-based membership from the membership's perspective. Belonging-based club membership may trigger fuzzy obligations in addition to well-defined obligations of club membership. Fuzzy obligations may include the duties to participate in the life of the club and to seek new club members who may then become a part of the club's lifeblood. Well-defined rights of voting and obligations to pay dues may accompany club membership. However, these rights and obligations may be

15. *See* SHKLAR, *supra* note 2, at 6 ("University departments, for instance, routinely speak of some of their members as good citizens, by which they mean that they do their share of chores such as sitting on dull committees, teaching elementary courses, and attending meetings rather than just doing what is often called 'their own work.'").

16. For an interesting discussion of club membership in the context of deciding whether a club is private for discrimination purposes, see Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399 (E.D. Va. 1983).

seen as insignificant in comparison to the less well-defined benefits that attend membership.

Club membership can be analogized to citizenship that stems from a desire to belong to a particular group. The desire to belong may be based merely on the tangible benefits that may flow from citizenship or from the desire to join a group of like-minded people. The process of joining a club can be likened to the naturalization process. However, it is unclear that the substance of American citizenship—once gained—should be likened to club membership.

3. Church Membership

Church membership may often begin as involuntary, with the faith of parents becoming the faith of children until those children can make independent decisions.[17] Once children become adults, church membership arguably becomes voluntary. Even so, the inertial pull of religion may make church membership less volitional than it appears. Indeed, the belief that one's religious views have not changed much over time might be sufficient to retain the church membership of one's youth without much thought. However, church membership may also be based on belief and affinity. Consequently, it may be primarily about belonging in a meaningful sense. The belonging may not be based on acceptance by the group to which the parishioner adheres. Rather, it may be based on the intellectual decision to associate oneself with a particular doctrine or belief system that manifests itself in the church.[18]

The rights and obligations that surround church membership can be quite fuzzy. Certainly, a general but often undefined obligation to support one's church may exist as may an obligation to participate in the life of the church. The obligations that are owed may not be owed to the other members of the church at all, but only to God, the church or the religion itself. There also may be few, if any, rights to exercise.

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17. A lack of consent does not necessarily excuse a member from obligations. *See* BREWER, *supra* note 2, at 5 ("As I stated, the mere fact of relationship carries obligations, and it matters not whether that relationship is one voluntarily entered into, or one in which we are placed without our consent.").

18. For a discussion of issues relating to the desire to associate or disassociate from beliefs regarding church doctrine, see Henry L. Chambers, Jr. & Isaac A. McBeth, *Much Ado About Nothing Much: Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*, 45 U. RICH. L. REV. 141 (2010).

Considering citizenship through the lens of church membership may be illuminating. It may evoke a citizenship that is particularly participatory. It suggests the possibility that citizenship can be volitional and can trigger generalized obligations that are not tied explicitly to rights but rather to beliefs. That suggests a citizenship of belonging that focuses on the individual's desire to affiliate with the American polity rather than focusing on the American polity's willingness to accept the citizen. This vision of citizenship might be analogized to birthright or naturalized citizens who have fully contemplated why they wish to be or remain American citizens.

4. Family Membership

Family membership is arguably the most complex type of membership of those mentioned. It is often based purely on birth and is usually involuntary rather than volitional. Exit from the family is possible as a mental or emotional matter and may be possible as a legal matter.[19] However, exit is not possible as a matter of biology. Few rights of membership may come from family membership, though legal rights and obligations may attend certain familial relationships and circumstances.[20] Similarly, few clear obligations may flow from family membership, though there may be fuzzy obligations such as an obligation of loyalty to other family members. Regardless of how a person fulfills familial obligations, and even if the person seeks to "leave" the family, the person may always be considered "one of us."

Of course, there are other non-birthright types of family membership, such as membership by marriage or by adoption. Membership by marriage is voluntary. Family membership by marriage triggers unclear rights and obligations. Of course, questions of acceptance and belonging do exist, and exit is possible. Family membership by adoption requires the acceptance of the subject based on the decision of the elders of the family. In the case of young children, there may be no formal acceptance of the membership. Once the adoption decision is made, membership by adoption becomes largely like

19. However, exit from the family through divorce often does not end obligations to other family members. *See* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303 (1994) (generally discussing obligations in the shadow of divorce). Indeed, exit from the family may be much more likely to occur when the family is dissolved rather than when a member exits the family.

20. Illness may create certain obligations and death may create certain rights or responsibilities. Indeed, the law may honor some of those obligations. *See* Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601, et seq. (providing unpaid leave for employee to tend to certain familial emergencies, including illness).

birthright family membership. Exit is possible based on emotional ties or by the breaking of legal bonds. However, even those breaks may not be permanent or effective. The adopted child may always be deemed a member of the family even after explicitly repudiating the family.

Familial membership is most like birthright citizenship.[21] Such citizenship is not volitional. It simply is. There is no formal acceptance that must occur and the citizen simply is a citizen. Nonetheless, that form of citizenship does not necessarily suggest that the citizenship is belonging-based. Indeed, one may argue that the automatic nature of the citizenship guarantees that the citizen is a citizen even if she does not really belong or even want to belong in any formal way.

C. Non-Members

The focus so far has been on membership and the relationship that members have with each other and with the community. However, the status of nonmembers in a community is important as well. For nonmembers, the value of membership depends on what rights are exercised exclusively by members. The content of membership may not depend on whether the membership is rights-based or belonging-based. Rather, it may depend on how membership rights are defined. For example, if a nonmember of a community is treated just like a member, membership may not matter much.[22] A family friend who is just like family may be treated as though she were a member of the family without regard to formal membership in the family. She may have "rights" similar to other family members. Similar issues may arise in the context of citizenship. For much of the history of the United States, citizenship rights and political rights were separate. Being an adult citizen did not mean that one could vote.[23] In addition, in the early days

21. *See* BREWER, *supra* note 2, at 5 ("We are not only born into families but also into citizenship in a nation, and so long as the relationship springing out of that birth continues there are obligations resting upon us as citizens which cannot be ignored. These obligations are the responsibilities of citizenship.").

22. Conversely, it may matter quite a bit. *See* SHKLAR, *supra* note 2, at 16 ("The value of citizenship was derived primarily from its denial to slaves, to some white men, and to all women.").

23. *See id.* at 34 (noting that, at times, freedmen were not given the franchise even when they were citizens of the jurisdiction).

of the country, some noncitizens could vote.[24] Voting rights were clearly treated as something other than citizenship rights.[25]

In a community where citizenship is rights-based, the rights owed by the state to the citizen may be fairly minimal and narrowly circumscribed. In that community, not being a citizen may not matter terribly much because membership may not provide much benefit.[26] Conversely, in a rights-based community where citizenship rights are significant, citizenship may matter very much. The key is whether citizens and noncitizens are treated differently or treated similarly regarding rights. For example, if nonmembers are afforded the same rights to vote or run for office as citizens, and are required to discharge the same obligations to pay taxes or serve in the military, citizenship and non-citizenship may not appear particularly different.[27]

As with rights-based citizenship, belonging-based citizenship may come with fairly insignificant rights and obligations or may come with fairly significant rights and obligations. Whether citizenship tends toward being belonging-based depends on how important the non-defined aspects of citizenship are, not merely on how many or how few rights and obligations attend citizenship. Nonetheless, belonging-based communities may tend to have fewer rights that accompany citizenship or membership. If the essence of citizenship is belonging-based and few rights come with citizenship, a noncitizen may be treated as if he belongs, i.e., as a citizen, even as actual citizens are treated as if they do not belong.

Membership can take many forms and can be viewed as primarily rights-based, primarily belonging-based or anything in between.[28] There is no

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24. *See* Henry L. Chambers, Jr., *Dred Scott: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 216–17 (2007) (discussing distribution of the vote in early America).

25. Of course, the extension of rights to non-citizens may not alter the possibility that the rights provided are fundamentally rights for citizens. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 170 (1998) ("Surely the fact that Americans may often extend many benefits of our Bill [of Rights] to, say resident aliens—for reasons of prudence, principle, or both—does not alter the basic fact that these rights are paradigmatically rights of and for American citizens.").

26. *See* PETER J. SPIRO, BEYOND CITIZENSHIP 81–82 (2008) (noting that the lack of rights owed specifically to and duties owed specifically by citizens makes citizenship less important or less salient to citizens and non-citizens alike).

27. *See id.* at 82 (noting that the obligations and rights of citizens and non-citizens are almost precisely the same although that has not historically been the case).

28. *See* BREWER, *supra* note 2, at 3 ("Out of all the relations into which human beings enter, or are brought, there spring obligations—obligations resting upon each party to the relationship, yet varying in the specific duties imposed with the character of the relationship and the place each occupies therein.").

clearly correct view of the nature of membership and citizenship. As importantly, different citizens may view citizenship differently. Nonetheless, citizenship of a particular type may tend to create societies that are more or less cohesive or are more or less able to live up to their ideals of civic virtue.

III. CITIZENSHIP UNTIL THE RECONSTRUCTION AMENDMENTS

A. Founding Era Principles

The Founding Era did not provide a definitive description of citizenship that necessarily tilted toward being either rights-based or belonging-based.[29] Many of the discussions of citizenship that punctuated the Founding Era hearken back to a classical vision of citizenship. That vision of citizenship suggests that a good citizen is somewhat selfless and works for the common good.[30] That may tend toward a belonging-based citizenship that focuses on civic virtue. Indeed, the Founding Era references to classical citizenship may be thought to suggest that many Founders wished for a belonging-based citizenship in which moral ties bound the citizen to the new country more tightly than laws and statutes.

However, the Founders recognized that man in his normal state may tend toward a selfishness that is inconsistent with sustained civic virtue.[31] The classical vision of the citizen being created or molded by the state—an assumption of an Aristotelian view of citizenship—did not fit comfortably

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29. It may have been enough for the Founders to focus on the concept of equal citizenship for those who were granted citizenship. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 10 (1978) ("The Revolution created the status of 'American citizen' and produced an expression of the general principles that ought to govern membership in a free society: republican citizenship ought to rest on consent; it ought to be uniform and without invidious gradations; and it ought to confer equal rights."); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 232 (1991) ("Equality was in fact the most radical and most powerful ideological force let loose in the Revolution.").

30. *See* Robert A. Dahl, *Is Civic Virtue a Relevant Ideal in a Pluralistic Society*, *in* DIVERSITY AND CITIZENSHIP 2 (1996) (describing civic virtue as animating various political traditions, including the American political tradition through the American Revolution and beyond); RICHARD C. SINOPOLI, THE FOUNDATIONS OF AMERICAN CITIZENSHIP 6 (1992) ("Leaving the differences aside for the moment, I suggest that both Federalists and anti-Federalists were concerned with the problem of fostering a sentiment of allegiance from which a disposition to undertake civic duties would emerge.").

31. *See* SINOPOLI, *supra* note 30, at 159 ("It is worth remembering that the authors of The Federalist considered the active patriotism of the revolutionary era to be the result of a 'temporary ardor,' not long sustainable in periods of normal politics.").

with a Revolution-era vision of a citizenry that creates the state.[32] That may suggest that the bonds between the state and citizen may only be as strong as can be enforced by the state.[33] In addition, there was reason to believe that a classical vision of citizenship was not attainable in a country the size of the United States.[34] All of this may suggest a practical notion of citizenship that is more rights-based than belonging-based. However, rather than focus directly on whether citizenship was rights-based or belonging-based, the Founders arguably focused more on providing that whatever citizenship was provided would be provided equally.[35] As will be seen below, equal citizenship may not necessarily tilt toward either being rights-based or belonging-based citizenship.

B. The Antebellum Constitution

American citizenship did not exist before the Constitution was written, though there may have been a distinctly American outlook that united many of the inhabitants of the several colonies.[36] The Declaration of Independence did not create an American citizenry; it united the colonies for purposes of war, not nationhood. State citizenship existed in the wake of independence. Indeed, state constitutions governed and defined the relationship between the state and its citizens and inhabitants. Even though the Articles of

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32. This is contested ground. *See* Gary Jeffrey Jacobsohn & Susan Dunn, *Introduction*, *in* DIVERSITY AND CITIZENSHIP x (1996) ("There has always been an important strand in the liberal political tradition that has resisted the idea that membership in the political community requires the subordination of one's own interests to those of others.").

33. However, the citizen's attachment to the republic may not be static. *See* Pickus, *supra* note 7, at 64 ("For Publius [of the Federalist Papers], American citizenship meant attachment to a common identity that is itself subject to change. He tried to forge a shared identity without foreclosing deliberation over the nature of that identity.").

34. *See* Dahl, *supra* note 30, at 2–4 (suggesting that the primacy of civic virtue does not work with a large, diverse republic that does not agree of the precise content of the public good).

35. Of course, even for some of the most equality-minded Founders, none of this discussion included free blacks. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 133 (2d ed. 2001).

> Because Jefferson could not imagine living in a society in which blacks could claim equal rights, he could never comfortably consider emancipation or manumission. . . . Because Jefferson believed free blacks could never be citizens—despite the fact that they were citizens in the states immediately north and south of Virginia—he assumed they would become an exploited and ungovernable mob.

Id.

36. *See* WOOD, *supra* note 29, at 8 (1991) (discussing the American Revolution and implementation of an American vision of culture and society).

Confederation created a United States, it did not create the United States in a way that created American citizenship.[37] Until the Constitution was drafted, there was no need to contemplate the content of American citizenship because American citizenship did not exist. Given that state citizenship clearly predated national citizenship, the question is not whether American citizenship came before state citizenship, but when it eclipsed state citizenship in relevance and what were its essential features.[38]

Citizenship became a national issue when the Constitution created a nation and transferred the right to make new United States citizens to Congress through its control over naturalization.[39] The Constitution may reflect the nature of American citizenship.[40] However, it did not provide a specific content of American citizenship.[41] Though the Constitution said little about the content of citizenship, it required that citizens be treated equally by the states. That may not illuminate the content of American citizenship, but it suggested that American citizens must be treated with a reasonable level of decency everywhere in the country.

Though the Constitution has little to say about the content of citizenship, it mentions citizenship a number of times. The text of the antebellum Constitution did not provide definitive evidence that American citizenship should be viewed as rights-based or belonging-based. It arguably is a legal document that simply provides rights, and says nothing about the nature of

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37. *See* WISE, *supra* note 2, at 9 (noting that under the Articles of Confederation "while State citizenship necessarily followed at once to the inhabitants of the colonies, respectively, upon the acknowledgement of their independence, no citizenship of the United States was recognized or even existed.").

38. *See* Minor v. Happersett, 88 U.S. 162, 166–67 (1875) (noting that state citizenship predated U.S. citizenship); *see also* GETTYS, *supra* note 2, at 5 (noting that, since the Fourteenth Amendment, national citizenship is "paramount and dominant" to state citizenship). Interestingly, other types of citizenship also predated national citizenship. *See* WISE, *supra* note 2, at 13–17 (discussing the citizenship of the Northwest Territory, which predated national citizenship).

39. *See* WISE, *supra* note 2, at 17 ("When the Constitution was ratified by nine of the States composing the old confederacy, and not until then, was there an actual and real citizenship of the United States, however much the term may have been theretofore loosely employed.").

40. *See* SPIRO, *supra* note 26, at 4 ("Before one asks what it means to be an American, one must ask who is an American. Unlike other treatments of American national character, it takes the legal status of citizenship as a mirror of the community. In this view, nothing is more constitutive of the community than its membership practices.").

41. *See* LOUELLA GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 3 (1934) ("When the United States Constitution was adopted, it contained no definition of citizenship although it made use of the term 'citizens.' Furthermore, it recognized not only citizens of each state but also citizens of the United States.").

citizenship. Nonetheless, the Constitution—like any document—may reflect certain principles that are not explicitly stated in it. However, the Constitution does not speak definitively about its orientation on citizenship. The Constitution's equality-based text could support either a rights-based or a belonging-based citizenship.

1. Naturalization

Citizens of the several states also became citizens of the United States when the Constitution became operative. However, once passed, the Constitution granted Congress the sole power to determine who can become a U.S. citizen.[42] That text merely provides that non-citizens can become citizens on whatever terms Congress decides. It does not provide much reason to believe that citizenship is necessarily belonging-based or necessarily rights-based. Congress may structure the naturalization process so that the only people who are accepted as citizens are those who "belong."[43] However, providing the power to Congress to do so does not necessarily mean that citizenship is belonging-based or rights-based.

2. Privileges and Immunities Clause

The Constitution's Article IV Privileges and Immunities Clause suggests that states are ordinarily supposed to treat citizens of sister states the same as their own citizens.[44] This might appear to suggest that American citizenship is inclusive. However, the Privileges and Immunities Clause was borrowed in substance from the Articles of Confederation.[45] Consequently, the Privileges and Immunities Clause arguably is focused more on how states ought to treat free people rather than on the substance of national citizenship.

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42. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To establish an uniform rule of Naturalization.").

43. *See* Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months And A Hundred Yards Short Of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1 (2008) (discussing the history of United States naturalization law).

44. *See* U.S. CONST. art. IV, § 2. The Constitution also has a privileges or immunities clause embedded in the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1. However, that clause does not create rights. *See* Minor v. Happersett, 88 U.S. 162, 170 (1875) ("The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere."). It provides another protection for rights that already exist. *See* AMAR, *supra* note 25, at 182.

45. *See* ARTICLES OF CONFEDERATION of 1781, art. IV ("[T]he free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states[.]").

Nonetheless, continuing a tradition of the equal treatment of sister state citizens and transforming that necessarily into the equal treatment of U.S. citizens from sister states, may provide some hint regarding the substance of U.S. citizenship. The requirement that states treat all U.S. citizens as they treat their own when regulating sister-state citizens might be thought to suggest a belonging-based citizenship. Conversely, that states had to be required by constitutional text to treat sister state citizens like their own citizens may suggest that being an American citizen does not necessarily mean that the citizen will be treated as belonging to the polity by individual states. That might suggest a rights-based citizenship.

3. Citizenship Requirements for Holding Office

There are various citizenship requirements for holding specific federal offices.[46] United States Representatives must be citizens for seven years before serving.[47] United States Senators must be citizens for nine years before serving.[48] The president must be a natural born citizen.[49] The various limitations on which citizens can hold certain offices suggest a particular vision of belonging. By dividing some citizens from others with respect to who can hold office, the Constitution seems to suggest that mere citizenship may not suggest full belonging. Indeed, the requirement that the president be a natural born citizen suggests that there will always be some limits on the nature of belonging for those who do not enjoy birthright citizenship. Using the circumstances of one's birth as a qualification suggests a somewhat intriguing way of determining fidelity to the United States. Put differently, there may always be a bit of doubt about whether a foreign-born U.S. citizen is sufficiently American to be trusted to run the country. The limitations on holding certain federal offices arguably suggest that citizenship may not only be belonging-based, but that the belonging must be of a certain type.

4. Diversity Jurisdiction

The Constitution mentions citizenship with respect to the jurisdiction of the federal courts. The federal courts have jurisdiction over various matters

46. Some have argued that holding office is a citizenship right. *See* Chambers, *supra* note 24, at 215 n.27.

47. U.S. CONST. art. I, § 2.

48. U.S. CONST. art. I, § 3.

49. U.S. CONST. art. II, § 1;. Chin, *supra* note 43, at 5–14 (discussing natural-born citizenship)

in which the citizen-parties are from different states.[50] Without federal jurisdiction, a state court would have jurisdiction over a matter in which it could presumably favor its home state litigant. However, as with the privileges and immunities clause, the existence of diversity jurisdiction says more about concerns regarding how states treat citizens from fellow states than it does about the substance of American citizenship.

C. Dred Scott v. Sandford, American Citizenship and Black Citizenship

Dred Scott v. Sandford[51] defined and denied African American citizenship before the Civil War.[52] The questions surrounding free blacks and the American polity revolved around citizenship, membership and inclusion. *Dred Scott* conflated them and rejected all of them for free blacks. *Dred Scott* made clear that African American citizenship was non-existent.[53] Not only did Chief Justice Taney make clear in that opinion that free blacks were not citizens, he argued that free blacks were ill-suited to citizenship in general and American citizenship in particular.[54] Taney stated that free blacks and slaves could only become American citizens through naturalization processes that had not and likely never would materialize. The *Dred Scott* Court's position was simple: Free blacks were not and could not be a part of the polity absent specific action affirming their citizenship.[55]

Dred Scott arguably supports both a belonging-based and a rights-based vision of citizenship. Taney suggested that citizenship is about belonging and being accepted as a member of the American citizenry by the American citizenry.[56] The Chief Justice explained that Indians and Europeans could become American citizens through naturalization and become part of the "us" that constituted the American citizenry by giving up their prior political

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50. *See* U.S. CONST. art. III, § 2.

51. 60 U.S. 393 (1857).

52. However, the question regarding the citizenship status of free blacks did not first arise in the 1850s. *See* Randall Kennedy, *Dred Scott and African American Citizenship*, *in* DIVERSITY AND CITIZENSHIP 105–06 (1996) (noting the unresolved controversy accompanying the Missouri Compromise regarding whether free blacks were citizens of the United States); Maier, *supra* note 3, at 56 ("The question soon arose whether the freed blacks were citizens of the United States. It was not readily answered; indeed, that issue prompted the attorney general's expression of puzzlement in 1862, and was only definitively resolved in 1868 with the Fourteenth Amendment.").

53. For a discussion of *Dred Scott* of particular relevance to this essay, see Chambers, *Dred Scott*, *supra* note 24.

54. *Dred Scott*, 60 U.S. at 409.

55. *Id.*

56. *Id.* at 407.

and tribal commitments and aligning themselves with the American people.[57] Conversely, the Court suggested that blacks could never belong to the American polity in the way that a citizen needs to belong to the American polity.[58] However, the *Dred Scott* Court relied on a rights-and-obligations-based vision of citizenship to explain why free blacks had never been considered citizens. Taney relied on rights ostensibly never given to blacks (such as the right to vote) and duties ostensibly never owed by blacks to the state (such as the obligation to bear arms to defend the state) to explain why blacks had never been a part of the citizenry.[59] Taney did not adequately explain how his rights-based vision of citizenship meshed with the facts that some non-citizens voted and some defended the United States by bearing arms.[60] Nonetheless, Taney focused much of his citizenship argument on rights and obligations.[61]

Taney had no need to determine the nature of American citizenship when rejecting African American citizenship. Nonetheless, Taney provided a glimpse of his thoughts on American citizenship and slavery. As importantly, he provided justification and precedent for treating claims of African American citizenship as rudely and as narrowly as possible. The *Dred Scott* Court created a special outsider status for free blacks in the midst of a society governed by a Constitution that arguably suggests that free native-born people, e.g., American Indians, should be treated tolerably well, and possibly as citizens. The issue post-*Dred Scott* became whether the treatment of free blacks would change in the wake of the Civil War to square the group's treatment with the notions of freedom and liberty arguably extant in the Constitution.

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57. *Id.* at 403–04.

58. *See* Chambers, *Dred Scott*, *supra* note 24, at 213.

59. *See id.* at 215–17.

60. *See* SPIRO, *supra* note 26, at 92 (noting that even participation in political life is not and has not always been fully restricted by citizenship status, though noting that much alien voting was based on a precitizenship status that was based on declared intention to become a citizen).

61. Taney's structure could not easily explain women's citizenship. Women were citizens and were clearly part of the body of American citizens. They belonged. However, the Court noted that women neither exercised all of the rights of citizenship nor owed all of the duties to the state that male citizens owed. Thus, women were citizens, even without receiving some of the rights male citizens were owed and without discharging some of the obligations that male citizens owed as citizens. Taney simply asserted that women's citizenship was a fact. *See* Chambers, *Dred Scott*, *supra* note 24, at 216.

D. Civil War, Slavery and African American Citizenship

In the immediate post-Civil War period, the discussion of African American citizenship became particularly prominent.[62] For many in power, the issue was not whether African American citizenship was to exist, but how. The outlawing of slavery by the Thirteenth Amendment was, for some, all that was required to create African American citizenship. Slavery's end created a large group of free people born in the United States who could become citizens. Their freedom alone should have been enough to make them citizens, according to some.[63] Others believed that the abolition of slavery merely created additional free blacks. Assuming that the *Dred Scott* Court's denial of citizenship to free blacks was not essentially reversed by the Civil War, the Thirteenth Amendment did not automatically make free blacks and newly freed slaves citizens. Indeed, many Southern states indicated that the regulation of long-free blacks and newly-freed slaves would continue in the form of newly passed Black Codes. The nature of those codes made clear that many would not accept free blacks as citizens.[64] However, the Black Codes helped trigger the passage of the Civil Rights Act of 1866.[65] That law commanded what the Thirteenth Amendment did not, that former slaves born in the United States were citizens of the United States.[66] In addition to providing citizenship, the law cataloged a number of contract-based and property-based rights clearly deemed incident to citizenship.[67]

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62. For a thorough discussion of the Thirteenth Amendment see Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951).

63. *See* Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1401 (2002).

64. *See* JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY 5 (2006) (arguing that the institution of black codes suggested that "Southern whites could not easily view blacks in fundamentally new ways" after the Civil War).

65. *Id.* at 5–6.

66. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 341 (1978) (noting that the 1866 Civil Rights Act was "based explicitly upon the principle that citizenship derived from birth within the allegiance and entitled persons enjoying the status to basic rights throughout the nation.").

67. *See* Civil Rights Act of 1866, §1, 14 Stat. 27 (1866).

> [A]ll persons born in the United States and not subject to any foreign power . . . 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

Neither the passage of the Thirteenth Amendment nor the 1866 Civil Rights Act proves that African American citizenship was specifically rights-based or specifically belonging-based in the immediate aftermath of the Civil War. The Thirteenth Amendment's passage arguably suggests that citizenship is belonging-based. Many who worked to pass the Thirteenth Amendment appeared to assume that the end of slavery would herald the beginning of African American citizenship without any specific edict. Simply, all Americans would do the right thing, accept former slaves and free blacks as citizens and move on. The attempt to have African Americans treated as citizens without a specific edict telling other citizens to do so, certainly may suggest that those who pressed for the Thirteenth Amendment believed that American citizenship is belonging-based, i.e., that American citizenship is about being "one of us."

However, the 1866 Act's need to assert explicitly the citizenship of former slaves in the wake of the refusal of some to accept it may suggest that American citizenship is not necessarily belonging-based. The Act's specific provision of the right of African American citizens to be treated as the equal of white citizens does not prove that American citizenship was rights-based. Rather, it suggests that in the wake of the passage of the Black Codes, African American citizenship needed some explicit protection, at least in the short run. However, the need to protect rights that would seem to flow clearly and directly from citizenship may suggest that African American citizenship will be treated as rights-based even if the nature of American citizenship is belonging-based.

IV. AFRICAN AMERICAN CITIZENSHIP IN THE WAKE OF THE RECONSTRUCTION AMENDMENTS

By setting free blacks apart as a group that could never belong to the American polity, *Dred Scott* guaranteed that free blacks and those acting in their interest would have to fight for African American citizenship and citizenship rights.[68] The Fourteenth Amendment superseded the 1866 Civil Rights Act and granted citizenship to all native-born black Americans, making African American citizenship a part of the Constitution.[69] The

laws and proceedings for the security of person and property, as is enjoyed by white citizens[.]

Id.

68. *See* Glazer, *supra* note 8, at 97 (noting that native black Americans have been treated noninclusively more than other minority groups).

69. *See* U.S. CONST. amend. XIV.

Amendment also guaranteed equal citizenship.[70] The Fifteenth Amendment followed a few years later, barring the provision of the franchise based on race and formally making African Americans men full voting members of American society.[71] In whole, the Reconstruction Amendments—the Thirteenth, Fourteenth and Fifteenth Amendments—guaranteed that free blacks were to be full members of the American Republic and would be treated as such by the individual states.[72] The amendments gave real life to the basic promises of freedom and equality found in the Constitution, but that had been obscured by the interpretation of other language in the Constitution. Indeed, to some, the amendments merely recognized rights that should have already existed.[73]

The amendments did not define what being a citizen meant, could not guarantee that blacks would be accepted as citizens-members of the republic, and could not ensure that African American citizenship would be belonging-based.[74] Indeed, that the newest native-born Americans had to have their citizenship confirmed explicitly by amendment may suggest that such citizenship was grudgingly acknowledged by some and was not in the nature of belonging. As a result, African American citizenship arguably was rights-based in that such citizenship would extend only so far as the Constitution specifically allowed. Indeed, how the rights of citizenship have been

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70. *See* Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895, 905–06 (2006).

> What are the radical ideas that underlie the Fourteenth Amendment? . . . Each citizen is seen as an independent and equal economic and political actor, and government is to be available and responsive to each of them equally. In this phrase, too, is captured the idea that membership in American society is not tribal. . . . There are no legal ranks among the people of such a republic.

Id.

71. *See* U.S. CONST. amend. XV.

72. The Reconstruction Amendments did not fully resolve the issue of the full equality for all citizens, as different groups of citizens had different sets of rights for many years after the Civil War. For example, restrictions on voting based on sex were lawful until the Nineteenth Amendment was ratified. *See* U.S. CONST. amend. XIX.

73. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 790 (2008) ("Like many radical Republicans in other states, Louisiana activists viewed the Fourteenth Amendment as recognition of a set of claims to citizenship that had always been legitimate, not simply as the conferring of citizenship on men and women of color at the moment of ratification.").

74. *See* BOSNIAK, supra note 4, at 85 (noting a minimalist reading of the Fourteenth Amendment that guarantees citizenship to some but says little if anything about the content of citizenship).

structured and how African Americans have been treated in the wake of the Reconstruction Amendments arguably confirms that.

A. Efforts to Belong

The passage of the Fourteenth Amendment was a significant step in fully integrating African Americans into the American polity. The process has been a struggle.[75] Certainly, there have been successes. However, law has been used to stop the full inclusion of African Americans in all areas of the national community as well as to foster that inclusion. That law had to be used to force inclusion may suggest that fellow citizens viewed African American citizenship formally, as rights-based rather than belonging-based.

Plessy v. Ferguson[76] is an important case in understanding the structure of citizenship under the Fourteenth Amendment. At issue in *Plessy* was a Louisiana law that required that different races sit in separate rail cars while traveling. Homer Plessy challenged the constitutionality of the law, and lost. Though the Fourteenth Amendment guaranteed that all citizens would enjoy the same citizenship rights, the Court took a narrow approach in defining citizenship rights and evaluating their content. Rather than provide a right to equal dignity in public accommodations, the Court conceptualized the right claimed as a social right to sit next to white Americans or to ride in a rail car reserved for white Americans.[77] In defining the claimed right as it did and rejecting it, the *Plessy* Court suggested that African Americans, and by extension all Americans, had certain narrow rights triggered by the Constitution, but no more. In addition, the substance of *Plessy* suggested that the Fourteenth Amendment and citizenship were not necessarily about belonging to the community as a whole.

Brown v. Board of Education[78] essentially overruled *Plessy*. *Brown* may be thought to be quintessentially about belonging. It could have been, but

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75. It is possible that gaining citizenship rights is always a struggle. *See* SHKLAR, *supra* note 2, at 15.

> Because exclusion was so much more common and so much easier than inclusiveness, citizenship was, moreover, always something that required prolonged struggle, and this also has molded its character. Citizenship so gained lost much of its urgency once it was attained. The years of denial have left their paradoxical marks upon this constitutional right.

Id.

76. 163 U.S. 537 (1896).

77. *See* Scott, *Public Rights*, *supra* note 73, at 800 (noting that Plessy focuses on the enforcement of dignitary rights rather than a claim of "social equality").

78. 347 U.S. 483 (1954).

arguably was not. The Supreme Court's position was that separate but equal was inherently unequal.[79] However, that merely proved that the government failed in its requirement to provide equality with respect to a good that it provided. The essence of *Brown* was not necessarily that segregation was wrong because the races were separated. Though *Brown* could be interpreted to make the point that citizens should not be separated based on race, the decision was based on the specific harm that was caused by the separation (suggesting a rights-based remedy) rather than from the fact of the separation (suggesting a belonging-based remedy).[80]

In one of the Supreme Court's recent school desegregation cases, *Parents Involved in Community Schools v. Seattle School District*,[81] school districts were required to litigate an attempt to make sure that their schools were reasonably diverse. In that case, two school districts were admonished to stop attempts to racially balance schools using race.[82] Regardless of one's vision of the rightness or wrongness of the outcome, the vision of citizenship evidenced in the case appears rights-based. The right vindicated was the right to avoid racial classification, even if that racial classification was arguably necessary to ensure a certain level of racial diversity among a student body. That is, inclusion was deemed secondary to the right not to be racially classified. The nature of that vision of citizenship is not one of a citizenship that necessarily encourages or creates strong bonds among the citizen, all of her fellow citizens and the state. The vision of citizenship suggested in *Parents Involved* arguably is one that views the citizen as an individual with well-defined rights to be asserted and honored, even possibly to the detriment of the goals of the community in which the citizen lives.

The point of mentioning these cases is not to suggest that the Court wrongly or rightly decided any of them. That would require far more nuanced and lengthy analysis of the cases. Rather, it is to suggest that there may be little evidence that citizenship consists of anything other than the rights that can be gleaned directly from the Constitution. That is the essence of a rights-based citizenship. The cases could have been about community and belonging, but they are not. They are about rights and precisely how those rights will be interpreted and enforced. That lack of consideration regarding the community as a whole suggests a citizenship that may be marked more by rights and obligations than by belonging.

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79. *Id.* at 495.

80. *Id.* at 492 (noting that the key to the case is the effect of segregation on public education).

81. 551 U.S. 701 (2007).

82. *Id.* at 747–48.

B. Voting

Voting was not a citizenship right when the Fourteenth Amendment was ratified. However, it has continued to expand to the extent that it can now be considered a citizenship right. The expansion of the right may suggest the right is about making sure that everyone belongs, or it may merely relate to the acceptance that equal citizenship requires equal voting rights. Nonetheless, the need to fight for voting rights suggests a tilt toward a rights-based citizenship rather than a belonging-based citizenship.

Protection for the right to vote began with the Fourteenth Amendment and continues in various forms today. Section two of the Fourteenth Amendment was an attempt to protect against race-based disfranchisement.[83] The section provided a penalty of the loss of representation for states that disfranchised voters based on race.[84] That could be seen as an attempt to encourage states to welcome African American citizens as voters and full participants in the polity. However, that attempt was preempted when the Fifteenth Amendment banned the use of race in providing the right to vote. The Fifteenth Amendment provides a right for male former slaves to vote on the same grounds as other male citizens.[85] The protection was welcomed and necessary. However, even with the Fifteenth Amendment, the practical disfranchisement of African American citizens continued for nearly a century. The Voting Rights Act of 1965 was passed to implement the Fifteenth Amendment fully.[86] The Act has provided actual protection for the right to vote since its passage.

The protection of the right to vote of African Americans dovetails with the continued expansion of the right to vote through the Twentieth Century. The Constitution has been amended through the years to eliminate restrictions on the right to vote. Through the Nineteenth, Twenty-fourth and Twenty-sixth Amendments, the Constitution has become a backdoor guarantee of voting rights to citizens.[87] Voting has become the quintessential right of citizenship. However, voting has not necessarily shaped the nature of

83. For a discussion of section two of the Fourteenth Amendment, see Chambers, *Colorblindness*, *supra* note 63, at 1417–18.

84. *See* U.S. CONST. amend. XIV, §2.

85. *See* U.S. CONST. amend. XV.

86. 42 U.S.C. §§ 1973, et seq. (2012).

87. *See* U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

citizenship.[88] A citizen is allowed to vote whether or not citizenship is based on belonging. As voting becomes a citizenship right that is provided to all citizens absent justification and is denied to noncitizens, it merely marks the content of the citizenship right—what the state must provide to the citizen. It does not indicate that the citizen necessarily is an integral part of the community. Indeed, when groups of citizens must fight for the right to vote, it is possible that voting has become a mere citizenship right that all can exercise rather than proof that the citizen belongs to the community in which he votes.

C. The Nature of African American Citizenship

The Reconstruction Amendments repudiated *Dred Scott* regarding the citizenship of free blacks. The Thirteenth Amendment arguably hinted at an inclusive citizenship with the abolition of slavery. The Fourteenth Amendment guaranteed citizenship to free blacks. The Fifteenth Amendment provided a stronger form of citizenship-based rights for male former slaves. However, the issue of inclusion may yet remain separate from the issue of citizenship. Indeed, citizenship may be defined through the Reconstruction Amendments merely as a set of rights and obligations owed to citizens by the country. If citizenship means no more than that, the notion of citizenship as belonging may have been lost—if it ever existed—in part as a direct result of how citizenship was addressed in the years surrounding the Civil War.

In the wake of the Fourteenth Amendment, free blacks were made citizens. However, that citizenship may have been and may be formal and rights-based. It is unclear that the fact of African American citizenship means that all citizens are treated as if they belong in the polity. When citizenship is more about belonging, the formal rights and obligations fade and the informal ones come to the fore. Little reason exists to believe that post-Fourteenth Amendment citizenship is belonging-based. There is a difference between being a citizen and being one of us. The issue is not the substance of citizenship rights, it is whether the relationship between the citizen and the nation is structured as rights-based or belonging-based. The Reconstruction Amendments formally clarified the issues, but arguably did

88. However, it is possible that the expansion itself changes the nature of the Founders' democracy even if it does not tell us precisely how. *See* SINPOLI, *supra* note 30, at 170 ("Moreover, each time we have expanded the electorate by including previously excluded groups, such as blacks and women, we have effectively suggested that a liberal-democratic system can tolerate a larger, more diverse civic body than either Madison and Hamilton thought possible.").

not resolve the deeper question of whether citizenship made free blacks a true part of the citizenry, rather than merely recognized free blacks as a segment of the citizenry.

In the wake of the Reconstruction Amendments, African American citizens have had to fight for basic citizenship rights. Unfortunately, resistance to the existence of African American citizenship stemming from racialized slavery of the type endorsed in *Dred Scott* guaranteed that claiming African American citizenship would be a process of demanding rights rather than accepting the benefits of citizenship that all citizens are thought to enjoy. *Dred Scott* provided the need to base African American citizenship on the Constitution's text. However, the Constitution is a legal document. A resort to a legal document to find the substance of a right may be problematic because the process of finding the right can lead directly to a rights-based citizenship. Of course, if the process of finding the content of citizenship requires a close reading of a legal document to find specific support for a claim to a right, the process is likely to lead to a rights-based citizenship. However, if the point of grounding rights in text is to search for general principles to use to extrapolate general citizenship rights or rights flowing from belonging, a text-based hunt for the content of citizenship is not necessarily destined to produce a rights-based citizenship.

The need to ground African American citizenship on constitutional text was understandable both because Chief Justice Taney's *Dred Scott* opinion suggested that blacks could never be accepted as citizens and because the precise contours of American citizenship rights were unclear. However, basing African American citizenship rights on text had an additional effect. It guaranteed that African Americans and other Americans were going to need to fight for equal citizenship rights, right by right. If the Constitution's text does not indicate that the citizen enjoys a particular right, then no such right exists. That approach almost guarantees that African American citizenship would be viewed as a less robust rights-based citizenship rather than as a more robust belonging-based citizenship.[89] Simply, *Dred Scott* and its treatment of free blacks tended to move us toward rights-based citizenship, rather than belonging-based citizenship.

89. The nature of American citizenship appears to be changing, though almost certainly not based on a single cause. *See* SPIRO, *supra* note 26, at 6 ("The rights and obligations attendant to citizenship have also attenuated over the course of American history. Citizenship both demands and privileges less than it once did. The declining legal significance of the status betrays and reinforces the waning intensity of bonds among members.").

V. CONCLUSION

Since the Founding, Americans have tried to develop principles that would lead us to a more perfect union.[90] In theory, citizenship is the foundation on which that attempt rests. However, the nature of American citizenship was not clear at the Founding and remains somewhat unclear. Whether American citizenship is supposed to be rights-based with a focus on the rights owed to citizens by the community and obligations owed by citizens to the community, or belonging-based with a focus on making sure that every citizen is thoroughly connected to the community through implicit connections to fellow citizens and the community that augment any formal rights and obligations that attend citizenship status is not clear. Constitutional developments over the past century and a half have not resolved the issue.[91]

Regardless of how American citizenship is supposed to be conceived, it appears that the *Dred Scott* decision has acted as a headwind against moving toward a belonging-based citizenship by shaping the manner in which African American citizenship rights are conceived and enforced. The *Dred Scott* Court provided language and precedent that structures African American citizenship as rights-based. The Court essentially guaranteed that African American citizenship would necessarily have to be created by and imposed on the country by specific edicts grounded in the text of the Constitution. In addition, it ensured that African American citizenship would be narrowly construed and would have to be defended at all turns by pressing for specific rights. That process was required even in the wake of the destruction of slavery and the ratification of a Fourteenth Amendment that promised equal citizenship and an expanded citizenry.

The treatment of citizenship claims by African Americans arguably reflects a fragile, static, and formal relationship among those citizens and the polity. If American citizenship in general comes to reflect a fragile, static, and formal relationship, it may well be because at some point in the past, Americans were reluctant to view citizenship as belonging-based because that would have required that the former slaves and free blacks be welcomed

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90. *See* U.S. CONST. pmbl.

91. It may be that the rapid expansion of citizenship has altered society in ways that are difficult to measure merely by reference to citizenship rights. *See* Douglas Klusmyer, *Introduction, in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 1 (T. Alexander Aleinikoff & Douglas Klusmyer eds., 2000) ("The admission of immigrants with cultural heritages and historical experiences different from those of their host societies inevitably changes the fabric of these societies and requires a complex process of mutual adaptation.").

into a society that had, up to that point, not viewed them as fundamentally belonging. That reluctance may have been sufficient to stop American citizenship from developing into a belonging-based citizenship. However, that reluctance had significant support from the Court's opinion in *Dred Scott*. That opinion almost certainly helped limit the bonds among citizens and between citizens and the state, and may have led to a weaker republic than would have existed otherwise.[92] If so, this is just one more legacy that can be laid at the footsteps of that notorious case.

92. It may have had an effect on the drift that has appeared to have occurred. *See* SPIRO, *supra* note 26, at 162.

> This perspective confirms the general perception across American society that America is losing its sense of special social, cultural, and political purpose and that Americans themselves feel less bonded to each other. Those who describe this drift invariably look to restore the intensity of the national tie. Call it patriotism on the right, civic duty on the left—both point in the same direction, toward the formerly elevated place of the nation among our many forms of association.
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> *Id.*