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.

Representatives shall be apportioned among the several States according

America's Equal Citizenship Clause

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The Fourteenth Amendment begins with a simple declaration: if you're born in America under the American flag, you're an American citizen. It doesn't matter if you're male or female, rich or poor, black or white, gay or straight, the daughter of a president or the son of an undocumented/unauthorized/illegal immigrant. You're a free and equal citizen. This principle of equal citizenship was at the core of the Republican vision for post-Civil War America.

In 1857, the Supreme Court set out its own racialist vision of American identity in the infamous *Dred Scott v. Sandford* (1857) decision. There, Chief Justice Roger Brooke Taney declared that a black man generally couldn't be a United States citizen—that he had "no rights which the white man was bound to respect." As a matter of history, many of Taney's assertions were plainly false: As dissenting Justices and other critics of Taney made clear, free blacks were viewed as citizens in several states at the time of the Founding; indeed, some blacks had even fought in Washington's army, and had in several states been eligible to vote on the Constitution itself in 1787-88.The newly formed Republican Party set

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 of the 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

out to reverse various aspects of *Dred Scott*—most pressingly, the decision's ruling that Congress could not generally prohibit slavery in federal territories.

Candidate Abraham Lincoln campaigned against the decision in 1858 and 1860. Then, under *President* Abraham Lincoln, Attorney General Edward Bates took on *Dred Scott* in an 1862 legal opinion arguing that free blacks generally *could* be U.S. citizens. Finally, the Republican Congress enshrined the principle of birthright citizenship in America's first major civil rights law, the Civil Rights Act of 1866. Two months later, Congress included birthright citizenship in its proposed Fourteenth Amendment.

At the simplest level, the Fourteenth Amendment's Citizenship Clause was meant to repudiate *Dred Scott* and place the Civil Rights Act of 1866 on a firm legal foundation. However, it was also meant to root post-Civil War America—America's Second Founding—in an inspiring Lincolnian reinterpretation of one of our nation's Founding truths, that we're *all* created/born free and equal.

Let's begin with the text of the Citizenship Clause: "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." While the Citizenship Clause was directed at the specific evils of both the *Dred Scott* decision and the Black Codes, the Clause's text doesn't protect only African Americans. For instance, while the Fifteenth Amendment explicitly mentions race, the Fourteenth Amendment's text is more capacious—speaking not just of African

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.

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

Americans, but of "[a]ll persons." This sweeping language grants U.S. citizenship to *everyone* born here and subject to our laws. The only relevant exception today (given that Native Americans no longer live in the same kind of tribal regime that existed in the 1860s) is for those who owe their allegiance to another sovereign, such as the children of foreign diplomats.

The Citizenship Clause also marked an important shift in American identity. Prior to the ratification of the Fourteenth Amendment, the Constitution didn't provide a set definition of citizenship. This allowed states to set their own ground rules, with many states reserving state citizenship for whites and making African Americans—even those born on a state's own soil—mere "inhabitants." In turn, these state-by-state determinations often defined who would become a U.S. citizen. The Citizenship Clause flipped this troubling script. Rather than deferring to the racist citizenship determinations of individual states, the Fourteenth Amendment made Americans citizens of the nation, first and foremost, and established a simple *national* rule for citizenship: If you're born in America under our flag, you're a U.S. citizen. Furthermore, under the Fourteenth Amendment, American citizenship brought with it a set of fundamental "privileges or immunities"—rights protected not just against abuses by the federal government (as with the original Bill of Rights), but also against abuses by one's own state. (This aspect of the Clause was elaborated and clarified by the next sentence of the Amendment, which includes express language prohibiting states from abridging the "privileges" and "immunities" of American "citizens.")

executive or 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.

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

Finally, properly understood, the Citizenship Clause also offers interpreters a way around one of the most vexing challenges of modern constitutional law, the so-called "state action doctrine." Under this doctrine, the Fourteenth Amendment's key protections—equal protection of the laws, privileges or immunities of U.S. citizenship, and due process of law—reach only the actions of state governments, *not* those of private actors. During Reconstruction, the Supreme Court used this doctrine to unduly limit Congress's ability to attack acts of private discrimination—and private violence—in the South.

While the Fourteenth Amendment's second sentence ("No state shall . . .") can plausibly be read as creating rights only against state governments, the Citizenship Clause's text sweeps more broadly. By its own terms, the Citizenship Clause is not expressly limited to the relationship between citizens and governments; it can also be understood as having implications for the relationship between citizens themselves in certain situations—for example, in certain prominent public spaces, even if these public spaces are not, strictly speaking, owned by the government. This opening sentence of the Fourteenth Amendment must be read in connection with the Amendment's closing sentence, which grants Congress sweeping power to "enforce" all the Amendment's provisions. Together, these two sentences give Congress the power to address *private* actions that undermine the Amendment's command of equal citizenship. (While the Citizenship Clause doesn't explicitly mention "equality," it *does* imply it—declaring those "born" on American soil free and equal

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.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Back to Original Text

citizens. This reading is reinforced by the text of the Civil Rights Act of 1866—which spoke of "full and equal" civil rights for all citizens—and a later Supreme Court majority opinion (authored by the towering Justice John Marshall Harlan, the great dissenter in *Plessy v. Ferguson* (1896)) reading the Citizenship Clause as guaranteeing that "[a]ll citizens are equal before the law."

A key word in the Fourteenth Amendment's opening sentence is the word "born"—a word undergirding the key concept of birth equality. Under this equal-birth principle, the government may regulate its citizens in numerous ways using all sorts of legal distinctions—for example, between wage earners and dividend earners in the tax code, or between opticians and ophthalmologists in medical regulations. But government may not penalize or degrade anyone born on American soil simply because he or she was born the wrong way—because, say, he was born black or she was born female, or he was born out of wedlock, or she was born gay. This birth-equality principle stood in sharp contrast with the infamous Black Codes that many ex-Confederate states had enacted after the Civil War. These laws—the paradigm evils that the Fourteenth Amendment was designed to eradicate—degraded African Americans simply because they were born with dark skin, reducing them to the status of second-class citizens.
Furthermore, *Dred Scott* itself situated citizenship in a broader context—defined not just by official state action, but also social meaning and practice. According to *Dred Scott*, African Americans couldn't be citizens because whites disrespected blacks— not just through

government action, but also because private custom and belief reinforced the idea that African Americans were "beings of an inferior order, and altogether unfit to associate with the white race."

The Citizenship Clause—designed to strike out against both the Black Codes and *Dred Scott*—gave Congress the power to overturn this order, not just by going after the actions of state governments, but also through passing laws that affirmed that African Americans were free and equal citizens. To be clear, there *were* limits to the Clause's reach. For instance, Congress couldn't force whites to invite African Americans to private dinners or promote political equality. It didn't cover these social and political rights that lay outside the domain of citizenship pure and simple. However, Congress *could* protect the full and equal citizenship of African Americans by shielding them from racially motivated private violence; likewise, Congress *could* go after powerful private systems of pervasive racial exclusion, including in privately owned yet distinctly "public" places like hotels, theaters, trains, and steamships. The Reconstruction Congress passed several laws along these lines; however, the Supreme Court struck down some of them, reading the Fourteenth Amendment as only reaching actions by state governments. These Supreme Court decisions—including the infamous 1883 *Civil Rights Cases*—were inconsistent with the Fourteenth Amendment's text and history.

In the end, the Citizenship Clause is one of the richest single sentences in the entire Constitution, rivalling the

Preamble in both theoretical depth and breadth. Here are just some of the many extraordinary things done by this extraordinary sentence:

- First, by overruling the infamous and erroneous *Dred Scott* case, the sentence reminds us that the Court has not been infallible in American constitutional history and that the ultimate "supreme court" in our system is not a tiny knot of jurists in our national capital, but rather, the sovereign citizenry itself—We, the People, who retain the right to make amends for the sins of our fathers and our judges.
- Second, the sentence establishes the priority of national citizenship; no matter what a state might say, anyone born in America under the American flag is an American.
- Third, the sentence requires a state to treat any American who chooses to reside in that state as a full and equal *state* citizen. The sentence thus makes emphatically clear that there is a right of any American to move to and remain in any state, no matter what a state might prefer.
- Fourth, the sentence in tandem with the sentence that follows affirms that an American citizen is entitled to all the basic civil rights—the privileges and immunities—of citizenship against both state and federal governments. For example, thanks to this first sentence (which does not open with the words "No state shall" as does the next sentence) the right of racial equality of all citizens is a right that applies against federal officialdom as well as against states. (This is what lawyers and judges sometimes refer to as "reverse incorporation" of the Fourteenth Amendment's equality principle against the federal government.)
- Fifth, the Fourteenth Amendment's first sentence in tandem with the Fourteenth Amendment's last sentence gives Congress broad power to define and protect various badges of citizenship against both governments and powerful private actors. (Note that the first sentence—unlike the next sentence of the Fourteenth Amendment, which begins with the words "No state shall"—does not expressly limit itself to declaring individual rights against state governments.)
- Sixth, the Amendment constitutionalizes Lincoln's

reinterpretation of Jefferson by making clear that Americans are created equal—*born* equal, in the key language of this key sentence.

- Seventh, and related, this birth equality idea clearly condemns a racial caste system in which light-skinned children are born lords and dark-skinned children are born serfs.
- Eighth, the sentence goes far beyond race by condemning all sorts of other birth-based caste-like systems improperly exalting some and improperly degrading others because of birth status. The sentence thus explains why certain types of birth-based governmental discrimination are suspect (laws based on race or sex or sexual orientation or illegitimacy) whereas most other kinds of governmental line-drawing (say, between opticians and ophthalmologists) should not be viewed with comparable skepticism. (The bland language of "equal protection" in the Amendment's next sentence is less helpful in distinguishing among different kinds of governmental line-drawing—less helpful in showing readers why, say, the non-birth-based lines drawn in our tax code between wage income and rental income are categorically different from the racialized birth-based lines that were drawn in the infamous Black Codes.)
- Ninth, the sentence focuses our attention on place, not parentage. Unlike the law of many European countries, in America the key issue of constitutional citizenship is based on the law of the soil, not the law of blood. The issue is where one was born, not to whom.
- Tenth and relatedly, the sentence resoundingly affirms that constitutional birthright citizenship does not depend on the immigration status of one's biological parents. Anyone born in America under the American flag is a citizen, even if his parents are not citizens and indeed even if his parents are not here legally. (Although several prominent political figures, including President Donald Trump, have recently sought to argue that the Fourteenth Amendment is somehow unclear or unsettled on this point, the Constitution's text, enactment history, and subsequent elaboration by the Supreme Court are all squarely against Trumpists on this issue: In the 1860s, surely all American-

born children of slaves were meant to be covered by the Amendment's citizenship clause, so as to completely repudiate the infamous *Dred Scott* case. Yet Reconstruction Republicans in Congress doubtless were aware that some antebellum slaves had been smuggled into America illegally, in violation of various nineteenth congressional laws prohibiting transatlantic slave importation. This stubborn fact about the children of certain "illegal aliens" in the 1860s strongly suggests that American-born children of "illegal aliens" today are likewise birthright American citizens, regardless of the deficient immigration status of their parents. In multiple cases decided in the late nineteenth and the late twentieth century, the Supreme Court has recognized only three narrow exceptions to birthright citizenship: diplomatic children, tribal Indians, and invading armies. The language and logic of these cases clearly suggest that children of "illegal aliens" are indeed birthright citizens; and the broad legislative backdrop of the Amendment and its intended application to all American-born slave children provide compelling support for this conclusion.)

Thus, every generation, the constitutional clock resets; regardless of the lapses of a person's parents, the sins of the fathers and mothers are not visited upon the children. To repeat: Anyone born on American soil under the American flag is an American.

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Sep 2

Table

View Text

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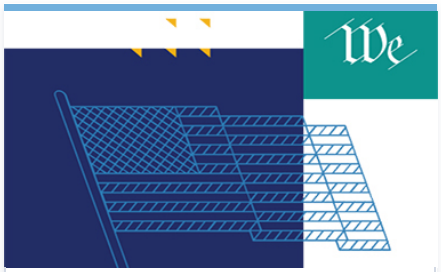

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