No. 25-365

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

BARBARA, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the First Circuit

BRIEF OF HISTORIANS MARTHA S. JONES AND KATE MASUR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Additional Historical Sources

Publications and Speeches by Black Activists:

Other Publications and Speeches:

Meeting Minutes of the Colored Conventions Movement:

Historical Newspapers:

Additional Sources:

Secondary Sources

INTERESTS OF *AMICI CURIAE*

Professor Martha S. Jones, JD, PhD, and Professor Kate Masur, PhD, are United States historians, professors of legal history, and experts on the legal and cultural history of the United States, including how during the Antebellum and Reconstruction eras free Black Americans advocated for birthright citizenship.

Amici submit this brief to provide the Court with historical insight into the degradations that free Black Americans endured when denied citizenship and how their understanding of inclusive, birthright citizenship—which included Black Americans and also the children of immigrants—was constitutionalized by the Citizenship Clause of the Fourteenth Amendment.[1]

[1] *Amici* state no counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[C]onstitutional cases" permit no room for "spotty," "equivocal," and "ambiguous historical evidence."[2] To overcome *stare decisis*, Petitioners' "historical evidence must, at a minimum, be better than middling."[3] Petitioners' "historical" account is far worse than middling: it omits, and thus misrepresents, the historical forces that led the Framers to enshrine birthright citizenship in the Fourteenth Amendment.

Petitioners insist that the Citizenship Clause of the Fourteenth Amendment served "one pervading purpose": "to confer citizenship on the newly freed slaves and their children."[4] This claim is fundamentally incorrect. *Amici* submit this brief to supply the history that Petitioners omit, and explain why that history should matter for the Court's understanding of the Citizenship Clause.

When the Framers wrote birthright citizenship into the Constitution, they were not addressing only the status of former slaves. They were also remedying the eight decades of injustice imposed upon ***free*** people born in the United States, among them free Black Americans, including those who had never been enslaved. From the nation's founding, free Black American activists insisted upon their membership in the national body politic and fought for the application of a broad and inclusive definition of

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[2] *Gamble v. United States*, 587 U.S. 678, 691 (2019).
[3] *See id.*
[4] Petitioners' Br. 2; *see also id.* at (I) ("Question Presented"), 17, 19.

birthright citizenship. It was this view that the Framers of the Fourteenth Amendment adopted, knowing that it would apply to all children born in the United States, whether Black or white and regardless of their parents' origin.

In the decades preceding the Amendment's ratification in 1868, some 500,000 free Black Americans endured uncertain standing before the federal Constitution. Though native-born and not enslaved, free Black Americans, in many states north and south, were not recognized as citizens. They were instead subjected to anti-Black laws and threatened with removal through a scheme termed "colonization." They endured denigration, mob violence, and prohibitions against interstate travel. They feared arrest and imprisonment and had limited access to the nation's courts. With growing intensity from the 1830s to the 1860s, free Black Americans responded to these oppressive circumstances by insisting they were birthright citizens protected by the U.S. Constitution. In newspapers, pamphlets, and political conventions, at podiums and in courtrooms, they claimed, as persons born in the United States, that they were entitled to the constitutional privileges and immunities belonging to all citizens.

Petitioners erase the indispensable role of free Black Americans in constitutionalizing birthright citizenship and, as a result, misrepresent the origin, purpose, and scope of the Fourteenth Amendment's Citizenship Clause. The Framers were aware that, during the decades predating the Civil War, free Black Americans had responded to legal obstacles, unpredictability, and terror by insisting they were

birthright citizens. The Framers in turn drafted a bright-line, inclusive, national rule of birthright citizenship that responded to the longstanding claim of free Black Americans that they—like all free persons born in the United States—were citizens. And, as representatives of a nation in which 13.2 percent of the population were immigrants, the Framers well understood that the Amendment's broad terms would recognize and protect the citizenship status of the children of immigrants.[5] This history demonstrates that the Citizenship Clause was not, as Petitioners claim, a narrow settlement that extended citizenship solely to formerly enslaved people and their children, while leaving the citizenship status of others open for future negotiation through politics. Instead, the Clause secured a broad and enduring constitutional rule under which everyone born on the soil would be a citizen.

Petitioners purport to condemn Chief Justice Roger Taney's "shameful" 1857 *Dred Scott* decision, and yet they reprise Taney's approach to citizenship: a consent-based model that empowered political leaders to determine which children born in this country deserved to be citizens. Taney imposed race and color prerequisites for citizenship and declared that even free Black Americans born in the United States could not be citizens. In dissent, Justice Benjamin Curtis acknowledged the injustices visited

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[5] Campbell J. Gibson and Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990* (U.S. Census Bureau, Working Paper No. POP-WP029, 1999), https://www.census.gov/library/working-papers/1999/demo/POP-twps0029.html#intro.

upon free Black Americans and drew upon English common law and the founding documents to conclude that, in the United States, citizenship was acquired upon birth, as a natural and inalienable right not subject to curtailment by authorities.

When the Framers added birthright citizenship to the Constitution, they vindicated the claims that free Black Americans had made on behalf of themselves, their progeny, and, by extension, the progeny of the nation's rapidly-expanding immigrant communities. Not only did the Amendment repudiate Taney's reasoning in *Dred Scott*; it constitutionalized what free Black Americans had long envisioned: birthright citizenship for all.

ARGUMENT

I. In The Antebellum Era, Free Black Activists Promoted A Broad Vision Of Birthright Citizenship.

Petitioners' brief rests on a crucial error: they proclaim, contrary to ample and unequivocal historical evidence, that the Citizenship Clause was narrowly devised to do no more than "confer citizenship on the newly freed slaves and their children."[6] This brief demonstrates, by contrast, that long before the Civil War, free Black Americans believed in and fought for a broad-based, universal vision of birthright citizenship, one that the Framers of the Fourteenth Amendment ultimately adopted.

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[6] Petitioners' Br. at (I) ("Question Presented").

A. In the early republic, Black Americans drew on the nation's founding documents and the common law to assert birthright citizenship in the face of denigration and terror.

The history of Black American activism is grounded in the sources upon which they relied when claiming citizenship by birthright. By the 1790s, Black American activists drew on the promise of the Declaration of Independence—that "[a]ll men are ***created*** equal"—and on the Constitution's Article II reference to the President as a "natural-born citizen." They also observed that the Constitution drew no distinctions of race or color. Early state and federal courts reinforced their view, holding that the United States was subject to the universalizing principle of birthright subjecthood articulated in the English decision, *Calvin's Case*, 77 Eng. Rep. 377 (1608): "[A]ll those that were born under one natural obedience … should remain natural born subjects, and not aliens; for that naturalization due and vested by birthright, cannot by any separation of the Crowns afterward be taken away…."[7]

As northern states gradually abolished slavery at the close of the eighteenth century, growing free Black communities established churches, schools, and mutual-aid societies; and some free Black men exercised their right to vote.[8] But terror also loomed.

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[7] Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Human. 73, 116 (1997).

[8] James Oliver Horton & Lois E. Horton, *In Hope of Liberty* 125–76 (1997).

In 1793, Congress had passed the Fugitive Slave Act,[9] authorizing the recovery of slaves who escaped into states where slavery was outlawed. The measure led to the kidnapping and detention of free Black people. These harrowing circumstances prompted calls upon Congress to protect free Black Americans as citizens. In 1799, scores of Philadelphia's free Black residents led by the Reverend Absalom Jones—head of the Free African Society and the nation's first Black Episcopal priest—petitioned Congress for redress, representing themselves as citizens "like every other class of Citizens" and claiming "the Liberties and unalienable Rights" provided for by the Constitution.[10] Congress never acted on the merits of their petition.

In the early nineteenth century, authorities increasingly denied that free Black Americans could be assimilated into American society and organized to undermine their claims to "natural-born" citizenship. Many of these elites insisted the best course was to "colonize" free Black Americans—that is, to resettle them outside the United States.[11] That thinking was formalized with the 1816 founding of the American Colonization Society (ACS), led by such prominent men as Speaker of the House Henry Clay. In its typical idiom, in 1821, the ACS urged Congress that free Black Americans "are not, and cannot be, either useful or happy among us," and it would be "best, for all the parties interested, that there should be a

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[9] 1 Stat. 302 (1793).

[10] Martha S. Jones, *Citizenship* in *The 1619 Project* 223–24 (Nikole Hannah-Jones et al. eds., 2021).

[11] Martha S. Jones, *Birthright Citizens* 37 (2018); Ousmane K. Power-Greene, *Against Wind and Tide* 15–16 (2014).

separation."[12] The ACS established the West African colony of Liberia and provided ships, pressuring free Black Americans to voluntarily relocate. They insisted that even free Black Americans born in the United States were not really Americans and possessed no right to remain in the United States or enjoy membership in its body politic.[13]

Free Black Americans thus faced precarious circumstances, their rights and privileges varying from state to state. Some northern states, like Massachusetts and New York, affirmed that free Black residents were state citizens, while most southern and many northern states did not.[14] Ohio and other midwestern states passed anti-Black legislation—"Black Laws"—that discouraged Black in-migration and settlement. An 1804 Ohio law required that "black or mulatto" persons seeking to "settle or reside" in the state provide proof of their freedom and carry work permits.[15] Ohio and several other free states subsequently extended and reinforced such laws.[16]

When free Black Americans traveled to states that did not recognize their citizenship, they could be treated as runaway slaves and subjected to interrogation, imprisonment, and sale into

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[12] Fourth Annual Report of the American Society for Colonizing the Free People of Colour of the United States 24 (1821).
[13] Jones, *Birthright Citizens*, *supra* note 11, at 37–38; Power-Greene, *supra* note 11, at 12.
[14] Kate Masur, *Until Justice Be Done* 49–52, 56–60, 75–76, 117 (2021).
[15] *Id.* at 16–17; *see also* Ohio Black Codes § 1 (1804).
[16] *Id.* at 114, 230–31.

servitude.[17] Free Black sailors working along the Atlantic Coast were especially vulnerable. Southern state laws required them to submit to jail or "quarantine" while in port, even if their home states recognized them as citizens.[18] In 1822, when South Carolina passed the first "Negro Seamen Act," ship captains complained immediately that Black seamen, though "native citizens of the United States," were unjustly seized and imprisoned "without a writ or any crime alleged."[19] Some authorities, including a U.S. Attorney General and a federal judge, held the Negro Seamen Act violated Congress's treaty-making and interstate commerce powers.[20] Still, local officials in South Carolina and elsewhere enforced such laws, leaving free Black sailors at risk of incarceration and sale into slavery.[21]

The deadliest slave rebellion in U.S. history, led by Nat Turner in 1831, prompted many states to harden their laws regulating free Black Americans. State lawmakers claimed that the example set by free Black people threatened to incite unrest among the enslaved.[22] One legislative response came from Octavius Taney, a member of Maryland's senate and brother of then-U.S. Attorney General Roger Taney. In early 1832, Octavius Taney proposed Maryland lead the wholesale removal of all "free persons of color

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[17] Jones, *Birthright Citizens*, *supra* note 11, at 30; Masur, *supra* note 14, at 27–30, 42–43, 67, 84, 99, 119–20.

[18] Jones, *Birthright Citizens*, *supra* note 11, at 52–53; *see generally*, Michael A. Schoeppner, *Moral Contagion* (2020).

[19] Masur, *supra* note 14, at 124.

[20] Jones, *Birthright Citizens*, *supra* note 11, at 42–43; Masur, *supra* note 14, at 124–26.

[21] Masur, *supra* note 14, at 119–20, 127, 137–43, 156–58.

[22] Jones, *Birthright Citizens*, *supra* note 11, at 46.

from our state, and from the United States."[23] Maryland did not go as far as Taney urged, but it did enact punishing Black Laws, banning free Black people from entering the state or staying longer than ten days, denying a right of return to Black residents who ventured out of the state for more than thirty days, and prohibiting Black religious meetings outside the presence of a white minister.[24]

Laws imposing special restrictions on free Black Americans were consistent with the aims of the ACS. Such laws branded free Black people as unwelcome sojourners, denied them fundamental rights, and signaled that white Americans were not required to tolerate their presence. Black entrepreneur and activist James Forten wrote from Philadelphia in 1813 that such policies invited abuse, allowing "police officers … to apprehend any black, whether a vagrant or a man of responsible character, who cannot produce a Certificate that he has been registered." Such laws encouraged mobs to harass and "hunt" random Black people, knowing they had limited recourse before the courts. "Can any thing be done more shocking to the principles of Civil Liberty!" Forten decried.[25] Where Black Laws ruled, reports abounded of white residents preying on their Black neighbors: seizing property, demolishing homes, running them out of the community, and even engaging in kidnapping and mob assaults.[26]

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[23] *Id*. at 46–47.
[24] *Id*.
[25] Masur, *supra* note 14, at 22–23.
[26] *See, e.g.*, *id*. at 27–28, 29–30, 42–43, 61–62, 84, 102, 190–91, 243.

B. Black Americans, organized in the Colored Conventions Movement, pushed back against the African Colonization Society and Black Laws by asserting their status as citizens by birthright.

Free Black Americans faced strong pressure to self-deport, given the ACS's colonization scheme, state Black Laws, limited recourse in court, and predation and abuse by white neighbors.[27] Still, most did not abandon the nation of their birth. Instead, they organized a political movement, remembered as the Colored Conventions Movement. Founded in Philadelphia in 1830, it flourished for decades as a venue in which Black Americans developed their ideas and plans of action.[28]

The conventions left a voluminous published record which, along with Black newspapers of the period, evidence free Black Americans' campaign to secure universal, birthright citizenship as the law of the land.[29] Attendees at the inaugural 1830 convention resisted the ACS's colonization scheme with an assertion of birthright: "[W]e who have been born and nurtured on this soil, we, whose habits, manners, and customs are the same in common with other Americans, can never consent to take our lives

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[27] Jones, *Birthright Citizens*, *supra* note 11, at 37–39, 107.

[28] *Id.* at 40–41.

[29] The Colored Conventions Project (coloredconventions.org) maintains this documentary record. *See also Colored Conventions Movement* (P. Gabrielle Foreman et al. eds., 2021); *see also* Christopher James Bonner, *Remaking the Republic* (2020) (regarding Black American claims to citizenship in conventions and newspapers).

in our hands, and be the bearers of the redress offered by [the ACS]."[30] In subsequent years, free Black Americans continued to insist that they were citizens by birth. Noting parallels between the ACS's efforts to remove free Black Americans and the genocidal purge remembered as the Trail of Tears, a New York convention headed by Samuel Ennals and Philip Bell warned that if "a colony was formed for the blacks in the United States, they would in a short time be removed, as has been the case with the poor Indians."[31] That convention understood that the ACS's anti-Black program encouraged self-deportation: "They cannot use force; that is out of the question. But they harp so much on 'inferiority,' 'prejudice,' 'distinction' and what not, that there will no alternative be left us but to fall in with their plans."[32]

Free Black Americans invoked their status as citizens born in the United States as a shield against colonization. Delegates at an 1835 Philadelphia convention published an address "To the American people" that advised: "[W]e claim to be American citizens, and we will not waste our time by holding converse with those who deny us this privilege, unless they first prove that a man is not a citizen of that

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[30] Constitution of the American Society of Free Persons of Colour (Philadelphia, 1830), at 10, *Minutes and Proceedings of the National Negro Conventions, 1830–1864* (Howard H. Bell ed., 1969), https://omeka.coloredconventions.org/items/show/70.

[31] *Report*, The Liberator, Mar. 12, 1831, at 54; Jones, *Birthright Citizens*, *supra* note 11, at 44–45.

[32] *An Address to the Citizens of New York*, The Liberator, Feb. 12, 1831, at 1; Jones, *Birthright Citizens*, *supra* note 11, at 44.

country in which he was born and reared."[33] Delegates regularly appealed to the examples of the American Revolution and the Declaration of Independence. For instance, led by Ohio's William Lambert, members of an 1843 Michigan convention declared they had studied the "fathers of '76" and failed to "discover anything like a system of exclusion." "No!" they insisted, "there is not an expression, nor an implied sentiment to be found making a distinction in the rights and privileges of any class of American citizens." Delegates urged that the nation, from its founding, had "boldly proclaim[ed] that all men are born free and equal, and that consequently life, liberty, and the pursuit of happiness, are inherent in every individual, vested inalienably by natural birth-right."[34] Likewise, at an 1848 Philadelphia convention, a committee report set forth: "Let us rest our cause on the republican standard of the revolutionary Fathers, while we knock at the doors of the constitution and demand an entrance. If we are asked what evidence we bring to sustain our qualifications for citizenship, we will offer them certificates of our BIRTH and NATIVITY."[35]

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[33] Minutes of the Fifth Annual Convention for the Improvement of the Free People of Colour in the United States (Philadelphia, June 1–5, 1835), at 30, *in* Bell, *supra* note 30, https://omeka.coloredconventions.org/items/show/277.

[34] Minutes of the State Convention of the Colored Citizens of the State of Michigan, Held in Detroit (Oct. 26–27, 1843), 1 *The Proceedings of the Black State Conventions, 1840–1865* (Philip S. Foner & George E. Walker eds., 1979), at 192, https://omeka.coloredconventions.org/items/show/245.

[35] Minutes of the State Convention of Colored Citizens of Pennsylvania, Convened at Harrisburg (Dec. 13–14, 1848), at 20,

Free Black Americans hoped an ironclad claim to U.S. citizenship—citizenship by birthright—would enable them to withstand inequitable and often terrifying circumstances.[36] For instance, as national citizens they hoped to avoid the terms of an 1844 Maryland statute that limited their right to travel across state lines. The stakes were high: violators of the law faced fines, imprisonment, or sale into servitude.[37] Free Black sailors, if recognized as birthright citizens, could better defend themselves against abuses in southern ports. Free Black Americans and their allies pressed Congress to protect Black Americans under the Privileges and Immunities Clause, Article IV, sec. 2, but Congress did not act.[38] Then, with support from the Massachusetts government, they looked to challenge the Negro Seamen Acts in federal court. But the attorneys sent to Charleston and New Orleans to bring claims under Article IV were threatened with mob violence and run out of town.[39]

When a free Black man named Henry Hambleton applied for a U.S. passport in 1849, the issue ignited again. Headed to England, Hambleton presented his birth certificate as proof of citizenship. Secretary of State John M. Clayton rejected his application, informing Hambleton that passports are "not granted by this department to persons of color."

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in Foner & Walker, *supra* note 34, https://omeka.coloredconventions.org/items/show/241; Jones, *Birthright Citizens*, *supra* note 11, at 64.

[36] Jones, *Birthright Citizens*, *supra* note 11, at 89–96.

[37] *Id*. at 91–102.

[38] Masur, *supra* note 14, at 156–67.

[39] *Id*. at 176, 177–81.

Hambleton provided Clayton's letter to newspapers that quickly picked up the story, expressing outrage at Clayton's decision.[40] Hambleton never secured a passport, but the public outcry made plain that Clayton's view was not universally held. Clayton later recalled that, after refusing Hambleton's application, he was "assailed by a great portion of the northern press, and by many responsible persons at the North." The outpouring, Clayton admitted, revealed that "a very respectable and considerable portion of the people of the northern States" believed "that colored persons can become citizens of the United States, and are citizens of the United States."[41]

Tensions continued to rise in the 1850s, in part because of the new federal Fugitive Slave Act. Greatly discouraged, some free Black Americans considered submitting to expatriation. Among them was journalist and abolitionist Martin Delany who explained what leaving the U.S. would cost free Black Americans: "We are Americans, having a birthright citizenship—natural claims upon the country—claims common to all others of our fellow citizens—natural rights, which may, by virtue of unjust laws, be obstructed, but never can be annulled."[42] Delany's lament was personal ***and*** political: "Our common

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[40] *Official Injustice—No Protection for Colored Men*, National Era, July 5, 1849; Elizabeth Stordeur Pryor, *Colored Travelers* 116–18, 119–20 (2016).

[41] Cong. Globe, 33rd Cong., 1st Sess. 1744 (1854); Masur, *supra* note 14, at 251.

[42] Martin Robinson Delany, *The Condition, Elevation, Emigration, and Destiny of the Colored People of the United States* 49–66 (1852); Jones, *Birthright Citizens*, *supra* note 11, at 89–90; Jones, *Citizenship*, *supra* note 10, at 228.

country is the United States. Here were we born, here raised and educated; here are the scenes of childhood; the pleasant associations of our school going days; … and the sacred graves of our departed fathers and mothers."[43] In Ohio, an 1854 convention echoed Delany: "We are native born inhabitants, and by our birth citizens." The "well established principle of our political creed," delegates declared, was "that natural birth gives citizenship … that those born in a country become members of the body politic on reaching the requisite age, and discharging the equal responsibilities imposed upon all."[44]

By the 1850s, free Black Americans stood firmly behind a fully-formed view of citizenship as derived from birthright. They insisted that all free persons born in the United States were citizens of the United States and rejected any scheme that gave politicians the authority to abridge that principle.[45]

II. Taney's Attempt In *Dred Scott* To Undermine The Birthright Citizenship Claims Of Black Activists Was Maligned By His Contemporaries.

Chief Justice Roger Taney's position in *Dred Scott*—that no Black American had ever been, or could be, a citizen of the United States—was one that

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[43] Delany, *supra* note 42, at 49–66; Jones, *Birthright Citizens*, *supra* note 11, at 89–90; Jones, *Citizenship*, *supra* note 10, at 228.

[44] Memorial of John Mercer Langston for Colored People of Ohio to General Assembly of the State of Ohio (June 1854), *in* Foner & Walker, *supra* note 34, at 299, https://omeka.coloredconventions.org/items/show/251.

[45] Jones, *Birthright Citizens*, *supra* note 11, at 90.

Black activists had rejected for years.[46] The issue divided the Court, reflecting broader divisions in American politics and law. Some, like Taney, insisted that political leaders held the power to decide which persons born in the United States were citizens, while many others—including Black activists along with many white legal and political authorities—maintained that universal birthright citizenship was the law of the land.

A. Taney's *Dred Scott* rejected the citizenship by birthright interpretation advanced by Black activists.

Today, Taney's *Dred Scott* is universally condemned. Still, its discredited reasoning permeates Petitioners' arguments. Taney held that the Constitution granted political leaders authority to withhold citizenship from those U.S.-born free persons whom they deemed undesirable. In his view, the nation had never admitted Black Americans as members. Whether Black Americans were enslaved or free, whether they were born in the United States or elsewhere, he argued, the United States simply did not accept them as citizens because they were Black: "We think they are not, and that 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."[47]

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[46] *See id*. at 128–32.

[47] *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857).

For Taney, free Black Americans enjoyed legal standing only at the discretion of the white political community; citizenship was a status that white Americans could "withhold or grant at their pleasure."[48] Taney acknowledged the universal language of the Declaration of Independence but insisted: "[T]he enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration."[49] He pointed to state Black Laws as evidence that the white "dominant race" had not consented to the citizenship of an "inferior class."[50] Thus for Taney, citizenship derived not from birthright, but instead from the consent of the body politic. He denied that any single, uniform national rule required the recognition of free Black Americans as citizens of the United States. Taney's reasoning would have reassured the colonization advocates of the ACS. According to the chief justice, nothing in the Constitution stood in the way of efforts to press free Black Americans to leave the country.[51]

B. Taney's *Dred Scott* reasoning was widely condemned.

Taney's reasoning in *Dred Scott* was widely criticized, including by members of his Court. Justice Benjamin Curtis, in dissent, condemned Taney's departure from generally accepted territorial-based citizenship. Membership in the nation, Curtis

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[48] *Id.* at 412.
[49] *Id.* at 410.
[50] *Id.* at 412–13.
[51] *See id.* at 426.

countered, flowed from place of birth, irrespective of parentage or the political whims of the day. The Constitution, he reasoned, employed the phrase "a natural-born citizen" and "thus assumes that citizenship may be acquired by birth."[52] That language, Curtis wrote, was "[u]ndoubtedly … used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth."[53] Curtis allowed that, under the existing Constitution, state governments could affirm or deny the state citizenship of free Black residents. Contrary to Taney, however, he hewed to the inclusive common-law tradition, affirming that "as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States" and should enjoy the Article IV "privileges and immunities" of citizenship "throughout the United States, under and by force of the national compact."[54]

Curtis also made plain that Taney had provided an incomplete and thus misleading account of U.S. history, and corrected the record. "In five of the thirteen original States, colored persons then [at the Founding] possessed the elective franchise, and were among those by whom the Constitution was ordained and established."[55] Reiterating a point long made by Black activists, Curtis observed there was no color line, real or implied, in the Constitution. "[T]hat the Constitution … was made exclusively for the

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[52] *Id.* at 576 (Curtis, J., dissenting).
[53] *Id.*
[54] *Id.* at 588, 580.
[55] *Id.* at 582.

white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity."[56]

Justice John McLean also dissented from Taney's opinion. In his view, citizenship derived from birth: "Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen."[57] In the wake of *Dred Scott*, some state and federal judges followed the thinking of Curtis and McLean and limited the applicability of Taney's decision, finding free Black Americans when born in the United States were indeed U.S. citizens.[58]

C. Black activists gained important allies who reinforced their birthright interpretation and rejected Taney's *Dred Scott*.

Black activists missed no opportunity to condemn Taney's *Dred Scott* and never abandoned their claim to be birthright citizens. Frederick Douglass, an abolitionist, statesman, and veteran of the Colored Conventions, declared the ruling "an open, glaring, and scandalous tissue of lies." Taney, Douglass urged, "can do many things, but he cannot … change the essential nature of things…." Douglass declared, "[t]he glorious birthright of our common humanity, will become the inheritance of all the

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[56] *Id*.
[57] *Id*. at 531 (McLean, J., dissenting).
[58] Jones, *Birthright Citizens*, *supra* note 11, at 134–36.

inhabitants of this highly favored country."[59] A group of Black residents of Boston and its vicinity also lambasted the decision, writing in a memorial to the state legislature: "To deny that those who are native-born and personally free … are, or can be, citizens of the United States, in accordance with the plain meaning of the Constitution, is to outrage the common sense of mankind, and most wickedly to pervert judgment."[60]

The claims of free Black activists captured the attention of emerging leaders in the new Republican party, including Salmon Chase and John Bingham of Ohio, Henry Wilson and Charles Sumner of Massachusetts, William Seward of New York, and Abraham Lincoln and Lyman Trumbull of Illinois.[61] Those Republicans and others encountered Black activists' speeches, published texts, petitions, and lobbying efforts. Many of them adamantly disagreed with the direction in which Taney was trying to take the country.

Lincoln spoke out immediately against Taney's *Dred Scott*, calling the decision tainted by "partisan bias" and "based on assumed historical facts which are not really true."[62] In the same moment, Lincoln

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[59] Frederick Douglass, Speech on the Dred Scott Decision (May 1857), *in* Two Speeches, by Frederick Douglass, 1857, at 27–46, teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision-2/.

[60] *Meeting of the Colored Citizens of Boston*, The Liberator, Feb. 26, 1858.

[61] *See, e.g.*, Masur, *supra* note 14, at 150–51, 217 (Seward); 192–94, 199, 201–202, 211, 320 (Chase); 202, 266 (Bingham); 316–17 (Trumbull); 183–84, 261 (Wilson); 281 (Lincoln).

[62] Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* 2 Collected Works of Abraham Lincoln, at 401,

was advancing his political career by publicly challenging incumbent Democratic U.S. Senator Stephen Douglas. Douglas vociferously supported Taney's decision and, in a widely-reprinted speech, insisted that the signers of the Declaration of Independence had "referred to the white race alone, and not to the African, when they declared all men to have been created equal—that they were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain."[63]

Lincoln responded that if Black Americans could be excised from the Declaration's sweeping promise that "was held sacred by all, and thought to include all," then so too could other groups of U.S.-born people who were not descended from British subjects.[64] He linked the fate of Black Americans and immigrant groups, noting the necessity of a universal definition of citizenship that excluded neither. Estimating that "perhaps half" of all Americans were not "descended by blood" from British subjects who were present at the nation's founding, Lincoln lauded the "men who have come from Europe—German, Irish, French and Scandinavian."[65] They and their

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https://quod.lib.umich.edu/l/lincoln/lincoln2/1:438?rgn=div1;view=fulltext.

[63] *Remarks of the Hon. Stephen A. Douglas, on Kansas, Utah, and the Dred Scott Decision, delivered at Springfield, Illinois, June 12, 1857* (Chicago, 1857), at 9, https://www.loc.gov/resource/gdcmassbookdig.remarksofhonstep00doug/?sp=14&st=image&r=-1.326,0.079,3.652,1.654,0.

[64] Lincoln, *supra* note 62, at 404.

[65] Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), *in* 2 Collected Works of Abraham Lincoln, at 499, https://quod.lib.umich.edu/l/lincoln/lincoln2/1:526?rgn=div1;view=fulltext.

American-born descendants, Lincoln argued, found connection with the United States through the Declaration's promise that "all men are created equal." That phrase was the "electric cord … that links the hearts of patriotic and liberty-loving men together," regardless of whether they were descended from the nation's Anglo founders.[66]

Lincoln urged white Americans not to be misled into believing that "we should not care about" attacks on Black citizenship. The arguments that men like Taney and Douglas proffered would "not stop with the negro," Lincoln warned. "I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle[,] and making exceptions to it[,] where will it stop. If one man says it does not mean a negro, why not another say it does not mean some other man?"[67]

In 1857, when Lincoln connected the *Dred Scott* decision with the fate of other immigrants in the United States, he was also taking a position in a debate within the Republican party on how much to accommodate nativists and nativism. Questions associated with immigrants, naturalization, and citizenship had roiled American politics for years. From 1845 to 1854, approximately 2,900,000 immigrants landed in the United States—raising the percentage to a new high of 14.5 percent of the nation's total population.[68] Between 1855 and 1860, Republican leadership, including Lincoln, sidelined

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[66] *Id*. at 500.
[67] *Id*.
[68] Tyler G. Anbinder, *Nativism and Slavery* 3 (1992).

their party's nativist thinking.[69] The party's 1860 platform exemplified an inclusive perspective on the citizenship of immigrants, declaring opposition "to any change in our naturalization laws or any state legislation by which the rights of citizens hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad."[70]

The Lincoln administration, assuming office in 1861, continued to echo the inclusive interpretation of national citizenship long advocated by Black Americans.[71] In 1862, Treasury secretary Salmon Chase, a long-time opponent of Ohio's Black Laws, saw one such opportunity when a question about the citizenship of a free Black ship captain made its way up the Treasury Department's chain of command.[72] Chase prompted U.S. Attorney General Edward Bates to issue an opinion declaring the Lincoln administration's position on Black citizenship.[73] Bates plainly set forth his concern: "Who is a citizen? What constitutes a citizen of the United States?"[74]

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[69] Eric Foner, *Free Soil, Free Labor, Free Men* 241–56 (1995).

[70] Republican Party Platform of 1860 (May 17, 1860), https://www.presidency.ucsb.edu/documents/republican-party-platform-1860; *see also* Foner, *supra* note 69, at 257-258. In 1860, Republicans in the House also consolidated around a homestead bill that "allowed aliens to claim free land, in preference to the Senate version limiting benefits to citizens." *Id*. at 256.

[71] Foner, *supra* note 69, at 280–86, 288.

[72] *Id*. at 281–82.

[73] *Id*.

[74] 10 U.S. Op. Att'y Gen. 382, 383 (1862).

Bates spurned Taney's *Dred Scott* decision as "an entire mistake," and echoed the claims of Black activists in the Colored Conventions: "Every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the '***natural-born***' right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance."[75] Bates underscored that the citizenship status of a U.S.-born child was entirely distinct from that of the parents: "It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law."[76]

Black activists were encouraged that the Lincoln administration affirmed their long-held position. In 1864, John Jones, a leading Illinois activist, urged voters to repeal the state's Black Laws, arguing, as the Black Convention movement had for decades, that the Declaration of Independence and the Constitution supported universal birthright citizenship. He declared: "I think the mere fact of mentioning the decision of Attorney General Bates upon the subject of our citizenship … establishes our

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[75] *Id*. at 394; Jones, *Citizenship*, *supra* note 10, at 231; Masur, *supra* note 14, at 283–86.

[76] Bates opinion, *supra* note 74, at 399; Jones, *Citizenship*, *supra* note 10, at 231.

point."[77] At a national convention in 1864, Ohio delegate John Mercer Langston similarly lauded Bates' opinion as "a complete answer to the arguments and cavils against us."[78]

III. The Framers Constitutionalized The Universal View Of Birthright Citizenship That Free Black Americans Advanced And The Common Law Guaranteed.

Petitioners' truncated and misleading account of the *Dred Scott* decision—and failure to consider the advocacy of free Black Americans and the position of the Republican party—thus misrepresents the historical context in which the Framers developed their view of citizenship. The Framers had witnessed the dilemmas faced by ***free*** Black Americans and had learned from their decades of activism. The Framers had also participated in intensive prewar debates about the impact of immigration from abroad. Drawing on their understanding of the world in which they lived and of the constitutional questions laid bare by the crisis that led to the Civil War, the Framers set out to place the question of who is a citizen beyond the reach of politics and prejudice.

Legislators in the 39th Congress understood the problems free Black Americans had faced because their birthright citizenship was not universally

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[77] John Jones, *The Black Laws of Illinois, and a Few Reasons Why They Should be Repealed* 4, 8 (Chicago, 1864).

[78] Minutes from Proceedings of the National Convention of Colored Men, Held in Syracuse (Oct. 4–7, 1864), at 15, *in* Bell, *supra* note 30, https://omeka.coloredconventions.org/items/show/282; Jones, *Citizenship*, *supra* note 10, at 232.

recognized. In the House, John Bingham reminded his colleagues that South Carolina had disregarded the Constitution's Article IV "privileges and immunities" guarantee when its residents drove away "the honored representative of Massachusetts, who went thither upon the peaceful mission of asserting … the rights of American ***citizens***."[79] Senator Lyman Trumbull stated his belief that "persons of African descent, born in the United States, are as much citizens as white persons who are born in the country." Lamenting that "the people" of the slave states had "not regarded the colored race as citizens," he insisted it was time "for Congress to declare, under the Constitution of the United States, who are citizens."[80] These Republicans, among the Framers of the Fourteenth Amendment, believed the citizenship status of persons born in the United States must be defined by enduring and inclusive constitutional principles, not by political authorities.

The U.S. Senate debate on the Fourteenth Amendment's birthright citizenship clause reveals that, contrary to Petitioners' claims, the clause was understood to be broad-reaching.[81] A Joint

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[79] Cong. Globe, 39th Cong., 1st Sess. 158 (1866) (emphasis added). Bingham had said in 1859, when discussing admission of Oregon as a state, "[C]itizens of the United States are the free inhabitants, born and domiciled within the United States, or naturalized under the laws thereof." He added, "It is, sir, the public law of the civilized world, that every free man is entitled to live in the land of his birth." *See* Cong. Globe, 35th Cong., 2d Sess. 983, 985 (1859).

[80] Cong. Globe, 39th Cong., 1st Sess. 475; Masur, *supra* note 14, at 316–17.

[81] On these debates generally, *see* Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 Am. U. L. Rev. 331 (2010).

Committee on Reconstruction was charged with drafting the Fourteenth Amendment, and a version of it passed the House, though without the now-familiar birthright citizenship clause. As the Senate began discussion of the Amendment, Senator Jacob Howard of Michigan, a member of the joint committee, reflected on the term "citizen" as used in the 1787 Constitution: "It is not, perhaps, very easy to define with accuracy what is meant by the expression, 'citizens of the United States,' although that expression occurs twice in the Constitution."[82]

Ohio's Benjamin Wade weighed in: "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."[83] Wade had heard arguments to the contrary yet insisted that "persons born in the United States" were assuredly citizens.[84] William Fessenden of Maine probed the limits of Wade's view: "Suppose a person is born here of parents from abroad temporarily in this country."[85] Wade held fast to his broad interpretation, admitting only a narrow concession: a "fiction of law" excluded "the children of foreign ministers" from birthright.[86]

Senator Howard insisted only an additional clause in the Amendment would resolve the matter and suggested the words that would become the basis for the first clause of the Fourteenth Amendment: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United

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[82] Cong. Globe, 39th Cong., 1st Sess. 2765.
[83] *Id.* at 2768.
[84] *Id.*
[85] *Id.* at 2769.
[86] *Id.*

States and of the States wherein they reside."[87] Howard explained what those words meant: "Simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."[88] The measure, Howard stated, was designed to be both decisive and inclusive; it "settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States."[89] Howard noted only conventional exceptions: the children of diplomats—"[f]oreigners, aliens, who belong to the families of ambassadors or foreign ministers"—and "Indians … who maintain their tribal relations."[90]

Missouri's John Henderson took direct aim at Taney's *Dred Scott* decision, which he argued had "abandoned the Constitution and the Declaration of Independence" and misinterpreted history. The Amendment's Birthright Citizenship Clause, he said, "will leave citizenship where it is now. It makes plain only what has been rendered doubtful by the past action of the Government."[91]

The discussion that followed went further still: Legislators clarified that the birthright citizenship clause would not only nullify Taney's decision, it would settle any lingering questions about the children of immigrants. It had been widely assumed that the U.S.-born children of immigrants from

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[87] *Id.* at 2890.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 3031.

Europe and Britain were birthright citizens. But Senator Edgar Cowan of Pennsylvania wondered aloud if the Framers really meant that the children of non-white immigrants would also be birthright citizens, challenging Howard: "Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?"[92]

Cowan envisioned further implications: "Is it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race?"[93] Might California face "a flood of Australians or people from Borneo, man-eaters or cannibals"?[94] Cowan gave full voice to xenophobia laced with scientific racism: "It is utterly and totally impossible to mingle all the various families of men, from the lowest form of the Hottentot up to the highest Caucasian, in the same society."[95] Howard's proposed clause would prevent states from excluding such persons, Cowan warned: "If the mere fact of being born in the country confers that right [of citizenship], then they will have it; and I think it will be mischievous."[96]

Cowan thought California Senator John Conness might agree with him, as California was the epicenter of Chinese immigration into the United States. But Conness, who had himself immigrated from Ireland at age 15, insisted that the children of Chinese immigrants must be regarded as birthright

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[92] *Id.* at 2890.
[93] *Id.* at 2890–91.
[94] *Id.* at 2891.
[95] *Id.*
[96] *Id.* Thomas Hendricks of Indiana also expressed fears about the egalitarian impact of birthright Citizenship. *See id.* at 2939.

citizens: "I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States entitled to equal civil rights with other citizens of the United States."[97] Conness understood "citizen" in inclusive terms: "the children of ***all parentage whatever***."[98] He urged Cowan "not to give himself any trouble about the Chinese," and mocked fears of "the invasion of Pennsylvania by Gypsies."[99] The only invasion of concern to Pennsylvania, Conness reminded the Senate, was that of rebels during the recent Civil War. As for California: "We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others."[100]

After some minor changes to Howard's proposed language—including one from Fessenden, who came around to support the measure—Congress passed the Fourteenth Amendment as we know it today. The Citizenship Clause extended, in express terms, to "all persons." The advocacy of free Black Americans, who had illuminated what it meant to be denied birthright citizenship and fought for an inclusive vision, helped bring the nation to this point. The Framers understood that the creation of a bright-line rule of citizenship would also guard against the concern Lincoln had expressed in the 1850s—that the

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[97] *Id.* at 2891.
[98] *Id.* (emphasis added).
[99] *Id.* at 2892.
[100] *Id.*

denial of citizenship to one group of U.S.-born people would likely lead, eventually, to the denial of that right to members of other groups. Lincoln had said in 1863, "It is easy to see that under the sharp discipline of civil war the nation is beginning a new life."[101] Part of that new life was the rule that, with a small number of well-defined exceptions, everyone born in the United States was a citizen of the United States. The Fourteenth Amendment guaranteed birthright citizenship as free Black Americans had imagined: inclusive of all.

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In 1869, Frederick Douglass expressly endorsed the Fourteenth Amendment's capacious terms—ones that regarded Black Americans and the children of immigrants alike as citizens—in a speech titled "Composite Nation."

Douglass understood that the nation had been transformed by the Civil War and the abolition of slavery, and he knew it would continue to be shaped by immigration from all corners of the world. He explained: "Our people defy all the ethnological and logical classifications … we range from black to white, with intermediate shades which, as in the apocalyptic vision, no man can name or number." He envisioned a future in which Black Americans and immigrant communities, as well as descendants of the nation's

[101] Abraham Lincoln, Third Annual Message, (Dec. 8, 1863) (transcript available at https://www.presidency.ucsb.edu/documents/third-annual-message-9).

founders, would all participate together in the body politic:

> [T]he right of locomotion; the right of migration; the right which belongs to no particular race but belongs alike to all and to all alike. It is the right you assert by staying here, and your fathers asserted by coming here. It is this great right that I assert for the Chinese and the Japanese, and for all other varieties of men equal with yourselves, now and forever…. I want a home here not only for the negro, the mulatto and the Latin races, but I want the Asiatic to find a home here in the United States, to feel at home here, both for his sake and for ours…. And here I hold that a liberal and brotherly welcome to all who are likely to come to the United States is the only wise policy which this nation can adopt.[102]

Douglass and other free Black Americans knew precisely why a sweeping, democratic birthright principle needed to be written into the Constitution: without it, the whims of political authorities would continue to determine citizenship, and large groups of U.S.-born people might be deemed non-citizens and therefore subject to removal or banishment from the country, to arbitrary arrests, to exclusion from courts, and to other abuses. The birthright principle constitutionalized in 1868—which Douglass and his

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[102] Frederick Douglass, Composite Nation, Delivered in the Parker Fraternity Course (Boston 1867 [*sic*]), https://www.loc.gov/item/mss1187900407/.

community of free Black Americans had advocated for decades before the Civil War—aimed to make a nation in which ***every person*** born in the United States is a citizen of the United States, no matter their status, color, heritage, means of entry, or immigration status of their parents.

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling below.

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