

THE SPECULATIVE ORIGINS
OF U.S. CITIZENSHIP



CARRIE HYDE

CIVIC LONGING







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HARVARD UNIVERSITY PRESS

Cambridge, Massachusetts & London, England / 2018

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Printed in the United States of America

First printing

Frontispiece: Washington Peale, *The three days of May 1844. Columbia mourns her citizens slain* (Philadelphia: Colon & Adriaance, 1844). Library of Congress Prints and Photographs Division, Washington, DC. LC-USZ62-46533.

Library of Congress Cataloging-in-Publication Data

Names: Hyde, Carrie, 1982– author.

Title: Civic longing : the speculative origins of U.S. citizenship / Carrie Hyde.

Description: Cambridge, Massachusetts : Harvard University Press, 2018. |

Includes bibliographical references and index.

Identifiers: LCCN 2017017585 | ISBN 9780674976153 (alk. paper)

Subjects: LCSH: Citizenship—United States—History—18th century. |

Citizenship—United States—History—19th century. | Citizenship—United States—Philosophy—History.

Classification: LCC JK1759 .H94 2018 | DDC 323.60973—dc23

LC record available at <https://lcn.loc.gov/2017017585>

Jacket design: Jill Breitbarth

Jacket art: Engraving: View of the new market from the corner of Shippen & Second streets in Philadelphia, 1787 by James Thackara, 1767–1848/courtesy of the Library of Congress. Swallow by James Carter Beard, 1837–1913/courtesy of the Library of Congress.

It is a singular fact that, unlike all other nations, this nation has yet a question as to what makes or constitutes a citizen. The great basis of our civil architecture is yet unsettled.

—Wendell Phillips, antislavery speech at Cooper Institute (1865)

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The Retroactive Invention of Citizenship

A Textual History

As the Constitution of the United States does not define the word *citizen*, the definition must be sought in the exact meaning of the word itself, altogether independently of the Constitution. Herein, after all, lies the great and only safeguard against the corruption or centralization which grow out of a written constitution. Language, and words with their distinct meaning at the time of its adoption are the only record to which we can safely go back as a barrier against new and forced or false interpretations.

—James McCune Smith, “Citizenship” (1859)

I am aware that some of our most learned lawyers and able writers have allowed themselves to speak upon this subject [citizenship] in loose and indeterminate language. They speak of “all rights and immunities guaranteed by the Constitution to the citizen” without telling us what they are. They speak of a man’s citizenship as defective and imperfect, because he is supposed not to have “all the civil rights,” (all the *jura civitatis*, as expressed by one of my predecessors,) without telling what particular rights they are nor what relation they have, if any, with citizenship.

—U.S. Attorney General Edward Bates, *Opinion on Citizenship* (1862)

THIS BOOK BEGAN with a relatively straightforward question, raised by Nathaniel Hawthorne’s use of “citizen” in the preface to *The Scarlet Letter* (1850). When the narrator declares, “I am a citizen of somewhere else”—in a passage that is full of the classic tropes of Hawthornian fiction (a “village in cloud-land” seen through the “haze of memory” and peopled by “imaginary inhabitants”)—what sort of political membership, rights, and duties did readers understand him to be giving up?¹ And insofar as the narrator’s identification as “a citizen of somewhere else” can be understood as a kind of “literary citizenship”—a symbolic allegiance to the imaginative realm of the “republic of letters”—how might this formulation help illuminate the political power and possibilities of literature? What is the

relationship between the imagined communities forged in fiction and the everyday institutional and imaginative life of citizenship? I return to these last two questions in the following chapters. This chapter sets the foundation for the arguments that follow by outlining the broader interpretative challenges and methodological opportunities that this initial inquiry raised. When I turned to the law in the hope of gaining a better sense of how Hawthorne and other writers were representing and/or revising the dominant legal sense of the term “citizen,” I was surprised (if not initially a little disappointed) to find that there was no single “ready-made” legal definition of citizenship in this period, which might offer a self-contained gloss of this keyword. To ventriloquize an instructive and extraordinary disclosure in U.S. Attorney General Edward Bates’s 1862 *Opinion on Citizenship* (to which I soon will be turning), “I have been often pained by the fruitless search in our law books and the records of our courts, for a satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase.”²

So what did Americans understand themselves to mean when they spoke of “citizenship” in the period between the Revolution and the Fourteenth Amendment? And when they did not use this term, what assumptions, convictions, and aspirations shaped the way they thought and wrote about political membership? To begin to answer these questions, this chapter carefully distinguishes the *term* “citizen” from the legal *category* of citizenship (codified with the Fourteenth Amendment) and also from the philosophical *ideal* of consensual allegiance (prospectively envisioned in the Age of Revolutions). The definitional poverty of “citizenship” in early U.S. law, I argue, did not inhibit its cultural idealization; it actually facilitated it. The terminological pliancy of citizenship in early U.S. law helped establish the citizen as the preferred cultural palimpsest for theories of political membership and rights, which could, initially, have coalesced around a number of different titular personages (whether subject, human, person, etc.). With few clearly specified boundaries, “citizenship” was a uniquely powerful terminological cipher for a range of political ideals and agendas.

After discussing the role the French Revolution played in establishing the terminological association between the term “citizen” and a newly empowered rights-bearing subject, the chapter moves backward from Attorney General Bates’s “fruitless search” for a definition of citizenship in the 1860s to the foundational legal texts and debates to which he and other political commentators turned in the hope of answering questions that, as many acknowledged, had no officially recognized answers. Finally, the chapter concludes with a reexamination of Chief Justice Roger B. Taney’s selective reconstruction of the legal history of citizenship in his infamous ruling

against black citizenship in the *Dred Scott* case (1857). I use Taney's influential opinion as an object lesson in the interpretative dangers—and also ethical responsibilities—that twenty-first-century readers of "citizenship" share in as inheritors of the speculative prehistory of citizenship.

The Terminological Origins of the Subject/Citizen Revolution

The word "citizen" evokes a constellation of meanings, both practical and emotive. It is a designation that often has seemed to be a privilege in and of itself. To be a citizen—and perhaps more importantly to not be a "subject"—is presumably to enjoy some form of political self-authorization.³ Understood through the liberatory paradigm of American independence, the practical political achievement of the Revolution was not only the collective sovereignty of the United States as a country, but the newly empowered form of consensual political membership to which it ostensibly gave rise.⁴ This oppositional conception of "citizenship," as an emancipation from "subjecthood," provides the narrative hinge for one of the first authoritative accounts of U.S. citizenship, David Ramsay's *Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States* (1789). "The principle of the government being radically changed by the revolution, the political character of the people was also changed from subjects to citizens," Ramsay writes. "The difference is immense," he continues. "Subject is derived from the latin words, *sub* and *jacio*, and means one who is under the power of another; but a citizen is an unit of a mass of free people, who, collectively, possess sovereignty."⁵ For Ramsay, the difference between subjecthood and citizenship is immanent to the words themselves. To be a subject is to be marked by one's subjection to another, while a citizen is the sovereign unit of a form of territorially delimited collectivity, which exercises a mediated kind of self-rule through the election of kindred representatives.

Ramsay's recourse to etymology allows him to sidestep the juridical perplexities of "citizenship." He presents the fabular transformation of British subjects to U.S. citizens as an artifact of linguistic transformation rather than legal process. "A nation was born in a day. Nearly three millions of people who had become subjects, became citizens."⁶ Ramsay enumerates the modes of acquiring citizenship, but they take the form of philosophical principles rather than legal procedure. Access to citizenship, for example, is open to "parties to the original compact, the declaration of independence," and by oaths of fidelity, "tacit consent and acquiescence."⁷ Ramsay's theorization of political membership as the outgrowth of compact and

consent echoes the voluntary form of allegiance set out in John Locke's influential *Second Treatise on Government* (1690), which identifies society as an outgrowth of an artificial (and so dissolvable) contract that supersedes the turbulent state of nature. According to Locke, since men enter society for the protection of their property, "whenever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience."⁸ For Locke, government is an institution of convenience that loses its value (and legitimacy) as soon as it infringes on the natural rights of its constituents. It is this notion of the voluntary and so amendable nature of allegiance that defines Locke's often-remarked philosophical importance for the American Revolutionary ethos—as it is encapsulated in the Declaration of Independence, which directly parallels select arguments from Locke's *Second Treatise* in several places.⁹

As one of the first major historians of the American Revolution, Ramsay has, both directly and indirectly, shaped the way many Americans came to understand the meaning of Independence.¹⁰ Yet Ramsay's recognizably Lockean narrative is as misleading as it is iconic. The conceptual importance of Locke for U.S. intellectual history is undeniable, but as we will see when we turn to the legal history of expatriation, the voluntary, contractual theory of allegiance that Locke theorizes had almost no juridical traction in U.S. law.¹¹ Moreover, we risk anachronism when we speak about Locke's philosophical contribution to the debates surrounding the Revolution in the language of "citizen" or "citizenship"—terminology that Locke does not use at any point in either of his influential treatises on government.¹² Locke provides the conceptual framework for something that Jean-Jacques Rousseau and others later identified as "citizenship," but which few writers spoke of in this language prior to the French Revolution. When Rousseau published his own take on contract theory seventy years after Locke, in *Social Contract* (1762), he retroactively fixed on "citizen" as a specialized designation for the sovereign political agent whose entrance into society was voluntary and self-willed. As Rousseau recognized, this specialized usage of "citizen" had little precedent in previous political philosophy. "The true meaning of this word ['citizen']," Rousseau mused in a footnote, is almost entirely lost on modern man. . . . I have not found in my reading that the title of *citizen* has ever been given to the subjects of a prince, not even in ancient times to the Macedonians or in our own time the English, although they are closer to liberty than all the others."¹³

Ramsay's strong differentiation of "subject" and "citizen" does not track back to Locke. It registered a terminological shift that was just beginning

to take root when he published his dissertation in 1789, the same year as the French Declaration.¹⁴ The idealized association of the term "citizen" with an all-empowered rights-bearing subject was, by and large, a transatlantic aftershock of the "citoyen" of the French Revolution. During the American Revolution, "citizen" and "subject" were used as roughly synonymous terms.¹⁵ It was only after the American Revolution—and in dialogue with the revolutions that followed—that this familiar terminological distinction gradually gained traction in colloquial speech. Documents like the French Declaration of the Rights of the Man and of the Citizen (1789) helped position "citizen" as a differential term for the rights-bearing subject. However, the initial, more generic sense of "citizen" as a designation of membership (synonymous with "subject") persisted well into the nineteenth century.¹⁶

In the early United States, "citizenship" was an exceptionally malleable word. It offered a flexible conceptual rubric for a range of political ideals and disappointments. The language of citizenship was sometimes employed in ways that sound familiar in retrospect (as, for example, in the phrase the "American citizen"), but these invocations tend to mislead the contemporary reader because they make the early rhetorical experiments in citizenship seem more familiar (and nationalistic) than they really are.¹⁷ This sense of continuity, to some extent, is endemic to term-based analysis. Terminological continuities easily obscure conceptual dissimilarities. In the early United States, citizenship was not yet a fully articulated ideological concept. It was, to borrow Raymond Williams's formulation, an emergent "structure of feeling . . . at the very edge of semantic availability."¹⁸ The uneven development of citizenship in the eighteenth and nineteenth centuries is the history of a term made concept. This erratic transformation has often been neglected, because it is difficult not to read the modern concept of citizenship back into its nascent iterations.¹⁹

"Citizenship" as Term and Concept

Citizenship's terminological prominence and juridical impoverishment in the early United States did not go unnoticed. It prompted confusion, disappointment, and also fantasy. "Who is a citizen? What constitutes a citizen of the United States?" Attorney General Edward Bates queries in his 1862 *Opinion on Citizenship*.²⁰ Prompted by a letter from Secretary of the Treasury Salmon Chase that inquired "whether or not colored men can be citizens of the United States," Bates grapples with the definitional ambiguities that attended the early conceptualization of citizenship well into the

1860s. Bates's answer to the question of black citizenship is thus another set of questions:

Who is a citizen? What constitutes a citizen of the United States? I have been often pained by the fruitless search in our law books and the records of our courts, for a satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decisions in our courts, nor by the continued and consentaneous action of the different branches of our political government. For aught I see to the contrary, the subject is now as little understood in its details and elements, and the question as open to argument and to speculative criticism, as it was in the beginning of the government. Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word, or the constituent elements of the thing we prize so highly.²¹

Coming from the attorney general, seventy-five years after the ratification of the Constitution in 1787, this reflection on the residual ambiguity of the central term for political membership is astonishing. Bates dramatizes the difficulties endemic to any comprehensive account of citizenship in the early United States: the "fruitless search" for its definition in law books, the inconstant course of judicial decisions, its conceptual pliancy to "speculative criticism." And yet, as the final line of the passage makes clear, the uncertain meaning of citizenship in early U.S. law did not diminish its significance; it only made its benefits more inestimable.

Bates acknowledges the many unanswered questions about citizenship in early U.S. law, but this does not stop him from answering Chase's initial question about "whether or not colored men can be citizens of the United States." Bates concludes that "free m[e]n of color" who are "born in the United States" are "citizens" of it.²² Bates's conclusion that free men of color were automatically citizens by virtue of their birth within the United States breaks with the precedent-setting U.S. Supreme Court ruling in *Dred Scott vs. Sandford* (1857), in which the majority found that individuals of African American descent were not eligible for citizenship. Interestingly, Bates does not discuss Judge Taney's ruling in his own inquiry into black citizenship. Bates does not focus on how others have interpreted the law. Unlike Taney, whose opinion hinged on his extratextual invocation of "original intent," Bates is not interested in what the founders may have intended or how the founding documents have been read at different moments in time. Bates is an insistent textualist. "Our nationality," Bates emphasizes, was created and our political government exists by written law, and inasmuch as that laws does not exclude persons of that [African] descent, it follows inevitability that such persons, born in the country,

must be citizens."²³ Adopting a literalist reading practice that was popular among abolitionists, Bates invokes the letter of the law—in this case, its definitional reticence about citizenship—to counteract prejudicial inferences about the racial limits of citizenship.²⁴ For Bates, and for many others in the early United States, the under-definition of citizenship was not a political liability, but an opportunity.

Bates's *Opinion* never fully resolves the larger questions about citizenship that it so elegantly poses. However, it offers a useful definition of the affiliatory problems that "citizenship" constellates. In a clarification of the most basic connotations of the term in the period, Bates explains that "the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other."²⁵ Allegiance did not always guarantee protection, as Frederick Douglass and others pointed out.²⁶ Yet the expectation that the relationship between allegiance and protection was (or ought to be) "reciprocal" was a promise that "citizenship" regularly demarcated in this period.²⁷ Throughout this book, I use the term "citizenship" in the structural sense of the term identified by Bates, in order to designate the affiliatory concerns that revolve around the interlocking problems of protection (privileges, immunities, rights) and allegiance (loyalty and duties). With Bates's basic structural definition in place, we can better appreciate the partial and plural meanings that "citizenship" took on in early U.S. law and in the "speculative criticism" that Bates mentions in passing—and which this book identifies as formative imaginative and political resources in the cultural development of citizenship in the era of its legal nascence.

Needless to say, "citizenship" continues to elicit intense passions and debate in the twenty-first century—and it will carry somewhat different meanings for each reader of this book. So before turning to the specific legal texts that Bates would himself have consulted in his search for a definition of citizenship, I want to offer a brief overview of the four basic innovations of the form of political membership that came into being with the two-part juridical reconstitution of "citizenship," which I collectively identify as the "twin legal reformations of 1868": the Fourteenth Amendment and the 1868 Expatriation Act, passed the day before the ratification of the Fourteenth Amendment. I will begin with the two most familiar of these changes, ushered in by the Fourteenth Amendment. First, the amendment's Citizenship Clause made citizenship available to all African-American men, regardless of their previous condition or ancestry (*jus sanguinis*, right of the blood), by establishing the territory of one's birth (*jus soli*, right of the

soil) as the natural foundation of political membership. Second, the Citizenship Clause established the primacy of federal citizenship over state citizenship. In so doing, it resolved long-standing debates about the primary unit of political membership, as well as the scope of the obligations and protections it structured. Third, in line with the federalization of citizenship, the Fourteenth Amendment's Privileges and Immunities Clause declared that "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."²⁸ This clause is crucial from the perspective of the terminological inconsistencies discussed in the next section, because it retroactively identified the rights enumerated in the Bill of Rights—not as generic rights of "the people"—but as constitutive rights of a newly substantive and federal juridical personage, the "citizen."

Finally—and of key significance for Chapter 4's reassessment of the politics of literary autonomy—the 1868 Expatriation Act belatedly formalized a model of "citizenship" that Ramsay prematurely lauded (and which scholars often still mistakenly take for granted): the notion that "citizenship," for those who enjoyed it, designated a newly voluntary form of political membership from the beginning. The iconic mythology of political consent is rooted in an overreliance on the Declaration of Independence, taken as an aspirational textual blueprint for the new government it helped authorize. The Declaration celebrates the collective right to "dissolve the political bands which have connected [one people] with another," but—as with many of its other universal claims, including the equality of "all men"—the right of individuals to voluntarily refuse allegiance was deeply contested in the decades that followed the Revolution.²⁹

The British common law doctrine of *indefeasible* (natural and perpetual) allegiance did not, in fact, end with British imperial rule. In the early United States, those who met the narrow qualifications for naturalization could *become* citizens, but the parallel and interconnected right to expatriate—and thereby voluntarily *relinquish* the reciprocal rights and duties that automatically extended to most native-born white men by virtue of their nativity—was a source of active debate. Virginia and its sister-state, Kentucky, were the only two states to explicitly recognize the right to expatriate in the early United States.³⁰ The Supreme Court tended to disfavor expatriation, but it was variously affirmed and denied in the lower courts.³¹

British common law provided the default framework for political allegiance in the early United States—and for the many questions that had not yet been addressed in U.S. legislation. In this respect, some continuity

between the models of political membership developed in each legal tradition was all but inevitable in a still burgeoning republic. However, the late recognition of the right to expatriate in 1868 was not an oversight of early legislators. In 1817, Congress considered the question of expatriation at length. After appointing a committee "to inquire into . . . the right of expatriation," the House of Representatives reviewed a bill in December 1817 "by which the right of citizenship may be relinquished."³² There were numerous objections to the bill: that allegiance to the state is natural and perpetual,³³ that federal legislation on the issue would infringe on state sovereignty,³⁴ and even that allowing expatriation would create a class of licentious outlaws "without home and destitute of country."³⁵ After much debate, the bill was rejected by a narrow margin (75 to 64).³⁶ Congress did not recognize the right to expatriate for another fifty years, when the 1868 Expatriation Act recognized "the inherent and inalienable right of man to change his home and allegiance."³⁷ Juridically speaking, the shift from the model of perpetual allegiance associated with British "subjecthood" to the defeasible (artificial and so dissolvable) model of voluntary political membership associated with Lockean social contract theory was—like the legal category of citizenship—a late development in U.S. legal history.

The 1868 Expatriation Act marked a shift away from the perpetual model of allegiance born of British common law. Yet the Fourteenth Amendment's solidification of the doctrine of *jus soli* did not itself mark a departure from the British model of political membership. It actually marked a *return* to a principle established in British law in 1608 with Sir Edmund Coke's influential ruling in Calvin's Case—the same case that established the doctrine of perpetual allegiance. Calvin's Case identified the territory in which one was born as the foundation of political membership, but it also understood this allegiance to be natural and perpetual—the main doctrine challenged by the 1868 Expatriation Act.³⁸ In this respect, the form of citizenship codified in the twin legal reformations of 1868 was both more and less like the form of political membership the American colonists had ceded in the Revolutionary War: from thence forward, the bonds of allegiance and the protections that extend from it were an automatic outgrowth of the territory of one's birth, but these reciprocal ties were now voluntary (and so relinquishable).

The precedential innovation of the Fourteenth Amendment was not in relation to British common law, but America's own feudal history. In formalizing a territorial conception of native allegiance—based on *jus soli*—the Fourteenth Amendment departed from the United States' historical investment in *jus sanguinis*, a model of citizenship by descent, which was integral to the genealogical structure of chattel slavery. The condition

of enslavement was passed matrilineally from enslaved mother to child—regardless of the race of the father.³⁹ The gendered transmission of slavery was mirrored by another, lesser-known, aspect of *jus sanguinis*: when children were born abroad to two white parents, the hereditary transmission of citizenship was effectively confined to patrilineal descent. Beyond the jurisprudential limits of the United States, citizenship only could be transmitted through white fathers who were U.S. citizens, and who had also been “residents” of the United States at one point. The 1790 Naturalization Act specified that “the right of citizenship shall not descend to persons whose *fathers* have never been resident in the United States.”⁴⁰ The enslavement of the mother may have trumped the legal personhood of the father within the institution of slavery, but when children were born outside of the territorial limits of the United States, the citizenship status of white women did little to secure the citizenship of their children. Children born abroad were not eligible for naturalization by virtue of their mother’s nativity.

The patrilineal transmission of citizenship abroad was one of the many effects of the legal doctrine of coverture, wherein the legal entitlements and obligations of married women were subsumed under their husband’s legal status. Coverture began to lose some of its force with the enactment of married women’s property acts beginning in 1839. Yet it persisted in different forms until 1992, when the Supreme Court finally abolished it in a ruling related to Planned Parenthood.⁴¹ The patrilineal transmission of citizenship abroad lost traction somewhat sooner. It was overturned in a 1934 statute, which recognized the equal civic capacity of women to transmit their citizenship to children born abroad.⁴² As even these few staggered developments remind us, the evolution of citizenship has never been free of ambiguities, nor have its developments been unqualified.

Citizenship’s Legal Nascence

Naturalization law is a useful starting place for retracing the juridical usages of “citizenship,” because the path to becoming a citizen through naturalization was more clearly and consistently defined than its formal features. Unlike most aspects of citizenship, which were presumed to fall within the scope of state regulatory power, naturalization was fully federalized from the beginning. By virtue of article I, section 8 of the Constitution, Congress enjoyed an unambiguous “power to establish a uniform rule of naturalization.”⁴³ In the early United States, Congress made quick and frequent use of its power to regulate which (and when) foreign-born persons

were eligible to naturalize as U.S. citizens. According to the first naturalization act, adopted in 1790, "any Alien being a free white person . . . of good character" who had resided in "the jurisdiction of the United States" for two years "shall be considered as a Citizen of the United States."⁴⁴ The 1790 act provided the template for subsequent naturalization acts, but residency requirements changed quickly and dramatically in the years that followed in response to shifting perceptions of the dangers of foreign influence. Indeed, the two-year residency requirement was almost immediately supplanted. The 1795 Naturalization Act extended the residency period to five years. Then, at the height of anxieties about the unruly and potentially seditious effects of francophone culture, Congress passed the Alien and Sedition Acts in 1798, extending the residency period to fourteen years. As the reactionary climate of these cascading revisions attest, Congress's power to change naturalization law, as and when it sees fit, has made it a uniquely volatile and responsive barometer of changing legislative assumptions and anxieties about access to citizenship.

Naturalization law witnessed some of the most explicit and also inegalitarian formulations of citizenship in early U.S. law. The openly exclusionary terms of early naturalization laws—which restricted the transmission of citizenship abroad to patrilineal descent and limited naturalization to "free white persons"—made explicit the inegalitarian assumptions that often lurked, unstated, in the background of debates about citizenship. Still, as Peter Coviello observes in a nuanced discussion of naturalization law, even the 1790 Naturalization Act does not offer an unequivocal formulation of white citizenship: "The Act does nothing to validate the civic status of white subjects [many of the propertied did not have the right to vote]; nor does it preclude the citizenship of non-white subjects already in the nation."⁴⁵ Naturalization laws zealously policed the line between aliens and citizens, but, as with many other negative formulations of citizenship, the juridical constitution of citizens as *not* aliens did not help to answer questions like Bates's, which sought to identify the internal meaning of citizenship. The specification of which non-natives could become citizens did not clarify the basis of political membership, whether by virtue *jus soli* or *jus sanguinis*, the perpetuity of political allegiance, or the specific protections and obligations that structured the reciprocal bonds of citizenship.

The under-definition of citizenship is fundamental to the Constitution, as originally ratified. As Bates and other commentators were uncomfortably aware, the Constitution "does not declare who are and who are not a citizen, nor does it attempt to describe the constituent elements of citizenship."⁴⁶ The eleven original references to "citizen(s)" in the Constitution are nominal rather than substantive. Traditionally, the Comity Clause (in article IV, sec-

tion 2) is understood as the most definitive of the original constitutional references to citizenship.⁴⁷ The Comity Clause extends “all Privileges and Immunities of Citizens in the several States” to the “Citizens of each state,” but it does not specify what these privileges and immunities are.⁴⁸ This omission was not an oversight. The reticence about citizenship’s meaning was integral to the delicate and fraught making of the Constitution. The Comity Clause’s vague allusion to “*all* Privileges and Immunities of Citizens in the several States” addressed an anxiety that was brought to a head in the context of debates about the Bill of Rights: the enumeration of rights, the founders recognized, had the potential to cut both ways—it solidified the rights specifically named, but it also, implicitly, delimited rights that might otherwise be presumed. In this spirit, James Wilson, Pennsylvania delegate in the Continental Congress, famously warned that the adoption of the Bill of Rights was not only “unnecessary” but also potentially “dangerous,” because the very existence of a list of rights implies that only explicitly enumerated rights are reserved for the people. Since very few people understand the “whole rights of the people, as men and as citizens,” Wilson stressed, it was best not to confine these rights to writing.⁴⁹ Wilson’s objections to adopting the Bill of Rights came to naught. However, in a broader sense, the desire for ambiguity he voiced prevailed. “Citizen,” appropriately, does not appear anywhere in the Bill of Rights. It uses the more generic designations of “the people” and “person.” The proliferation of nonequivalent designations in the U.S. Constitution and in the constitutions of the several states left more than ample interpretative leeway for the speculative constitution of citizenship in the years to come.

The Constitution’s definitional reticence, it should be said, was not limited to citizenship. Many of the beliefs and doctrines that shaped early debates about the state and federal government (and that continue to shape both today) do not appear in the Constitution proper. These principles appear instead in legislative enactments, judicial opinions, and a number of other extra-constitutional legal documents.⁵⁰ Part of what made the Constitution’s reticence about citizenship uniquely problematic was that ancillary legal precedents were in relatively short supply when it came to citizenship—and those that existed often were in direct tension with one another because of unresolved questions about the relationship between federal and state governments. In theory, state and federal citizenship—as presented in the Comity Clause—were interlocking and complementary forms of political membership, whose privileges and immunities were transferable across state lines. Yet in practice, this dual model of allegiance created deep schisms between what were, in fact, several distinct legal traditions.⁵¹

The definitional problem of citizenship in early U.S. law was not merely the absence of a clear statutory definition of citizenship, but also the varied, partial meanings that were assigned to it within a nascent and exceptionally heterogeneous legal tradition. Of the eight state constitutions adopted in 1776—in New Hampshire, South Carolina, Virginia, New Jersey, Delaware, Pennsylvania, Maryland, and North Carolina—only Pennsylvania and North Carolina even use the term “citizen.” And they only use the term once each in passing; the Constitution of North Carolina states that “any foreigner” who settles in the state and takes an oath of allegiance to it will be “deemed a free citizen” after a year of residence;⁵² and the Pennsylvania Constitution stipulates that no man can “be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.”⁵³ The language of citizen appears more regularly in subsequent state constitutions, but as with the U.S. Constitution, the use of “citizen” in these documents was usually nominal rather than substantive. Even if we were to assume (rather reductively) that all references to “free inhabitants,” “freeman,” property-holding “inhabitants,” and so on, are roughly interchangeable ways of characterizing the citizens of each state, these kinds of terminological equivalencies do not yield a unified model of citizenship.

The legal requirements for being a citizen, and the protections it guaranteed, were ill-defined and varied from state to state and from year to year. There is thus no simple answer to the question of whether women were deemed citizens in this period.⁵⁴ As scholars often note, from 1776 to 1807 women briefly enjoyed the right to vote in New Jersey. The 1776 Constitution of New Jersey granted suffrage to “all inhabitants . . . worth fifty pounds.” The gender-neutral use of the term “inhabitants” made it possible for women to vote, but the property requirement further limited suffrage in practice. Under the common law doctrine of coverture, married women could not hold property, so even during the brief period of female suffrage in New Jersey, only *unmarried* women could vote.⁵⁵

Common law was the default precedential framework for adjudicating questions not treated explicitly in U.S. law, so in the absence of provisions that explicitly empowered women, the British common law doctrine of coverture was persistent and difficult to dislodge. Still, as recent historians of women’s rights have begun to discuss, coverture found countervailing precedents in some rather unlikely places. Under civil law, the Roman-inspired system of law practiced in the Spanish and French empires, women enjoyed a host of rights foreclosed in British common law—including the right to hold property, make contracts, and sue.⁵⁶ As a result, in some cases,

U.S. imperial expansion and incorporation of Spanish and French colonies resulted in internally fractured amalgamations of Anglo/Continental law that partially undercut the doctrine of coverture. Historian Laurel Clark captures these tensions with nuance in her paradigm-shifting reexamination of women's property rights in early Florida. As Clark observes, "American expansion into Florida yielded an unintended consequence for marital property law: civil law marital property rights were upheld, and therefore common law coverture (the common law rule that married women cannot own separate property) was partially overturned."⁵⁷ In Florida between 1820 and 1860, women's right to hold property initially was rooted in treaties, but after Florida became a U.S. state in 1845, this right was explicitly confirmed in statutes. Early precedents for women's right to hold property in Florida were limited to white women—and, as Clark emphasizes, these seemingly progressive formulations of property rights were rooted in imperial expansion, and they also actively facilitated imperial racial regimes by protecting and reinforcing the property-based system of chattel slavery in a southern borderland territory-turned-state. Thus, one of the earliest and under-discussed precedents for women's right to hold property was not only racially delimited, it actively worked to reinforce a broader system of racial inequality. As is so often the case, when we delve into the intricacies of early U.S. law, we leave with more qualifications than categorical claims—and a related recognition that often what looks like a political victory and an expansion of political rights, from one perspective, was, from another, a complicated renegotiation of abiding political divisions and inequalities.

From the beginning, white, propertied men loomed large in the U.S. legal imaginary. However, as with gender, unqualified characterizations of the whiteness of citizenship only partially capture the insistently gradated and changeable demarcations of legal personhood in the early United States. In several cases, racial constraints for suffrage were only introduced to state constitutions in their later amendments. In Tennessee, for example, the 1796 constitution declared, "Every free man of the age of twenty-one years and upwards, possessing a freehold in the county . . . shall be entitled to vote," but in 1835 the language was changed to "every free white man."⁵⁸ Similarly, in 1821 New York passed property qualifications for blacks but abolished them for whites, thus limiting black suffrage in practice.⁵⁹ By 1855 only five states admitted black suffrage.⁶⁰ Overall, the trend was not toward increasingly inclusive definitions of political membership but toward further restriction; and in this sense, the conceit that the historical practice of rights gradually caught up to the founding rhetoric of liberty is particularly

misleading.⁶¹ Legally speaking, the meaning of citizenship was actually more capacious in the early post-Revolutionary period, precisely because its limits had not yet been clearly established.

The belated introduction of racial formulations of suffrage bears emphasis on a number of levels. It belies the Whiggish narrative of citizenship—with its conceit of the progressive move toward increasingly inclusive political practices. It also offers a useful reminder of the incompleteness of the law as an index of political opinion. The comparatively inclusive scope of suffrage in these earlier state constitutions was consequential both practically and imaginatively, but the legal narrowing of suffrage cannot be neatly equated with a narrowing of public opinion. Rather, as abolitionist and women's rights movements gained momentum in the nineteenth century, some of the exclusions that had gone unspoken in the immediate aftermath of the Revolution were quickly losing self-evidence as both women and blacks availed themselves of privileges that they had not been denied, but had also not been positively granted. In this respect, what the law leaves unsaid is itself a valuable indication of broader assumptions at various moments in history.

Thinking Sovereignty beyond Citizenship

In a limited sense, the Constitution's reticence about citizenship actually helped preserve and fuel the colloquial association of "citizen" with a nebulously idealized rights-bearing subject. With few clearly specified boundaries, "citizenship" was a uniquely capacious terminological cipher for the "whole rights of the people." However, as we have seen, Wilson's apparent faith in a shared understanding of citizenship was not particularly well founded. Being able to presume the designation "citizen" was certainly a good starting place, but in the era before the Fourteenth Amendment, citizenship was not yoked to a relatively unified set of juridical practices and privileges.

The residual continuities between citizenship and subjecthood were both structural and terminological. In the early United States, "citizen" was an essentially contested designation understood in an uneasy continuum with a range of divergent subject positions. Even if/when one was acknowledged as a citizen, it could mean different things—not only because of rapidly changing state policies, but because many commentators did not imagine citizenship as a *singular* category, but as a sliding scale with several "intermediary" forms. As one politician observed in a discussion of "colored suffrage" at an 1846 convention for revising the New York state con-

stitution, there is “a strange disposition to overlook the existence of the conditions of extraneous alienage and the various stages of *quasi* citizenship intermediate between the condition of chattel slavery, and that of complete citizenship.”⁶² The very notion of “quasi citizenship” cuts against the ambiguously idealized “whole rights of the people” that Wilson had hoped to preserve. However, in some ways, the definitional reticence about citizenship created the conditions for the fractionalization of citizenship. In practice, the decentralized, presumptive usages of “citizen” in the law positioned citizenship as a sliding scale of legal personhood, unequally associated with fractional rights. As such, no rights safely could be taken for granted. Indeed, as Bates emphasized in 1862, even suffrage, the right that we now most closely associate with citizenship, was not consistently recognized as a right of *all* citizens.⁶³

Ultimately, the problem with Wilson’s idealized defense of the nonenumeration of rights was that it presumed a vernacular, commonsense understanding of citizenship, which as the subsequent years showed simply did not exist.⁶⁴ To be called a citizen was not in itself a meaningful admission of political agency. Nominal as its meaning was in the law, “citizen” named political obligations as well as privileges, duties as well as rights, and governmental coercion as well as protection. William Apess’s *Indian Nullification of the Unconstitutional Laws of Massachusetts Relative of the Mashpee Tribe; or, The Pretended Riot Explained* (1835) is particularly instructive in this respect. In Apess’s incisive account of the Massachusetts government’s narrative strategies for quelling the Mashpee Revolt, he notes that when officials sought to “explain” the laws, they told the Mashpees “that merely declaring a law to be oppressive could not abrogate it; and that it would become us, as good citizens whom the government was disposed to treat well, to wait for the session of the Legislature and then apply for relief. (Surely it was either insult or wrong to call the Marshpees citizens, for such they never were, from the Declaration of Independence up to the session of the Legislature in 1834).”⁶⁵ Massachusetts officials incentivized obedience by presenting the spectacle of the government’s benign disposition toward the would-be “good citizens,” who just happened to be amid revolt. “Citizens” as used in response to the Mashpee Revolt indicates an unqualified expectation of compliance divested of the rights associated with political obligation in the reciprocal model of allegiance and protection described by Bates.

The nominal characterization of the Mashpee as “citizens,” as Apess recognized, was a strategy of delegitimation that reframed the violent subjection of settler colonialism as a contingent promise of protection.⁶⁶ Apess’s response to this imperial strategy was to advance a claim to a kind of dual

citizenship, in which—as with the dual structure of the Comity Clause—the Mashpees would be “entitled to all Privileges and Immunities of Citizens in the several States” but would still preserve their political autonomy as a sovereign people. Apess’s strategic comparison of the Mashpee Revolt to the Nullification Crisis of 1832—in which South Carolina invoked state sovereignty to justify its refusal of new federal tariffs—is crucial in this respect, because it allowed him to recast the Mashpee Revolt not as the breach of Massachusetts’s law but as the fulfillment of the culturally resonant regional ideal of state sovereignty.⁶⁷ Revolt, as Apess knew, may be extralegal, but it was also a culturally idealized expression of political entitlement, which established rights through a refusal of unjust obligations. This claim to rights *without* obligation was no more reciprocal as a structure of allegiance than the model of top-down subjection it was used to counter. Yet reciprocity was not itself the goal within the tradition of rights by dissent that Apess invoked. Apess’s primary gambit was to authorize the sovereignty of the Mashpee. Sovereignty, not citizenship, was the paradigmatic symbol of Native autonomy and political empowerment in the early United States. So although Apess and other Native writers occasionally drew upon the extralegal traditions of political authorization that Walker and other reformers regularly invoked, this book does not try to explain or assimilate indigenous arguments within the interpretative rubric of citizenship.

In the context of Native Americans’ uniquely fraught skirmishes with the federal government in the early United States, citizenship was a uniquely problematic conceptual and legal rubric for political autonomy. In ways that differed markedly from its currency in abolitionist discourse, in struggles for Native sovereignty in the early United States, “citizen” was a structure of colonial subjection as well as a symbolic remedy to it. This double relation to citizenship began to shift over the course of the nineteenth century, both because citizenship gained new meaning in post-Civil War law and because the prospect of achieving a meaningful form of political sovereignty apart from the United States seemed increasingly unlikely as the nineteenth century advanced.

Seen from the perspective of early contests over indigenous sovereignty, it is little surprise that the doctrine of *jus soli* did not enjoy the same primacy in the early United States as it does today. As the Fourteenth Amendment’s explicit exclusionary provision—“excluding Indians not taxed”—itself later registered, the notion of soil-based rights conjured a logic that lent itself to indigenous claims to sovereignty and later citizenship. The Fourteenth Amendment also delimited indigenous claims to citizenship through another more subtly phrased but consequential clause: by re-

stricting citizenship to “persons . . . subject to the jurisdiction” of the United States, the Citizenship Clause formalized citizenship as a specialized form of subjection, in which U.S. governmental protection is purchased by ceding any claims to sovereignty *before* (or in the case of the higher law traditions discussed in the next two chapters, *above*, the United States).⁶⁸

Native Americans had no clear statutory path to citizenship until the Indian Citizenship Act in 1924, more than half a century after the Fourteenth Amendment. And the Indian Citizenship Act was itself an ambivalent development. Considered from the perspective of the landmark 1831 Supreme Court case *Cherokee Nation vs. Georgia*—which subjected indigenous tribes to allegiance without protection by theorizing them as “domestic dependent nation[s]”—the legal recognition of Native Americans as “citizens” in 1924 was unquestionably a historic victory.⁶⁹ However, from the perspective of earlier defenses of tribal sovereignty, it also marked the foreclosure of a different form of political sovereignty.⁷⁰ This point bears emphasis because when we presume the monolithic desirability of citizenship in the early United States, we impose our own political fantasies on a period that was populated by many ways of envisioning political membership—not all of which measured the success of their political projects through the incorporative dream of citizenship.

Dred Scott and the Retroactive Making of Citizenship

In the early United States, the cultural constitution of citizenship was a speculative artifact of narrative fabulation, not an interpretative hermeneutic of statutory law. Some of these fables were produced in courts and some in novels, tales, sermons, and instructional literature. Yet despite their generic range, these narratives of citizenship share with Bates’s opinion an occasionally uncomfortable awareness of the invented character of the “citizen” they describe. To underline the far-reaching questions about citizenship that inspired Bates and others officials to look beyond the law to theorize citizenship, I close this chapter with a brief reexamination of Taney’s decision in *Dred Scott vs. Sandford*. Taney’s decision operates in a very different ideological register than Bates’s opinion, but it too bears the pronounced traces of his own speculative reading practice.

The lynchpin of Taney’s argument rests on his interpretation of the Declaration of Independence, a document that has a complex, antagonistic relation to legal tradition: both in relation to the British laws that it seeks to nullify by force of its invocation of higher law, and also in relation to the American political tradition it helped bring into being. For all of its

political significance, the Declaration, as legal historians point out, "lacks the legal force of the law."⁷¹ The extralegal status of the Declaration of Independence bears remark, but it is the way Taney reads the Declaration that I want to underline in closing. With no clear definition in the Declaration on which to ground his narrow definition of citizenship, Taney turns his interpretative focus from the text of the Declaration to the men who authored it. Taney's evidence for his claim that "it is too clear to dispute, that the enslaved African race were not intended to be included, and formed no part of the people" has little to do with the language of the Declaration. It comes instead from a twofold interpretative assumption: first, that the meaning of the Declaration lies in the intentions of its authors; second, that these intentions can be reliably determined on the basis of their actions.⁷² Taney belabors this second gambit, explaining that the Declaration's framers "were great men—high in literary acquirements—high in their sense of honor," who were, as such, "incapable of asserting principles inconsistent with those on which they were acting."⁷³ As "literary" men, Taney suggests, the framers could be trusted to understand the meaning of their words, and as honorable men they could be trusted to act in ways that accorded with their convictions. Thus, Taney infers, they could not have intended "the people" to include "the negro race."⁷⁴ I underline the inferential, extratextual character of Taney's interpretation of the Declaration, because scholars regularly cite the opinion as the legal benchmark of citizenship without recognizing its vexed relationship to the legal history it purports to rehearse.⁷⁵

Treating Taney's decision as speculative may seem deflationary, since we tend to associate the speculative power of fiction with its potential to disrupt and overthrow rigid systems of thought. Yet this recognition also levels the discursive playing field in a different way, because it identifies Taney's decision as one of many competing formulations of citizenship, none of which were self-evidently definitive in the early United States. Not all formulations of citizenship enjoy equal authority, of course. However, the disproportionate historiographical reliance on Taney's decision runs the risk of oversimplifying the history that it so concertedly retells. Impact and representativeness are two very different things. Taney's opinion was impactful, but it offers a very partial and somewhat skewed view of citizenship's erratic cultural and legal history in the preceding decades. Indeed, if we treat the racially inclusive scope of many of the early state constitutions as the definitional benchmark for citizenship, it is Taney's explicitly racialized decision that appears revisionary.

The absence of a clear constitutional definition of citizenship made it possible for abolitionists like Ohio representative Philemon Bliss to carica-

ture Taney's decision as not only unjust but also "illegal"—as seen through the prescriptive lens of higher law. "This court is itself a democratic anomaly—a solecism," Bliss observed of Taney's opinion, because it "has overthrown the law of citizenship, and published pages of gross and illegal *dicta* upon the law of Slavery."⁷⁶ Bliss, though firmly entrenched within the legal system himself, adopts the extralegal paradigm of "higher law" to delegitimize Taney's decision. "I ordinarily feel bound to treat judicial opinions with respect, though they disagree with mine," Bliss remarks in a pointed re-writing of Taney, but "I can have no reverence for men merely as judges; and if they descend from their high calling as protectors of liberty and law, to become their betrayers."⁷⁷ Taney's decision incited outrage among abolitionists, who saw in it a failure of the law itself, as measured through the unwritten principles of a "higher law."

The two dissenting opinions in the *Dred Scott* case, delivered by Justices Benjamin Curtis and John McLean, are themselves instructive reminders of the Supreme Court's own fractured interpretation of the legal history of citizenship. In historian Christopher Tomlins's discussion of the dissenting opinions in *Freedom Bound* (2010), he draws a useful contrast that I would like to echo here but with significantly different emphasis. "Whereas Taney embraced a substantive citizenship filled with content protected by racial exclusivity," Tomlins writes, "McLean and Curtis were ready to distribute citizenship more widely while simultaneously depriving it of content." Tomlins identifies the *Dred Scott* case "as the convulsive climax and endpoint" of the racialized concepts of civic identity he discusses in the context of the colonization of the Americas, so for his purposes, what sets the dissenting opinions apart is less interesting than the different ways in which they too participate in the racialized logic that Taney openly embraces. Tomlins's emphasis on the flat, contentless meaning of "citizenship" in the dissenting opinions is insightful and illuminating, but it is also misleading to suggest that these opinions "emptied the concept of citizenship of virtually all substantive content."⁷⁸ As we have seen, "citizenship" did not yet have the legal content with which it is now associated, so to characterize these flat formulations of citizenship as a diminishment of its meaning is to retroactively give it a substantive juridical meaning it did not have. Understood in relationship to the nominal "citizen" examined in this chapter, we are left with another (equally disconcerting) realization: Taney played an active role in retroactively giving "citizenship" the substantive juridical meaning it holds today, and he did so by generalizing and reinforcing a racialized logic that was integral to chattel slavery and early naturalization laws but that had not yet been established as part of a broader centralized definition of citizenship.

To a degree, Taney was simply making explicit a racial logic that was there from the beginning. However, Taney's explication of the racial logic that haunted the formation of the juridical citizen marked a significant and consequential departure from the insistent vagaries of citizenship's early legal conceptualization—ambiguities that, once foreclosed, made it increasingly difficult for politicians and writers in the late 1850s and early 1860s to authorize racially inclusive interpretations of "citizenship" within the idiom of the law. Understood in relation to the broader arguments of this book, Taney's decision was doubly significant. It facilitated the law's increasing control over the meaning of "citizenship," and it marginalized abolitionist theorizations of citizenship by pushing them to the periphery of cultural practice. Yet because the case helped bind the legal meaning of "citizenship" to the precepts of chattel slavery, Taney's decision also added new political urgency to the alternate conceptions of "citizenship" developed in the "higher-law" traditions of citizenship examined in Chapters 2 and 3.

The historical and juridical intricacies of citizenship, as we have seen, do not lend themselves to sweeping generalizations. At various moments in time, simplified characterizations of inclusion and exclusion—such as the common abolitionist trope that analogized the bonds of marriage to the chains of slavery—have proven politically enabling and even necessary, catalyzing denizens to act collectively and with a sense of urgency.⁷⁹ However, as with Taney's opinion, similarly broad generalizations about the exclusionary history of citizenship also have foreclosed more inclusive models of political membership, for which there were and are coexisting juridical precedents. The loopholes in the juridical history of U.S. citizenship were not always intentional, and—as with women's suffrage in New Jersey—these political openings were often quickly closed in the years that followed. Still, as Attorney General Bates emphasized, in a legal culture beholden to the written law, these ambiguities and omissions were and are consequential. For this very reason, generalizations about the racial and gender makeup of the "citizen" function differently when they are framed in terms of our juridical past rather than our political present. U.S. law functions by way of historical precedent, so characterizations of the juridical past are never merely descriptive nor ideologically reparative. Positive law gains its authority from the legal past, which is grounded in a written Constitution in the United States. So even as we consider the most inequalitarian aspects of U.S. political history, it is worth being circumspect about how we characterize the legal history of citizenship, lest these generalized characterizations become naturalized futures.

There is, admittedly, no single panacea to the interpretative quandaries that surround the early usages of “citizenship.” However, by grappling with its uneasy evolution from term to concept, we can bring a redoubled self-awareness to our own interpretative involvement in the retroactive making of citizenship. For, as with Bates, Taney, and Bliss, where we place our interpretative emphasis determines the broader field in which we “discover” citizenship’s meaning. The speculative prehistory of citizenship thus has far-ranging methodological consequences that extend beyond the period covered in this book. Among other things, it dramatizes the fundamental limitations of originalist readings of the Constitution and of early U.S. political literature broadly understood. When we recognize that “citizenship” as we use it today and “citizenship” as it was used in the early United States do not name identical—and so interchangeable—models of political membership, the idea that we can recover its original meaning starts to look not only optimistic but also specious.⁸⁰

The two dominant modes of originalism—original intent and original meaning—may locate the source of the Constitution’s meaning in different expressive “agents” (the authors’ intentions and the culturally recognized meanings of their words), but both share a common fantasy of interpretative neutrality in which the interpreter is, at least in theory, squarely outside the authorial sphere of meaning making.⁸¹ The terminological and conceptual stability Originalism retroactively confers on early U.S. political thought is especially misleading when it comes to the prehistory of citizenship. Indeed, as we will see most dramatically in Chapter 2’s examination of the expressly theological usages of “citizenship,” when we look closely at the term’s usages at various moments in time, we see something more profound than change over time—we realize we are looking at fundamentally different concepts.

- larly stresses in her influential reassessment of popular genres like the sentimental novel, “novelists have designs upon their audiences, in the sense of wanting to make people think and act in a particular way” (Jane Tompkins, *Sensational Designs: The Cultural Work of American Fiction, 1790–1860* [New York: Oxford University Press, 1985], xi).
44. While legal mandates are traditionally exempted from the broader subordination of rhetoric—because of the coercive power of the imperatives they institute—imaginative writing is often seen through the diminutive lens of *mere* rhetoric.
 45. As legal historian Steven Wilf observes in his discussion of the popular imagination of criminal law during the American Revolution, “The law is imagined before it is enacted.” Wilf justifies his attention to the wide-ranging, largely unofficial theorizations of criminal law as “aspirational visions of the law”—an aspirational impulse that I theorize somewhat differently in terms of the “political subjunctive” (Steven Wilf, *Law’s Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* [New York: Cambridge University Press, 2010], 7–8). The political subjunctive, as I am theorizing it here, is aspirational, but its politics does not depend on the law as telos. The political subjunctive is not, by definition, “before” the law—its cultural precursor; it is a mode that cuts across a number of semiofficial and imaginative discourses.
 46. In a characteristic formulation of this fantasy of future political perfectibility, Whitman explains that he “assum[es] Democracy to be at present in its embryo condition, and that the only large and satisfactory justification of it resides in the future” (Walt Whitman, *Democratic Vistas: The Original Edition in Facsimile*, ed. Ed Folsom [Iowa City: University of Iowa Press, 2010], 36–37. I discuss the insistently futural structure of Whitman’s romance of democracy at greater length in Chapter 5).
 47. Bates, *Opinion*, 3.

1. The Retroactive Invention of Citizenship

1. Nathaniel Hawthorne, *The Scarlet Letter*, Centenary Edition of the Works of Nathaniel Hawthorne (Columbus: Ohio State University Press, 1968), 1:44.
2. Edward Bates, *Opinion of Attorney General Bates on Citizenship* (Washington, DC: Government Printing Office, 1862), 4.
3. The terminological distinction between “subject” and “citizen” continues to organize many discussions of citizenship—including those that seek to complicate each term. Thus in Cathy Davidson and Michael Moon’s excellent collection on the topic, *Subjects and Citizens* (1995), they evoke two interlocking ways of understanding “subject,” but they do not discuss the variable historical meanings of “citizenship.” “In juxtaposing the terms ‘subject’ and ‘citizen’ in the title, we have chosen to emphasize some of the historical and political continuities between the traditional political and social meanings of ‘subject’ (one who is placed under the authority of a monarch and governed by his law, as well as the wife who was enjoined to be ‘subject’ to her husband as servants—or slaves—

- were to their masters) and the term ‘subject’ in its contemporary sense (a person considered as the sum of the psychic effects of his or her interactions with the laws of language and other institutions that are formative of culture)” (Cathy Davidson and Michael Moon, eds., *Subjects and Citizens: Nation, Race, and Gender from Oroonoko to Anita Hill* [Durham, NC: Duke University Press, 1995], 1–2). As Brook Thomas emphasizes, “Even though the word ‘citizen’ resonates with thoughts of self-governance and freedom from subjection, citizens remain subjects of the state,” so “even if not all subjects are citizens, all citizens are subjects” (Brook Thomas, *Civic Myths: A Law-and-Literature Approach to Citizenship* [Chapel Hill: University of North Carolina Press, 2007], 9).
4. In the comparative framework of American Independence, citizenship gains its significance differentially through assumptions about its structural difference from British subjecthood (assumptions that are inflected by a celebratory account of U.S. founding).
 5. David Ramsay, *A Dissertation of the Manners of Acquiring the Character and Privileges of a Citizen of the United States* (n.p., 1789), 3.
 6. Ramsay, *Dissertation*, 4.
 7. Ramsay, *Dissertation*, 4.
 8. John Locke, *Second Treatise on Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), 111.
 9. Most famously, the Declaration adapts and revises Locke’s enumeration of the basic rights to “life, liberty, and *estate*” as “life, liberty and the pursuit of *happiness*” (Pauline Maier, ed., “Introduction,” in *The Declaration of Independence and the Constitution of the United States* [New York: Bantam, 1998], 10). The inclusion of “happiness” is believed to indicate Jefferson’s debt to George Mason’s Declaration of Rights of Virginia.

As Bernard Bailyn observes, “In pamphlet after pamphlet the American writers cited Locke on nature rights and on the social and governmental contract” (Bernard Bailyn, *Ideological Origins of the American Revolution*, enlarged edition [1967; Cambridge, MA: Belknap Press of Harvard University Press, 1992], 27). T. H. Breen has argued that explicit references to Locke only partially capture his tremendous cultural impact. Breen contends, “[E]ven when the name of the great philosopher did not appear, his ideas still powerfully informed popular public consciousness” (T. H. Breen, “Ideology and Nationalism on the Eve of the American Revolution: Revisions Once More in Need of Revising,” *Journal of American History* 84, no. 1 [June 1997]: 13–39, esp. 37). In an instructive alternative to this Locke-centered view, Robert Ferguson has insightfully argued that “if the language of self-evidence and equality seems to come from John Locke’s *Second Treatise of Civil Government* (1690), it can be found just as easily in Algernon Sidney’s *Discourses Concerning Government* (1698), and, by the 1770s everywhere in colonial America” (Robert A. Ferguson, *The American Enlightenment, 1750–1820* [Cambridge, MA: Harvard University Press, 1994], 126). For another excellent, in-depth treatment of the broader political culture that shaped the Declaration of Independence, see Pauline Maier,

- American Scripture: Making the Declaration of Independence* (New York: Vintage Books, 1998).
10. By 1865 Ramsay's *History of the American Revolution* had gone through six American editions as well as multiple foreign reprintings (Arthur Schaffer, *To Be an American: David Ramsay and the Making of the American Consciousness* [Columbia: University of South Carolina Press, 1991], 1).
 11. Lockean liberalism is a pervasive point of reference in American political historiography and literary criticism. Gillian Brown's *Consent of the Governed* offers a lucid distillation of the intellectual importance (and, as she argues, continued political promise) of Lockean social contract theory in the United States (Gillian Brown, *Consent of the Governed: The Lockean Legacy in Early American Culture* [Cambridge, MA: Harvard University Press, 2001]). As Gail Murray notes, Jay Fliegelman's influential *Prodigals and Pilgrims* (1985) "reasserted Locke's formative influence" amid a renewed attention to civic republicanism spurred by J. G. A. Pocock's *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975). Gail S. Murray, "Reviewed Work: *The Consent of the Governed: The Lockean Legacy in Early American Culture* by Gillian Brown," *Journal of the Early Republic* 21, no. 4 (Winter 2001): 700–703, esp. 700. While influential, Fliegelman's *Prodigals and Pilgrims* is somewhat atypical in its approach to Locke. Fliegelman shifts his focus away from the well-trodden terrain of *Second Treatise* to examine the reception of the model of "parental responsibility and filial freedom set forth by Locke in *Some Thoughts Concerning Education*" (Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution against Patriarchal Authority, 1750–1800* [New York: Cambridge University Press, 1985], 5).
 12. Locke uses "citizen" once in *An Essay Considering Human Understanding* and once in his *Four Letters Concerning Toleration*. In *An Essay* Locke treats "citizen" as synonymous with "burgher" ("A citizen or a burgher"), and in *Letters* he speaks of it in relation to the Bible—which, as I discuss in Chapter 2, continued to be one of the primary texts for conceptualizing the meaning of citizenship in the nineteenth century. Locke also uses "citizen" in passing in "A Letter from a Person of Standing to His Friend in the Country," where Locke complains of the "vanities" of a "pert citizen." To find these isolated, nominal uses of "citizen" in Locke, I searched through the Liberty Fund's nine-volume collection of Locke's writing (<http://oll.libertyfund.org/people/john-locke>).
 13. Jean-Jacques Rousseau, *On the Social Contract*, in *Basic Political Writings*, ed. and trans. Donald A. Cress and Peter Gay (Indianapolis, IN: Hackett, 1987), 148–149n.
 14. Ramsay's definition of U.S. citizenship was doubly timely. Ramsay published the pamphlet the same year he contested the results of a failed congressional run. When William Smith of South Carolina bested Ramsay's pursuit of a seat in the House of Representatives, Ramsay contested Smith's eligibility, arguing that Smith was not eligible for the position—a question that hinged on "whether he has been seven years a citizen of the United States or not." Smith's situation was admittedly a peculiar one. His parents had died before the American Revolution and, although he was born in South Carolina, Smith was studying abroad

at the time of the Declaration of Independence. However, Ramsay's effort to disqualify Smith failed. The dispute spurred the congressional debate about citizenship discussed in the Introduction (see Madison's remarks about the legal ambiguities surrounding citizenship). Madison ultimately concluded in Smith's favor, but the circumstances of Smith's citizenship were too idiosyncratic for the decision to constitute a major precedent. As Madison observed, "If we are bound by the precedent of such a decision as we are about to make . . . I still think we are not likely to be inundated with such characters" (James Madison, "May 22: Citizenship of the United States," in *The Writings of James Madison, 1787-1790*, ed. Gaillard Hunt [New York: J. P. Putnam and Sons, 1904], 369).

15. In a deft formulation of pre-Revolutionary usages of "subject" and "citizen," Peter Onuf emphasizes that "before 1776, the distinction between subject and citizen would have been meaningless to most Anglo-Americans: they were citizens *because* they were subjects" (Onuf, "Introduction: State and Citizen in British America and the Early United States," in *State and Citizen: British America and the Early United States*, ed. Peter Thompson and Peter S. Onuf [Charlottesville: University of Virginia Press, 2013], 3). As legal historian Maximilian Koessler similarly notes, "Even in the period immediately before the American Revolution, there was no such difference in connotation between 'subject' and 'citizen' as would predicate reserving the status of 'citizen' to the people of a republic and 'subject' to those under the sovereignty of a monarch." Koessler, like many others, overemphasizes the decisiveness of this terminological shift when she argues that "the term 'subject' was brushed aside as a leftover from the feudal law" with the "enactment of the Federal Constitution" (Maximilian Koessler "'Subject,' 'Citizen,' 'National,' and 'Permanent Allegiance,'" *Law Journal Company* 56, no. 1 [November 1946]: 59, 60). The terminological distinction between citizen and subject, I want to stress, did not solidify in the immediate aftermath of the American Revolution (as the frequent recourse to 1776 to periodize this shift implies). Instead, the gradual colloquial differentiation of "subject" and "citizen" found its most unqualified precedents in the French tradition—first in Rousseau and later in the French Declaration of the Rights of Man and of the Citizen (1789).
16. As Ohio representative Philemon Bliss observed in January 1859, in a congressional speech contesting Taney's ruling in the *Dred Scott* case, "Confusion in the meaning of the term citizen is often created by referring to its use in the old Republics." "But we use not the word in its legal sense. . . . It no longer means electors or those enrolled in the national or city guards, but is a simple transfer of, or substitute for, the word subject" (Philemon Bliss, *Citizenship: State Citizens, General Citizens* [Washington, DC: Buell and Blanchard, 1858], 2).
17. As Douglas Bradburn remarks, scholarly "emphasis on national identity and the 'making of American nationalism' obscures the non-national, highly federal character of citizenship in the United States before the Civil War" (Douglas Bradburn, "The Problem of Citizenship in the American Revolution," *History Compass* 8, no. 9 [2010]: 1093-1113, esp. 1101).

18. Raymond Williams, *Marxism and Ideology* (New York: Oxford University Press, 1977), 134.
19. The Fourteenth Amendment is pivotal to current understandings of citizenship—and the meanings to which it helped give rise understandably shape our encounter with this term in the republican and antebellum archive.
20. Bates, *Opinion*, 4.
21. Bates, *Opinion*, 3–4.
22. Bates, *Opinion*, 26.
23. Bates, *Opinion*, 15.
24. I discuss this abolitionist reading strategy at greater length in my discussion of David Walker's *Appeal* in Chapter 2.
25. Not everyone shared Bates's conviction about the national character of allegiance. This aspect of Bates's definition bespeaks the relatively late date of this pamphlet and Bates's official role in the regional conflict that spurred Chase's question. As an attorney general in Lincoln's administration during the Civil War, it was politically necessary for Bates to presume the primacy of *national* allegiance—and, by implication, the illegitimacy of the seceded Confederate States. Yet as the war itself dramatized, many in the early United States understood themselves, first and foremost, as members of the individual states in which they resided (Bates, *Opinion*, 7).
26. In an 1851 speech on the Fugitive Slave Law, Douglass attacks this conceit directly. "The basis of allegiance is protection. We owe allegiance to the government that protects us, but to the government that destroys us, we owe no allegiance" (Frederick Douglass, "Freedom's Battle at Christiana," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Sheldon Foner and Yuval Taylor [Chicago: Lawrence Hill, 1999], 179–182, esp. 181).
27. The term was not always used with expectant optimism, but Bates's definition can easily and usefully be adopted to include conceptions of allegiance and protection that were marked by their *failure* to meet the reciprocal promise of citizenship.
28. Jurists and legal historians continue to disagree about which provision of the Fourteenth Amendment requires the states to protect the federal rights enumerated in the Bill of Rights. For a longer discussion of these debates, see Kurt T. Lash's extensive account of historical interpretations of the Privileges and Immunities Clause. As Lash notes, "Initially the Supreme Court rejected the idea that the Fourteenth Amendment forces the states to follow the federal Bill of Rights" (Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* [New York: Cambridge University Press, 2014], viii). U.S. Constitution, amendment XIV, section 1.
29. U.S. Declaration of Independence (1776).
30. A handful of states recognized the right to emigrate, but as several early U.S. politicians pointed out, emigration (or permanent relocation) did not in itself dissolve the juridical ties between citizens and their native state (see George Hay's important *A Treatise on Expatriation* [Washington, DC: A. & G. Way, 1814], 2). State constitutions that include language about emigration include Pennsylvania (1776), Vermont (1776), Louisiana (1812), Indiana (1816), Alabama (1819), and Mississippi (1819) (Ezra Seaman, *Commentaries on the*

- Constitutions and Laws, Peoples and History, of the United States: And upon the Great Rebellion and Its Causes* [Ann Arbor, MI: Printed for the Author, at the Journal Office, 1863], 107). Thomas Jefferson, “A Bill Declaring Who Shall Be Deemed Citizens of the Commonwealth,” in *Thomas Jefferson: Writings* (New York: Library of America, 1984), 374–375.
31. See I-Mien Tsiang, *The Question of Expatriation in America Prior to 1907* (Baltimore: Johns Hopkins University Press, 1942), 61–70.
 32. The resolution to form a committee for this purpose was put forward by Robertson on December 13, 1817. *Annals of Congress*, 15th Congress, 1st session, 448.
 33. The principle of natural and perpetual allegiance was established in Sir Edward Coke’s influential decision in Calvin’s Case (1608). Johnson of Virginia eloquently critiqued the proposed adherence to this British precedent, proclaiming: “Introduce but the doctrine of perpetual allegiance, that baleful scion from the odious stock the feudal system, and you have tooled the death bell to the liberties of the people of this country” (*Annals*, 15th Congress, 1st session, 1065). For more on natural allegiance and Calvin’s Case, see James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), 13–28.
 34. As Representative Cobb of Georgia noted, to counter this argument, Congress has the right to regulate naturalization, so it should have the right to regulate expatriation as well (since the two are correlative). *Annals*, 15th Congress, 1st session, 1068.
 35. The latter suggestion was made by Mr. McLane, a representative of Delaware and an eloquent opponent of the bill. *Annals*, 15th Congress, 1st session, 1060.
 36. A notable geographic bias can be discerned in the votes for and against the bill. According to Tsiang’s tabulation, New England representatives voted 2 to 1 in opposition to the right of expatriation, and middle states representatives were only slightly inclined to oppose the right, whereas southern representatives voted in favor of the bill by over 2 to 1, and the new western representatives favored it by a striking margin of about 3 to 1 (Tsiang, *Question of Expatriation*, 61). Interestingly, although the passage of the bill would have effectively buttressed the *national* character of citizenship (by subjecting it to congressional regulation), southern representatives, on the whole, were more favorable toward the bill. Other than Tsiang’s exhaustive account of expatriation prior to 1907, there is only a handful of criticism that discusses expatriation debates in “the years of confusion,” as Roche appropriately terms it (John P. Roche, “Loss of American Nationality: The Years of Confusion,” *Western Political Quarterly* 4, no. 2 [June 1951]: 268–294). Rising Lake Morrow, “The Early American Attitude toward the Doctrine of Expatriation,” *American Journal of International Law* 26, no. 3 (1932): 552–564.
 37. Act of July 27, 1868. 15 Stat. 223.
 38. Coke ruled that persons born in Scotland after the Union of the Crowns in 1603 owed the British Crown allegiance and were entitled to the king’s protection. As legal historian Polly Price observes in her discussion of the Fourteenth

- Amendment, “The roots of United States conceptions of birthright citizenship lie deep in England’s medieval past” (Polly Price, “Natural Law and Birthright Citizenship in Calvin’s Case [1608],” *Yale Journal of Law and the Humanities* 9, no. 1 [2013]: 73–145, esp. 73).
39. For an excellent theoretical treatment of the blood logic of chattel slavery, see Nancy Bentley, “The Fourth Dimension: Kinlessness and African American Narrative,” *Critical Inquiry* 35 (Winter 2009): 270–292.
 40. U.S. Congress, Sess. II, Chap. 3; 1 stat 103. 1st Congress; March 26, 1790.
 41. See Linda K. Kerber, “Meanings of Citizenship,” *Journal of American History* 84, no. 3 (1997): 839.
 42. See Kerber, “Meanings of Citizenship,” 839.
 43. U.S. Constitution, article I, section 8, clause 4.
 44. U.S. Congress, Sess. II, Chap. 3; 1 stat 103. 1st Congress; March 26, 1790.
 45. As Coviello observes, “the relation of the social category called ‘race’ to property and to the possessive states of self-relation is profoundly unsettled in late-eighteenth century America” (Coviello, *Intimacy in America: Dreams of Affiliation in Antebellum Literature* [Minneapolis: University of Minnesota Press, 2005], 34).
 46. Bates, *Opinion*, 5.
 47. U.S. Constitution, article IV, section 2.
 48. The problem, as James Kettner observes, is that “the comity clause placed a constitutional obligation on the states to confer ‘all Privileges and Immunities of Citizens’ upon the ‘Citizens of each State’—but who was to determine what those privileges and immunities were?” (Kettner, *Development of American Citizenship*, 231). The Fourteenth Amendment, it is worth stressing, does not itself explicitly enumerate all of the privileges and immunities of citizenship. However, the 1866 Civil Rights Act to which it is closely tied specified that “citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .” (Civil Rights Act, 14 Stat. 27 [1866]). In addition, as the Fifteenth Amendment’s subsequent clarification of the right to vote attests, by putting into place a working constitutional definition of citizenship, the Fourteenth Amendment set the foundation for an increasingly substantive constitutional understanding of these privileges and immunities in the following years.
 49. James Wilson, “Pennsylvania Ratifying Convention, Nov. 28 & Dec. 4 1787,” in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, ed. Jonathan Elliott, 5 vols., 2:434–437, 453–454, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s27.html>. I would like to thank Hunt Howell for a helpful question and conversation about the Bill of Rights, following a talk I gave on citizenship at the Mahindra Humanities Center at Harvard University in November 2016.
 50. For a lucid account of the Constitution’s complex interrelationship to “extra-textual sources such as judicial opinions, executive practices, legislative enact-

ments, and American tradition,” see Akhil Reed Amar’s *America’s Unwritten Constitution: Its Precedents and the Principles We Live By* (New York: Basic Books, 2012), xiii. I find Amar’s argument about the Constitution’s fundamental interdependence on a host of precedents outside of its textual limits compelling. I also find his heuristic characterization of these precedents as an “unwritten Constitution” evocative. However, the heuristic has its limits, since (as Amar acknowledges) many of the precedents he discusses do appear in written form. For the purposes of clarity, I would recast what he terms “extra-textual” as extra-constitutional, because, as I argue in this book, there was no shortage of textual treatments of citizenship. Moreover, this revised phrasing can help us to distinguish between questions that were extraordinarily under-conceived within the law *writ large* (such as citizenship) and the many questions that were not addressed in the Constitution proper but *were* addressed at length in other legal documents.

51. As historian Douglas Bradburn observes in his account of the debates that surrounded citizenship in the thirty years after the Declaration of Independence, “In law there was very little national uniformity to American citizenship: states controlled the extent and limits of the franchise; some states possessed religious establishments; states followed different derivations of the English Common law; one state (Louisiana) possessed a completely alien legal code . . . and numerous minor differences complicated the civil and political rights of citizens and non-citizens throughout the United States” (Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774–1804* [Charlottesville: University of Virginia Press, 2009], 1–2).
52. The North Carolina Constitution holds that “every foreigner, who comes to settle in this State having first taken an oath of allegiance to the same, may purchase, or, by other means, acquire, hold, and transfer land, or other real estate; and after one year’s residence, shall be deemed a free citizen” (North Carolina Constitution [1776], XL).
53. The Pennsylvania Constitution (and the 1777 Constitution of Vermont after it) mentions citizenship once in the context of religious freedom (Pennsylvania Constitution [1776], II).
54. “The enigma,” as historian Nancy Isenberg frames it, is that “freeborn women had the appearance of citizenship but lacked the basic rights to be real citizens” (Nancy Isenberg, *Sex and Citizenship in Antebellum America* [Chapel Hill: University of North Carolina Press, 1998], esp. xii, 24). The problem, as Linda Kerber aptly frames it, is that “if a citizen had to possess civic rights, then women were not citizens, for they did not vote except briefly in New Jersey” (Linda Kerber, “‘May All Our Citizens Be Soldiers, and All Our Soldiers Citizens’: The Ambiguities of Female Citizenship in the New Nation,” in *Arms at Rest: Peacemaking and Peacekeeping in American History*, ed. J. R. Challinor and R. L. Beisner [New York: Greenwood Press, 1987], 5). See also Kerber’s extended treatment of these questions in her seminal study, *No Constitutional Right to Be Ladies: Women and Obligations of Citizenship* (New York: Hill & Wang, 1998).
55. This admittedly limited form of women’s suffrage came to an end with the 1807 New Jersey Constitution, which restricted suffrage to white men. See

- Judith Apter Klinghoffer and Lois Elkis, “‘The Petticoat Electors’: Women’s Suffrage in New Jersey, 1776–1807,” *Journal of the Early Republic* 12, no. 2 (Summer 1992): 159–193; Jan Ellen Lewis, “Rethinking Women’s Suffrage in New Jersey, 1776–1807,” *Rutgers Law Review* 63, no. 3 (August 2011): 1017–1035.
56. Theresa Anne Murphy, *Citizenship and the Origins of Women’s History in the United States* (Philadelphia: University of Pennsylvania Press, 2013), 115.
 57. Laurel A. Clark, “The Rights of a Florida Wife: Slavery, U.S. Expansion, and Married Women’s Property Law,” *Journal of Women’s History* 22, no. 4 (Winter 2010): 39–63, esp. 40.
 58. “The First Constitution of the Great State of Tennessee, 1796,” <http://www.tngenweb.org/law/constitution1796.html>; “State of Tennessee Constitution of 1835,” <http://www.tngenweb.org/law/constitution1835.html>.
 59. “The Second Constitution of New York, 1821,” http://www.nycourts.gov/history/constitutions/1821_constitution.htm.
 60. By 1855, only Massachusetts, Vermont, New Hampshire, Maine, and Rhode Island did not exclude or restrict black suffrage. Amid these increasingly explicit racial exclusions, black reformers seized new forms and modes of political participation. As Derrick Spires argues in his discussion of the printed proceedings of black state conventions, “unofficial modes of participatory politics” provided “viable, visible, and potentially revolutionary modes of direct intervention in a civic sphere in which voting was just becoming accessible to masses of white men” (Derrick R. Spires, “Imagining a Nation of Fellow Citizens: Early African American Politics of Publicity,” in *Early African American Print Culture*, ed. Lara L. Cohen and Jordan A. Stein [Philadelphia: University of Pennsylvania Press, 2012], 274–289, esp. 275).
 61. Dana Nelson succinctly captures and dismantles this persistent teleological narrative in her reexamination of democracy. “One of the cornerstones of the United States’ self-image,” Nelson writes, “is a story of how its orderly political freedom matured over time into ‘the world’s leading democracy’” (Nelson, *Commons Democracy: Reading the Politics of Participation in the United States* [New York: Fordham University Press, 2015], 24). As with this book’s prehistory of citizenship, Nelson’s genealogy of democracy turns its focus from the official mandates of the law (what Nelson glosses in terms of “formal democracy”) to examine the informal practices that helped to shape the uneven development of political thought in the early United States.
 62. S. Crosswell and R. Sutton, “Speech of Mr. Cornell, on Colored Suffrage,” in *Debates and Proceedings in the New-York State Convention, for the Revision of the Constitution* (Albany, NY: S. Crosswell and R. Sutton, 1846): 904–907, esp. 906, emphasis in original. For another discussion of this instructive speech, see Jeannine DeLombard’s *In the Shadow of the Gallows: Race, Crime, and American Civic Identity* (Philadelphia: University of Pennsylvania Press, 2012), 51–52).
 63. As Bates emphasized in his 1862 pamphlet, it is a “common error” to think that “the right to vote for public officers is one of the constituent elements of American citizenship” (Bates, *Opinion*, 4). The uncertain link between citizen-

- ship and suffrage is suggested by the very existence of the Fifteenth Amendment (1870). If voting had been practically recognized as an incontrovertible right of all citizens, the Fourteenth Amendment's extension of citizenship to black men should have been sufficient to guarantee black suffrage. Even the Fifteenth Amendment did not fully clarify this issue. In declaring that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," the Fifteenth Amendment makes it clear that the right to vote is *only* enjoyed by citizens, but it does not unequivocally establish suffrage as a right enjoyed by *all* citizens (U.S. Constitution, amendment XV, section 1).
64. As Sophia Rosenfield observes in a different context, Wilson is "best known for his attachment to the ideal of common sense as the bedrock of republican government (Sophia Rosenfield, *Common Sense: A Political History* [Cambridge, MA: Harvard University Press, 2011], 176).
 65. William Apess, *Indian Nullification of the Unconstitutional Laws of Massachusetts Relative to the Marshpee Tribe; or, the Pretended Riot Explained*, in *On Our Own Ground: The Writings of William Apess, a Pequot*, ed. Barry O'Connell (Amherst: University of Massachusetts Press, 1993), 166–274, esp. 183.
 66. This is a good example of what Mark Rifkin refers to as a "settler common sense" (Mark Rifkin, *Settler Common Sense: Queerness and Everyday Colonialism in the American Renaissance* [Minneapolis: University of Minnesota Press, 2014]). Rifkin discusses Apess through the lens of his "Eulogy on King Philip's War" (1836), where Apess describes Congress "disenfranchising us as citizens" (William Apess, "Eulogy on King Philip's War," in *On Our Own Ground*, 277–310, esp. 306).
 67. To further solidify his analogical defense of tribal sovereignty, Apess situates the Maspee Revolt in relationship to Massachusetts's own history of dissent: its role as "the boasted cradle of independence" in the Boston tea party, and the later revolt of white farmers against the state government during the Constitutional Convention in Shay's Rebellion (Apess, *Indian Nullification*, 195, 237).
 68. U.S. Constitution, amendment XIV, section 1.
 69. Within this double standard, as it was set out in Justice Marshall's majority ruling, "[Indians] are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens," but "they are in a state of pupilage" (Richard Peters, ed., *The Case of the Cherokee Nation against the State of Georgia*, University of Michigan Library facsimile reprint [Philadelphia: John Grigg, 1831], 161).
 70. For another treatment that stresses the limits of citizenship for discussing Native politics and agency, see Audra Simpson's account of the Mohawk efforts to maintain political sovereignty by refusing American or Canadian citizenship (Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* [Durham, NC: Duke University Press, 2014]). As Mishuana Goeman observes, the Indian Act reflects the settler nation's investment in "mold[ing] a particular citizenship, in which a 'person [is] an individual other than an Indian'" (Mishuana Goeman, *Mark My Words: Native Women Mapping Our Nations* [Minneapolis: Minnesota University Press, 2013], 41).

71. See Josh Blackman, “Original Citizenship,” *University of Pennsylvania Law Review* 159, no. 95 (2010): 95–126, esp. 125.
72. *Dred Scott v. Sandford: A Brief History with Documents*, ed. Paul Finkelman (New York: Bedford, 1997), 63.
73. *Dred Scott*, 63.
74. *Dred Scott*, 64.
75. As David Bromwich emphasizes, “There was a reason why Lincoln called [Taney’s] finding ‘an astonisher in legal history.’” His decision “presented a new theory about the meaning of the Constitution” (David Bromwich, *Moral Imagination* [Princeton, NJ: Princeton University Press, 2014], 19).
76. Philemon Bliss, *Citizenship*, 1.
77. Bliss, *Citizenship*, 1.
78. Tomlins’s discussion of citizenship in the United States appears after nine chapters on the colonies, so his treatment of Taney’s decision stands in for the broader debates about citizenship in the early United States—debates that, as I argue here, usefully bring into focus the decision’s peculiarities as well as its continuities with previous legal precedents (Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* [New York: Cambridge University Press, 2010], 510, 534, emphasis added).
79. For a powerful discussion of this analogy, see Karen Sanchez-Eppler, “Bodily Bonds: The Intersecting Rhetorics of Feminism and Abolition,” *Representations* 24 (1988): 28–59.
80. Here I want to echo Robert Ferguson’s trenchant critique of our misplaced confidence in our understanding of the early republican terminology: “When modern wielders of early republican phraseology think they are using the same language, they do so only in a literal sense. The words themselves often held different meanings when first expressed, and every original expression came in a context now lost to easy comprehension” [Robert A. Ferguson, *Reading the Early Republic* (Cambridge, MA: Harvard University Press, 2004), 9–10].
81. For a discussion of these interpretative theories in relation to the Fourteenth Amendment, see Bret Boyce’s call for a return to the common-law approach to constitutional adjudication in the present (Bret Boyce, “Originalism and Fourteenth Amendment,” *Wake Forest Law Review* 33, no. 4 [1996]: 909–1034, esp. 909).

2. “Citizenship in Heaven”

1. Isaac Kramnick and Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State*, updated ed. (New York: W. W. Norton, 2005).
2. “In marked contrast with their federal counterpart,” as political scientist Alan Tarr notes, “most early state constitutions expressly recognized the existence of God, and most later state constitutions acknowledged the state’s dependence on God’s favor” (Alan Tarr, “Religion under State Constitutions,” *Annals of the American Academy of Political and Social Science* 946 [March 1988]: 65–75, esp. 67).