

# Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause

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It has been the common belief that the chief purpose and effect of the last two amendments to the Federal Constitution were to clothe the negro with the same civil rights that are enjoyed by white citizens . . . But there is little doubt that [the *Slaughter-House Cases*] will greatly restrict the operation of the fourteenth amendment, as the purpose and effect of that amendment have been popularly understood . . . Inferior courts have declared that laws preventing the intermarriage of blacks and whites do not make an unconstitutional discrimination against color, and such statutes are in force in some of the States.<sup>1</sup>

A perennial objection to the constitutional theory known as “originalism” is its alleged inconsistency with the result in *Loving v. Virginia*.<sup>2</sup> Judicial and scholarly critics have often cited this inconsistency as a leading argument against what one court called the “rigid, originalist view of constitutional interpretation.”<sup>3</sup> One prominent critic has insisted that “constitutional protection of interracial marriage” is simply incompatible with the “original

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1. Editorial, *Jury Rights of Colored Citizens*, N.Y. TIMES, Apr. 26, 1879, at 4, available at <http://query.nytimes.com/mem/archive-free/pdf?res=FA0B1EF7395A137B93C4AB178FD85F4D8784F9> (last visited Feb. 22, 2013).

2. *Loving v. Virginia*, 388 U.S. 1 (1967).

3. *Compassion in Dying v. Washington*, 79 F.3d 790, 805, n.20 (9th Cir. 1996) (en banc) (Reinhardt, J.) (citing the *Loving* precedent as the first argument against such a “rigid” originalism), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

expected application” of the Fourteenth Amendment.<sup>4</sup> Many scholars have concurred.<sup>5</sup>

Most notably, the Supreme Court in *Planned Parenthood v. Casey*<sup>6</sup> relied chiefly on *Loving* to resist the “tempting” view that the Fourteenth Amendment should be interpreted consistent with its original understanding:

Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U. S. 1, 12 (1967).<sup>7</sup>

In recent years, this alleged deficiency has supported the so-called “*Loving* analogy.”<sup>8</sup> According to several courts (prompted by the

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4. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENTARY 291, 297 (2007).

5. See, e.g., SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES 15–20 (2002) (preparing a mock dissenting opinion that Justice Thomas would have written in *Loving* had he been on the Court and faithful to his “staunch originalist” reading). See also this satirical “news” piece that I was credulous enough to initially consider authentic: Brent Youngren, *Justice Thomas Declares His Own Marriage Unconstitutional*, FREE WOOD POST (Mar. 29, 2012), <http://www.freewoodpost.com/2012/03/29/justice-thomas-declares-his-own-marriage-unconstitutional/> (“reporting” that Justice Thomas conceded in an interview that he “probably would have voted to uphold Virginia’s Racial Integrity Act of 1924”); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 774 (2011) (stating that the result in *Loving* was not compelled by “the plain, objective, unambiguous meaning of the text of the Privileges or Immunities Clause”); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 996 (1998) (concluding that “the public understanding of the Amendment expressed by its originators” was consistent with state racial-endogamy laws); William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1202, 1259 n.54 (2011); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1920 (1995); RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 252 (2012) (arguing that “[t]he historical record strongly indicates that the politicians who framed the Fourteenth Amendment did not intend for it to render illegal statutes prohibiting interracial marriage”).

6. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992).

7. *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (stating that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack”).

8. As of November 2012, the Lexis database includes 90 law review articles that use this term; most of these articles have appeared in the last ten years. See, e.g., William N.

Supreme Court's opinion in *United States v. Windsor*),<sup>9</sup> just as *Loving* properly disregarded the original understanding of the Fourteenth Amendment by invalidating laws prohibiting marriage between persons of *different races*, courts today should likewise set aside historical understandings to invalidate laws inhibiting marriage between persons of the *same sex*.<sup>10</sup>

In response to the criticism, some have offered an originalist defense of *Loving*, but many originalists (and other conservative jurists) have agreed that the proponents of the Fourteenth Amendment believed it would not affect racial-endogamy laws.<sup>11</sup> Perhaps the most cited originalist authority is Alfred Avins's extensive 1966 study that affirmed that no one in the 39th Congress (which framed the Amendment) "seriously thought that these state laws were within the pale of the amendment's prohibitions."<sup>12</sup> More recently, a prominent originalist—and co-founder of the Federalist Society—has baldly asserted as "*fact* that the Reconstruction Framers

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Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1504–05 & n.290 (1993).

9. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Loving* as a restriction on the states' otherwise "virtually exclusive" authority to regulate marriage).

10. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1210 (10th Cir. 2014) (relying on *Casey*'s characterization of *Loving* as contrary to history and tradition); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014) (citing *Loving* as vindicating an "expansive liberty interest that may stretch to accommodate changing societal norms").

11. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* 389 n.143 (1985) (citing similar conclusions of Alexander Bickel, Raoul Berger, and Alfred Avins). The state of Virginia relied heavily on this historical claim in *Loving*: "[A]n analysis of the legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes. The precise question was specifically considered by the framers of the Amendment, and a clear intent to exclude such statutes from the scope of the Fourteenth Amendment was repeatedly made manifest." *Loving v. Virginia*, 388 U.S. 1, Brief and Appendix on Behalf of Appellee, in 16 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES* 794, 798 (Philip B. Kurland & Gerhard Casper eds., 1975).

12. Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1253 (1966). Even more categorically, at oral argument Virginia's attorney in *Loving* asserted that, "for over one hundred years since the Fourteenth Amendment was adopted, numerous states . . . have been exercising this power *without any question being raised* as to the authority of the States to exercise this power." *Loving v. Virginia*, 388 U.S. 1, Oral Argument of R.D. McIlwaine III, Esq., on Behalf of Appellee, in 16 *LANDMARK BRIEFS AND ARGUMENTS*, *supra* note 11, at 976, 1000 (emphasis added).

expected their laws to be consistent with . . . bans on racial intermarriage.”<sup>13</sup>

This article seeks to challenge this widespread belief by an analysis of abundant and significant historic evidence—most of which has not been considered by contemporary legal scholars.<sup>14</sup> The article will proceed in four parts, corresponding to the following conclusions: (1) that before the Amendment, most (but not all) authorities concluded that such laws abridged a pre-existing right recognized at common law, which represented a privilege of citizenship; (2) that during the adoption of the Amendment, both proponents and opponents generally (though not unanimously) declared, acknowledged, or conspicuously failed to deny, that the Amendment would invalidate such laws; (3) that *contra* the Supreme Court’s claim in *Casey* (and the argument of Virginia’s attorneys in *Loving*), within five years of the Amendment’s ratification, racial-endogamy laws were either non-existent or unenforced in a clear majority of the states, in large part because Republican officials—including virtually every Republican judge to face the question—concluded that African Americans’ constitutional entitlement to the status and privileges of citizenship precluded the making or enforcing of such laws; and (4) that the contrary holdings were made by Democratic judges hostile to Reconstruction, whose hostility was frequently manifest in their implausible interpretations of the Amendment. The article will conclude with reflections on how the Supreme Court’s decision in the *Slaughter-House Cases*<sup>15</sup> dealt a serious blow to the Amendment’s original meaning and thus facilitated the renewed making and enforcing of these laws. This history will prove, by a strong preponderance of the evidence, that the Fourteenth Amendment, as understood by the citizens that proposed, ratified, and initially

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13. Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U. L. REV. 1393, 1398 (emphasis added). Still, Matthews and Calabresi argue that the Amendment’s original expected non-application was inconsistent with its original public meaning. *Id.* See also Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1263 (2012) (asserting that “if there is anything that is clear about the original understanding of the Fourteenth Amendment, it is that Lyman Trumbull, who managed that Amendment in the Senate, assured his colleagues up and down that nothing in that proposed Amendment would call into question those laws in Illinois as well as Virginia that barred interracial marriage”).

14. Much of this evidence has until recently been difficult to find, but new digital databases have greatly facilitated the collection of relevant evidence. In this article, I have relied heavily on Lexis, Google Books, and the newspaper database of the “Chronicling America” project. Further, this study is greatly indebted to the work of historians Peter Wallenstein and the late Peggy Pascoe.

15. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

interpreted it, precluded the making or enforcing of state racial-endogamy laws, insofar as such laws prohibited or invalidated marriages between citizens of the United States.

As a preliminary matter, I should explain my preference for the term “racial endogamy” instead of “anti-miscegenation.” Racial endogamy is a more precise term, for anti-miscegenation laws reached not only marriage, but also nonmarital sex; yet the Fourteenth Amendment, as originally understood, may have protected the former, but almost certainly not the latter.<sup>16</sup> Besides its imprecision, “miscegenation” was a pejorative neologism (invented by critics in 1863)<sup>17</sup> that begged a central question at issue during Reconstruction. The term *miscegenation* presupposed that the different races represented different *genera*, whose intermarriage constituted a mixing (*miscere*) of these *genera*. Yet according to leading Republican framers, the Fourteenth Amendment recognized no *genera* except humanity and citizenship, that is, the human race and the American people<sup>18</sup>—so marriage between American citizens, of whatever race, could not be properly called a *mixing* of different *genera*.

### **I. The Pre-Amendment Understanding of State Racial-Endogamy Laws and the Abridgement of the Privileges of**

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16. See, e.g., *Pollard v. Lyon*, 91 U.S. 225, 227–28 (1876) (unanimously affirming that both adultery and fornication are “[b]eyond all doubt, offences [that] involve moral turpitude”); *Ford v. State*, 53 Ala. 150, 151 (1875) (distinguishing interracial marriage, arguably protected by the Constitution, from interracial adultery, which is not, for “[m]arriage may be a natural and civil right, pertaining to all persons,” but “adultery is offensive to all laws human and divine, and human laws must impose punishments adequate to the enormity of the offence and its insult to public decency”). For more recent (but pre-sexual-revolution) authority, see, e.g., *Perez v. Sharp*, 198 P.2d 17, 26 (1948) (Traynor, J.) (plurality opinion) (distinguishing racial-endogamy laws from the interracial adultery law upheld in *Pace v. Alabama*, 106 U.S. 583 (1883), on the grounds that “adultery and nonmarital intercourse are not, like marriage, a basic right, but are offenses subject to various degrees of punishment”); *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964) (unanimously affirming that a statute dealing with “with illicit extramarital and premarital promiscuity” could be properly characterized as an effort “to prevent breaches of the basic concepts of sexual decency” but striking down the law because it discriminated on the basis of the race).

17. PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 28 (2009).

18. John Bingham, a leading sponsor of the Amendment, published his speech introducing an initial draft of the Amendment under this title: “One Country, One Constitution, and *One People*: Speech of Hon. John A. Bingham, of Ohio, in the House of Representatives, February 28, 1866: in Support of the Proposed Amendment to Enforce the Bill of Rights.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 387 (2005) (emphasis added).

## Citizenship

Let us begin with the primordial originalist evidence: the actual text of the Constitution. The Fourteenth Amendment's Privileges or Immunities Clause reads as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>19</sup> In this part, we will consider whether this provision, as its express terms were understood before the Fourteenth Amendment, would have precluded state racial-endogamy laws. The inquiry can be divided into three parts: (1) whether such restrictions were deemed laws "made or enforced" by the states; (2) if so, whether such laws "abridged" some right; and (3) if so, whether the right so abridged represented a privilege or immunity of citizens of the United States.

### A. No State shall make or enforce any law . . .

The first issue can be easily answered. Racial-endogamy laws were universally understood to be laws *made* by the states. Before the Civil War, these laws were entirely statutory. And for the most part only state legislatures made these laws.<sup>20</sup> These state restrictions were in derogation of the common law<sup>21</sup> and thus neither declaratory nor clarificatory of the common law, which was generally not deemed to be law *made* by the states.<sup>22</sup>

To be sure, after the drafting of the Amendment (but not before), some authorities would invoke another allegedly anterior law—"natural law"—to justify this legislation.<sup>23</sup> But this postbellum,

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19. U.S. CONST. amend. XIV, § 1.

20. Other than local laws for the District of Columbia and some federal territories, there were no federal laws. PASCOE, *supra* note 17, at 21. After the Civil War, federal immigration law indirectly enforced a certain racial endogamy. See generally Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011).

21. See, e.g., JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 29 (2d ed., 1874) (noting that "race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any such impediment now recognized in England. But by local statutes in *some* of the United States, intermarriage has long been discouraged between persons of the negro, Indian, and white races.") (emphasis added); *Robertson v. State*, 42 Ala. 509, 512 (1868) (Byrd, J., concurring) (citing Alabama's racial-endogamy statute to show that the legislature had restricted the full common-law liberty to marry).

22. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (holding that the general commercial law and other laws of a "general nature," as opposed to merely local statutes or local customs, were not laws of the several states).

23. See, e.g., *State v. Gibson*, 36 Ind. 389, 404 (1871) (referring to the "natural law which forbids their intermarriage"); *State v. Bell*, 66 Tenn. 9, 11 (1872) (asserting that

racialist account of natural law reflected the new racial science and not traditional, natural-law and common-law jurisprudence.<sup>24</sup> According to this tradition, natural law embodied rules of widespread *recognition* and universal *validity*.<sup>25</sup> But the theory of natural law that supported enforced racial endogamy had neither of these features.<sup>26</sup> As to general *recognition*, no authority, before or after the war, made the manifestly false assertion that interracial marriages were generally recognized as unlawful in the world in general, in the Christian world, or even the Anglo-American world.<sup>27</sup> Contrary to the naked assertion

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neither incest nor polygamy is “more revolting, more to be avoided, or more unnatural” than interracial marriage).

24. See, e.g., Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 569 (2000) (contending that postbellum judicial decisions endorsing racial endogamy were “[m]otivated wholly or in part by scientific racism”).

25. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 39–40 (1765) (Univ. Chi. 1979) (teaching that God “laid down certain *immutable laws* of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also *the faculty of reason to discover* the purport of those laws,” thus indicating that natural law involves general validity and recognition) (emphasis added).

26. Consider, for instance, the oft-cited 1867 dictum of Pennsylvania’s Supreme Court: “[T]he fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to inter marriage.” *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 213 (1867) (cited and discussed in Steven A. Bank, Comment, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303 (1995)). This “law of nature” involved neither of the hallmarks of traditional natural law: general recognition and validity. The *recognition* was not general, but dependent on the alleged scientific fact of geographic separation—a fact not generally known to human reason. In fact, the court suggested that in the absence of enforced segregation, the sexes of both races would be naturally inclined to marry one another. Further, the *validity* was obviously not general—for the court surely knew that in Pennsylvania itself and many other states, the law had long recognized the full validity of interracial marriage.

27. See *Medway v. Needham*, 16 Mass. 157, 161 (1819) (Parker, C.J.) (holding that an interracial marriage celebrated in Rhode Island would be valid in Massachusetts, by distinguishing interracial marriage, which Massachusetts “prohibited merely on account of political expediency” from incestuous marriages, “which would tend to outrage the principles and feelings of all civilized nations”); *State v. Ross*, 76 N.C. 242, 245–47 (1877) (citing *Medway* and rejecting the argument of counsel that a “marriage between persons of different races is an unnatural and as revolting as an incestuous one,” by noting that while “all Christian countries agree that marriages in the direct line and between the nearest collaterals, are incestuous, and that polygamy is unlawful,” interracial marriages do not offend “the common sentiment of the civilized and Christian world” even though many southerners find them “revolting”); *State v. Baltimore & O. R.R.*, 15 W. Va. 362, 385–86 (1879) (discussing certain “sections in [the state code] punishing offenses or acts

by the Kentucky and Georgia supreme courts, no legal authority claimed that “miscegenation was an offense with ancient roots.”<sup>28</sup> Moreover, as to general *validity*, no one asserted that in the absence of some local statute, such marriages were invalid by force of natural law<sup>29</sup> or common law.<sup>30</sup> Indeed, as peculiarly modern and local statutes in derogation of the common law, courts tended to construe these laws narrowly, by limiting the statute’s territorial effect<sup>31</sup> or in other ways.<sup>32</sup> As one jurist explained in 1883 (the same year the Supreme Court decided *Pace v. Alabama*), “[m]arriage is a natural right into which the question of color does not enter except as an individual preference expressed by the parties to the marriage. It is so recognized by the laws of all nations except our own.”<sup>33</sup>

### B. . . . which shall abridge . . .

The second issue can likewise be easily answered. State racial-endogamy laws emphatically “abridged” a right—they *contracted a*

which can not be regarded as *mala in se*, or as contrary to religion or abstract morality; [such] as the intermarriage of a white person with a negro”).

28. *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (cited in ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 103 (2006)); *Christensen v. State*, 468 S.E.2d 188, 196 (Ga. 1996).

29. See e.g., JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS* 24, 54, 174 (1852) (defining marriage as “a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex” originating in “the law of nature” and affirming that “when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation—that, in a state of nature, would be a marriage,” but noting that in *some*, but not *all*, the American states, there are positive laws restricting such natural marriage between persons of different races).

30. SCHOULER, *supra* note 21, at 20 (noting that such laws were in derogation of the common law); 2 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES*, app. G, at 58 (1803) (noting that in Virginia, interracial marriage remained valid, though statutorily illicit); *Baity v. Cranfill*, 91 N.C. 293, 295 (1884) (contrasting the common law’s nullification of certain immoral marriages with North Carolina’s merely statutory nullification of interracial marriages).

31. See e.g., *Ross*, 76 N.C. at 245–47; *Succession of Caballero v. Executor*, 24 La. Ann. 573, 575 (1872) (referring to Louisiana’s racial-endogamy law as an “edict . . . of local and limited effect [that] existed for a purpose local and special in this country”).

32. *Boyer v. Tassin*, 9 La. Ann. 491, 492–93 (1854) (estopping a remarried widow from denying the validity of her previous, interracial marriage on both statutory grounds, for she had failed to follow the prescribed method of impeaching the marriage during her husband’s lifetime, and on quasi-equitable grounds, for her claim “present[ed] the revolting spectacle of a mother attempting to deprive her children of their *status* or position in society”) (emphasis in original).

33. Gordon A. Stewart, *Our Marriage and Divorce Laws*, 23 THE POPULAR SCIENCE MONTHLY 224, 234 (1883).

*prior* right of individuals. Seemingly all authorities concurred that in the absence of such positive law, the race of the parties was no impediment to a lawful marriage.<sup>34</sup> Because marriage arose from natural right as recognized at common law, the “legalization” of interracial marriages required merely the absence of the statutory prohibition; so, for instance, Iowa’s legislature permitted such marriage simply by omitting the restriction from the state’s 1851 code.<sup>35</sup> Even in antebellum South Carolina, some prominent authorities concluded that the lack of an express and specific statutory prohibition<sup>36</sup> implied the validity of interracial marriages.<sup>37</sup> As the Illinois Supreme Court explained at the end of the century,

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34. See, e.g., *Pearson v. Pearson*, 51 Cal. 120, 124–25 (1875) (holding that a marriage between a black slave and white slave-owner in the Territory of Utah *ipso facto* emancipated the slave, and that because there was at the time of the marriage, “no law or regulation at the time prevailing in the Territory of Utah interdicting intermarriage between white and black persons,” the marriage was valid there and remained valid even after the couple moved to California where such marriage was locally unlawful).

35. ROBERT R. DYKSTRA, *BRIGHT RADICAL STAR: BLACK FREEDOM AND WHITE SUPREMACY ON THE HAWKEYE FRONTIER* 109 (1993) (noting that through the 1851 codification, the legislature “silently revoked” most of Iowa’s existing “black laws,” including those concerning intermarriage). Compare LAWS OF THE TERRITORY OF IOWA 1838-1839, 1834-1840, at ch. 25, § 13 (declaring interracial marriages illegal and void) with IOWA CODE OF 1851, ch. 85, §§ 1463–1479 (omitting any such prohibition).

36. South Carolina did not have a statute specifically addressing interracial marriage until 1865; of course, public opinion had been very hostile to such marriage long before then. JOHN WERTHEIMER, *LAW AND SOCIETY IN THE SOUTH: A HISTORY OF NORTH CAROLINA COURT CASES* 31 (2009).

37. *Bowers v. Newman*, 27 S.C.L. (2 McMul.) 472, 486 (1838) (noting the extensive argument of counsel as to the validity of an interracial marriage but refusing to decide the issue); *id.* at 491–92 (Harper, C., dissenting) (contending that “marriage was merely a civil contract, and that therefore, it was good and legal between a white person and a free negro”); *id.* at 492 (O’Neill, J., dissenting) (noting his agreement with Chancellor Harper); JOHN BELTON O’NEALL, *THE NEGRO LAW OF SOUTH CAROLINA* 13 (1848) (citing *Bowers* and arguing that free blacks’ “marriages with one another, and even with white people, are legal”). See also Editorial, *Judge O’Neill’s Digest of the Negro Law of South Carolina*, *THE ADVOCATE*, Dec. 1848, reprinted in O’NEALL, *supra*, at 59, 60 (defending O’Neill’s claim on the authority of Blackstone’s definition that marriage, i.e., the status of “husband and wife,” required merely that the man and woman (1) be able to contract, (2) be willing to contract, and (3) have actually so contracted). But see *Coloured Marriages*, 1 CAROLINA L.J. 92, 101–104 (1830) (arguing that South Carolina law impliedly nullified such marriages, for bona-fide marriage required that the parties enjoy a certain equality of status, which free blacks, by force of statutory law, did not enjoy with whites); Editorial, *Judge O’Neill and the Judiciary Committee*, *THE TELEGRAPH*, Dec. 25, 1848, reprinted in O’NEALL, *supra*, at 57–58 (including a legislative committee report that cited the *Coloured Marriages* article, *supra*, to dispute O’Neill’s claim). All of these authorities, however, concurred that the source of any restriction on interracial marriage was not common law or natural law, but rather statutory law, whether an express, specific prohibition, or a prohibition to be implied from statutes imposing civil inferiority on free blacks.

“the contract of marriage is a contract *jure gentium*, and consent and the assumption of the marriage status are all that is required by natural or public law,” so “[i]n the absence of local restrictions or regulations” a man and woman, regardless of race, were “capable of contracting marriage as of common right.”<sup>38</sup>

Racial-endogamy laws abridged this natural and common right in various ways. Some laws criminalized the *making* of the marriage agreement by punishing the parties and/or the official solemnizing their agreement.<sup>39</sup> Some laws, by declaring such marriages not only illicit, but also invalid, criminalized the *performance* of the marriage agreement, for the ensuing cohabitation and/or sexual intercourse could be punished by force of general anti-fornication law<sup>40</sup> or special statutes providing enhanced liability for interracial nonmarital sex.<sup>41</sup> There were significant civil consequences as well. The illegality of such marriages could defeat a claim of a breach of a promise to marry.<sup>42</sup> And invalidity affected the custodial and property rights of the putative husband and wife, and their resulting children.<sup>43</sup>

### C. . . . the privileges or immunities of citizens of the United States

Although it seems clear that state racial-endogamy statutes abridged the marital right recognized at common law, what is far from clear is whether that abridged right could be identified as a privilege or immunity of citizens of the United States. The inquiry is nearly impossible without some working definition of the terms “privileges [and] immunities of citizens of the United States”—and there is no

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38. *Laurence v. Laurence*, 45 N.E. 1071, 1072 (Ill. 1896) (citing both *Hutchins v. Kinemel*, 31 Mich. 126 (1875), and *BISHOP*, *supra* note 29).

39. *See, e.g.*, An Act to Prevent the Amalgamation of the White and Colored Races, Acts, 58 Laws of Ohio 6 (Jan. 31, 1861); *Fergus v. Nash*, 48 Ohio L. Bull. 442, 442 (Franklin County, Ohio Probate Ct. 1901) (holding that “there seems to be little doubt about the validity of the marriage [between a black man and white woman]” under Ohio’s 1861 statute, for “although they might have been punished criminally for marrying, yet, having married, the marriage was valid”).

40. *See, e.g.*, *State v. Hooper*, 27 N.C. 201 (1844).

41. *See, e.g.*, *State v. Brady*, 28 Tenn. 74 (1848).

42. *See Ferguson v. Bradshaw*, Unpublished case, discussed in Editorial, *Miscegenatory: The African versus the Anglo Saxon, A Negro Sues and Recovers \$10,000*, MEMPHIS DAILY APPEAL, Mar. 13, 1869 (Warren County, Ohio 1869) (discussed *infra* text accompanying notes 275–80).

43. *See e.g.*, *Bailey v. Fiske*, 34 Me. 77 (1852) (finding the son of an interracial putative marriage to be illegitimate and thus unable to inherit from his natural father); *Boyer*, 9 La. Ann. 491 (indicating that the invalidity of a white widow’s husband would impair the limited custodial rights of her relatives and those of her deceased husband).

scholarly consensus.<sup>44</sup> For purposes of this study, I propose, simply as a working hypothesis,<sup>45</sup> the following two-part definition. First, these rights were *privileges of citizenship*, not universal human rights; these rights were enjoyed by citizens as a matter of right but by aliens only as a matter of indulgence, if at all. Second, these rights were, more specifically, privileges of *United States* citizenship in at least two ways: (1) each state in the Union had recognized these rights from the time of American independence (1776); and, (2) by force of Article IV and/or perhaps other law, during that same time, a *bona-fide* citizen of any state had some right to enjoy these privileges in all the other states of the Union, even if the citizen was a mere sojourner therein. In other words, the states had been *united* in recognizing, for the benefit of their own citizens, these privileges of citizenship and *united* in extending these rights to citizens of each of the United States. Accordingly, these privileges of citizenship did not include political rights or other rights that the several states properly reserved to their own resident citizens—especially where such discrimination was essential to the integrity of the states as discrete republics.<sup>46</sup> This definition is evidently based upon (1) the actual text of the Fourteenth Amendment’s Privileges or Immunities Clause, (2) *Corfield v. Coryell*,<sup>47</sup> the antebellum authority most frequently cited by the drafters of the Clause to explain its meaning,<sup>48</sup> and (3) the non-

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44. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030 (2010) (Alito, J.) (plurality opinion) (asserting the absence of any “consensus” as to the “full scope” of the Clause); *id.* at 3089 & n.2 (Stevens, J., dissenting) (arguing that the original meaning of the Clause is “not as clear” as petitioner’s alleged and citing conflicting scholarly conclusions).

45. It would take a volume, perhaps, to defend this definition in the face of the competing definitions that have been offered by judges and scholars. Still, this article will *support* as well as *rely on*, this hypothesis in this limited respect: this definition (1) is supported by the evidence of initial widespread constitutional objection to racial-endogamy laws, and (2) helps explain the judicial evisceration of this objection in the aftermath of the rival interpretation set forth in the *Slaughter-House*. See *infra* Part III & Concl.

46. See, e.g., *Murray v. M’Carty*, 16 Va. 393, 398 (1811) (distinguishing the rights of United States citizenship, such as holding land, from “those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state [such as] the rights of election and of representation; for they cannot be imparted to any but citizens, without a subversion of the principles of the social compact.”).

47. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,320) (holding that the “privileges and immunities” secured by Article IV include those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign”).

48. David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1484 (2005) (discussing the case’s influence on the drafters of the Amendment).

guaranty of political rights as implied in section 2 of that Amendment.<sup>49</sup>

### 1. *Endogamy and the privileges of citizenship*

At first glance, it may seem that interracial marriage was not at all a privilege of citizenship. Marriage was generally deemed a natural, universal, human right. As Attorney General Caleb Cushing affirmed a decade before the Fourteenth Amendment, “[American] Indians were human beings entitled to the rights of humanity . . . including the rights of marriage and descent.”<sup>50</sup> According to most authorities, marriage was anterior to citizenship, for marriage was logically and historically prior to civil society itself. To cite but one of many authorities, James Wilson explained, “to the institution of marriage the true origin of society must be traced.”<sup>51</sup> Accordingly, as a general principle, neither citizenship nor the lack thereof affected the anterior rights and duties of marriage; for example, the marriage of two aliens married abroad was as valid as the marriage of two citizens married domestically.<sup>52</sup> Perhaps for this reason, before the Fourteenth Amendment, the Supreme Court held that the Privileges and Immunities Clause of Article IV did not encompass certain marital property rights because they did not “belong to citizenship.”<sup>53</sup>

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49. See U.S. CONST. amend. XIV, § 2.

50. *United States v. Ritchie*, 58 U.S. (17 How.) 525 (1855); see also *Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick*, 2 Vt. 151, 159 (1829) (holding that “[t]o marry is one of the natural rights of human nature”); *Stikes v. Swanson*, 44 Ala. 633, 636 (1870) (finding that “[m]arriage is undoubtedly a natural right, and slavery did not deprive the man in this condition of all his natural rights” and that “[s]o far as was consistent with his status, these were allowed”); *Campbell v. Campbell*, 37 Wis. 206, 214 (1875) (“Marriage was before human law, and exists by higher and holier authority—the Divine Order, which we call the law of nature.”).

51. James Wilson, *Lectures on Law*, in 2 WORKS 476 (1804); see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 100 (1834) (“Marriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin a contract of natural law. It may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, and not the child of society; *principium urbis et quasi seminarium reipublicae*.”).

52. See, e.g., STORY, *supra* note 51, at 277 (noting that “[m]arriage . . . is admitted to be a valid contract everywhere, when it is so by the law of the place, where it is celebrated”); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 599 (1857) (Curtis, J., dissenting) (“It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere”).

53. *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1856) (holding that “no privileges are secured by [the Clause], except those which belong to citizenship, and so [r]ights, attached by the law to [marital] contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts,

Nonetheless, despite this general rule, citizenship (or the lack thereof) was relevant to the scope of an individual's marital rights in at least one respect: "citizenship" provided a limited immunity against endogamy laws. This understanding derived, in part, from the following facts: (1) that American legislators and jurists tended to be familiar with both the Latin language and Greco-Roman history,<sup>54</sup> (2) that the terms "privilege," "immunity," and "citizen," were all words of obvious Latinate origin, and consequently (3) that in defining these terms, American legislators and jurists frequently made reference to the privileges of Greek and Roman citizenship.<sup>55</sup>

As American jurists knew well, under Greco-Roman law and practice, the right of intermarriage was a cardinal privilege of citizenship. In Roman law, this right, the *ius connubii*, involved the freedom to intermarry with Roman citizens or more precisely, the immunity from the endogamy law that prohibited aliens (*peregrini*) and other noncitizens, even if natives and free subjects of the Republic or Empire, from such intermarriage.<sup>56</sup> As a 19th century textbook explained, the rights of Roman citizens included certain *iura privata*, including this right of intermarriage, and the right to acquire, transfer, and hold property of all kinds, as well as certain *iura publica*,

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cannot be deemed 'privileges of a citizen'). *But see* *Amy v. Smith*, 11 Ky. 326, 342 (1822) (Mills, J., dissenting) (contending that what makes "a citizen" is the enjoyment of certain rights, including the "the right of acquiring and possessing property, of marriage and the social relations").

54. *See generally* CARL J. RICHARD, *THE GOLDEN AGE OF THE CLASSICS IN AMERICA: GREECE, ROME, AND THE ANTEBELLUM UNITED STATES* 5, 17 (2009) (noting that nearly all the new universities founded before the Civil War required applicants to be proficient in the classical languages and that in 1860, over one-fourth of the space in world history textbooks was devoted to Greek and Roman history).

55. *See, e.g.*, Attorney General Bates, *Citizenship*, 10 Op. Att'y. Gen. 382, 391–93 (1862) (noting, but criticizing, "the common habit of many of our best and most learned men (the wise aptitude of which I have not been able to perceive) of testing the political status and governmental relation of our people by standards drawn from the laws and history of ancient Greece and Rome" but acknowledging the possible "analogy between Roman and American citizenship"); *Roberts v. Commonwealth* (C.C. Ky. 5th Circuit (Jefferson County) 1848), in 74 NILES' WEEKLY REG. 248, 249 (1848) (explaining that "[t]he term citizen is derived from the Latin word "*civis*" or "*civitas*," in their origin signifying a citizen or the State itself. *Civis* was one who was invested with the privileges of the city, or State, as contradistinguished from those to whom these privileges were denied. During the best and the purest days of the Roman Republic, to be a citizen in the full sense of the term, was to have been invested with what were termed the "*privatum jus*," and the "*publicum jus*,"); *Scott*, 60 U.S. (19 How.) at 478–80 (opinion of Daniel, J.) (citing Roman law to argue that emancipation does not confer citizenship); Speech of Hon. Owen Lovejoy in the House of Representatives, Apr. 5, 1860, available at <http://www.wvculture.org/history/jbexhibit/lovejoyspeech.html> (arguing that the rights of American citizenship were no less extensive than those of Roman citizenship).

56. "Aliens," in 1 THE AMERICAN CYCLOPEDIA 312, 312 (1873).

such as the right to vote and hold office, and make certain judicial appeals.<sup>57</sup> Without the *ius connubii*, children resulting from such putative marriages were denied the status and privileges of citizenship.<sup>58</sup> Similar endogamy rules prevailed in many of the ancient Greek city-states; accordingly, Aristotle had famously called intermarriage a peculiar characteristic of citizenship.<sup>59</sup>

Relying partly on Greco-Roman law, 19th century Americans frequently identified the right of intermarriage as a privilege of citizenship. One author explained, “[i]n all political bodies the right of marriage (*ius connubii*) becomes in some form or other a constituent element of citizenship.”<sup>60</sup> In a popular encyclopedia, another author noted that in ancient Greece, certain states generously granted “individuals and sometimes whole classes of aliens . . . civil rights, such as the privilege of intermarriage, of holding real property, and of exemption from special taxation.”<sup>61</sup> In a similar vein, James Wilson spoke of “the right of citizenship . . . in the highest degree too—I mean not only the right of commerce, the *right of marriage*, the right of inheritance; but even the right of suffrage, and the right to the offices and the honours of the republic”<sup>62</sup>; that is, the full private and public rights of citizenship.

In this regard, of particular importance to our inquiry is Chancellor James Kent’s brief discussion of American citizenship and endogamy in his *Commentaries*. Kent was perhaps the most prominent early authority to interpret Article IV’s Privileges and Immunities Clause to prohibit only interstate discrimination.<sup>63</sup> In elaborating this interpretation, Kent briefly compared the American Union with the ancient Greece confederations. Unlike the American states, he explained, the confederated Greek states “indulged such a

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57. WILLIAM RAMSAY, AN ELEMENTARY MANUAL OF ROMAN ANTIQUITIES 39, 122 (1859).

58. *Id.* at 122; *see also* 1 STEWART RAPALJE & ROBERT LINN LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 286 (1888).

59. ARISTOTLE, THE POLITICS, bk. III, ch. 9, at 99 (Carnes Lord, trans. 1984) (stating that intermarriage between the citizens (*politeis*) of two cities (*poleis*) would not be sufficient to unify them into a single city (*polis*), even though intermarriage is one of those aspects that is peculiar to the *polis*).

60. “Marriage” *in* DR. WILLIAM SMITH’S DICTIONARY OF THE BIBLE 1793, 1796 (1872).

61. “Aliens,” *in* 1 THE AMERICAN CYCLOPEDIA 312. *Cf. Corfield*, 6 F. Cas. at 551–52 (identifying the right to acquire property, real and personal, as well as an exemption from special taxation, among the constitutional “privileges and immunities of citizens”).

62. James Wilson, *Lectures on Law*, *in* 2 WORKS 446 (Bird Wilson ed., 1804) (emphasis added).

63. Upham, *supra* note 48, at 1504–05 & n.99.

narrow and excessive jealousy of each other, that intermarriage was forbidden, and none were allowed to possess lands within the territory of another state.”<sup>64</sup> Kent thus indicated that among the “privileges and immunities” to which the citizens of each American state were entitled, throughout the Union, was the privilege of intermarriage with citizens of other states. Therefore, for Kent, the constitutional prohibition on interstate discrimination precluded any state endogamy law, even if it had a formal equality, (like racial-endogamy legislation), by prohibiting all citizens equally from entering such “mixed” marriages.<sup>65</sup>

At the same time, however, by the 19th century, the common association of citizenship with the right of intermarriage had largely become merely verbal and anachronistic, for the ancient impediments to alien-citizen intermarriage had long been disfavored. Therefore, it may seem, citizenship no longer gave any *in-munitas* at all, since non-citizens had long been free of any *munitas* (burden or restriction) on intermarriage with citizens. As Francis Bacon had noted two centuries earlier, while among the Romans, citizenship involved “four kinds, or rather degrees” of privileges, namely, “*Ius Connubii*, *Ius Civitatis*, *Ius Suffragii*, and *Ius Petitionis* or *Honorum*,” the first “is a thing in these times out of use: for marriage is open between all diversities of nations.”<sup>66</sup> Accordingly, in the late 19th century, Alexander Cockburn, the Lord Chief Justice of England, categorically asserted that “[a]liens are everywhere allowed to intermarry with the subject,”<sup>67</sup> and a federal judge contemporaneously declared that “[t]he relation of husband and wife is not inconsistent with one being a citizen and the other being an

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64. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 62 (1827).

65. Kent’s claim here, of course, would support the conclusion that the Privileges or Immunities Clause would preclude restrictions on interracial marriage, *provided* the Fourteenth Amendment prohibited interracial discrimination much as Article IV was said to prohibit interstate discrimination. For an early statement of this view, see *Slaughter-House*, 83 U.S. (16 Wall.) at 100–01 (Field, J., dissenting) (“What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.”). See also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1467 (1992) (endorsing Field’s view).

66. Francis Bacon, *A Brief Discourse Touching the Happy Union of the Kingdoms of England and Scotland*, in 3 THE LETTERS AND THE LIFE OF FRANCIS BACON, INCLUDING ALL HIS OCCASIONAL WORKS 90, 97 (James Spedding ed., 1868).

67. ALEXANDER COCKBURN, NATIONALITY: OR, THE LAW RELATING TO SUBJECTS AND ALIENS 139 (1869).

alien.”<sup>68</sup> Indeed, insofar as intermarriage conferred automatic citizenship (as it frequently did under 19th century American law),<sup>69</sup> intermarriage was not so much a privilege of citizenship as citizenship was a privilege of intermarriage.<sup>70</sup>

Nonetheless, Bacon and Cockburn overstated the matter. In some respects, in the modern era, the legal connection between intermarriage and citizenship endured, for some endogamy rules still impeded aliens’ intermarriage with citizens. Under the Anglo-American common law, such intermarriage remained disfavored: the wife was denied the full property rights of marriage, and the alienage of either husband or wife would prevent the widow from enjoying the estate of dower.<sup>71</sup> Moreover, various English statutes governing Ireland had imposed ethnic or religious endogamy rules. Before the Reformation, the Statutes of Kilkenny (1367) prohibited the conquered Irish from intermarriage with English subjects.<sup>72</sup> After the Glorious Revolution, Parliament adopted similar statutes to prohibit Irish Roman Catholics from intermarriage with Irish Protestants;<sup>73</sup> according to critics, this compulsory religious endogamy amounted to ethno-national endogamy, as Catholics thus became aliens vis-à-vis the dominant Protestants and were barred from incorporation into one, multi-religious people in Ireland.<sup>74</sup> Furthermore, in the United States, federal law frustrated the intermarriage of alien men with American women by suspending the wife’s citizenship (and any

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68. *Comitis v. Parkerson*, 56 F. 556, 562 (C.C.E.D. La. 1893).

69. See ALEXANDER PORTER MORSE, *A TREATISE ON CITIZENSHIP, BY BIRTH AND BY NATURALIZATION* 137–44 (1881) (explaining in what way intermarriage between a citizen-husband and his alien wife can act to naturalize the wife).

70. In the 20th century legal authority tended to treat this immunity of citizenship as a universal human right: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.” Universal Declaration of Human Rights, art. 16, G.A. Res. 217A U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (emphasis added).

71. 1 CHARLES H. SCRIBNER, *A TREATISE ON THE LAW OF DOWER* 143–45 (1867) (cited in 5 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII* 293 n.1 (1938)).

72. THOMAS BARTLETT, *IRELAND: A HISTORY* 58 (2010).

73. See, e.g., *An Act to Prevent Protestants Intermarrying with Papists*, 9 Will III c.3 (1697).

74. Henry Grattan, *Speech on the Roman Catholic Bill* (Feb. 22, 1793), in 3 *THE SPEECHES OF THE RIGHT HONOURABLE HENRY GRATTAN: IN THE IRISH, AND IN THE IMPERIAL PARLIAMENT* 43, 52 (Henry Grattan, Jr., ed., 1822). Parenthetically, we might note that Grattan’s speech indicates the interesting parallels between the status of Roman Catholics in Ireland during the eighteenth century and the status of free blacks in the United States in much of antebellum and postbellum Jim Crow America. *Id.*

attendant privileges) during the course of such marriage, at least if the woman did not retain American residence.<sup>75</sup> Granted, however, the United States lifted these restrictions as to intermarriage with citizens of certain countries by treaty.<sup>76</sup> Finally, some American Indian nations erected more imposing barriers. The Cherokee Nation declared “null and void” any marriage between a Cherokee woman and a white man unless the white man had first taken an oath of allegiance to the Nation—that is, unless the white man had first been quasi-naturalized as a Cherokee.<sup>77</sup> The Choctaw Nation passed a similar law.<sup>78</sup> Attorney General Cushing noted that Congress had comparable authority to prohibit such intermarriage.<sup>79</sup>

In each of these cases, then, outsiders were still subject to a burden on their intermarriage with insiders—a *munitas*; but membership in the community relieved individuals from this burden—an *immunitas*. Stated otherwise, at the time of the adoption of the Fourteenth Amendment, citizenship *still* involved a certain *immunitas* from the endogamy restriction frequently imposed against noncitizens.

In this limited respect, then, “marriage” remained a privilege of citizenship. Parenthetically, this privilege did not necessarily entail a right to marry any *person* of one’s choice. This immunity involved a right to intermarry with other citizens, not aliens. As Alabama’s Supreme Court would explain in 1872, the privileges of citizenship included the right “of marriage with any *citizen* capable of entering

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75. Case of Madame Berthemy, 12 Op. Atty. Gen. 7, 7–9 (1866) (holding that a woman born in France to a United States citizen had lost her natal citizenship upon her marriage in France to a Frenchman). Cf. Mackenzie v. Hare, 239 U.S. 299 (1915) (interpreting and upholding federal statutory law suspending a woman’s citizenship while married to an alien, even if the woman remained a resident of the United States).

76. Treaty of Friendship, Commerce and Navigation, U.S.-Nicar., June 21, 1867, art. IX, 18 Stat. (2) 566, 569; General Treaty of Amity, Commerce and Consular Privileges, U.S.-El Sal., Dec. 6, 1870, art. 29, 18 Stat. (3) 725, 739.

77. CONSTITUTION AND LAWS OF THE CHEROKEE NATION, ch. XII, art. XV, at 221–24 (1875).

78. CONSTITUTION AND LAWS OF THE CHOCTAW NATION 225–26 (1894) (prohibiting an American citizen from intermarriage with a member of the tribe unless he had first sworn to “honor, defend, and submit to the constitution and laws of the Choctaw Nation”); see *In re Choctaw Nation Cases* (D. Ind. Terr. 1899), reprinted in 2 ANNUAL REPORT OF THE DEPARTMENT OF THE INTERIOR, app. 12, at 91, 100–104 (1899) (discussing this 1875 statute with apparent approval).

79. Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att’y Gen. 174, 185 (1855) (“Congress might, if it pleased, prohibit any white man from intermarrying with Indians and from acquiring, in this or any way, the tribal rights of person and property; but it has not done so.”).

into that relation.”<sup>80</sup> Further, arguably this immunity did not entail even a right to marry any *citizen* of one’s choice. The immunity from enforced *endogamy* did not encompass a freedom from laws against incest or other rules encouraging *exogamy*. Such laws arguably did not abridge any right of citizenship but served, instead, to establish and maintain a common citizenship among a people. To mandate—or at least encourage—that marriage occur only across familial lines, or even regional or racial lines, may be critical to the creation of a common citizenship—insofar as intermarriage blends separate communities “into one by ties of blood and children.”<sup>81</sup> Such was no doubt the inspiration, for instance, of Patrick Henry’s proposal that Virginia adopt a discriminatory fiscal policy to encourage intermarriage between American Indians and white Virginians.<sup>82</sup>

## 2. Racial endogamy and the privileges of citizenship

In antebellum America, by far the most discussed and controversial form of enforced endogamy was racial. The implications of racial-endogamy laws became a frequent topic in broader debates over black citizenship. Most commentators agreed that the existence of such restrictions demonstrated that blacks did not share a common citizenship with white Americans. As one Founding-era writer explained, Americans were simply unwilling to allow freed blacks “all the privileges of citizenship,” including the “free intercourse and intermarriage with the white inhabitants,” by

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80. *Burns v. State*, 48 Ala. 195, 198 (1872).

81. PLUTARCH, ON THE FORTUNE OR THE VIRTUE OF ALEXANDER (Frank Cole Babbitt trans.), available at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Moralia/Fortuna\\_Alexandri\\*/1.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Moralia/Fortuna_Alexandri*/1.html) (last visited Mar. 4, 2013); W. B. Allen, *Guinier’s Poetry of Race; or, When Accepting the Reality of Difference Means Conceding Different Realities*, 5 THE GOOD SOCIETY 32, 36 (1995) (“If we follow teachings as old as Aristotle, namely that political community requires a supporting dynamic of social unity, the institutional designs that would engage our attentions on Guinier’s reading of the facts would be measures to foster mutual interdependence and concourse rather than political measures to highlight group independence . . . Intermarriage would be a far more effective counsel than political isolation and, if broadly embraced by opinion leaders, would doubtless change the society more swiftly.”). Cf. Orestes Augustus Brownson, *Emancipation and Colonization* (April 1862), in 17 WORKS 253, 266 (Henry F. Brownson ed., 1885) (“There can be no society between persons who have a mutually instinctive aversion to intermarriage; for marriage is the basis of the family, and the family is the basis of general society; when therefore the different races or varieties are separated by too broad an interval for the family union, it is clear that they cannot form one and the same society.”).

82. WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 173–74 (1850).

which a united people would be cemented by “common interest.”<sup>83</sup> Another author, writing in 1803, explained that freed blacks would always remain a “distinct people,” for they were “[d]enied the privilege of intermarriage” with the “white people.”<sup>84</sup> Throughout the 19th century, commentators made similar observations.<sup>85</sup>

Most observers added that racial endogamy reflected not only blacks’ exclusion from, but also their subordination to, the white citizenry. James Kent, in the second edition of his treatise, cited these laws as evidence that persons of the “African race were essentially a degraded class.”<sup>86</sup> A Connecticut court relied on this comment to hold that blacks were not citizens under the federal Constitution.<sup>87</sup> Another writer compared the racial endogamy of the early American republic with the caste endogamy of the early Roman Republic; just as the plebs had been forbidden to intermarry with the patricians, so too were blacks prevented from intermarriage with whites: “The [Roman] commons struggled violently for even the privilege of intermarriage with the nobles, which was forbidden by law . . . . The amalgamation was regarded pretty much in the same light, as that in this country, between the black and the white.”<sup>88</sup> Likewise, H. Ford Douglas, a fugitive-slave turned abolitionist orator, cited the historian Thomas Babington Macauley to compare American racial relations with post-conquest Norman-Saxon relations: “it was considered as

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83. Ferdinando Fairfax, *Plans for Liberating the Negroes Within the United States*, 8 THE AMERICAN MUSEUM OR UNIVERSAL MAGAZINE 285, 285 (1790). Fairfax was a protégé of George Washington. Benjamin Schwarz, *What Jefferson Helps to Explain*, THE ATLANTIC MONTHLY, Mar. 1997, available at <http://www.theatlantic.com/past/docs/issues/97mar/jeffer/jeffer.htm> (last visited Feb. 6, 2013).

84. *On the Moral and Political Effects of Negro Slavery*, 2 THE BALANCE AND COLUMBIAN REPOSITORY 185, 186 (1803).

85. See e.g., Joseph Holdich, *Judgment for the Oppressed*, 5 METHODIST MAG. & Q. REV. 412, 421 (1834) (discussing the difficulties of withholding from free blacks the “privilege of intermarriage” when they were “otherwise admitted to equality” with white citizens); 2 JOHN HOWARD HINTON, THE HISTORY AND TOPOGRAPHY OF THE UNITED STATES 311 note b (1832).

86. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258, note a (2d ed., 1832); accord *Coloured Marriages*, *supra* note 37, at 97–98 (citing racial-endogamy laws to show that “it is manifest that the people of colour are, in every part of the United States, considered, not merely by the populace, but by the law, as a permanently degraded people; not participating as by right, of the civil privileges belonging to every white man, but enjoying what civil privileges they possess, as a gift and grant, as a matter of favour conceded by the law, and revocable by law”).

87. *Crandall v. State*, 10 Conn. 339, 346 (1834) (reporting the jury instructions given by the trial judge).

88. Henry M. Brackenridge, *Editor’s Preface* to 3 HUGH H. BRACKENRIDGE, MODERN CHIVALRY: OR, SEQUEL TO THE ADVENTURES OF CAPTAIN FARRAGO, at iv (1857).

disgraceful for a Norman to marry a Saxon as it is now for a white person to marry a negro.”<sup>89</sup>

Because racial-endogamy laws were indicative of blacks’ status as alien, and even inferior, to the white citizenry, these laws were frequently invoked in debates as to the rights of free blacks under Article IV’s Privileges and Immunities Clause.<sup>90</sup> In the 1820-1821 controversy over Missouri’s admission—with a state constitution that would prohibit free blacks from even entering the state—supporters of Missouri’s admission repeatedly argued that that free blacks could not be “citizens” of any state that prohibited their intermarriage with whites.<sup>91</sup> Delaware’s Representative Louis McLane remarked: “If they were citizens, these [marital] disabilities could not be imposed upon them, but for some personal defect. The real truth is, sir, that they are nowhere considered as members of the civil society, but as inhabitants of the country, holding their rights at the will of the local authority.”<sup>92</sup>

In subsequent decades, the connection between racial endogamy and non-citizenship reappeared frequently in both legislative halls<sup>93</sup> and courts.<sup>94</sup> One Kentucky court, for instance, rejected a black defendant’s claim of citizenship under Article IV by comparing “the condition of the descendants of . . . emancipated negroes” to that “of

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89. H. Ford Douglas, *I Do Not Believe in the Antislavery of Abraham Lincoln*, in *LIFT EVERY VOICE: AFRICAN AMERICAN ORATORY, 1787-1900*, at 340, 348 (Philip Sheldon Foner & Robert James Branham eds., 1998).

90. U.S. CONST. art. IV, § 2, cl. 1.

91. See, e.g., THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 16th Cong, 2d sess., at 546-47 (remarks of Representative Barbour of Virginia) (arguing that even in Massachusetts free blacks did not enjoy “full enjoyment of civil rights” such as the right of intermarriage); *id.* at 66-67 (Sen. Smith) (arguing that “marriage to whomever the citizen shall think proper [is] a right of the highest importance” that is “secured to every [bona-fide] citizen”).

92. *Id.* at 616.

93. *Debate in the Senate on the Admission of Iowa and Florida*, 68 NILES’ WEEKLY REGISTER, Mar. 29, 1845, 55, 62 (reporting argument that even in Massachusetts and Maine, free blacks were not citizens because barred from juries and intermarriage with whites, to which Massachusetts Senator Rufus Choate replied that Massachusetts had just abolished the prohibition on such intermarriage); JOURNAL OF THE CONVENTION, ASSEMBLED AT SPRINGFIELD, JUNE 7, 1847 [FOR] REVISING THE CONSTITUTION OF THE STATE OF ILLINOIS 475 (1847) (reporting one delegate’s motion to strike any suggestion from the state bill of rights that free blacks enjoyed “privileges and immunities” as citizens of Illinois or the United States, for Illinois law clearly denied such persons citizenship by subjecting them to “severe penalties” for intermarriage with whites); CONG. GLOBE, 35th Cong., 2d sess. 986 (1859) (remarks of Representative Sandridge during Oregon debates).

94. *Hobbs v. Fogg*, 6 Watts 553, 558-59 (Pa. 1837) (attempting to prove “that no coloured race was party to our social compact” by citing colonial racial-endogamy laws still in force in 1776).

the freed slaves and their descendants in the earlier days of the Roman Republic. There neither the freed slave nor his descendants, wheresoever born, could be citizens or intermarry with citizens . . . . The same principle applies in America.”<sup>95</sup> Therefore, “[t]he emancipated negro and his descendants to the last generation are alike deprived of citizenship.”<sup>96</sup>

In his opinion for the Court in *Dred Scott v. Sandford*,<sup>97</sup> Chief Justice Taney famously went further: colonial racial-endogamy laws demonstrated the Founders’ view of blacks as not only noncitizens, but even subhuman.<sup>98</sup> But among antebellum authorities, Taney’s opinion was singular in drawing such an extreme conclusion.

Through the Civil War, some jurists opposed to black citizenship offered a complementary argument. They claimed that free blacks could not be citizens under Article IV, for the “privileges and immunities” to which they would be entitled included an immunity against local racial-endogamy laws—and this result was so contrary to well-accepted practice as to be absurd: “If negroes are citizens, [racial-endogamy] laws amount to the worst forms of political proscription and degradation,” one pro-slavery jurist explained.<sup>99</sup> These laws “have received the popular sanction from time immemorial. Marriage, in the eye of the law, is a civil contract, and any abridgement of the rights of citizens, in this matter, that does not operate equally upon all classes, is an unconstitutional proscription.”<sup>100</sup> In a similar vein, during the Civil War, Senator Garrett Davis of Kentucky (later a member of the 39th Congress) denounced President Abraham Lincoln’s policy of enlisting the freedmen into the military with the promise of citizenship: As

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95. *Roberts v. Commonwealth* (C.C. Ky. 5th Circuit (Jefferson County) (1848)), *supra* note 55, at 248, 249.

96. *Id.*

97. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

98. *Scott*, 60 U.S. at 407–409 (citing racial-endogamy statutes as evidence that the Founders considered blacks not only unfit for citizenship, but even “so far below [the whites] in the scale of created beings” for “intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes”).

99. GEORGE S. SAWYER, *SOUTHERN INSTITUTES: OR, AN INQUIRY INTO THE ORIGIN AND EARLY PREVALENCE OF SLAVERY AND THE SLAVE TRADE* 299 (1859).

100. *Id.*; *see also* MARVIN T. WHEAT, *THE PROGRESS AND INTELLIGENCE OF AMERICANS* 555 (1862) (contending that if free blacks were citizens of a state, “the slave States have ever acted unconstitutionally with most of the free States” for a genuine citizen could not be forbidden from intermarriage with another citizen: “What law is there in any State forbidding [sic] a male citizen from marrying a female citizen? . . . Most of the States forbid the marriage of whites to [colored persons], for sound reasons.”) (emphasis in original).

“citizens of the United States[,]” the freedmen would be constitutionally “entitled to all the rights, privileges and immunities of citizens of the other States” without regard to race, including freedom from state laws prohibiting blacks’ migration, residence, and intermarriage with whites.<sup>101</sup>

Unlike Kent, these jurists assumed that the “privileges and immunities of citizens” guaranteed in Article IV included an immunity against not only interstate discrimination but also interracial discrimination.<sup>102</sup> Accordingly, while Kent thought the Clause protected the right to marry across state lines, these jurists concluded the Clause would protect marriages across racial lines as well—but only in the counter-factual world where free blacks were bona-fide citizens.

Stephen Douglas adopted this position during his 1858 debates with Lincoln. In accusing Lincoln of defining the term “citizens” to encompass free blacks, Douglas argued that the “privileges and immunities” to which black citizens would be thus (outrageously) entitled included, *inter alia*, the right to “marry whom they please.”<sup>103</sup> Stated otherwise, the male citizen, as such, had the “privilege of marrying any woman he may select.”<sup>104</sup> For his part, Lincoln denied any intention to recognize or confer either black citizenship or the right of intermarriage (but he did not elaborate whether the former would entail the latter).<sup>105</sup> Lincoln was wise to take this position—

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101. Garret Davis, *The Exchange of Prisoners, White Men Imprisoned for the Sake of the Negro!*, Speech in the United States Senate, December 15, 1863, HOLMES COUNTY FARMER. (Millersburg, Ohio), Jan. 28, 1864, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84028822/1864-01-28/ed-1/seq-1/> (last visited Sept. 12, 2013).

102. This opinion was increasingly popular among both pro-slavery and Republican leaders on the eve of the Civil War. See David R. Upham, *Meanings of the “Privileges and Immunities of Citizens” on the Eve of the Civil War* 32–56 (Mar. 11, 2013) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2107460](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107460)).

103. Stephen A. Douglas, Speech at Bloomington (July 16, 1858), in POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS 24, 36 (1860).

104. Douglas, Speech at Springfield (July 17, 1858), in POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS 40, 52 (1860).

105. Abraham Lincoln, Speech in Fourth Joint Debate at Charleston, in POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS 136, 136 (1860) (asserting “that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people” and that “I will to the very last stand by the law of this State, which forbids the marrying of white people with negroes”); Abraham Lincoln, Rejoinder in Fourth Joint Debate at Charleston, *id.* at 156 (saying “very frankly that I am not in favor of negro citizenship”).

support of racial-endogamy laws was nearly unanimous in antebellum Illinois.<sup>106</sup>

Two years later, William English, a Democratic congressman from neighboring Indiana, leveled Douglas' accusation against the whole Republican Party. He decried the tendency of Republican-leaning states to grant the right of intermarriage and other privileges of citizenship to free blacks. English complained that in most of the states that had voted for Republican presidential candidate John C. Frémont, there was no law prohibiting such intermarriage.<sup>107</sup> In this regard, he singled out Massachusetts as the exemplar of Republican extremism: "In Massachusetts, which is a type of them all, and may justly be considered the model Republican State of the Union, negroes are . . . clothed with the privileges and immunities of the white man."<sup>108</sup> These privileges included not only the rights of travel, of residence, and of "competing with the white man in his labor," but also the right to vote, hold office, practice law, sit on juries, testify (even against whites), send their children to interracial schools, and "what is worse, intermarry with white persons, thus legalizing a disgusting, revolting, and ruinous system of practical amalgamation."<sup>109</sup>

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106. In 1845, by a roll-call vote, the Illinois House of Representatives unanimously resolved against any repeal of the laws prohibiting blacks' intermarriage with whites. SUNBURY AMERICAN AND SHAMOKIN JOURNAL (Pa.), Feb. 1, 1845, at 2, col. 6, available at <http://chroniclingamerica.loc.gov/lccn/sn85054702/1845-02-01/ed-1/seq-2/> (last visited on Feb. 10, 2013).

107. William H. English, *The Political Crisis—The Danger and the Remedy*, Speech in the House of Representatives 7 (May 2, 1860) available at <http://archive.org/details/politicalcrisis00engl>. English was correct, for as of 1861, nine of the eleven Fremont states had no such laws. The following eleven states had either repealed, or had never adopted, such restrictions: New Hampshire, Vermont, Massachusetts (repeal 1843), Connecticut, Rhode Island, New York, New Jersey, Pennsylvania (repeal 1780), Minnesota, Iowa (repeal 1851), and Wisconsin. PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 253–54 (2002). Nine of these eleven states (all but New Jersey and Pennsylvania) were among the eleven states that had supported Fremont in 1856. DONALD RICHARD DESKINS ET AL., PRESIDENTIAL ELECTIONS, 1789–2008: COUNTY, STATE, AND NATIONAL MAPPING OF ELECTION DATA 159–160 (2010). The two Fremont states that had these laws were Ohio and Michigan. See *infra* text accompanying notes 238–48 (discussing the non-enforcement of these laws in the five years following ratification of the Fourteenth Amendment).

108. English, *supra* note 107, at 7.

109. *Id.* Accord Remarks of Hon. Thomas J. Orr, in [Ohio] Senate, January 31st, 1861, on House Bill No. 46, to Prevent the Amalgamation of the African with the White Race, in Ohio, DAILY OHIO STATESMAN, Feb. 6, 1861, at 2 (asserting that many Republicans "wish to make the black man equal to the white man, and to give him *all the rights and privileges of citizens*. Do this and the inevitable result would be the intermarriage of the two races" (emphasis added)).

Contrary to English's accusation, many Republican moderates remained opposed to black citizenship, and some openly agreed that multiracial citizenship would nullify racial-endogamy laws. Orestes Brownson<sup>110</sup> favored post-emancipation colonization instead of the freedmen's admission to "perfect equality with the white race, in one and the same civil and political community."<sup>111</sup> "By what right," he asked, could you "forbid [intermarriage] by law . . . if you deny all distinction in the case, and assert the black and white races are equal?"<sup>112</sup>

In response to these arguments, some supporters of black citizenship disputed the alleged inconsistency between multi-racial citizenship and enforced racial-endogamy. During the Missouri admission debates, for example, Representative William Eustis of Massachusetts argued that his state's law, operating equally on white as well as black, did not abridge black citizenship: "The same law, sir, interdicts the marriage of a white man with a black woman. The law, then, applies equally to both, and cannot justify the inference which has been drawn from it."<sup>113</sup> In effect, "if the black man ceased to be a citizen because he had lost this civil right . . . the white man also must be determined not to be a citizen."<sup>114</sup> In subsequent decades, this argument was reiterated by others, most notably a justice of the Supreme Court of Maine<sup>115</sup> (which did not fully repeal its statute until 1883)<sup>116</sup> and the anti-slavery jurist John Codman Hurd.<sup>117</sup>

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110. PATRICK W. CAREY, ORESTES A. BROWNSON: AMERICAN RELIGIOUS WEATHERVANE 268 (2004).

111. CAREY, *supra* note 110, at 264.

112. *Id.* at 265.

113. 16 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 16th Cong., 2d sess. at 637 (1820).

114. *Id.*; *see also id.* at 96 (remarks of Sen. Otis) ("Why was a black person disqualified as a citizen by being inhibited from marrying a white person more than a white person was so under a reverse of the rule?").

115. "The statutes, on this subject, apply equally to the white and the black, and are designed to prevent all who are desirous to enter into such marriage, from so doing. It shows that the legislature deems such unions inexpedient, and as a matter of public policy to be prohibited; but it is difficult to perceive why it is more onerous upon one race than the other, (for the assumption is that both desire it, and hence the prohibition,) or why it should deprive either of citizenship." Opinion of the Justices of Supreme Judicial Court, 44 Me. 505, 564 (1857) (Appleton, J.).

116. WALLENSTEIN, *supra* note 107, at 254.

117. 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE 286 n.2 (1862) ("If restriction, in respect to marriage, is incompatible with citizenship, why is not the prohibition on the white to marry a negro to be considered? To assume that what is disability on the one party is privilege on the other, is very like begging the question."). Arguing on behalf of a black woman's claim to Article IV citizenship, Connecticut's

Opponents of black citizenship ridiculed these arguments. In the Missouri debates, one congressman treated the argument as unworthy of serious response:

But one of the gentlemen . . . has been pleased to say, that if the black man cannot marry with the white, so the white man cannot marry with the black, and gravely inferred, that therefore, the whites could not be citizens! This observation might, indeed, rather afford matter for amusement, than of sober reply; but, as I deem the latter unnecessary, I will not consume time in indulging the former.<sup>118</sup>

Indeed, no antebellum opponent of black citizenship (to my knowledge) conceded or even took seriously that racial-endogamy laws were compatible with equal multiracial citizenship.

In fact, many supporters of black citizenship agreed: they acknowledged that full citizenship includes the privilege of intermarriage. Still, they insisted that the impairment of this one *privilege* did not destroy all the other privileges of citizenship. According to a writer in *The Abolitionist*, although “cruel” statutes had stripped free blacks of such privileges as the right to “intermarry with the whites . . . these laws [did] not deprive them of citizenship [in other respects].”<sup>119</sup> The common law, he explained, had conferred the full status and privileges of citizenship to every free person born within the state; accordingly, “the free native colored man cannot be deprived of any one of the smallest privileges of citizenship, except by express enactment.”<sup>120</sup> Even if statutory law had abridged one privilege of citizenship, the citizen did not lose the others: a citizen

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William Ellsworth made a somewhat different, more radical argument: “Marriage and citizenship have no relation to each other—they are founded upon and regulated by different considerations. The legislature have a right, (if they please to exercise it,) to regulate marriage according to age, or property, or profession, or color. Citizenship is founded in the tie of natural allegiance.” REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLAINTIFF IN ERROR, VS. STATE OF CONNECTICUT 11 (1834). Obviously, then, this interpretation would permit laws restricting intermarriage between citizens of different classes, for instance.

118. 16 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 16th Cong., 2d sess., at 620 (1820) (remarks of Rep. McLane of Delaware).

119. *Miss Crandall's Second Trial*, 1 THE ABOLITIONIST, Nov. 1833, at 162, 168.

120. *Id.*

“cannot be robbed of the *whole* of these privileges without some direct provision of law.”<sup>121</sup>

On the eve of the Civil War, this argument was elaborated by John McCune Smith, “the foremost black intellectual in nineteenth-century America.”<sup>122</sup> Like many of his contemporaries,<sup>123</sup> McCune Smith understood that citizenship was “of [L]atin derivation” and “gathers its purport and exact meaning from the Roman Republic; it originated and grew under the Romans.”<sup>124</sup> Enumerating the rights of Roman citizenship, he contended, “the possession of all or any of them constituted citizenship on the part of the individual holding them.”<sup>125</sup> In other words, the enjoyment of one privilege of citizenship was a *sufficient*, not a *necessary* condition for the enjoyment of the status of citizenship. One of these privileges was the *ius connubii*: “*the right of marriage.*”<sup>126</sup> He explained that Roman law’s initial prohibition of “intermarriages between the Patricians and the Plebeians” was akin to the prior Massachusetts restriction on “intermarriage between whites and blacks.”<sup>127</sup> He added that just as “this restriction did not, in Rome, destroy the citizenship of the Plebeian, neither could it in Massachusetts.”<sup>128</sup>

This Roman history, and the recent repeal in Massachusetts, provided hope that free blacks would eventually enjoy, throughout the Union, full citizenship, including the *ius connubii*: “[t]his restriction was soon abolished in Rome, as has been done in Massachusetts [in 1843].”<sup>129</sup> The suggestion here was that the enjoyment of any one privilege of citizenship conferred the status, and that status, in turn, should eventually lead to the conferral of all the other privileges, including the *ius connubii*; such had been true of

121. *Id.* (emphasis added). Cf., JAMES DUNCAN, A TREATISE ON SLAVERY: IN WHICH IS SHOWN FORTH THE EVIL OF SLAVE HOLDING BOTH FROM THE LIGHT OF NATURE AND DIVINE REVELATION 104 (Amer. Anti-Slavery Society 1840) (1824) (“It is granted [intermarriage] might be the consequence [of emancipation], yet it would be much better that it should be so than worse. As matters now stand, a mixture of color is rapidly increasing by means of illicit embraces, much more than could be expected by lawful marriages, if they were all free and independent . . .”).

122. JOHN STAUFFER, *Introduction* to THE WORKS OF JAMES MCCUNE SMITH: BLACK INTELLECTUAL AND ABOLITIONIST xiii, xiii (2006).

123. *See supra* note 55.

124. John McCune Smith, *Citizenship*, 1 THE ANGLO-AFRICAN MAGAZINE, 1859, at 144, 146, available at <http://lincoln.lib.niu.edu/file.php?file=angloafrican1.html>.

125. *Id.* at 147 (emphasis in original).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* (footnotes omitted).

the Roman Republic, was true of the state of Massachusetts, and would one day perhaps be true throughout the whole American Republic.

The conclusion that racial-endogamy laws unjustly *impaired* (but did not *destroy*) the rights of citizenship seemed likewise to prevail among legislators who successfully resisted these measures. As David Fowler pointed out, many held that “public enforcement of caste violated social values even more primary than caste, namely, Christian brotherhood and the political equality of free individuals.”<sup>130</sup> This conclusion influenced the rejection of these laws by the legislatures of New York in 1785<sup>131</sup> and Pennsylvania in 1841.<sup>132</sup> In the latter state, a legislative committee raised a “deep[]” and “important” objection: that “[h]owever revolting the intermarriage of blacks and whites may be to every person of correct and delicate feelings,” it would be wrong “to restrain the *natural liberty of the citizen* in any particular, except when the safety of society, the right of property[,] or public morals demand it.”<sup>133</sup>

As Fowler explained, this committee report exemplified both the antebellum “case against intermarriage laws [and] the anti-Negro bias which permeated the ranks of those who resisted the laws.”<sup>134</sup> Critical to the committee’s position, at once racist but opposed to racist legislation, was the distinction between racist *feelings* and public *morals*; this distinction reflected the widespread opinion that

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130. DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE: LEGISLATION AND PUBLIC OPINION IN THE MIDDLE ATLANTIC AND THE STATES OF THE OLD NORTHWEST, 1780-1930, at 215 (1987).

131. JOHN WOOD SWEET, BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730-1830, at 180 (2003) (noting that one state senator explained that his colleagues had rejected a racial-endogamy law because “[i]n so important a connection, they thought the free subjects of this State ought to be left to their free choice”). David Fowler finds that “none of the Middle Atlantic states seems to have considered seriously the enactment of an intermarriage law” from 1790 to 1830, and infers that “to many or most whites, caste solidarity mattered less than other social values.” FOWLER, *supra* note 130, at 106.

132. WALLENSTEIN, *supra* note 107, at 40. Pennsylvania had repealed its law in 1785; one proponent of repeal argued that such legal prohibitions would not be “consistent with natural right.” FOWLER, *supra* note 130, at 87.

133. Committee on the Judiciary System, Report on “An Act to Prevent the Intermarriage of White and Black Persons and Mulattoes,” reprinted in 1 JOURNAL OF SENATE (Pa.), 1841, at 282, 283 (emphasis added). The committee, however, suggested the “citizen” whose liberty was to be secured was the white citizen’s, for later in the report, the committee commented that blacks were “denied the privilege of citizenship.” *Id.* at 284.

134. FOWLER, *supra* note 130, at 174.

interracial marriage was distasteful but morally licit (unlike, e.g., incest and polygamy).<sup>135</sup>

The successful efforts to repeal the ban in Massachusetts occasioned the most important elaboration of the relation between citizenship and intermarriage. In response to a petition presented by thousands of men and women,<sup>136</sup> a joint committee of the legislature recommended repeal in 1840.<sup>137</sup> The committee began its analysis by invoking “the theory of our government and the letter of our Constitution,” by which “the races whose intermixture is prohibited by the statutes . . . are entitled to stand as citizens upon a footing of entire civil equality, and exempted from all partial disabilities.”<sup>138</sup> The committee argued that free blacks were already bona-fide citizens, and that racial-endogamy laws wrongly imposed such “partial disabilities.” The committee vigorously refuted the claim “that there is no inequality, because no restriction is interposed against the marriage of blacks with whites, which is not also interposed against the marriage of whites with blacks”:

[T]his form of oppression is not a new one. It has repeatedly been resorted to in past ages, by tyrants or bigots, who sought to separate the objects of their persecution from all those social influences which mitigate party strife and sectarian hatred. But that it was oppression, and was so meant, was never denied in any case till the present. In the histories of the reformation, we find the prohibition, by the catholic authorities, of marriages between persons professing different religions, enumerated and classed by the historian with those regulations which removed protestants from all public institutions and from acting as guardians to the young, deprived them of the rights of citizens, ordered that they should not be received as apprentices. It was reserved for the astuteness of this day to discover, that what the common sense of mankind had for ages stigmatized as an act of

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135. See *supra* note 27.

136. Louis Ruchames, *Race, Marriage, and Abolition in Massachusetts*, 40 J. NEGRO HIS. 250, 267 (1955), available at <https://pantherfile.uwm.edu/margo/public/FedlStatisticalSystem/2715951.pdf> (last visited Feb. 11, 2013).

137. H.R. Rep. No. 46, 1st Sess., at 2 (Mass. Mar. 6, 1840), available at [http://archive.org/stream/inhouseofreprese00mass/inhouseofreprese00mass\\_djvu.txt](http://archive.org/stream/inhouseofreprese00mass/inhouseofreprese00mass_djvu.txt).

138. *Id.*

persecution, was in fact no persecution or annoyance at all.<sup>139</sup>

The Massachusetts committee added that the imposition of these “peculiar disabilities”<sup>140</sup> contravened not only blacks’ citizenship but even their emancipation. The committee advocated the repeal of this “relic” of slavery, for native freedmen were entitled all “the *privileges and immunities of freemen*.”<sup>141</sup>

William Lloyd Garrison likewise called the law “a disgraceful badge of servitude.”<sup>142</sup> In this latter respect, many pro-slavery Americans agreed with the committee. Consider these comments of Maryland’s Senator Reverdy Johnson, a future member of the Joint Committee on Reconstruction:

You [antislavery citizens] talk about a free man, and yet this man who is free and equal, according to your idea of the subject, is not permitted . . . to intermarry with a white [or enjoy other civil rights]. What, then, does constitute a freeman? Oh, yes, I suppose he enjoys liberty. Liberty! Deprived of every privilege, yet enjoys liberty! He is a freeman, and yet can exercise no franchise that pertains to a freeman! [H]e enjoys the shadow of the name of being a freeman, but is stripped of all the franchises that constitute a freeman.<sup>143</sup>

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139. *Id.* at 3–4. The poet John Greenleaf Whittier, a signatory to one of the petitions, similarly argued that the law was “the offspring and relic of the old slave laws of Massachusetts.” See Ruchames, *supra* note 136, at 259.

140. H.R. Rep. No. 46, 1st Sess., at 6 (Mass. Mar. 6, 1840).

141. *Id.* at 7–8 (emphasis added).

142. Ruchames, *supra* note 136, at 253.

143. Reverdy Johnson, *Invasion of Harper’s Ferry, Speech in the Senate of the United States, December 12, 1859*, NASHVILLE UNION AND AMERICAN, Dec. 23, 1859, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85038518/1859-12-23/ed-1/seq-2/> (last visited Sept. 12, 2013). At the close of the Civil War, Charles Chauncey Burr insisted that blacks should not be permitted to intermarry with whites or otherwise be admitted to membership in the sovereign people. C. Chauncey Burr, *White Supremacy and Negro Subordination*, 3 THE OLD GUARD 193, 196–98 (1865). Burr was a peculiar person: a former abolitionist turned white supremacist, his magazine was temporarily suppressed during the Civil War. DAVID W. BULLA & JUSTYNA SEMPRUCH, LINCOLN’S CENSOR: MILO HASCALL AND FREEDOM OF THE PRESS IN CIVIL WAR INDIANA 93 (2008).

After a few narrow defeats, the repeal efforts in Massachusetts finally succeeded in 1843.<sup>144</sup>

## II. Racial-Endogamy Laws and the Adoption of the Fourteenth Amendment

Therefore, before the adoption of the Fourteenth Amendment, according to the seemingly universal understanding of antebellum authorities, racial-endogamy laws were (1) positive laws made by some states, (2) which impaired a preexisting right recognized at common law. Moreover, most, but not all, legal authorities concluded that (3) the right so abridged represented a privilege of citizenship. Opinions for and against such laws were largely (though not precisely) coextensive with opinions against and for black citizenship, respectively.

Therefore, it was not surprising that when the 39th Congress proposed to amend the federal Constitution by (1) defining citizenship without regard to race or previous condition of servitude, and (2) prohibiting the states from making or enforcing any law that should abridge the “privileges or immunities of citizens of the United States,” that many thought this Amendment might abrogate state racial-endogamy laws. As we shall see below, the Amendment was generally understood, during its framing and adoption, to preclude the making or enforcing of such laws.

### A. Democratic Objections

In Congress, a leading opponent of the Amendment, Representative Andrew Rogers of New Jersey, repeatedly argued that the “privileges and immunities” to be secured would include the right of intermarriage.<sup>145</sup> Although a member of the Joint Committee on Reconstruction that had drafted the Amendment, he apparently heard nothing in committee to assuage his objections. As reported in one newspaper, Rogers contended that “[t]he right of marriage came under the general meaning of privileges and immunities, and a black man could, under the [the Joint Committee’s initial version of the Amendment], go into a State and claim the privilege of marrying a white woman.”<sup>146</sup> In discussing the final version, Rogers raised a similar objection: “What are privileges and immunities? Why, sir, all

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144. Ruchames, *supra* note 136, at 269–73.

145. Cong. Globe, 39th Cong., 1st sess. at House app. 134 (1866).

146. *Specimen of Democratic Eloquence*, BURLINGTON WEEKLY FREE PRESS (Vt.), Mar. 9, 1866, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn86072143/1866-03-09/ed-1/seq-1/> (last visited Feb. 14, 2003).

the rights we have under the laws . . . The right to vote is a privilege. The right to marry is a privilege . . .”<sup>147</sup>

During ratification, opponents made similar allegations. One Tennessee newspaper concluded that there was “no reasonable question” that the legalization of interracial marriage was one of the “intended effects” of the Amendment, for the “language is clearly susceptible of this construction, and however revolting its enforcement upon an unwilling people may be, it will unquestionably be insisted upon, the moment it is ratified.”<sup>148</sup> Many others made a similar objection.<sup>149</sup> A joint committee of the North Carolina legislature was also worried, though less so. The committee recommended against ratification, in part because the federal government *might* declare these “privileges or immunities” to include intermarriage.<sup>150</sup> Although conceding that such a declaration was not “probable,” the committee insisted this result was sufficiently “possible” that the Amendment should be rejected.<sup>151</sup>

## B. Republicans’ Tacit (or Not so Tacit) Acknowledgement

In response to these objections, leading Republicans and Democrats provided little to no reassurance. In the 39th Congress, the silence was deafening. Indeed, my research has not identified any instance where a supporter *expressly* assured, or an opponent *expressly* conceded, that the privileges of citizenship to be guaranteed would *not* include an immunity from racial-endogamy laws. This silence is, of course, in sharp contrast with the prominent,

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147. Cong. Globe, 39th Cong., 1st sess. 2538.

148. Editorial, *Political Violence—the Constitutional Amendment*, DAILY UNION AND AMERICAN (Nashville), June 27, 1866, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85038519/1866-06-27/ed-1/seq-2/> (last visited Feb. 26, 2013).

149. See, e.g., Editorial, *Will the South Adopt the Constitutional Amendment?*, THE ANDERSON INTELLIGENCER (Anderson County, S.C.), Nov. 1, 1866, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn84026965/1866-11-01/ed-1/seq-2/> (last visited Feb. 27, 2013); *Great Ratification Meeting—Conservatives in Council—Speech of Judge John S. Brien*, DAILY UNION AND AMERICAN (Nashville), Oct. 28, 1866, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn85038519/1866-10-28/ed-1/seq-1/> (reporting Judge Brien’s speech, including the claim that racial-endogamy laws would be “abrogated” by the Amendment); “*N/-jr Equality*”: a Democratic “*Snivel*,” HIGHLAND WEEKLY NEWS (Ohio), Oct. 3, 1867, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85038158/1867-10-03/ed-1/seq-2/> (reporting one “copperhead’s” objection).

150. Joint Select Committee on Federal Relations, Report (December 6, 1866), in JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1866-1867 sess., at 91, 96 (1867).

151. *Id.*; see also JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 59 (1997) (discussing this report); see also *id.* at 192 (noting similar objections in an Arkansas newspaper).

authoritative assurances and concession made during the adoption of the Civil Rights Act.<sup>152</sup> As the Supreme Court noted in *Loving*, Virginia's attorneys cited substantial evidence related to Reconstruction-era statutes, but none of the assurances concerned the Fourteenth Amendment itself.<sup>153</sup>

To be sure, there is abundant evidence of nearly universal distaste for, and even disapprobation of, interracial marriage. Some scholars have presented such statements as proof that Republicans favored racial-endogamy laws. For instance, some have cited James E. Bond's study of the ratification debates in the Midwest as evidence of *Loving's* inconsistency with originalism.<sup>154</sup> But Bond did not adopt that conclusion, and the only relevant evidence he presented is one proponent's vehement denial that white supporters of racial equality wanted their daughters to intermarry with black men.<sup>155</sup> This speaker mocked the coarse, racist speech of Democrats<sup>156</sup> and disavowed any personal inclination to intermarry, but added that any legal restrictions would be unnecessary and improper: "For my part, I should burn with shame and mortified indignation, if I supposed that any legislation, any Constitutional enactment was required to be thrown around my daughters to shield their purity, and the integrity and high sublimity of their personal virtue."<sup>157</sup> This statement, then,

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152. See, e.g., CONG. GLOBE, 39th Cong., 1st sess., 505 (1866) (remarks of Senator Lyman Trumbull); Andrew Johnson, II [Second Veto Message], March 27, 1866, in VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, WITH THE ACTION OF CONGRESS THEREON, 297, 299 (Benjamin Perley Poore ed., 1886) (conceding that the Act would not "repeal [] State laws on the subject of marriage between the two races").

153. *Loving*, 388 U.S. at 9 (noting that the statements "pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment").

154. See, e.g., Klarman, *supra* note 5, at 1920, n.99; DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 175 n.57 (2002).

155. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 457 & n.152 (1985).

156. *Id.* ("Are you in favor of your daughter marrying a big buck n[—]r?").

157. *Id.* Another comment, sometimes cited, is Pennsylvania Representative Glenni Scofield's remark, in January 1866, that interracial marriage would *not* result from black suffrage in the District of Columbia: "[No] person of common sense can bring himself to believe that marriages between any persons, much less between white and colored people, will take place because a colored man is allowed to drop a little piece of paper in a box." Cong. Globe, 39th Cong., 1st sess. 180 (1866). One scholar has used this quote as evidence that "Republicans refused to extend the Fourteenth Amendment prohibition on discrimination . . . to the question of marriage." Jane Dailey, *Marriage, Mixed*, in 2 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619-1895: FROM THE COLONIAL PERIOD TO THE AGE OF FREDERICK DOUGLASS 330, 332 (Paul Finkelman ed., 2006). Yet Scofield was plainly speaking about the likelihood of such marriages, not their

evinces opposition not only to interracial marriage, but also to laws restricting it.<sup>158</sup>

In fact, opponents of racial-endogamy laws typically protested their personal aversion to interracial marriage. To cite one example, at the Arkansas constitutional convention of 1868, various delegates, both black and white, successfully argued against the inclusion of any racial-endogamy rule in the state's constitution; but they also joined a unanimous resolution expressing their "opposition to all amalgamation between the white and colored races, whether the same is legitimate or illegitimate."<sup>159</sup> One delegate argued, perhaps counter-intuitively, that if "legal intercourse" should be permitted, but extra-marital interracial intercourse vigorously prohibited, there would be a net decrease in interracial cohabitation, whether legal or not.<sup>160</sup> Avins, then, was, for the most part, correct in concluding that neither white nor black Republicans "advocated miscegenation."<sup>161</sup> But disapprobation did not imply approval of legal restriction.<sup>162</sup>

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legality, for the Republican Congress had repealed the local racial-endogamy statute in 1862. For a discussion of this repeal, see *infra* text accompanying notes 180–89.

158. In his study of the debates in the South, Bond likewise provided no evidence of any assurance that such laws would not be affected. See BOND, NO EASY WALK, *supra* note 151.

159. DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7, 1868, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 2D, 1867, AND THE ACTS OF MARCH 23D AND JULY 19TH, 1867, SUPPLEMENTARY THERETO, TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 489, 500, 504, 507 (1868). For a good treatment of these debates, see Paul C. Palmer, *Miscegenation as an Issue in the Arkansas Constitutional Convention of 1868*, 24 ARK. HIST. Q. 99 (1965).

160. *Id.* at 503 (comments of James Hodges).

161. Avins, *supra* note 12, at 1253. One prominent exception was George Downing, who spearheaded the repeal efforts in Rhode Island. Downing, *George Thomas*, in 6 AFRICAN-AMERICAN NATIONAL BIOGRAPHY 847 (Henry Louis Gates ed., 1999) (quoting Downing's claim that "[t]he world has no such beauties as are the product of the Africo-American with other races in America"). Another prominent exception was the Methodist preacher Gilbert Haven. GEORGE PRENTICE, THE LIFE OF GILBERT HAVEN: BISHOP OF THE METHODIST EPISCOPAL CHURCH 298–301 (1883) (quoting Haven's sermon defending the "right and fitness" of intermarriage). Not surprisingly, in antebellum America, the leading proponent of interracial marriage was Garrison. FOWLER, *supra* note 130, at 150.

162. See, e.g., THE BLACK LAWS! SPEECHES OF HON. B. W. ARNETT OF GREENE COUNTY, AND HON. J. A. BROWN, OF CUYAHOGA COUNTY, IN THE OHIO HOUSE OF REPRESENTATIVES, MARCH 10, 1886 (transcribed 1994), available at [lcweb2.loc.gov/rbc/lcrbmrp/t0d/t0d06.sgm\\_old](http://lcweb2.loc.gov/rbc/lcrbmrp/t0d/t0d06.sgm_old) (last visited Nov. 13, 2014) ("The question of marrying white women is not in this bill, but is one of individual taste and preference, and no reasonable person should, for one moment, think of connecting the two together. The intent of the repeal of these laws is to break down that legal wall that is now built up between citizens of the same rights and obligations. . . . There are many reasons why I prefer our own women. I think that colored men ought to marry their own women, and

On the other hand, some proponents of the Amendment at least implied that it would not adversely affect intermarriage statutes. Just two and half weeks after voting for the Fourteenth Amendment, Senator Waitman Willey, a Republican from West Virginia, explained that black suffrage would create “no barrier to the interposition of legislative prohibitions against such intermarriage,” which restriction, he said, might be justified “if the good of society should render it necessary.”<sup>163</sup> Furthermore, Senator Lyman Trumbull repeatedly suggested that the first section of the Amendment served *only* to constitutionalize the restrictions of the Civil Rights Act<sup>164</sup>—which Act, he had elsewhere said, did not secure the right of interracial marriage.<sup>165</sup> Although neither of these senators expressly made the reassurance in connection with the Fourteenth Amendment, the inference can plainly be drawn from their various statements.

A more emphatic implied reassurance is found in the votes of some state legislators. In Oregon, just after Unionists barely secured ratification, the legislature fell to Democratic control, and voted both to rescind ratification and to extend the state’s 1862 ban on interracial marriage.<sup>166</sup> While Democratic legislators insisted that no one who had voted for the Amendment could also vote for this statute, most Amendment supporters (now in the minority) did so anyway.<sup>167</sup>

Still, it should be noted that Oregon was something of a political, as well as geographic, outlier. Relative to the other antebellum free states, Oregon had arguably the most racist citizenry. In 1859, the

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white men ought to stay on their own side of the fence, and if any person desires to know the character of society, let them look at our congregations and the various complexions. It has been the pouring of black veins, until it is almost impossible to tell where the white race begins or the black one ends. I have a pride for the women of my race; I am proud of their beauty.”).

163. CONG. GLOBE, 39th Cong., 1st sess. 3437 (1866). As Avins properly emphasized, this statement is especially important given that Willey was a Republican who had recently voted for the Amendment. Avins, *supra* note 12, at 1237.

164. *Senator Trumbull in Chicago*, SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY (1866) (stating that section 1 was “a reiteration of the rights as set forth in the Civil Rights Bill”); *Speech of Senator Trumbull, Delivered at Evanston, Illinois, August 31, [1866]*, in *id.* at 49 (stating that Section 1 was “an unnecessary provision, perhaps, since the passage of the Civil Rights Bill and the abolition of slavery”).

165. CONG. GLOBE, 39th Cong., 1st sess. 505 (1866).

166. PASCOE, *supra* note 17, at 77–80.

167. Cheryl A. Brooks, Comment, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731, 743 (2004) (citing, *inter alia*, the comment of Isaac Cox that he would vote for the statute “believing, as I do, that those laws of Congress, and that the late amendments to the Constitution will, in the course of time, be declared null and void” but that supporters could not vote for the law).

state had adopted a constitution that controversially prohibited black immigration<sup>168</sup> (a provision not formally repealed until 1926),<sup>169</sup> and in 1860, the state gave nearly as many votes to the pro-slavery Breckenridge as to Abraham Lincoln.<sup>170</sup> In the 1866 election, the people had elected a pro-Amendment majority in the legislature, but that coalition was explicitly Unionist rather than Republican.<sup>171</sup>

In more mainstream Ohio, however, some Republicans likewise suggested the constitutionality of such laws under the pending amendment. As in Oregon, after the legislature voted for ratification, the Democrats obtained a majority, voted to rescind ratification, and proposed to extend the state's intermarriage law. Like in Oregon, some minority Republicans voted for the measure; still, about half of the Republicans in the Ohio House opposed the law, and the bill never reached a vote in the Ohio Senate.<sup>172</sup>

To be sure, the votes of these Republican legislators occurred before the Amendment became effective (in July 1868). Nonetheless, these actions provide significant evidence that some supporters of the Amendment at least impliedly denied that racial-endogamy laws would be nullified.

Nonetheless, by and large, supporters of the Amendment did not respond to Democrats' intermarriage objection. According to Avins, this Republican silence simply reflected Republican "scorn."<sup>173</sup> But there are five good reasons to conclude that this silence represented tacit concession.

First, the evidence surveyed above indicates that the express terms of the Citizenship and Privileges or Immunities Clauses, as widely understood before 1866, would have precluded any state law that would abridge the right of intermarriage or other fundamental privilege of citizenship.<sup>174</sup> Given this background, the failure to clarify otherwise confirmed, rather than denied, the threat posed to state racial-endogamy statutes.

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168. 2 HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 624–27 (1879).

169. Darrell Millner, *Oregon*, in BLACK AMERICA: A STATE-BY-STATE HISTORICAL ENCYCLOPEDIA 679, 680–82 (Alton Hornsby, Jr., ed., 2011).

170. EUGENE M WAIT, OPENING OF THE CIVIL WAR 4 (1999). Breckenridge's performance in Oregon (34.8% to Lincoln's 36.6%) nearly matched his results in pro-slavery Kentucky (36.4%), and far exceeded his results in pro-slavery Missouri (18.9%). *Id.*

171. Brooks, *supra* note 167, at 742.

172. FOWLER, *supra* note 130, at 231–32 & n.24.

173. Avins, *supra* note 12, at 1235.

174. See *supra* Part I.

Second, many Republicans, both in Congress and the country at large, had demonstrated hostility to racial-endogamy laws for decades. As noted above, in the heavily anti-slavery (and future Republican) states of Massachusetts and Iowa, the legislature had repealed the state statutes in 1843 and 1851, respectively.<sup>175</sup> In 1859, the strongly Republican territorial legislature in Kansas territory had taken the same step.<sup>176</sup> In the same year, Republican legislators in Wisconsin overwhelmingly rejected such a law.<sup>177</sup> In 1860, the Republican majority in the Ohio House likewise rejected such a proposal (though many changed sides and voted for a prohibition during that “mad winter of compromise” of 1861).<sup>178</sup> And in 1864, Unionists in Louisiana had made unsuccessful repeal efforts.<sup>179</sup>

Perhaps the most important pre-1866 evidence of this Republican hostility or recklessness was Congress’ repeal of the racial-endogamy law in the District of Columbia. In 1862, congressional Republicans repealed the District’s entire “black code” (adopted from Maryland laws) that had included, *inter alia*, provisions criminalizing and invalidating interracial marriage.<sup>180</sup> The general repeal required that “persons of color” be “subject or amenable” only “to the same laws and ordinances to which free white persons are or may be subject or amenable.”<sup>181</sup>

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175. *Supra* text accompanying notes 35, 136–44.

176. PHYL NEWBECK, VIRGINIA HASN’T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING 42 (2004).

177. FOWLER, *supra* note 130, at 187–92 (showing that roughly half of House Republicans and nearly all Senate Republicans voted against the bill).

178. *Id.* at 194–201; BEVERLY LOWRY, HARRIET TUBMAN: IMAGINING A LIFE 271 (2008) (quoting the abolitionist Franklin Sanford).

179. *Official Minutes of the House of Representatives of the State of Louisiana*, The Daily True Delta (New Orleans), Jan. 4, 1865, at 1, available at [http://news.google.com/newspapers?nid=i\\_QFVEgXGzMC&dat=18650104&printsec=frontpage&hl=en](http://news.google.com/newspapers?nid=i_QFVEgXGzMC&dat=18650104&printsec=frontpage&hl=en) (reporting Representative Marie’s introduction of a repeal measure) (last visited Mar. 11, 2013). In 1865, the Illinois legislature repealed much of the state’s black code but did not repeal the intermarriage law. FOWLER, *supra* note 130, at 223.

180. THE BLACK CODE OF THE DISTRICT OF COLUMBIA, IN FORCE SEPTEMBER 1ST, 1848, Chaps. IX, XIII (Worthington G. Snethen ed., 1848).

181. An Act Providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for Other Purposes, § 4, 12 STAT. 407 (May 21, 1862)

That all persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the *same laws and ordinances* to which free white persons are or may be subject or amenable; that they shall be tried for any offences against the laws in the same manner as free

Although this general repeal did not specifically mention marriage, some proponents almost certainly knew that the measure would sweep away the extant racial-endogamy laws.<sup>182</sup> The sponsor of this general repeal was Senator Henry Wilson, who had championed racial-endogamy repeal efforts in Massachusetts two decades earlier.<sup>183</sup> Furthermore, as Wilson later recalled,<sup>184</sup> during the preceding congressional debates, Democrats had accused proponents of desiring or advocating intermarriage with blacks, but Republicans answered the charge with counter-accusations of the same,<sup>185</sup> or with conspicuous silence.<sup>186</sup> But no supporter of the general repeal of the black code sought any special exception for intermarriage laws.

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white persons are or may be tried for the same offences; and that, upon being legally convicted of any crime or offence against any law or ordinance, such person of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts, or parts of acts, inconsistent with the provisions of this act are *hereby repealed* (emphasis added).

182. Contemporaries noted this effect. See MICHAEL THOMPSON, AN ANALYTICAL DIGEST OF THE LAWS OF THE DISTRICT OF COLUMBIA: CONTAINING ALL THE LAWS OF MARYLAND OF FORCE AND APPLICABLE IN THE DISTRICT OF COLUMBIA, AND THE ACTS OF CONGRESS IN RELATION TO THE DISTRICT, TO MARCH 3, 1863, at 296 & note a (1863) (noting the effect that the comprehensive repeal had on racial-endogamy laws). See also COMPILATION OF THE LAWS IN FORCE IN THE DISTRICT OF COLUMBIA, APRIL 1, 1868, at 159–64 (1868) (including various pre-cession Maryland marital statutes but conspicuously omitting the prohibition on intermarriage).

183. ELIAS NASON, THE LIFE AND PUBLIC SERVICES OF HENRY WILSON 48 (1881) (showing that Wilson supported the Massachusetts repeal in 1843); JONATHAN B. MANN, The Life of Henry Wilson: Republican Candidate for Vice-President, 1872, at 95 (1872) (noting that Wilson introduced the amendment to repeal the black code). Wilson's involvement in the repeal of both the Massachusetts racial-endogamy law and D.C.'s black code was noted by the attorneys in *Brown*. See Brief of Appellants, *Brown v. Board of Ed.*, 344 U.S. 1 (1953) (Nos. 1, 2, and 4 and for Respondents in No. 1 on Reargument), available at <http://law.jrank.org/pages/11477/Brief-Appellants-in-Nos-1-2-4-Respondents-in-No-10-on-Reargument-ARGUMENT.html>.

184. HENRY WILSON, HISTORY OF THE ANTISLAVERY MEASURES OF THE THIRTY-SEVENTH AND THIRTY-EIGHTH UNITED-STATES CONGRESSES, 1861-64, at 49–53 (1864).

185. *Id.* See, e.g., 37th Cong., 2d sess. 1357 (1862) (remarks of Rep. Harlan). Harlan was from Iowa, which, like Massachusetts, had repealed its racial-endogamy law before the War. *Supra* note 35.

186. John Bingham was challenged on the question of whether black citizenship entailed the right of intermarriage and the right to vote. Bingham denied that citizenship would automatically give blacks the suffrage, but said nothing about intermarriage. *Id.* at 1639. A decade later, during the debates leading to the Civil Rights Act of 1875, congressional Republicans would likewise tacitly indicate the invalidity of racial-endogamy laws. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1018 (1995) (“But it is striking that not a single supporter of the 1875 Act

Parenthetically, note that the statute containing this repeal is most famous, as its title indicates, for establishing schools for “colored children” in the District.<sup>187</sup> This statute thus has provided evidence that congressional Republicans were favorable toward educational racial segregation. As Michael McConnell has remarked, this statute is “[t]he single piece of evidence most often cited in support of the proposition that the framers of the Fourteenth Amendment did not deem school segregation unconstitutional.”<sup>188</sup> But as to marriage, this statute provides opposite evidence—Republicans were reckless or even hostile toward marital segregation.<sup>189</sup>

Third, contemporaneous with the adoption of the Amendment (1866-1868), many Republicans continued their campaign against racial-endogamy laws. As early as March 1864, Horace Greeley had argued, in company with other abolitionists, that “under the Constitution in its most liberal interpretation, and admitting our cherished American doctrine of equal human rights, if a white man pleases to marry a black woman, the mere fact that she is black gives no one a right to interfere to prevent or set aside such marriage.”<sup>190</sup> In 1867, in response to an editorial of the ex-Republican *New York World*, which had complained that “Republican legislation” had made the question of interracial marriage “every day of fearful

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attempted to deny that under their interpretation, anti-miscegenation laws were unconstitutional.”).

187. An Act Providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for Other Purposes, § 1, 12 STAT. 407 (May 21, 1862).

188. McConnell, *supra* note 186, at 977.

189. Avins quotes a comment in December 1867 by Senator Samuel Pomeroy of Kansas, indicating that he believed the prohibition, and the whole black code, remained valid, and Sumner’s terse response that it was “not expedient to raise any further questions.” Avins, *supra* note 12, at 1237–38 (citing CONG. GLOBE, 40th Cong., 2d Sess. pt. 1 at 38–39 (1867)). Neither Pomeroy nor Avins seemed aware of the 1862 repeal of this black code. Perhaps Sumner’s change of the subject was an effort to spare Pomeroy the embarrassment of a correction on the floor of the Senate.

190. SAMUEL S. COX, EIGHT YEARS IN CONGRESS, FROM 1857-1865: MEMOIR AND SPEECHES 353 (1865) (quoting this editorial). The *Tribune* disavowed the notion that “such union would be wise, but we do distinctly assert that society has nothing to do with the wisdom of matches.” *Id.* Other advocates of black citizenship during the war made similar claims. *Id.* (citing the abolitionist paper *Principia* for advocating interracial marriage on these grounds “that God has made of one blood all nations of men, endowed them with equal rights, and that they are entitled to all the civil and political prerogatives and privileges of other citizens”); *id.* at 367 (quoting the conclusion that “equality before the law, for the negro, secures to him freedom, privilege to secure property and public position, and, above all, carries with it the *ultimate fusion of the negro and white races*”). See also HORACE GREELEY, HORACE GREELEY’S VIEWS ON VIRGINIA 2 (1872), available at <https://archive.org/stream/horacegreeleysvi00gree#page/2/mode/2up> (last visited Jan. 1, 2014).

practical importance,” Greeley’s *Tribune* denied there was any “case in which the State would be justified in interfering to prevent such a marriage any more than to command it.”<sup>191</sup>

More modestly, the *New York Times* conceded that if blacks were admitted to full citizenship, they might enjoy intermarriage rights, but argued that, in any case, “legalized intercourse was to be preferred to illegal [intercourse].”<sup>192</sup> And in August 1868, just after the Fourteenth Amendment’s full ratification, the *Times* again acknowledged that Republicans sought to ensure that the “negro . . . should share the privileges of other men,” and conceded that such privileges might involve “a legal right to intermarry”; nonetheless, the “proper obstacle” to such intermarriage was “social opinion” and not legal prohibition.<sup>193</sup> In a similar vein, *Harper’s* suggested that insofar as freedmen enjoyed the “rights and prerogatives of citizenship,” including “the equality of all men before the law,” then “legal barriers” to interracial marriage would be “broken down.”<sup>194</sup>

While the Amendment was pending before the states, Republicans continued their legislative efforts. Repeal measures succeeded in Louisiana,<sup>195</sup> and the territories of New Mexico<sup>196</sup> and Washington,<sup>197</sup> passed one house of the Maine legislature,<sup>198</sup> but failed

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191. Editorial, *Mixed Marriages*, N.Y. DAILY TRIBUNE, Dec. 19, 1867, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn83030214/1867-12-10/ed-1/seq-4/>.

192. Editorial, *Georgia*, N.Y. TIMES, Jan. 27, 1866, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F20617F7345A1A7493C5AB178AD85F428684F9>; but see Editorial, *Amalgamation in Nashville*, N.Y. TIMES, July 16, 1866, at 4 (criticizing the *New York Tribune* for making “[s]ocial equality” the newspaper’s “mission.”).

193. Editorial, *The Grand Climax*, N.Y. TIMES, Aug. 10, 1868, at 4.

194. *Editor’s Book Table*, 38 HARPER’S NEW MONTHLY MAG. 148, 148 (Dec. 1868) (reviewing ANNA E. DICKINSON, *WHAT ANSWER?* (1868)). The author of this book review, however, added that the “almost universal sentiment of aversion” would limit the frequency of such marriages. *Id.*

195. Louisiana Acts of 1868, No. 210, at 278–79 (1868); the measure was not fully passed until November 1868, after the ratification of the Fourteenth Amendment, but had been proposed and discussed in the previous summer while the Amendment was pending. CHARLES VINCENT, *BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION* 102–03 (2011).

196. WALLENSTEIN, *supra* note 107, at 253 (noting repeal in 1866). New Mexico’s repeal was part of a comprehensive repeal of the entire 1857 law adverse to free blacks. HUBERT HOWE BANCROFT, *ARIZONA AND NEW MEXICO, 1530-1888*, at 683 (1888). In December 1865, the territorial governor had urged this comprehensive repeal for this reason: “The law relating to free negroes, is . . . in discord with the legislation of Congress, and the proclamation of the President, abolishing slavery and restoring to civil rights the freedmen of the African race, and should be made to conform to the status now occupied by that race, under the laws of Congress.” H.R.J. 15th Leg. 20 (N.M. Terr. 1866).

197. An Act to Amend an Act Entitled an Act to Regulate Marriages, Jan. 23, 1868, § 1, 1868 Wash. Terr. Stat. 619; Jason A. Gillmer, *Crimes of Passion: The Regulation of*

overwhelmingly in Missouri.<sup>199</sup> At the same time, Reconstruction conventions in at least six states—South Carolina, Mississippi, Arkansas, Alabama, Georgia, and North Carolina—rejected proposals to mandate racial endogamy in their state constitutions.<sup>200</sup>

Indeed, the actions and omissions of these conventions largely confirmed the fears of legalized intermarriage. Indeed, in three states—South Carolina, Mississippi, and Florida—the Constitution was not merely silent, but contained affirmative provisions that would be authoritatively interpreted to prohibit racial-endogamy laws.<sup>201</sup> In

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*Interracial Sex in Washington, 1855-1950*, 47 GONZ. L. REV. 393, 405–06, n. 75 (2011) (noting this repeal and attributing it to Republicans’ “desire to destroy the legal distinctions based on race”).

198. Editorial, *Maine Legislature*, NASHVILLE UNION AND DISPATCH, Feb. 7, 1867, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85038521/1867-02-07/ed-1/seq-2/> (reporting that the Maine House had rejected the Senate’s bill to permit interracial marriage).

199. Editorial, FAYETTEVILLE OBSERVER (Tenn.), Mar. 29, 1866, at 2 (reporting an overwhelming vote against a measure introduced by a “radical” representative from St. Louis), available at <http://chroniclingamerica.loc.gov/lccn/sn85033395/1866-03-29/ed-1/seq-2/>.

200. BOND, NO EASY WALK, *supra* note 151, at 131 (noting that the South Carolina convention was “dominated by black Republicans” and “declined to include any prohibition against interracial marriage”); JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI, 1868, at 199–200 (1871) (showing a rejection of such a prohibition by an overwhelming vote of 10 to 55); DEBATES AT ARKANSAS CONVENTION, *supra* note 159, at 489, 500, 504, 507; OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA HELD IN THE CITY OF MONTGOMERY, COMMENCING ON TUESDAY, NOVEMBER 5TH, A.D. 1867, at 189 (1868), available at [http://www.legislature.state.al.us/misc/history/acts\\_and\\_journals/1867\\_Journals/1867ConventionJournal\\_fulldocument.html](http://www.legislature.state.al.us/misc/history/acts_and_journals/1867_Journals/1867ConventionJournal_fulldocument.html); BOND, NO EASY WALK, *supra* note 151, at 108–09 (noting that the “Republican-dominated convention” rejected proposals concerning interracial marriages); JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PEOPLE OF GEORGIA, 1868, at 64, 148 (1868) (showing a proposed constitutional prohibition, but not included in the final draft, as well as a proposed ordinance, rejected because out of order); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, 1868, at 216 (1868) (noting that a proposal to constitutionally prohibit interracial marriages was laid on the table).

201. S.C. CONST. art. I, § 39 (1868) (providing that “Distinction on account of race or color, in any case whatever, shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal and political privileges.”); CHARLES F. ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 29 (2003) (noting this provision’s implicit abrogation of the South Carolina law); FLA. CONST. OF 1868, art XVI, § 28 (“There shall be no civil or political distinction in this State on account of race, color, or previous condition of servitude”) for a discussion of the subsequent statutory repeal, motivated by this clause, *see infra* text accompanying note 256; *Dickerson v. Brown*, 49 Miss. 357, 374 (1873) (affirming that “[w]ith the adoption of the present [state] constitution [in December 1869], former impediments to marriage between whites and blacks ceased”). In 1870, before this decision, the Mississippi legislature had passed an act that “forever repealed” all “black codes,” including the racial endogamy statutes. WALLENSTEIN, *supra* note 107, at 59. Soon after this repeal, a member of the Mississippi

Louisiana, where the legislature would formally repeal the statute a few months later,<sup>202</sup> the delegates likewise included provisions repudiating racial discrimination.<sup>203</sup> In Arkansas, the delegates at the convention seemed to assume that constitutional silence would signify legal permission, for they spoke as if the old statutory provision had already been abrogated,<sup>204</sup> an abrogation later confirmed by the conspicuous omission of the statute from the state's 1873 code.<sup>205</sup> In the two others—Georgia and Alabama—constitutional silence effectively repealed the existing constitutional prohibitions of the 1865 constitutions;<sup>206</sup> however, the extant statutory bans seemingly survived, but somewhat precariously in Alabama<sup>207</sup> and somewhat

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senate married an African-American woman. Editorial, *Miscegenation—A White Senator of Mississippi Marries a Colored Lady—The Ceremonies*, N.Y. TIMES, Aug. 5, 1870, at 5; Ronald E. Butchart, *Edmonia G. and Carolina V. Highgate: Black Teachers, Freed Slaves, and the Betrayal of Black Hearts*, in *PORTRAITS OF AFRICAN AMERICAN LIFE SINCE 1865*, at 1, 9 (Nina Mjagkij ed., 2003).

202. See *supra* note 195.

203. LA. CONST. arts. 2, 100 (1868).

204. DEBATES AT ARKANSAS CONVENTION, *supra* note 159, at 489–507 (suggesting the absence, in 1868, of any extant local racial-endogamy law).

205. WALLENSTEIN, *supra* note 107, at 80; DIGEST OF THE STATUTES OF ARKANSAS, ch. 92, §§ 4171–4191 (Edward W. Gantt ed., 1874) (conspicuously omitting any racial-endogamy rules). There is one newspaper account of a legislative repeal in 1869, but I have not been able to find any corroborating evidence. FAYETTEVILLE OBSERVER (Tenn.), Mar. 4, 1869, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85033395/1869-03-04/ed-1/seq-2/> (denouncing the “carpet-bag legislature of Arkansas” for “repeal[ing] all laws preventing the intermarriage of blacks and whites”).

206. GA. CONST., art. V, § 1, cl. 9 (1865) (“The marriage relation between white persons and persons of African descent, is forever prohibited, and such marriage shall be null and void; and it shall be the duty of the General Assembly to enact laws for the punishment of any officer who shall knowingly issue a license for the celebration of such marriage, and any officer or minister of the gospel who shall marry such persons together”). ALA. CONST. art. IV, § 31 (1865) (“It shall be the duty of the General Assembly, at its next session, and from time to time thereafter as it may deem proper, to enact laws prohibiting the intermarriage of white persons with negroes, or with persons of mixed blood, declaring such marriages null and void ab initio, and making the parties to any such marriage subject to criminal prosecutions, with such penalties as may be by law prescribed.”). See also W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880*, at 492 (1935) (indicating that white delegates in Alabama initially favored such a provision overwhelmingly, but were persuaded by black delegates’ objections).

207. In Alabama, however, during the 1868–69 session, soon after ratification, one or both houses of the Alabama legislatures reportedly voted to repeal the vestigial statute. Editorial, *THE WEEKLY ARIZONA MINER*, Feb. 6, 1869, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn82014899/1869-02-06/ed-1/seq-2/> (reporting that the “carpet-baggers” in the Alabama legislature had voted to repeal “all laws forbidding the intermarriage of blacks and whites”); Editorial, *THE PULASKI CITIZEN* (Tenn.), Dec. 25, 1868, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85033964/1868-12-25/ed-1/seq-2/> (containing two reports, one that the whole legislature had voted to repeal the

dubiously in Georgia.<sup>208</sup> Only in North Carolina did the convention expressly reassure citizens of the preservation of the status quo ante: The convention's cover letter insisted that interracial marriage could still "be regulated by the representatives of the people in the General Assembly."<sup>209</sup>

In light of Republicans' nationwide hostility to enforced racial-endogamy, Democrats understandably charged them with racial radicalism. On the eve of the Amendment's full ratification, one newspaper alleged that Republicans had moved decisively in favor of extending the right of intermarriage to blacks: "It is past denial now that the Radical party is in favor of 'impartial suffrage'—more than this, in favor of extending to the blacks the same rights and privileges exercised by the whites," including the right to "intermarry with the whites," and "and all things by law or custom tolerated in or conferred upon the white race."<sup>210</sup>

Fourth, while the Amendment was still pending, several prominent Democrats and Republicans outside Congress concluded that racial-endogamy laws were invalid under the very statute that the Amendment was (partly) designed to constitutionalize: the recently adopted Civil Rights Act—despite the contrary reassurances made during the statute's adoption.<sup>211</sup> As Horace Flack noted in his classic study, while the Amendment was pending, there was a widespread, though not "prevalent," belief that the Act had "permitted the intermarriage of the races."<sup>212</sup> Most notably, the Kentucky Supreme Court concluded that the Act was unconstitutional in 1867, in part

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statute, another that lower house only had so voted). The state's supreme court would soon thereafter nullify the law as unconstitutional in 1872. *Burns*, 48 Ala. at 197–98.

208. In Georgia, the new constitution's bill of rights declared, "[t]he social status of the citizen shall never be the subject of legislation." GA. CONST., art. I, § 11 (1868). This provision was subject to two opposing interpretations: some claimed it abolished all racial-endogamy laws, while others claimed that it would prevent the legislature from altering any existing legislation. Editorial, *Judge Irwin the Anti-Radical Candidate for Governor—Prospects of the Canvass—Candidates for Congress—Crops*, N.Y. TIMES, Apr. 5, 1868, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F50D1FFF3C541B7493C7A9178FD85F4C8684F9>. A year later, the state supreme court endorsed the latter interpretation. *Scott v. State*, 39 Ga. 321, 324 (1869).

209. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, 1868, at 485 (1868).

210. Editorial, *The Radical Party and the Negro*, PUBLIC LEDGER (Memphis), June 13, 1868, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn85033673/1868-06-13/ed-1/seq-1/> (reprinting the editorial from the *Cairo Democrat*).

211. See *supra* note 152.

212. HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 54 (1906).

because its allegedly extreme effects included the abrogation of state racial-endogamy laws.<sup>213</sup>

As Flack emphasized, this conclusion was not limited to opponents.<sup>214</sup> Indeed, the *New York Tribune* (not surprisingly) decried a criminal prosecution in Tennessee and hoped that the case would be “taken up by the United States Supreme Court for adjudication under the Civil Rights Act.”<sup>215</sup> The *New Orleans Tribune*, owned by African Americans, insisted that the Act effectively struck the word “white” from all state statutes, and thus entitled citizens to “[c]ertificates of marriage” even “when husband and wife belong to different races.”<sup>216</sup> At the Alabama constitutional convention, the Civil Rights Act provided the leading basis for opposing the prohibition on such marriages.<sup>217</sup> In trial courts from Maine to Mississippi, defendants repeatedly, though unsuccessfully, invoked the Act to defend themselves against local racial-endogamy laws; in response, radical Republicans frequently declared their exasperation and intent to bring an appeal to the Supreme Court.<sup>218</sup>

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213. *Bowlin v. Commonwealth*, 65 Ky. 5, 9 (1867). In 1869, Judge Joseph Crockett, of California’s Supreme Court, would reach the same conclusion. *People v. Washington*, 36 Cal. 658, 681 (1869) (Crockett, J., dissenting). Cf. Editorial, *Working of the Civil Rights Bill*, THE NASHVILLE DAILY UNION, Apr. 6, 1866, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn83025718/1866-04-06/ed-1/seq-1/> (objecting that any clergyman who obeyed a local racial-endogamy law would violate the Civil Rights Act); accord Editorial, *The Proceedings of the Rump Congress*, The Vinton Record (Ohio), Sept. 27, 1866, at 3, available at <http://chroniclingamerica.loc.gov/lccn/sn85038222/1866-09-27/ed-1/seq-3/>.

214. FLACK, *supra* note 212, at 42 (noting that the statements that the Act would nullify racial-endogamy laws “may seem extreme” [in 1906] but in 1866 were not “limited to opponents of the bill and partisan newspapers”).

215. *Amalgamation in Nashville*, N.Y. TIMES, July 16, 1866, at 4 (quoting and criticizing the *Tribune* for making “[s]ocial equality” the newspaper’s “mission”).

216. BOND, NO EASY WALK, *supra* note 151, at 78.

217. Editorial, *Marriage Between White and Black Citizens*, THE EVENING TELEGRAPH (Philadelphia), Dec. 10, 1867, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn83025925/1867-12-10/ed-1/seq-2/>.

218. FLACK, *supra* note 212, at 43 (discussing a Mississippi prosecution); JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 114 n.2 (1902) (same); Editorial, *Miscegenation*, THE DAILY PHOENIX (Columbia, S.C.), July 31, 1866, at 3, available at <http://chroniclingamerica.loc.gov/lccn/sn84027008/1866-07-31/ed-1/seq-3/> (discussing a Virginia defendant’s unsuccessful argument); Editorial, *Miscegenation in Knoxville*, NASHVILLE UNION AND AMERICAN, Dec. 19, 1868, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1868-12-19/ed-1/seq-1/> (reporting the prosecution of John and Maria Gadshaw and their unsuccessful invocation of the Act); Editorial, *Repudiation of the Civil Rights Bill in Maine*, THE PLYMOUTH WEEKLY DEMOCRAT, Aug. 29, 1867, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn87056248/1867-08-29/ed-1/seq-2/> (reprinting the *Boston Post* article about a prosecution in Maine and Radicals’ exasperation with the judge’s decision); PASCOE, *supra* note 17, at 50 (noting the Indiana prosecution); Editorial, *News in Brief*, THE ANDERSON INTELLIGENCER, Dec. 25, 1867, at 2 (reporting a planned appeal).

But in North Carolina, military authorities intervened to permit interracial marriage despite local statutory law, seemingly because of the Act<sup>219</sup>—which marriages were subsequently ratified by an ordinance adopted by the North Carolina constitutional convention.<sup>220</sup>

Fifth, during the ratification debates, some Republicans were *not* silent but acknowledged the threat the Amendment posed to racial-endogamy laws. As noted above, at the Arkansas constitutional convention, the Republican majority successfully opposed any constitutional ban.<sup>221</sup> One of the opponents' main arguments was that a prohibition would violate Section 1 of the pending Amendment, and more specifically the Privileges or Immunities Clause. Two delegates made this argument,<sup>222</sup> with one delegate adding that "Congress will reject any constitution, containing such a provision."<sup>223</sup> No one expressly opposed this interpretation of the Clause. The only explicit disagreement came from a delegate who noted that the Amendment had not yet been ratified.<sup>224</sup> Still, at least one supporter of the pending Amendment implied that its ratification would not affect such laws.<sup>225</sup>

During the 1866 campaign, Indiana's Governor Oliver Morton offered a similar interpretation. He declared that Section 1 would

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219. J.W. Smith, *All Human Blood Is Alike—Intermarriage*, in JOHN JAMES HOLM, *HOLM'S RACE ASSIMILATION, OR THE FADING LEOPARD'S SPOTS* 511, 518 (1910) (recounting story of 1866 intermarriage sanctioned by military authorities); JOSEPH GRÉGOIRE DE ROULHAC HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* 234 (1914) (noting that military authorities declared in early 1868 that the refusal of marriage licenses to a man and woman of different races to be "a violation of United States law"); cf. Editorial, *The Marriage Question*, THE CHARLESTON DAILY NEWS, Sept. 22, 1869, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn84026994/1869-09-22/ed-1/seq-4/> (discussing a post-ratification appeal made to military authorities in Virginia).

220. HOLM, *supra* note 219, at 518; An Ordinance in Relation to Marriages Authorized by Military Authority, in CONSTITUTION OF THE STATE OF NORTH-CAROLINA: TOGETHER WITH THE ORDINANCES AND RESOLUTIONS OF THE CONSTITUTIONAL CONVENTION, ASSEMBLED IN THE CITY OF RALEIGH, JAN. 14TH, 1868, at 86 (1868); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, 1868, at 462, 473 (1868) (indicating that this ordinance was controversially designed to preserve the validity of certain interracial marriages).

221. See *supra* note 200.

222. DEBATES AT ARKANSAS CONVENTION, *supra* note 159, at 377, 502–04 (remarks of Miles Langley & James Hodges). Hodges also cited the Privileges and Immunities Clause of Article IV. *Id.* at 502.

223. *Id.* at 377 (remark of Miles Langley). Indeed, none of the Southern states had such constitutional provisions at the time of readmission.

224. *Id.* at 377 (remarks of J.N. Cypert).

225. William Grey, for instance, an African-American delegate, stated that he could, in theory support such a statute provided whites and blacks were subject to truly equal punishments for interracial marriage. *Id.* at 374, 492.

ensure that “without regard to color,” each man “shall have the same right to enjoy his life and property, to have his family protected.”<sup>226</sup> In response to charges that such equality would involve black suffrage and interracial marriage, Morton emphatically denied the former, but ridiculed the latter fear, saying that opponents of interracial equality “seem to think that the negro will certainly marry their daughter unless there is some law made to prevent it [laughter] . . . Why the thing of marrying and being married I always understood was a question of consent and taste.”<sup>227</sup> Morton praised those “[s]tates in the North,” and Massachusetts in particular, where “amalgamation is almost entirely unknown, [but] where you degrade him, and where you destroy the marriage relation, [amalgamation] has taken place between the two races, and that is the only place it ever will.”<sup>228</sup> Governor Morton thereby acknowledged that by granting equal familial rights to all citizens, “without regard to color,” the Amendment would nullify state racial-endogamy laws by granting to free blacks nationwide the equal citizenship that they had long enjoyed in Massachusetts. But like some delegates at the Arkansas convention,<sup>229</sup> he (dubiously) reassured his audience that such equal citizenship would decrease *actual* interracial sex and fecundity.

In sum, the discussion of interracial marriage, in connection with the adoption of the Fourteenth Amendment, roughly followed the same pattern found in the antebellum debates over black citizenship. Opponents of black citizenship again insisted that free blacks’ enjoyment of the status and privileges of citizenship would invalidate racial-endogamy laws. Some proponents of multiracial citizenship demurred (at least impliedly), but others plainly agreed with opponents. Still, many proponents treated the issue with deafening silence—but a silence that can best be interpreted as tacit agreement with opponents.

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226. Speech of Governor Morton, at Anderson, Madison County, Ind., Sept. 22, 1866, in *CAMPAIGN SPEECHES*, *supra* note 164, at 35.

227. *Id.*

228. *Id.*

229. *Supra* text accompanying notes 159–60.

### III. Post-Ratification Interpretation: the Absence, Repeal, and Non-Enforcement of Racial-Endogamy Laws in Republican-Leaning States

Perhaps the evidence most commonly offered to show the conflict between *Loving* and originalism is the alleged fact that even after the adoption of the Fourteenth Amendment, states generally prohibited interracial marriage. The majority in *Casey*, for instance, affirmed that “interracial marriage was illegal in most States in the 19th century.”<sup>230</sup> In *Loving* itself, counsel for Virginia made the prominent factual claim—neither rebutted nor even mentioned by either opposing counsel or the Court—that “a majority of the States which ratified the Fourteenth Amendment still maintained and enforced their anti-miscegenation laws as late as 1950.”<sup>231</sup>

If true, this evidence would strongly support the conclusion that, according to contemporaneous public officials, neither the Amendment nor anything in the Constitution, prevented the states from making or enforcing a racial-endogamy prohibition. Otherwise, as Lincoln would say, state officials’ “fidelity to correct principle, and their oath to support the Constitution, would have constrained them to oppose the prohibition.”<sup>232</sup>

But as we shall see, it is simply *not* true that “interracial marriage was illegal in most states” in the decade following the Fourteenth Amendment. Indeed, by 1873, within five years of the Amendment’s ratification, racial-endogamy laws either did not exist or were not in force, in both a clear majority of states and a super-majority of the states that had ratified the Amendment. The absence of enforced racial-endogamy largely resulted from the conclusion of Republican officials—including almost *every* Republican judge to face the question before *Slaughter-House* was decided in 1873—that the Amendment and/or the Civil Rights Act precluded the making or enforcing of such laws.

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230. *Casey*, 505 U.S. at 847–48; *see also*, EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 75 (1990) (stating that racial-endogamy laws “were common, even in the northern states”).

231. *Loving v. Virginia*, 388 U.S. 1 (1967), Brief and Appendix on Behalf of Appellee, in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 794, 799 (Philip B. Kurland & Gerhard Casper eds., 1975); *see also* Statement of Appellee Opposing Jurisdiction and Motion to Affirm, in *id.* at 717, 726 (contending that “those States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment”).

232. Abraham Lincoln, Address at Cooper Institute, New York City, Feb. 27, 1860, in 3 COLLECTED WORKS 522, 527 (Roy P. Basler ed., 1953).

### A. Racial-Endogamy Laws in Republican States

As a preliminary matter, it is important to note that the Privileges or Immunities Clause did not require any state to affirmatively repeal any law. The Clause prohibited the making or enforcing of certain laws. As to any pre-existing law, then, compliance required only non-enforcement. So in assessing the post-ratification evidence, it is important to distinguish those states where an unrepealed statute was unenforced.

Fortunately for our inquiry, a contemporary—Nebraska Probate Judge Robert Townsend—undertook a multistate survey to identify those states that still enforced racial endogamy in 1873. After refusing a marriage license to an interracial couple, consistent with Nebraska’s law,<sup>233</sup> Judge Townsend took “some pains to ascertain, as far as possible from official sources, the law in all the States concerning the intermarriage of whites and blacks.”<sup>234</sup> His widely published survey concluded that, in 1873, “such intermarriages are now valid” in both the District of Columbia and eighteen states, namely, “New York, New Hampshire, Vermont, Massachusetts, Connecticut, Pennsylvania, Wisconsin, Minnesota, Iowa, Kansas, New Jersey, South Carolina, Florida, Alabama, Mississippi, Louisiana, Texas, [and] Arkansas.”<sup>235</sup> Furthermore, officials from three other states—Maine, Michigan, and Illinois—reported that “although they have prohibitory statutes, yet the law with them is a dead letter, and that ‘such marriages frequently occur.’”<sup>236</sup>

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233. GREATER OMAHA GENEALOGICAL SOCIETY AND FRIENDS, DOUGLAS COUNTY, NEBRASKA MARRIAGES, 1854-1881, at 53 (2002). In a published comment, Townsend sarcastically urged the couple to obtain a license in neighboring Iowa, where, he said, the Republican governor’s daughter could (and should) marry a black husband. Townsend was a Democrat, or at least an anti-Republican. In this comment, he mockingly referred to the Republican Party as the “God and Equality” party; a local Republican newspaper ridiculed him for publishing this partisan advice, which ridicule led to first verbal, then physical altercations between local newspaper editors. DAVID L. BRISTOW, A DIRTY, WICKED TOWN: TALES OF 19TH CENTURY OMAHA 95–103 (2000).

234. Editorial, *Mixed Marriages*, NASHVILLE UNION AND AMERICAN, Oct. 3, 1873, at 3, col. 3, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1873-10-02/ed-1/seq-2/>.

235. *Id.* The report was widely reprinted. See, e.g., Editorial, *Political Paragraphs*, N.Y. TIMES, Sept. 29, 1873, available at <http://query.nytimes.com/mem/archive-free/pdf?res=FA0814F7395D1A7493CBAB1782D85F478784F9>; Editorial, VERMONT PHOENIX, Oct. 17, 1873, at 1, col. 7, available at <http://chroniclingamerica.loc.gov/lccn/sn98060050/1873-10-17/ed-1/seq-1/>; Editorial, *Intermarriage of Whites and Blacks*, THE DAILY PHOENIX (Columbia, S.C.), Oct. 7, 1873, at 1, col. 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84027008/1873-10-07/ed-1/seq-1/>; Editorial, THE ANDREW COUNTY REPUBLICAN (Savannah, Mo.), Nov. 7, 1873, at 4, col. 3, available at <http://chroniclingamerica.loc.gov/lccn/sn85034076/1873-11-07/ed-1/seq-4/>.

236. *Mixed Marriages*, *supra* note 234, at 3.

Judge Townsend's conclusion as to the repeal or judicial nullification in seven ex-confederate states has been confirmed by Peter Wallenstein's recent scholarship.<sup>237</sup> Additionally, my own research corroborates Judge Townsend's findings as to the post-1868 non-enforcement of the unrepealed laws in Maine,<sup>238</sup> Michigan,<sup>239</sup> and Illinois.<sup>240</sup> Further, in two other Northern states he did not mention,

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237. WALLENSTEIN *supra* note 107, at 80.

238. Even before repeal in 1883, contemporaries spoke of the Maine law in the past tense. See 4 GEORGE HOMER EMERSON, MEMOIR OF EBENEZER FISHER, D.D. 237 n.1 (1880) (noting that "[a]t that time," i.e., before the Civil War, "the laws of Maine prohibited the intermarriage of white and colored persons."). The *New Orleans Democrat* accused radicals of hypocrisy, for although enforcement in Virginia and Indiana had occasioned "much hostile comment in the Radical press," the radicals' own "strongholds" of Maine and Michigan retained these laws on the books; the *Democrat* thus tacitly indicated that these unrepealed laws were not enforced. Editorial, THE LAFAYETTE ADVERTISER, June 14, 1879, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn86079068/1879-06-14/ed-1/seq-2/> (quoting the *Democrat's* editorial). A Maryland court granted a divorce to a white woman (Emma Harrington) married in Maine in 1879 to a mixed-race husband (Robert Fearing), but it is unclear whether the court relied on Maine law or Maryland law to find invalidity. Compare Editorial, ST. PAUL DAILY GLOBE, Aug. 19, 1884, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn90059522/1884-08-19/ed-1/seq-4/> (attributing the decision to the court's enforcement of Maine law) with Editorial, *Divorced from a Mulatto*, N.Y. TIMES, Aug. 6, 1884, available at <http://query.nytimes.com/mem/archive-free/pdf?res=FA0D16FB355F15738DDDAF0894D0405B8484F0D3> (attributing the divorce to the judge's application of Maryland law). In an 1871 case, the Maine Supreme Court cited the antebellum law, but did so with reference to a marriage between parties who died before the war, and the nullity of whose marriage was a matter of *res judicata*. *Inhabitants of Raymond v. Inhabitants of N. Berwick*, 60 Me. 114, 117 (1871) (noting the invalidity of the marriage between a pauper's black grandfather and white grandmother, by force of the antebellum decision in *Bailey v. Fiske*, 34 Me. 77 (1852)).

239. The first successful postbellum prosecution under Michigan's law seemingly occurred in 1882 in Detroit; contemporaries viewed the enforcement as anomalous, given that there were 100 or so interracial couples living in Detroit alone. Editorial, *Miscegenation*, DUBUQUE HERALD, Aug. 13, 1882, at 3, available at <http://news.google.com/newspapers?nid=uh8FjILnQOkC&dat=18820813&printsec=frontpage&hl=en> (reporting the prosecution of a "colored man and a white woman, both entirely respectable and worthy," under an "old law" and that the couple, like hundred or so couples in Detroit, have been "living together some time in marriage relation"). David Katzman cites an 1859 prosecution and an initial effort in 1874, but the latter prosecution was abandoned when no witness was available to verify that the marriage had been contracted in Michigan. The state's statute prohibited the *making* and not the *performance* of the marital agreement, so if married in another state or Canada, interracial couples could live validly as husband and wife in Michigan. DAVID M. KATZMAN, *BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY* 92 (1973). Katzman notes that in the 1882 case, even the prosecutor conceded the law might be a "relic of barbarism," and the judge sympathetically urged the couple to just go to Canada to contract the marriage lawfully and then return to Michigan. *Id.*

240. Illinois had repealed all but the marital provisions of its prior black code by January 1865. Editorial, *The Illinois "Black Laws" They are Repealed by the Illinois Legislature A History of their Origin*, N.Y. TIMES, Jan. 26, 1865, at 4, available at

Rhode Island and Ohio, the unrepealed law was also a (virtual) dead letter. In Rhode Island, the law seemed unenforced,<sup>241</sup> and was, in any case, easy to evade (through marriage in neighboring states).<sup>242</sup> The only apparent legal effect was the law's frustration of suits for breach of a promise to marry.<sup>243</sup> In Ohio, the law criminalized only the making and solemnization of the marital agreement, but did not invalidate the resulting marriage or criminalize the performance of the agreement (cohabitation, etc.), for such a marriage remained valid even if illicitly contracted within the state.<sup>244</sup> Contemporaries called the statute a "dead letter," and noted the large number of interracial marriages in the state.<sup>245</sup> Before the 1880s, the only enforcement

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<http://www.nytimes.com/1865/01/26/news/illinois-black-laws-they-are-repealed-illinois-legislature-history-their-origin.html>. Despite this selective retention, I have not found any record of any enforcement of this statute between 1866 and the law's repeal in 1874.

241. In 1880, opponents, who had tried for a decade to win full legislative repeal, tried to bring a test case to obtain a judicial victory, but no prosecution seemed to have occurred. Editorial, *THE COLUMBIAN* (Bloomsburg, Pa.), June 25, 1880, at 4 (reporting the test case of the marriage of Samuel Dorrell and Ellen Carrington, officiated by Rev. George Smith, who was to be prosecuted); *but see Ellen Curington*, ANCESTRY.COM, <http://search.ancestry.com/cgi-bin/sse.dll?gl=allgs&gsfn=Ellen&gsln=Curington&gss=seo&ghc=20> (showing the couple's registered marriage) (last visited Mar. 16, 2013); *see also* GEORGE HENRY, *LIFE OF GEORGE HENRY, TOGETHER WITH A BRIEF HISTORY OF THE COLORED PEOPLE IN AMERICA* 74 (1894), available at <http://docsouth.unc.edu/neh/henryg/henryg.html> (last visited Mar. 16, 2013) (discussing repeal efforts but conspicuously omitting to mention prosecutions).

242. The law was easy to evade by a quick trip to Massachusetts because the state law did not affect out-of-state marriages. *General Assembly: General Session at Providence*, *THE PROVIDENCE EVENING PRESS*, Mar. 20, 1873, at 3 (reporting comment of Senator Samuel Currey that the law was thus "utterly useless").

243. *General Assembly: February Session—At Providence*, *THE MORNING HERALD* (Providence), Feb 21, 1873, at 2 ("Reckless young white men in this State have often, under promise of marriage to mulatto girls, caused their ruin, and the girls or the parents have no redress under the law.").

244. An Act to Prevent the Amalgamation of the White and Colored Races, § 1, 58 Ohio Laws 6, 6 (1861) (punishing persons who should "intermarry" or "have illicit carnal knowledge," which implied the legality of licit, marital carnal knowledge); *Carmichael v. State*, 12 Ohio St. 553 (1861) (recognizing the validity of common-law marriages); *Stewart*, *supra* note 33, at 234 (noting that Ohio's law did not invalidate interracial marriages, which remained valid at common law); *State v. Bailey*, 10 Ohio Dec. Reprint 455, 455 (Toledo Police Court 1884) (stating that despite the criminal prohibition has "have nothing to do with the validity of the marriage: we know of no law which invalidates it").

245. FOWLER, *supra* note 130, at 243 (noting an 1886 report by the *Cleveland Gazette* that despite "hundreds" of such marriages, there had been no prosecutions). Fowler says the *Gazette's* estimate was "probably an exaggeration," *id.*, but a contemporary later recalled, "the old law was largely a dead letter, for many cases of intermarriage . . . took place before its repeal [1887], and we have never heard of a prosecution in Ohio before its repeal." 2 LONDON C. BELL, *THE OLD FREE STATE: A CONTRIBUTION TO THE HISTORY OF LUNENBURG COUNTY AND SOUTHSIDE VIRGINIA* 20 (1927). But there was one successful prosecution in Toledo in 1884. *See infra* note 359.

consisted in the frustration of suits for breach of promise to marry (at least in one controversial case),<sup>246</sup> the occasional, but controversial denial of licenses,<sup>247</sup> and two criminal prosecutions in 1877 that were summarily dismissed because the trial judges declared the law unconstitutional.<sup>248</sup> The unrepealed but (virtually) unenforced laws of these five Northern states would be formally repealed in the fourteen years following Judge Townsend's report: Illinois (1874), Rhode Island (1881), Maine (1883), Michigan (1883), and Ohio (1887).<sup>249</sup>

Despite many unrepealed statutes, Judge Townsend's report shows that within five years of the Fourteenth Amendment's ratification, racial-endogamy laws either did not exist or were not in force in 21 states. These states, 21 of the 37, represented a clear majority of the whole number of states (roughly 57%), and contained roughly 60% of the nation's population.<sup>250</sup> If Ohio and Rhode Island, the two other states where the law was (virtually) a dead letter are added, the total comes to 62% of the states, containing roughly 70% of the national population.<sup>251</sup> Furthermore, those 23 states

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246. See *infra* text accompanying notes 275–80.

247. See, e.g., Editorial, THE STARK COUNTY DEMOCRAT, Apr. 28, 1869, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn84028490/1869-04-28/ed-1/seq-2/> (noting that a probate judge had denied a license to a couple in Perry, Ohio, but decrying the fact that the judge had expressed his deep reluctance to deny the license, and commenting that judges in more Republican areas, like Oberlin or Akron, probably would have granted the license); Editorial, "Pure White Blood, Sure!" *Amalgamation Nipped in the Bud by a Cincinnati Judge—A Nashville Girl the Intended Bride*, PUBLIC LEDGER (Memphis), May 23, 1870, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn85033673/1870-05-23/ed-1/seq-1/> (reporting a denial of a license by Probate Judge George Hoeffler); Editorial, *Amalgamation Advocated*, THE CHARITON DEMOCRAT (Iowa), May 31, 1870, at 3, available at <http://newspaperarchive.com/chariton-democrat/1870-05-31/page-3> (criticizing the Republican-owned *Cincinnati Gazette* for arguing that the refusal to grant the license violated the Privileges or Immunities Clause, for marriage was one of the privileges protected); Editorial, NASHVILLE UNION AND AMERICAN, Sept. 24, 1874, at 2 (reporting that despite the Ohio law, even in Cincinnati interracial couples occasionally requested a license); Editorial, *Rambler's Notebook*, SPRINGFIELD DAILY REPUBLIC (Ohio), Mar. 5, 1887, at 2 (explaining that before the repeal, there were already "many cases" of such marriages in Ohio, but that repeal would mean that the parties would be able to legally solemnize the agreement and procure a license).

248. See *infra* text accompanying notes 281–84.

249. WALLENSTEIN, *supra* note 107, at 136.

250. These states were allocated 174 of the 283 seats in the House of Representatives after the 1870 census. Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, ch. 11, § 1, 17 Stat. 28, 28 (1872).

251. These 23 states were allocated 196 of the 283 seats in the House after the 1870 census. *Id.*

represented nearly 70% of the states (33) that had ratified the Amendment by 1873.<sup>252</sup>

At first glance, these 23 states may seem miscellaneous. Yet they follow a fairly consistent partisan pattern. In the North, the list included each of the eleven states that supported Fremont in 1856, and every state, except Indiana, where Abraham Lincoln had received more than 48% of the vote in 1860, as well as strongly Republican Kansas (admitted 1861).<sup>253</sup> These states might be called traditional Republican states. In the South, the list included each of the three states where African Americans formed over 50% of the population (Louisiana, South Carolina, and Mississippi), and two of the three states where they constituted 45% to 50% of the population (Alabama and Florida, but not Georgia).<sup>254</sup> These states might be called the new Republican states—former slave states that had become predominantly Republican by force of African Americans’ partisan tendencies. In addition, the list included two southern states where the black population was less than 33% of the whole: Texas and Arkansas.<sup>255</sup> Republican political success, therefore, seems to have effected a dramatic change in American marriage law. By 1873, what had been true in a majority of Republican states in 1860 was now true in a majority of all states as well as the nation’s capital: citizens enjoyed freedom from racial-endogamy laws.

### **B. Racial Endogamy and Republican Post-Ratification Interpretation**

The sheer fact that officials in Republican-leaning states and the District of Columbia either repealed, failed to make, or failed to enforce racial-endogamy laws, is not sufficient to demonstrate official constitutional objection to such laws. Officials can act or refrain from acting for countless reasons, or even for no reason at all. Still, the preponderance of the evidence strongly suggests that, in repealing, not making, or not enforcing racial-endogamy laws, Republican

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252. ROBERT A. BRADY, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED 17* (2007) (listing the states’ dates of ratification).

253. In 1864, Lincoln won nearly 80% of the vote in Kansas. ERIK W. AUSTIN & JEROME M. CLUBB, *POLITICAL FACTS OF THE UNITED STATES SINCE 1789*, at 140 (1986).

254. DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 19* (1997).

255. *Id.* at 21 (indicating that blacks constituted between 26% and 31% of the population in those states). In four of these five states—all but Alabama—legislative action repealed the law. Peter Wallenstein, *Reconstruction, Segregation, and Miscegenation: Interracial Marriage and the Law in the Lower South, 1865-1900*, 6 *AMERICAN NINETEENTH CENTURY HISTORY* 57, 60 (2005). In Alabama, the Republican-dominated Supreme Court nullified the law in 1872, but legislative repeal nearly occurred in 1869. *See supra* note 207.

officials acted for conscious and deliberate reasons, and the most commonly cited reason was the belief that such laws violated the Fourteenth Amendment, the Civil Rights Act, or both.

As to executive or legislative motives, only fragmentary evidence exists; still, the available records indicate widespread concern that such restrictions were inconsistent with African Americans' rights under the Fourteenth Amendment and/or the Civil Rights Act. For example, the Florida legislature attributed its repeal of the state's intermarriage law to "deference to the opinion of those who think that they are opposed to our Constitution and to the legislation of Congress."<sup>256</sup> Non-enforcement and repeal (in 1874) of the Illinois statute likewise reflected a widespread opinion that the Amendment abrogated the laws.<sup>257</sup> In Rhode Island's legislature, where repeal finally occurred in 1881,<sup>258</sup> opponents routinely objected that such laws violated the letter and spirit of the Reconstruction Amendments.<sup>259</sup> In Rhode Island's senate, for instance, Samuel Currey insisted that the Constitution prohibited the making of any law that represented "an abridgement of a civil right," such as the state's racial-endogamy law.<sup>260</sup> In Indiana in 1873, a Democratic

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256. WALLENSTEIN, *supra* note 107, at 80 (citing and quoting from A DIGEST OF THE STATUTE LAW OF FLORIDA OF A GENERAL AND PUBLIC CHARACTER, IN FORCE UP TO THE FIRST DAY OF JANUARY, 1872, at 578, note q (1872)). It is possible, if not probable, that "our Constitution" referred to the Florida constitution's comprehensive prohibition on governmental racial discrimination. FLA. CONST. OF 1868, art XVI, § 28 ("There shall be no civil or political distinction in this State on account of race, color, or previous condition of servitude . . .").

257. Editorial, *A Question of Color*, THE INTER OCEAN (Chicago), Mar. 1, 1884, at 4, available at <http://www.newspapers.com/newspage/32697310/> (reporting that "the unanimous sentiment" of a sample of Chicago lawyers is "that such a law 'conflicts with the fourteenth amendment and is unconstitutional'"). The article further notes "Judge Bradwell[s]" remark that Illinois's law "was wiped out by the general legislation." The Judge Bradwell quoted here was almost certainly Judge James Bradwell, husband to Myra (of *Bradwell v. Illinois*, 83 U.S. 130 (1873) fame), and a member of the legislature from 1873 to 1877 that had repealed the law in 1874. *Hon. James B. Bradwell*, ALBUM OF GENEALOGY AND BIOGRAPHY, COOK COUNTY, ILLINOIS, 134, 135 (4th ed., 1896).

258. *General Assembly: January Session at Providence*, THE PROVIDENCE EVENING PRESS, Jan. 19, 1881, at 4 (noting that the legislature had referred to committee "the usual annual petition" to repeal the law).

259. Editorial, THE STARK COUNTY DEMOCRAT, Mar. 2, 1870, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84028490/1870-03-02/ed-1/seq-1/> (attributing repeal efforts to interpreting the Amendments to require "social equality"); *General Assembly: February Session—At Providence*, THE MORNING HERALD (Providence), Feb. 21, 1873, at 2 (reporting comments of Mr. Ames of Providence, that it was opposed to the "spirit" of the Constitution to say to a portion of the people, "[y]ou may not marry with the American people").

260. Editorial, *General Assembly: General Session at Providence*, THE PROVIDENCE EVENING PRESS, Mar. 20, 1873, at 3 (reporting comment of Senator Currey).

senator, pursuant to a petition “from certain colored citizens,” urged repeal on similar grounds: that “justice to twenty thousand of our fellow citizens in this state” required repeal; freedom to all, regardless of color “was the inevitable result of the Fourteenth Amendment.”<sup>261</sup>

Among the citizens at large, public opinion seemed to have moved significantly against racial-endogamy laws, in part from the conviction that the privileges of American citizenship included the right to intermarry.<sup>262</sup> Methodist Bishop Gilbert Haven, long an advocate of racial equality, celebrated the “enormous” change in Maryland public opinion during the prior decade (albeit from violent intolerance to merely general disapproval).<sup>263</sup> As one Southern newspaper complained, “[t]en years ago, the most reckless miscegenist did not dream of the progress which public opinion has made toward the consummation of his aims.”<sup>264</sup> In Tennessee, a convention of African Americans denounced a miscegenation prosecution as unconstitutional, for the black defendant’s “marriage was in conformity with his privilege as an American citizen.”<sup>265</sup> According to one author, “*all*” agreed that the rights that “the United States guaranties to all citizens,” included not only those enumerated in the Civil Rights Act, but also the following freedoms: “to be free from inequality of taxation, *to intermarry with citizens*, to engage in any profession or trade, when qualified” as well as some rights under federal statutory law.<sup>266</sup>

It was in the courts, however, where the reason for opposition to racial-endogamy laws was most frequently recorded. And the evidence here is decisive: before April 1873, virtually *every* Republican judge to address the issue concluded that such laws violated the Fourteenth Amendment and/or the Civil Rights Act.

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261. FOWLER, *supra* note 130, at 268.

262. Editorial, THE CHARITON DEMOCRAT (Iowa), May 31, 1870, at 3, *available at* <http://newspaperarchive.com/chariton-democrat/1870-05-31/page-3> (criticizing the Republican-owned *Cincinnati Gazette* for arguing that the refusal to grant the license violated the Privileges or Immunities Clause).

263. PRENTICE, *supra* note 161, at 409–10.

264. *Gen. Beauregard and His Platform*, THE PULASKI CITIZEN (Tenn.), July 17, 1873, at 2, *available at* <http://chroniclingamerica.loc.gov/lccn/sn85033964/1873-07-17/ed-1/seq-2/> (last visited Sept. 25, 2013).

265. Editorial, *The Negro Ultimatum*, NASHVILLE UNION AND AMERICAN, Apr. 30, 1874, at 4, *available at* <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-04-30/ed-1/seq-4/>.

266. A. O. Wright, *Citizenship—State and National*, 4 WIS. J. ED. 53, 55 (1874) (emphasis added).

This conclusion was reached by Republican trial judges in Indiana,<sup>267</sup> Mississippi,<sup>268</sup> North Carolina,<sup>269</sup> Louisiana,<sup>270</sup> and Texas.<sup>271</sup> In reported cases, the six judges of the Texas and Alabama supreme courts

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267. PASCOE, *supra* note 17, at 50, 54–55 (discussing the case of *Gibson*, 36 Ind. 389, where Gibson was represented by former Judge Andrew Robinson, and that his successor Judge Charles Butterfield had quashed the indictment). Butterfield was a Republican, and a veteran of Sherman’s march to the sea. LAWRENCE M. LIPIN, PRODUCERS, PROLETARIANS, AND POLITICIANS: WORKERS AND PARTY POLITICS IN EVANSVILLE AND NEW ALBANY, INDIANA, 1850–87, at 146 (1994); PASCOE *supra* note 17, at 50; JOSEPH PETER ELLIOTT, A HISTORY OF EVANSVILLE AND VANDERBURGH COUNTY, INDIANA 146 (1897). Butterfield quashed the indictment almost certainly for the same reasons later set forth in Robinson’s argument before the Indiana Supreme Court. *See Gibson*, 36 Ind. at 390 (quoting argument of Robinson that “all the laws of this State prohibiting the marrying of blacks and whites are abrogated by the fourteenth amendment to the constitution of the United States, and the law of Congress passed in pursuance to that amendment, which, in express terms, confers upon colored people the power of making contracts.”).

268. Editorial, EVENING STAR (D.C.), Oct. 4, 1869, at 3, *available at* <http://chroniclingamerica.loc.gov/lccn/sn83045462/1869-10-04/ed-1/seq-3/> (reporting Judge [Robert] Leachman’s decision that the Civil Rights Act had abrogated Mississippi’s law); Editorial, MEMPHIS DAILY APPEAL, Oct. 15, 1869, at 2 (denouncing a “Mississippi carpet-bagger Judge” for this decision). For a biography of Judge Leach, *see* ALFRED JOHN BROWN, HISTORY OF NEWTON COUNTY, MISSISSIPPI: FROM 1834 TO 1894, at 376–377 (1894).

269. *State v. Reinhardt*, 63 N.C. 547, 547–48 (1869) (stating that the trial judge, Judge Logan of Lincoln County, had instructed the jury to enter a verdict of not guilty because the parties were lawfully married, and indicating that the trial judge’s instruction involved the same claim at issue in *State v. Hairston*, 63 N.C. 451 (1869)). *Hairston* involved the argument that the Civil Rights Act had nullified North Carolina’s racial-endogamy law. *Hairston*, 63 N.C. at 453. Judge George W. Logan was a strongly pro-Reconstruction Republican, whose opponents alleged that he “would decide in favor of the negro every time.” JOHN WERTHEIMER, LAW AND SOCIETY IN THE SOUTH: A HISTORY OF NORTH CAROLINA COURT CASES 33 (2009). Logan had been a member of the Confederate Congress, but remained consistently pro-peace, anti-war, and pro-Union. Allen W. Trelease, *Logan, George Washington*, 4 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 83, 83 (William Stevens Powell ed., 1991).

270. *Hart v. Hoss & Elder*, 26 La. Ann. 90 (1874) (noting that the trial judge had been Judge Smith of Caddo Parish); Editorial, *Personal, Political, and General*, N.Y. TIMES, June 26, 1871, *available at* <http://select.nytimes.com/gst/abstract.html?res=F10A1FFE3D5D1A7493C4AB178DD85F458784F9> (noting such a parish court decision); ALFRED THEODORE ANDREAS, HISTORY OF COOK COUNTY, ILLINOIS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME 702 (1884) (noting that Judge F. M. Smith of Caddo Parish was a Pennsylvania native and a Union Army veteran).

271. *Bonds v. Foster*, 36 Tex. 68 (1872) (affirming the trial judge’s finding of a valid marriage despite the unrepealed antebellum law); PASCOE, *supra* note 17, at 36 (noting that the trial judge was Livingston Lindsay, a Republican). Even before judicial invalidation, the law was unenforced. According to one Democratic newspaper in Memphis, interracial marriage had become “quite common” in Texas by 1870, and that the chaplain of the Texas Senate, J. W. Tays, had controversially officiated at such a wedding in Millican, Texas. Editorial, PUBLIC LEDGER (Memphis), May 31, 1870, at 1, *available at* <http://chroniclingamerica.loc.gov/lccn/sn85033673/1870-05-31/ed-1/seq-1/>. I have not found record of any public prosecution.

likewise unanimously held that the Fourteenth Amendment had abrogated state racial-endogamy laws.<sup>272</sup> Each of these six judges were not only Republicans but had remained loyal to the Union throughout the Civil War.<sup>273</sup>

In the Northeastern and Midwestern states, except Indiana, the general absence of any enforced racial-endogamy statutes gave judges in the deeply Republican states little opportunity to directly address the issue, especially in reported appellate cases. The absence of such cases has fostered the skewed perception of the prevailing national judicial opinion.<sup>274</sup> But in Ohio, at least, some abortive efforts to enforce the law indicated the opinion of Northern Republican jurists. In spring 1869, an “olive-complexioned” plaintiff sued a man of “pure white blood” for breach of a contract for marriage.<sup>275</sup> Her attorneys contended not only that she was white, but also that the promised marriage—even if interracial—would be lawful, since Ohio’s racial-endogamy statute had been abrogated by the Fourteenth Amendment and the Civil Rights Act.<sup>276</sup> Her attorneys were Republicans Samuel Boltin and Andrew McBurney;<sup>277</sup> the former had been a probate judge in Dayton,<sup>278</sup> while the latter had been Lieutenant Governor in 1867 and thus presided when Ohio’s Senate ratified the Amendment.<sup>279</sup> Although the trial judge allowed the defendant to plead the woman’s race and consequent nullity of the

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272. *Bonds*, 36 Tex. at 69–70 (holding that “the law prohibiting such a marriage [was] abrogated by the 14th Amendment to the Constitution of the United States”); *Burns*, 48 Ala. at 197–98 (holding that both the Civil Rights Act and the Fourteenth Amendment secured citizenship to free blacks and guaranteed “the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation”).

273. JULIE LAVONNE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954*, at 46 (2008) (providing brief sketch of the Alabama Republicans on the Court); ROBINSON, *supra* note 201, at 31–32 (noting that the Texas court was “Republican-controlled”); JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836-1986*, at 81–82 (2013) (indicating that the three Texas judges, appointed by a Republican governor, consisted in Lemuel D. Evans, a unionist, Moses B. Walker, a Union officer from Ohio, and Wesley B. Ogden, a unionist who fled Texas during the Civil War).

274. *See, e.g.*, FOWLER, *supra* note 130, at 233–37 (relying on reported cases to conclude that the “legality of state intermarriage laws” was “clearly” established).

275. Editorial, *Miscegenatory: The African versus the Anglo Saxon, A Negro Sues and Recovers \$10,000*, MEMPHIS DAILY APPEAL, Mar. 13, 1869, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn83045160/1869-03-13/ed-1/seq-1>.

276. *Id.*

277. *Id.*

278. *Boltin, Samuel*, in 1 *A Biographical Cyclopaedia and Portrait Gallery of Distinguished Men, with a Historical Sketch of the State of Ohio* 214–15 (1880).

279. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES, 1787–1820, at 678 (1894).

promised marriage, the jury reportedly assumed the office of judicial review, tacitly rejected this defense, and awarded the plaintiff unusually high damages.<sup>280</sup>

In the late 1870s, renewed prosecutions in Cadiz and Cleveland gave Ohio Republican judges another opportunity to address the issue. Both trial judges held the statute invalid under the Amendment.<sup>281</sup> The judge in heavily Republican Cadiz (the adopted home of John Bingham, a leading drafter of the Amendment) was James Patrick, Jr., the son of a “staunch Republican,”<sup>282</sup> with various indirect connections to Bingham.<sup>283</sup> In Cleveland, the trial judge was Daniel Tilden, a veteran anti-slavery lawyer and former comrade of Joshua Giddings and Salmon Chase.<sup>284</sup>

Although fairly broad, this post-ratification (1868-1873) Republican judicial consensus was not very deep. Only a handful of Republican judges published elaborations of their interpretation. Even in published reports, the judges rarely identified the precise relevant clause of the Constitution, whether the Privileges or Immunities Clause, the Equal Protection Clause, or otherwise.<sup>285</sup>

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280. *Id.*

281. Editorial, BELMONT CHRONICLE (Ohio), July 19, 1877, at 3, available at <http://chroniclingamerica.loc.gov/lccn/sn85026241/1877-07-19/ed-1/seq-3/> (reporting that Judge Patrick in Cadiz had concluded that “the law was superseded by the 14th Amendment and the Civil Rights Bill”); *Ohio News Items*, PERRYSBURG JOURNAL (Ohio), Dec. 14, 1877, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn87076843/1877-12-14/ed-1/seq-1/> (reporting that Probate Judge Tilden in Cleveland had dismissed an indictment against a minister for solemnizing an interracial marriage, on the grounds that the Ohio law “is unconstitutional and void on the ground that it strikes at a natural and sacred right”).

282. JOHN BRAINARD MANSFIELD, *THE HISTORY OF TUSCARAWAS COUNTY, OHIO* 377 (1884); *Judge Abraham W. Patrick, in PORTRAIT AND BIOGRAPHICAL RECORD OF GUERNSEY COUNTY, OHIO* 341 (1895).

283. Judge Patrick’s father had apparently been a client of Bingham’s two decades earlier. *Steubenville & Ind. R.R. Co. v. Patrick*, 7 Ohio St. 170, 171 (1857) (indicating that Bingham represented “James Patrick” of Tuscarawas County in the case). Judge Patrick had held, from 1866 to 1870, the same position as county prosecutor that Bingham had held twenty years earlier. MANSFIELD, *supra* note 282, at 366.

284. Robert Sue Alexander, *The Willson Era: The Inception of the Northern District of Ohio, 1855-67*, in *JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO* 15, 23 (Paul Finkelman & Roberta Sue Alexander eds., 2012).

285. I am grateful to Andrew Hyman for highlighting the ways the early courts adopted indiscriminate interpretations of Section 1. *See, e.g., Bonds*, 36 Tex. at 69–70 (declaring that “the law prohibiting such a marriage had been abrogated by the 14th Amendment to the Constitution of the United States”); *Gibson*, 36 Ind. at 390, 392 (quoting the argument of [Judge] Robinson that “all the laws of this State prohibiting the marrying of blacks and whites are abrogated by the fourteenth amendment” and noting that the “learned attorney for the appellee has not informed us, in his brief, which one of

One major exception to this judicial silence was the extended opinion of Alabama's Supreme Court in *Burns v. State*.<sup>286</sup> That court, speaking through Justice Benjamin Saffold, held Alabama's law void under both the Civil Rights Act and the Fourteenth Amendment's Privileges or Immunities Clause.<sup>287</sup> As to the statute, Saffold concluded that (1) marriage was a "contract," and (2) that laws prohibiting blacks from forming marital contracts with white citizens denied African Americans the "same right" to contract enjoyed by white citizens.<sup>288</sup>

This statutory right, Saffold elaborated, was also a constitutional "privilege of citizenship."<sup>289</sup> In this regard, Saffold marshaled the authority of Chief Justice Taney, who had opined that if free blacks could not intermarry with the white citizenry, they could not belong to that citizenry.<sup>290</sup> Two years before *Burns*, Senate Democrats had recycled Taney's argument to claim that Mississippi Senator-elect Hiram Revels had not been a "citizen of the United States" until 1868 and thus could not satisfy the nine-year durational citizenship requirement.<sup>291</sup> Saffold, however, by way of "a modus-tollens-to-modus-ponens switch,"<sup>292</sup> turned the premise on its head and concluded that because such persons constitutionally enjoyed the full status and privileges of citizenship, these Americans could no longer be excluded from intermarriage with white citizens: "the persons who acquire citizenship under [the Amendment]" could no longer "be

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the clauses of the said section has had the effect to abrogate our laws prohibiting the intermarriage of persons of the white and black races").

286. *Burns*, 48 Ala. 195.

287. *Id.* at 197–98.

288. *Id.*

289. *Id.*

290. *Id.* at 197.

291. CONG. GLOBE, 41st Cong., 2d Sess. 1559 (1870) (remarks of Maryland's Senator George Vickers) (citing *Dred Scott* for the proposition that the "rights which one citizen enjoys as a citizen of the United States" when he goes into another state include "1. To travel into and sojourn in it. 2. To purchase and hold real estate. 3. To enter into trade and commerce. 4. To exercise the freedom of speech, and the freedom of the press. 5. To give testimony in court. 6. *To intermarry with white persons*. 7. To enter public hotels, churches, steamboats, and other public places with white people. 8. To be exempt from all degrading punishments.") (emphasis added); *id.* at 1511 (remarks of Kentucky Senator Garrett Davis) (citing Massachusetts's colonial racial-endogamy law to show that free blacks were not deemed citizens). Davis had made this sort of argument in 1864 as well. *See supra* note 101.

292. Christopher R. Green, Unpublished Manuscript, *The Original Sense of the Privileges or Immunities Clause: Integrating Equal Citizenship, Fundamental Civil Rights, and the Constitutional Text* 18 n.23 (2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1658010](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658010).

distinguished from the former citizens for any of the causes, or any of the grounds, which [according to *Dred Scott*] previously characterized their want of citizenship.”<sup>293</sup>

The broad Republican judicial consensus, whether elaborated or not, was not unanimous. It is highly probable that some Republican judges disagreed and acted officially on this belief. The Ohio Supreme Court, for instance, arguably implied the constitutionality of marital segregation in its 1872 decision upholding educational segregation.<sup>294</sup> Moreover, the judge who upheld the statute in the *Ferguson* case, decided in heavily Republican Warren County and was probably Republican.<sup>295</sup> A prosecution in Indianapolis probably involved a Republican judge.<sup>296</sup> Further, some of the Ohio judges who withheld marriage licenses were probably Republicans, though the fact that the law threatened the issuing judge with criminal liability hindered the judges’ freedom of decision.<sup>297</sup> Finally, the judges of the North Carolina Supreme Court were nominally Republicans; still, unlike their counterparts in Alabama and Texas, none of the justices had remained loyal to the Union throughout the war; and none had been Republicans before 1865.<sup>298</sup>

Conversely, however, the prevailing Republican interpretation was shared by some Democratic judges and officials. Judge James T. Walker, an Indiana Democrat, dismissed an indictment and declared the local statute in conflict with the Fourteenth Amendment and/or

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293. *Burns*, 48 Ala. at 198.

294. The court concluded that the privileges secured by the Fourteenth Amendment probably *included* “only such privileges or immunities as are derived from, or recognized by, the constitution of the United States. A broader interpretation opens into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment.” *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 210 (1871).

295. I have not been able to identify this judge.

296. Editorial, *FAYETTEVILLE OBSERVER* (Tenn.), June 3, 1869, at 2, *available at* <http://chroniclingamerica.loc.gov/lccn/sn85033395/1869-06-03/ed-1/seq-2/#date1=1867&sort=date&date2=1870&searchType=advanced&language=&sequence=0&index=12&words=Indiana+marrying+white&proxdistance=50&rows=20&ortext=&proxtext=indiana+white+marry&phrasertext=&andtext=&dateFilterType=yearRange&page=1> (noting the prosecution of Lewis Washington). The judge was probably George H. Chapman, a Civil War veteran and strong Republican. 1 JACOB PIATT DUNN, *GREATER INDIANAPOLIS: THE HISTORY, THE INDUSTRIES, THE INSTITUTIONS, AND THE PEOPLE OF A CITY OF HOMES* 391 (1910) (noting that Chapman served on the criminal court from 1865 through 1870).

297. An Act to Prevent the Amalgamation of the White and Colored Races, § 2, 58 Ohio Laws 6, 6 (1861) (stipulating that an officiating probate judge would be liable to imprisonment or fine).

298. *See infra* note 314.

the Civil Rights Act.<sup>299</sup> A judge in Kentucky reportedly found such intermarriages valid, perhaps on constitutional grounds.<sup>300</sup> In 1871, Representative Andrew King, a Missouri Democrat, introduced an amendment to the Constitution to prohibit interracial marriages, and explained that the Privileges or Immunities Clause had abrogated state racial-endogamy statutes.<sup>301</sup>

Even Tennessee's Supreme Court, which would later publish one of the strongest anti-intermarriage opinions in American history,<sup>302</sup> initially suggested that Reconstruction had abrogated the state's intermarriage law. Writing in dictum for the court in *Andrews v. Page*,<sup>303</sup> Justice Thomas Nelson quoted, with seeming approval, the following remark from a contemporary treatise:

Race, color and social rank, do not appear to constitute an impediment to marriage at common law, nor is any such impediment now recognized in England. But by local statutes in some of the United States, intermarriage has been discouraged between persons of the negro, indian and white races. With the recent extinction of slavery, many of these laws have passed into oblivion.<sup>304</sup>

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299. PASCOE, *supra* note 17, at 48 (stating that he found the law unconstitutional); *The News in Brief*, NASHUA DAILY TELEGRAPH (N.H.), July 13, 1870, at 1, available at [http://news.google.com/newspapers?id=1ds\\_AAAAIBA&sjid=8KMMAAAAIBA&pg=6607,3040334&dq](http://news.google.com/newspapers?id=1ds_AAAAIBA&sjid=8KMMAAAAIBA&pg=6607,3040334&dq) (reporting his finding that the act was in conflict with the Civil Rights Act).

300. PERRYSBURG JOURNAL (Ohio), Sept. 26, 1873, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn87076843/1873-09-26/ed-1/seq-1/> (last visited Mar. 19, 2013) (reporting that a judge in Paducah had declared such marriages legal in Kentucky).

301. Edward Stein, *Past and Present Proposed Amendments to the United States Constitution*, 82 WASH. U. L.Q. 611, 629 (2004) (noting that upon introducing the proposed amendment, King "justified it by saying that 'the second clause of the first section of the fourteenth amendment of the Constitution deprives the States of the power to prohibit by law the intermarriage of the white and colored races.'").

302. *Bell*, 66 Tenn. at 11 (asserting that even maternal incest was no "more revolting, more to be avoided, or more unnatural" than interracial marriage).

303. *Andrews v. Page*, 50 Tenn. 653 (1871).

304. *Id.* at 669 (quoting from JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT (1870)).

Nelson was a southern Democrat, but had remained a Union loyalist throughout the War.<sup>305</sup>

#### IV. Post-Ratification Enforcement by Democratic Judges

In a minority of states—primarily in the upper South, and the West—racial-endogamy laws remained in force, even before the *Slaughter-House* decision. This enforcement, despite constitutional objection, gave appellate judges in those states the opportunity to formally decide whether the Fourteenth Amendment abrogated such laws. Not surprisingly, judges in these states generally endorsed the laws. Consequently, this minority of states produced the majority of reported cases.

Nonetheless, these cases reflect a consistent partisan pattern. Virtually none of these judges had shown any antebellum support for either black citizenship or the Republican Party.<sup>306</sup> In the South, (unlike the Texan and Alabaman justices who nullified their state's racial-endogamy law),<sup>307</sup> none of these judges had remained Union loyalists during the Civil War. These former disloyalists included a federal trial judge in Georgia<sup>308</sup> and state trial judges in Alabama,<sup>309</sup> Virginia,<sup>310</sup> Georgia,<sup>311</sup> North Carolina,<sup>312</sup> and Tennessee.<sup>313</sup> The list

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305. *Nelson, Thomas Amos Rogers*, in BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, at 1649 (Andrew R. Dodge & Betty K. Koed eds., 2005).

306. For probable exceptions in unreported cases, see *supra* text accompanying notes 294–97.

307. See *supra* note 273.

308. *In re Hobbs*, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6550). Judge Erskine was a southern Unionist but practiced law in Confederate courts during the War; a Johnson appointee, he was remembered for interposing “the strong arm of the law in defending the prostrate South against the usurpations of power.” *Judge John Erskine*, in 2 ATLANTA AND ITS BUILDERS: A COMPREHENSIVE HISTORY OF THE GATE CITY OF THE SOUTH 647, 648 (Thomas H. Martin ed., 1902).

309. *Burns*, 48 Ala. at 195 (noting that the trial judge was C.F. Moulton. Moulton was a Confederate veteran). *Biographical Sketches: Judge Cleveland F. Moulton*, LOOK TO THE PAST, <http://www.looktothepast.com/jacksonbios05.html> (last visited Jan. 2, 2014).

310. *Henrico County Court*, THE DAILY STATE J. (Alexandria, Va.), Sept. 12, 1871, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn84024670/1871-09-12/ed-1/seq-1/> (noting a prosecution before Judge Minor). Judge Edmond C. Minor was a Confederate veteran. J. R. V. Daniel, *Memorials: Edmund Christian Minor*, in REPORT OF THE SIXTEENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 61 (Eugene C. Massie ed., 1904).

311. *Scott*, 39 Ga. at 321 (indicating that the trial judge, was Judge Clarke of Dougherty County). The judge appears to have been “James M. Clark,” *Clark v. Beall*, 39 Ga. 533, 534 (1869) (giving this full name), who had been a special assistant to Governor Joseph Brown during the Civil War, *Samuel H. Hawkins Diary Players and Places*, at <http://dlg.galileo.usg.edu/hawkins/figures.php> (last visited Apr. 3, 2013). See also *Anti-Miscegenation*, SEMI-WEEKLY LOUISIANIAN, Aug. 27, 1871, at 2, available at

also included the judges of the latter three states' supreme courts.<sup>314</sup> When Tennessee's high court upheld its law, conspicuously absent from the case was the Unionist Justice Nelson, the author of the *Andrews* opinion,<sup>315</sup> who had resigned months before.<sup>316</sup> The court

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<http://chroniclingamerica.loc.gov/lccn/sn83016631/1871-08-27/ed-1/seq-2/> (reporting multiple prosecutions in the "Atlanta District Court" before "Judge Lawrence"). One of the cases decided by Judge Lawrence was the "Hobbs" or "Hobbes" case that had been referred first to federal Judge Erskine. In the subsequent state prosecutions, the defendant unsuccessfully invoked also the Fifteenth Amendment. *Id.* I have not yet been able to find a biography of Judge Lawrence. For more newspaper reports of the Atlanta prosecutions before Judge Lawrence, see *The District Court: The Miscegenationists on Trial—Able Argument of Mr. Irwin—The Ku-Klux Bill Threatened, Mixed Race Studies*, <http://www.mixedracestudies.org/wordpress/?p=27868><http://www.mixedracestudies.org/wordpress/?tag=atlanta-weekly-sun> (last visited Jan. 1, 2014) (reprinting some contemporaneous newspaper articles).

312. *Hairston*, 63 N.C. at 451 (identifying the trial judge as Judge Cloud). Judge John M. Cloud had been an ardently pro-slavery slave-owner; upon ratification of the Thirteenth Amendment, he "threatened to cowhide a neighbor if he should let his (Cloud's) negroes know that they were free." JOSEPH GRÉGOIRE DE ROULHAC HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* 348 (1914).

313. *Lonas v. State*, 50 Tenn. 287 (1871) (noting that the trial judge, from whose decision the defendant appealed, was "M.L. Hall"). Although Judge Hall had become a Republican sometime during the course of the war; a biography indicates he had stayed in Tennessee after secession, but does not specify whether he ever held an office or practiced law or otherwise had some occasion to swear an oath to the Confederate government. *Judge M. L. Hall*, in *SKETCHES OF PROMINENT TENNESSEANS: BIOGRAPHIES AND RECORDS OF MANY OF THE FAMILIES WHO HAVE ATTAINED PROMINENCE IN TENNESSEE* 397, 398 (William S. Speer ed., 1888). See also *Miscegenation in Knoxville, NASHVILLE UNION AND AMERICAN*, Dec. 19, 1868, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1868-12-19/ed-1/seq-1/> (noting the prosecution of John and Maria Gadshaw, and the unnamed judge's rejection of their argument that the Civil Rights Act had secured the right of intermarriage).

314. The members of the Georgia Supreme Court, which decided *Scott* included Chief Justice Joseph Brown and Justice Henry McCay, but not Justice Warner, who offered no opinion. *Id.* at 327. Brown had been wartime Governor of Georgia and a "rabid secessionist." JAMES COOK, *THE GOVERNORS OF GEORGIA: 1754-2004*, at 138 (2005). Henry McCay had been a Confederate military officer. *Henry K. McCay*, in 2 *MEMOIRS OF GEORGIA: CONTAINING HISTORICAL ACCOUNTS OF THE STATE'S CIVIL, MILITARY, INDUSTRIAL AND PROFESSIONAL INTERESTS, AND PERSONAL SKETCHES OF MANY OF ITS PEOPLE* 288 (1895). The North Carolina court, which decided *Hairston*, 63 N.C. at 451 and *State v. Reinhardt*, 63 N.C. 547 included the following five judges: Chief Justice Richmond M. Pearson (who had remained on the court after secession), and Judges Edwin Reade (author of the opinions, and a Confederate Senator), Robert Dick (who had signed the state's ordinance of secession), William Rodman (a Confederate military veteran), and Thomas Settle (likewise a Confederate veteran). Walter Clark, *History of the Supreme Court of North Carolina*, in 177 N.C. 615, 624-26 (1919).

315. See *supra* text accompanying notes 302-305.

316. *Nelson, Thomas Amos Rogers*, in *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005*, at 1649 (Andrew R. Dodge & Betty K. Koed eds., 2005).

was thus left with only former Confederate officers, whether military or civilian.<sup>317</sup>

In Indiana, the four justices who reversed the Democratic and Republican trial judges' holdings were not secessionists. Still, as Indiana Democrats,<sup>318</sup> they were nominees of a state party overtly hostile to black citizenship and Reconstruction in general. Most notoriously, one of the judges, John Pettit, while a United States Senator in 1855, had called "all men are created equal" a "self-evident lie"—a quotation roundly condemned by Lincoln.<sup>319</sup> Senator Pettit had also defended Indiana's anti-black-migration policy in these inflammatory terms: "we choose to judge of the breed of dogs we want with us."<sup>320</sup> As late as 1866, the party had celebrated this policy: "That we are opposed to the repeal of the Thirteenth article of the Constitution of Indiana prohibiting negroes and mulattoes from settling in this State, and now, more than ever, deprecate the entrance of that class of persons within its borders."<sup>321</sup> And in 1870, the year of the judges' nomination and election, the party's platform had comprehensively denounced *all* of Congress' reconstruction measures as "infamous and revolutionary."<sup>322</sup>

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317. The judges of Tennessee's highest court, which decided *Lonas*, 50 Tenn. 287, *Bell*, 66 Tenn. 9, and *Galloway v. State* (unpublished) (Tenn. 1872) included John Sneed (author of the *Lonas* opinion), William Turley (author of the *Bell* opinion), Robert McFarland, Alfredo Nicholson, James Deaderick, and Thomas Freeman. WILLIAM ROBERTSON GARRETT & ALBERT VIRGIL GOODPASTURE, HISTORY OF TENNESSEE: ITS PEOPLE AND ITS INSTITUTIONS FROM THE EARLIEST TIMES TO THE YEAR 1903, at 344 (1903). Sneed, Turley, and Freeman were Confederate veterans; Nicholson had been twice imprisoned by Union authorities for supporting secession. R. Ben Brown, *The Tennessee Supreme Court During Reconstruction and Redemption*, in A HISTORY OF THE TENNESSEE SUPREME COURT 99, 123 (James W. Ely & Theodore Brown eds., 2002). Deaderick had likewise been a secessionist, and McFarland was a Confederate veteran. WILLIAM S. SPEER, SKETCHES OF PROMINENT TENNESSEANS: CONTAINING BIOGRAPHIES AND RECORDS OF MANY OF THE FAMILIES WHO HAVE ATTAINED PROMINENCE IN TENNESSEE 6, 68 (1888).

318. John Pettit, Alexander C. Downey, James L. Vorden and Samuel H. Buskirk had been elected in the 1870 wave election that replaced the four Republican judges elected in the Republican wave of 1864. CHARLES W. TAYLOR, BIOGRAPHICAL SKETCHES AND REVIEW OF THE BENCH AND BAR OF INDIANA 48–50 (1895).

319. HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 314 (1959).

320. CONG. GLOBE, 33d Cong, 2d sess., app. 224 (1855).

321. Democratic Platform, 1866 (Indiana), in STATE PLATFORMS OF THE TWO DOMINANT POLITICAL PARTIES IN INDIANA, 1850-1900, at 27, 29 (1902).

322. Democratic Platform, 1870 (Ind.), in INDIANA STATE PLATFORMS, 36, 36 (1902) (resolving that "That recent events have, more than ever, convinced us of the infamous and revolutionary character of the reconstruction measures of Congress, and we denounce these measures as an invasion of the sovereign and sacred rights of the people and of all the States").

The consistent partisan pattern in Indiana and the South suggests, but does not prove, that partisan, extra-constitutional considerations motivated these judges' failure to invalidate racial-endogamy laws. Nonetheless, at the very least, Democratic judges were surely ill-disposed to provide the Amendment with a robust interpretation.<sup>323</sup> As the Court alleged in *Brown* and *Loving*, opponents tended to be "antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect."<sup>324</sup>

A review of the reported cases confirms this antagonism, for the pro-endogamy interpretations did not reflect a plausible commitment to the letter and spirit of the Fourteenth Amendment. First and foremost, these (former) opponents of black citizenship now effectively denied what pre-Amendment opponents of black citizenship had once affirmed with seeming unanimity: that blacks' enjoyment of the status and privileges of citizenship would abrogate racial-endogamy laws.<sup>325</sup>

Moreover, those courts' interpretations of the Privileges or Immunities Clause—to the extent one was offered—were implausible. Indiana's Supreme Court disregarded not only the text and history of the Amendment, but also the court's own precedent. Justice Buskirk summarily rejected any issue under the Privileges or Immunities Clause in these words: "it is quite probable that this clause had reference to the political rights and privileges" of the freedmen.<sup>326</sup> This assertion was flatly inconsistent with the textual implications of the Fourteenth Amendment's second section, as well as the repeated assurances of proponents that the Amendment would not secure voting rights to African Americans. Moreover, this reading ignored an 1866 holding of the court, which had defined the "privileges and immunities of general citizenship of the *United States*" as including, *inter alia*, the right of free blacks to travel, reside, and make contracts, but *not* including political rights.<sup>327</sup>

Somewhat less implausibly, the only federal judge to weigh in, Georgia's John Erskine, relied on three arguments: (1) that the Clause and the rest of Section 1 of the Amendment secured nothing except the guaranties of the Civil Rights Act, which (he had held) did

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323. Not a single Democrat voted for the Amendment in Congress. MARC T. LITTLE, *THE PRODIGAL REPUBLICAN: FAITH AND POLITICS* 57 (2012).

324. *Loving*, 388 U.S. at 9 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954)).

325. See generally *supra* text accompanying notes 90–119.

326. *Gibson*, 36 Ind. at 393.

327. *Smith v. Moody*, 26 Ind. 299, 305–307 (1866) (emphasis in original).

not protect marital rights, (2) that the Clause, like its counterpart in Article IV, was only an interstate guaranty,<sup>328</sup> and (3) that the framers of the Amendment could not have considered “marriage” to be within the terms “privileges and immunities” because marriage has traditionally been left to the states.<sup>329</sup> Yet the textual and drafting evidence is overwhelming, however, that Section 1 of the Amendment was designed to secure (1) multiple “privileges and immunities” and not merely the singular immunity against racial discrimination defined in the Civil Rights Act,<sup>330</sup> (2) which privileges would be secured against one’s home state and not just upon removal to another,<sup>331</sup> and (3) which privileges incorporated various common-law rights, the regulation of which had been traditionally reserved to the states, such as the rights of real property.<sup>332</sup>

The least implausible argument was set forth by Tennessee’s supreme court in *Lonas v. State*.<sup>333</sup> The court (rightly, in my opinion) declined to adopt the attorney general’s sharp distinction between the privileges protected by the Amendment from those secured under Article IV<sup>334</sup> (a distinction later endorsed in *Slaughter-House*); this distinction would, of course, exclude marriage from the protection of the Privileges or Immunities Clause, for “[m]arriage is in no sense a privilege which the citizen has, as a citizen of the United States.”<sup>335</sup> Instead, the court acknowledged that the “privileges and immunities” secured by the Fourteenth Amendment were the same general privileges of citizenship protected in Article IV and partially enumerated in *Corfield*.<sup>336</sup>

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328. *In re Hobbs*, 12 F. Cas. 262; *cf. Scott*, 39 Ga. at 326 (opinion of Brown, C.J.) (not deciding any federal law claim, but stating in dicta that “the conquering people” of the northern states “have claimed the right to dictate the terms of settlement” including obliging us to “accord to the colored race equality of civil rights, including the ballot, with the same protection under the laws which are afforded the white race,” but “they have neither required of us the practice of miscegenation, nor have they claimed for the colored race, social equality with the white race”).

329. *In re Hobbs*, 12 F. Cas. at 263–64.

330. Garrett Eps, *Interpreting the Fourteenth Amendment: Two Don'ts and Three Dos*, 16 WM. & MARY BILL OF RTS. J. 433, 446–48 (2007).

331. KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 166 (2014).

332. *See supra* Part I.

333. *Lonas*, 50 Tenn. 287.

334. *Id.* at 292 (argument of Heiskell, Att’y Gen.) (“The rights of citizens of the United States, are not the rights of citizens of States, but those political and civil rights, guaranteed by the Constitution of the United States.”).

335. *Id.* at 293.

336. *Id.* at 307.

The court concluded, however, that these privileges did not include the right of intermarriage. The reason for this exclusion was that racial-endogamy laws served the general good, and, as *Corfield* itself had expressly said, all these rights were “*subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.*”<sup>337</sup>

This conclusion, however, reflected the judges’ infidelity to the Amendment’s purpose. In assessing the “general good of the whole,” the Tennessee court failed to adopt the very definition of “the whole” that had been settled by the Civil War and the Fourteenth Amendment itself. By that settlement, all persons born or naturalized in the United States and subject to the jurisdiction thereof—regardless of race or region—shared a common citizenship; they were “one people” with “one country” and “one Constitution.”<sup>338</sup> Yet in *Lonas*, the former Confederate judges persisted in asserting otherwise: black southerners and white southerners constituted different *peoples*: the “affection and fidelity in *these people* [when slaves] during the late sad war should commend them to the protection and charity of *our people* [and their] rights, social, civil, political and religious, will be jealously guarded; but they must not marry or be given in marriage with the sons and daughters of *our people.*”<sup>339</sup> Georgia’s supreme court likewise distinguished the conquered white “people” of the South from both southern blacks as well as the “conquering people” of the North.<sup>340</sup> As these courts indicated, racial-endogamy laws presupposed and reinforced the notion that whites and blacks were *not* common citizens, fellow members of the same people—a notion at odds with the spirit and letter of the Fourteenth Amendment. Moreover, in referring to the

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337. *Id.* (emphasis in original) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 551–52)).

338. *See supra* note 18.

339. *Lonas*, 50 Tenn. at 311 (emphasis added).

340. “The great mass of the conquering *people* of the States which adhered to the Union during the late civil strife, have claimed the right to dictate the terms of settlement, and have maintained in power those who demand that the *people of the States lately in rebellion*, shall accord to the colored race equality of civil rights, including the ballot, with the same protection under the laws which are afforded the white race, they have neither required of us the practice of miscegenation, nor have they claimed for the colored race, social equality with the white race. The fortunes of war have compelled *us* to yield to the *freedmen* the legal rights above mentioned, but we have neither authorized nor legalized the marriage relation between the races, nor have we enacted laws or placed it in the power of the Legislature hereafter to make laws, regulating the social status, so as to compel our people to meet the colored race on terms of social equality.” *Scott*, 39 Ga. at 326 (emphasis added).

southern white people as “our people,” the members of the Georgia and Tennessee Supreme Court effectively disqualified themselves as the judicial representative of all their state’s citizens, black as well as white—a posture incompatible with the republicanism impliedly mandated by the federal and state constitutions.<sup>341</sup>

In sharp contrast, in addressing the Civil Rights Act, these courts did employ persuasive arguments. Some courts relied on the plausible claim that marriage was not a “contract” at all.<sup>342</sup> Others contended, in company with Senator Trumbull and President Johnson, that laws against interracial marital contracts did not interfere with African Americans’ right to enter the “same” contracts as whites, because citizens of both races were equally permitted to marry intra-racially, and equally forbidden to marry interracially.<sup>343</sup>

### Conclusion

In early 1873, the Tennessee Supreme Court reaffirmed *Lonas* in two criminal cases: *State v. Bell*<sup>344</sup> and *Galloway v. State*.<sup>345</sup> The defendants in both cases planned to challenge their convictions before the U.S. Supreme Court.<sup>346</sup> Their prospective challenges seemed promising. Both defendants had a particularly able counsel:

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341. U.S. CONST. art. IV, § 4; GA. CONST. art. I, § 26 (1868) (providing that “Laws shall have a general operation”); TENN. CONST. art. 1, § 1 (1870) (stipulating that “all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness” and declaring that “government [are] instituted for the common benefit”). At oral argument in *Loving*, Philip Hirschkop made a similar observation: the early cases “talk about the ‘cherished southern civilization,’ but they didn’t speak about the ‘southern civilization’ as a whole but the white civilization.” *Loving v. Virginia*, 388 U.S. 1 (1967), Oral Argument at 3, in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 960, 962.

342. *In re Hobbs*, 12 F. Cas. at 263–64 (concluding that “the institution of marriage is not technically a contract, nor can it be said to relate to property”); *Gibson*, 36 Ind. at 402 (contending that marriage is “more than a mere civil contract”); *Lonas*, 50 Tenn. at 307–308 (holding that marriage is not “a contract, in the sense of the Constitution, which may be ‘made and enforced’”).

343. *Hairston*, 63 N.C. at 452–53; *In re Hobbs*, 12 F. Cas. at 264.

344. *Bell*, 66 Tenn. 9.

345. Christopher R. Green, Unpublished Manuscript, *The Original Sense of the Privileges or Immunities Clause: Integrating Equal Citizenship, Fundamental Civil Rights, and the Constitutional Text*, 2013, 18 n.23, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1658010](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658010) (last visited Mar. 22, 2013).

346. *Galloway’s Bride. Nuptial’s That Sent a Man and Brother to the Penitentiary. A History of the Case That Raise a Howl in the Colored Convention*, NASHVILLE UNION AND AMERICAN, May 1, 1874, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-05-01/ed-1/seq-4/>.

former Supreme Court Justice John Campbell<sup>347</sup>—whom one newspaper derided as “a favorite lawyer with the miscegenationists.”<sup>348</sup> Campbell apparently concluded, like the Supreme Court of Alabama (his adopted home state), that racial-endogamy laws represented an unconstitutional abridgement of the privileges of citizenship.<sup>349</sup> Like that court, Campbell probably saw the implications of Taney’s opinion for the Court in the *Dred Scott* case (in which Campbell had personally participated).<sup>350</sup> In *Slaughter-House*, Campbell’s proffered definition of these privileges seemed broad enough to include intermarriage: “the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country.”<sup>351</sup>

Unfortunately for the defendants, Campbell’s case for his clients in the *Slaughter-House Cases* got to the Supreme Court first. Relative to Galloway, Campbell’s clients in that case had a far weaker political and legal position. Galloway was a black Union veteran, whose actual bodily liberty was fully taken by a government dominated by former Confederates—solely because he had exercised a traditional privilege of citizenship—the right of intermarriage. The butchers in *Slaughter-House*, in contrast, were white citizens, whose mere economic liberty was merely impaired (not taken) by regulations

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347. *The Election Next Tuesday*, Nashville Union and American, Nov. 1, 1874, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-11-01/ed-1/seq-1/> (last visited Mar. 26, 2013) (explaining Campbell’s representation of Bell and Galloway).

348. *Id.*

349. *Miscegenation: The Habeas Corpus Case of Galloway Argued in the Federal Court: Judge Trigg to Pass Upon the Fourteenth Amendment*, NASHVILLE UNION AND AMERICAN, Nov. 7, 1874, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-11-07/ed-1/seq-4/> (noting the argument of Campbell and co-counsel that the Amendment guaranteed the right of the races to intermarry); see also *The Negro Ultimatum*, NASHVILLE UNION AND AMERICAN, Apr. 30, 1874, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-04-30/ed-1/seq-4/> (last visited 09/24/2013) (insisting that the right of intermarriage was an individual’s “privilege as an American citizen”). Judge Trigg dismissed the petition without specifically ruling on the constitutional objection, but added that it “was pretty well settled” that the regulation of marriage “belonged exclusively to the States.” *Habeas Corpus: Applications in Four Cases Argued Yesterday*, NASHVILLE UNION AND AMERICAN, Nov. 10, 1874, at 3, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-11-10/ed-1/seq-3/> (last visited Sept. 26, 2013).

350. See *supra* note 98; *Dred Scott v. Sandford*, 60 U.S. 393, 493 (1857) (Campbell, J., concurring).

351. *Slaughter-House*, 83 U.S. (16 Wall.) at 55 (argument of John Campbell and John Quincy Adams Fellows).

passed by a mixed-race legislature;<sup>352</sup> further, whether such impairment abridged any right of *citizenship* was dubious. If Galloway's case had been heard first, then, it is possible that the Republican majority on the Court would have voted to invalidate the law under which he was imprisoned, on the ground that the law's enforcement had abridged his constitutional privileges of citizenship.

In *Slaughter-House*, however, the Court's majority adopted such a restrictive definition of the "privileges [and] immunities of citizens of the United States," that the right to intermarry could no longer be found in the Fourteenth Amendment. The court defined these privileges to rights that "*owe their existence* to the Federal government, its National character, its Constitution, or its laws."<sup>353</sup> As Tennessee's attorney general had already explained in *Lonas*, intermarriage plainly could not satisfy this definition.<sup>354</sup>

Lower courts understood this implication. In subsequent cases, Democratic judges in Indiana and the South highlighted *Slaughter-House* as decisive precedent for rejecting challenges to racial-endogamy laws under the Fourteenth Amendment.<sup>355</sup> In the following decade, prominent Republican jurists likewise affirmed the constitutionality of such laws.<sup>356</sup> And in 1883, a unanimous Supreme Court not only upheld Alabama's law providing greater penalties for

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352. MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 195 (2003) (contending that "the real reason for resistance by the white residents of New Orleans to the slaughterhouse bill was their opposition . . . to the biracial Reconstruction legislature").

353. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

354. See *supra* text accompanying notes 334–35.

355. *Cory v. Carter*, 48 Ind. 327, 350–54 (1874); *Frasher v. State*, 3 Tex. Ct. App. 263, 268–70 (1877); *Ex parte Kinney*, 14 F. Cas. 602, 605 (C.C.E.D. Va. 1879) (No. 7,825); *State v. Jackson*, 80 Mo. 175, 177 (1884) (holding that "the privileges and immunities of citizens of the United States [are] those secured to them by the Constitution of the United States and laws enacted in pursuance thereof" and that the right of intermarriage is not such a privilege). See also, D. D. Shelby, *The Thirteenth and Fourteenth Amendments*, 3 S. L. REV. 524, 530–31 (1874) ("It can not be successfully contended that a statute of this kind is in conflict with [the Privileges or Immunities Clause], for there can be no doubt but that the privileges and immunities alluded to in that clause are only those which relate to citizenship of the United States, and arise out of the nature and essential character of the National Government.").

356. *Bertonneau v. Bd. of Dirs. of the City Schs.*, 3 F. Cas. 294, 296 (C.C.D. La. 1878) (No. 1361) (Woods, J.) (discussing with approval Judge Erskine's decision in *In re Hobbs*, 12 F. Cas. 262); *People v. Brown*, 34 Mich. 339, 340 (1876) (court opinion of Cooley, J.); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 229 (1880) (endorsing the "general current of judicial decision is, that [the racial-endogamy restriction] deprives a citizen of nothing that he can claim as a legal right, privilege, or exemption" for "the regulation discriminates no more against one race than against the other").

interracial adultery, but suggested that the state's racial-endogamy law—judicially revived after Reconstruction<sup>357</sup>—was likewise valid.<sup>358</sup> Even in Ohio and Michigan, where the laws had been a dead letter before *Slaughter-House*, judges permitted sporadic prosecutions to resume, with convictions in a few cases in the 1880s.<sup>359</sup>

*Slaughter-House* and its progeny, of course, were by no means the principal cause of the renewed making and enforcement of racial-endogamy laws. These judicial decisions do not stand in isolation from the political trends of the late 19th century. The racist and contra-constitutional zeitgeist proved very strong, especially in the South, and the judicial decisions exemplified the strength of the movement.

Many jurists and citizens (especially African Americans) likewise resisted the new trend.<sup>360</sup> As the *New York Times* lamented, the

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357. *Green v. State*, 58 Ala. 190, 197 (1877) (expressly overturning *Burns*, 48 Ala. 195).

358. *Pace v. Alabama*, 106 U.S. 583 (1883) (discussing the statute without drawing any distinction between its provisions concerning interracial marriage from interracial adultery). Contemporaries reported the case as upholding the ban on interracial marriage. *Legality of Laws Against Miscegenation*, THE N.Y. SUN, Jan. 30, 1883, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn83030272/1883-01-30/ed-1/seq-4/>; OMAHA DAILY BEE, Feb. 8, 1883, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn99021999/1883-02-08/ed-1/seq-4/> (last visited Jan. 2, 2014). *But see A Question of Color*, THE INTER OCEAN (Chicago), Mar. 1, 1884, at 4, available at <http://www.newspapers.com/newspage/32697310/> (reporting various lawyers' opinions that the Supreme Court had not yet decided the question).

359. *Miscegenation*, DUBUQUE HERALD, Aug. 13, 1882, at 3, available at <http://news.google.com/newspapers?id=VqNCAAAAIBAJ&sjid=PKsMAAAAIBAJ&pg=3215.2963851&dq=miscegenation&hl=en> (noting the prosecution of "a colored man and a white woman, both entirely respectable and worthy" under Michigan's old law" and that the case would likely go to the Supreme Court); *Mixed Marriages in Ohio*, THE DAILY DISPATCH (Richmond, Va.), Feb. 23, 1884, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn84024738/1884-02-23/ed-1/seq-4/> (noting a prosecution was a test case to reject the 1877 holding invalidating the statute); *State v. Bailey*, 10 Ohio Dec. Reprint 455 (upholding the law); *Miscegenation: A Case of More Than Ordinary Importance on Trial at Toledo*, FORT WORTH DAILY GAZETTE, Mar. 3, 1884, at 7, available at <http://chroniclingamerica.loc.gov/lccn/sn86064205/1884-03-03/ed-1/seq-7/> (giving a fuller report of the case); *The Marriage of Whites and Blacks*, NEW YORK TRIBUNE., Mar. 2, 1884, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn83030214/1884-03-02/ed-1/seq-1/> (explaining that the prosecution was a case to test the law's constitutionality and that there were 100 interracial couples in Toledo living as husband and wife); *A Minister in Jail*, DAILY EVENING BULL. (Maysville, Ky.), Jan. 7, 1886, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn87060189/1886-01-07/ed-1/seq-2/> (reporting a prosecution of an officiating minister); *Miscegenation in Ohio*, THE NAT'L TRIBUNE, Jan. 14, 1886, at 8, available at <http://chroniclingamerica.loc.gov/lccn/sn82016187/1886-01-14/ed-1/seq-8/> (last visited Jan. 1, 2014) (reporting that police in Cleveland were searching for a black groom with plans to prosecute him "with the utmost rigor of the law").

360. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 537 (1886) (criticizing courts for repeatedly affirming the constitutionality of these laws; *Jackson*, 80 Mo. at 175–77 (indicating that the trial judge

decision in *Slaughter-House* would “greatly restrict the operation of the fourteenth amendment, as the purpose and the effect of that amendment have been popularly understood”; for example, inferior courts had already “declared that laws preventing the intermarriage of blacks and whites do not make an unconstitutional discrimination against color, and such statutes are in force in some of the States.”<sup>361</sup> Judge James Bradwell (husband to Myra Bradwell) charged that such laws remained in force because the “Supreme Court is backing down some . . . as to the Fourteenth Amendment, and does not give it strict construction.”<sup>362</sup>

Even after *Slaughter-House*, this minority had a few remaining victories. By 1887, they succeeded in repealing the (largely)

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had declared the law invalid under the Privileges or Immunities Clause); *Intermarriage of the Races*, THE HIGHLAND WEEKLY NEWS, Apr. 21, 1881, at 2, available at <http://chroniclingamerica.loc.gov/lccn/sn85038158/1881-04-21/ed-1/seq-2/> (quoting with approval an editorial in the *New York Independent* that such laws violated the Fourteenth Amendment); Stewart, *supra* note 33, at 236 (stating that “the law in prohibiting the marriage could not be constitutional, because it abridges the privileges of the citizen on account of color; it denies to the colored male citizen the equal privilege and protection of the law extended to the white male citizen—the right to marry a white woman. It also denies the white female citizen the equal privilege and protection of the law granted the colored female citizen—the right to marry a colored man”); *The Negro Ultimatum*, NASHVILLE UNION AND AMERICAN, Apr. 30, 1874, at 4, available at <http://chroniclingamerica.loc.gov/lccn/sn85033699/1874-04-30/ed-1/seq-4/> (reporting the Tennessee State Colored Convention’s declaration that the right to intermarry was a privilege of American citizenship); *The Black Law of Indiana; A Movement Among the Negroes to Secure Its Repeal*, N.Y. TIMES, Sept. 5, 1875, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F50614FC345D1A7493C7A91782D85F418784F9> (reporting that delegates denied any desire to intermarry with white women but that the law violated the Fourteenth Amendment for it “circumscribes our rights as citizens”); *Emigration from Virginia: A Colored Convention in Richmond for the Promotion of this Object*, N.Y. TRIBUNE, May 20, 1879, at 2 (reporting resolution that because of the recent decision in *Kinney*, 14 F. Cas. 602, Virginia can now “oppress and abridge our privileges as citizens of the State”); Arnett, *supra* note 162 (arguing that racial-endogamy laws “are contrary to the spirit of the genius of our institutions and the letter of our Constitution, for it guarantees to every citizen his equal rights, his civil rights, and allows him to enjoy the universal blessings of manhood”); *Colored Journalists Discuss the Best Road to Travel*, WARSAW DAILY TIMES (Ind.), Aug. 11, 1887, at 1, available at <http://news.google.com/newspapers?id=SIZHAAAIAIAJ&sjid=tHwMAAAAIAIAJ&pg=4101,1105164&dq=maine+white+marry+in+intermarry+marriage+intermarriage+miscegenation+law&hl=en> (reporting that the National Colored Press Association denounced the legislatures of some states in passing these laws).

361. Editorial, *Jury Rights of Colored Citizens*, N.Y. TIMES, Apr. 26, 1879, at 4, available at <http://query.nytimes.com/mem/archive-free/pdf?res=FA0B1EF7395A137B93C4AB178FD85F4D8784F9>.

362. *A Question of Color*, THE INTER OCEAN (Chicago), Mar. 1, 1884, at 4, available at <http://www.newspapers.com/newspage/32697310/>.

unenforced statutes that remained in the Midwest and Northeast.<sup>363</sup> Ohio's belated repeal prompted black Ohioans to celebrate the vindication of their rights as American citizens.<sup>364</sup>

Still, opponents of "anti-miscegenation" laws were fighting a losing battle. After Reconstruction, each of the seven Southern states that had repealed or judicially nullified their racial-endogamy laws either re-adopted or judicially revived these laws.<sup>365</sup> In the West, where racial-endogamy laws were increasingly common, the states became more numerous through admission. By 1896, opposition was so marginalized that the Supreme Court could venture to say, with a straight face, that such laws "have been *universally* recognized as within the police power of the State."<sup>366</sup>

Indeed, by the 1910s, a clear majority of states now had such laws, and opponents were fighting near-run battles to *contain*, not *repeal*, the regime of racial endogamy.<sup>367</sup> Congress even considered re-adopting such a law for the District of Columbia;<sup>368</sup> a bipartisan majority in the House of Representatives passed such a ban by an overwhelming vote of 90-8 in 1913<sup>369</sup>—one half-century after the Republican Congress had repealed it.<sup>370</sup>

The reasons, then, for this revival of racial-endogamy laws—this partial nullification of the Fourteenth Amendment—were no doubt primarily political, just as these political reasons were largely responsible for the contemporaneous nullification of the Fifteenth Amendment. Still, the Supreme Court's decision in the *Slaughter-House Cases* surely played a significant role. The Court thereby

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363. WALLENSTEIN, *supra* note 107, at 253–54. In Michigan, Democrats and Republicans voted overwhelmingly for repeal. FOWLER, *supra* note 130, at 254–255. In Ohio, Democrats generally opposed repeal, but opposition was relatively muted. *Id.* at 263–64.

364. *Colored Citizens to Celebrate: Arrangements Made to Enthuse Over the Repeal of the Black Laws*, SPRINGFIELD DAILY REPUBLIC, Feb. 22, 1887, at 1, available at <http://chroniclingamerica.loc.gov/lccn/sn87076917/1887-02-22/ed-1/seq-1/> (reporting one speaker's comment that "[w]e are now free American citizens, in possession of all those God-given rights that belong to us as free American citizens"); THOMAS COUNTY CAT (Kan.), Mar. 31, 1887, at 5, available at <http://chroniclingamerica.loc.gov/lccn/sn85032814/1887-03-31/ed-1/seq-5/> (reporting that "the colored people in various parts of the state are arranging to celebrate [the repeal]").

365. WALLENSTEIN, *supra* note 107, at 253–54.

366. *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (emphasis added).

367. FOWLER, *supra* note 130, at 273–317 (discussing substantial efforts in Midwestern and mid-Atlantic states).

368. ROBINSON, *supra* note 201, at 82; WALLENSTEIN, *supra* note 107, at 136.

369. PASCOE, *supra* note 17, at 167.

370. *Supra* text accompanying notes 180–86.

provided to the political zeitgeist an authoritative judicial precedent that devastated the strongest legal argument that could be raised against state racial-endogamy laws: that the making and enforcement of such laws abridged a constitutional privilege of citizenship. As we have seen, this understanding of citizenship and its privileges not only had truly ancient roots, but had prevailed in the United States before the Civil War, during the adoption of the Fourteenth Amendment, and in the five years following its ratification.

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