

THE UNITARY FOURTEENTH AMENDMENT

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INTRODUCTION

In modern constitutional adjudication, Section 1 of the Fourteenth Amendment has been sliced and diced into the specific clauses that make up the Amendment's constitutional guarantees.¹ Instead of reading the Amendment's guarantees as a whole, we normally analyze the meaning of the various clauses that make up Section 1 in isolation from one another. Courts and scholars often ask questions about the meaning of the Citizenship Clause, the Due Process Clause, the Equal Protection Clause, and the Privileges or Immunities Clause as if they were free-standing units rather than parts of a larger whole.² The result is that we often lose sight of the ways in which the four component parts of Section 1 work together, and our constitutional doctrine often obscures the connections between and among the provisions that make up Section 1.

The four components of Section 1, however, form a coherent whole. The overarching aim of the Fourteenth Amendment was to make the newly emancipated slaves equal citizens in the reconstructed United States. Section 1 sought to accomplish this goal in four ways. First, the Citizenship Clause

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¹ My focus is on Section 1 of the Fourteenth Amendment because that section is the only one in the Amendment that enumerates substantive constitutional protections. The remainder of the Amendment deals with the apportionment of representatives in Congress (Section 2), the disabilities imposed on certain Confederate officers (Section 3), the validity of wartime debts (Section 4), and Congress's enforcement power (Section 5).

² Of course, there are important exceptions to this practice. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); William Eskridge, *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). For a recent article approaching the Bill of Rights holistically, see Burt Neuborne, "The House Was Quiet and the World Was Calm the Reader Became the Book," 57 VAND. L. REV. 2007 (2004). But these are exceptions that tend to prove the rule. In the main, analysis of Section 1 of the Fourteenth Amendment proceeds in clause-bound form, not holistically.

announces that citizenship is a birthright of all Americans.³ Second, the Privileges or Immunities Clause declares that substantive rights and liberties inhere in citizenship and forbids states from making or enforcing laws that deny citizens these constitutional rights.⁴ Third, the Equal Protection Clause embodies a ban on racial and other class-based forms of discrimination and subordination.⁵ Fourth, the Amendment's Due Process Clause guarantees procedural fairness and regularity.⁶

Groups, and the social roles their members play in the polity, are at the heart of Section 1's guarantees. Section 1's concern is the tyranny that a voting majority might exercise over marginalized social groups. Its guiding command is ensuring the equal citizenship of all Americans, and the text sets out a tripartite scheme to protect that principle. The Amendment's three substantive guarantees—liberty, equality, and fairness—work hand in hand to preserve each individual's right, as a citizen, to participate in American society on the terms he or she deems appropriate. The Privileges or Immunities Clause ensures that each citizen has all the rights and liberties that inhere in citizenship, barring governmental efforts to deprive marginalized group members of the liberty the Constitution grants to all citizens. In the same vein, the Equal Protection Clause prevents the government from forcing disfavored groups into the role of social subordinate, thereby liberating each person to participate, achieve, and contribute to society on his or her own terms. Finally, the Due Process Clause's fairness mandate complements the liberty and equality that Section 1 protects by preventing governments from using unfair procedures to undermine the formal guarantees of liberty and equality.

Modern constitutional law routinely overlooks this integrated vision of Section 1 for two reasons. First, the Privileges or Immunities Clause is close to a dead letter. Just a few short years after Section 1's enactment, the Supreme Court in the *Slaughter-House Cases*⁷ effectively read the Privileges or Immunities Clause out of the document.⁸ Without that Clause, one of

³ U.S. CONST. amend XIV, § 1.

⁴ *Id.*

⁵ See, e.g., Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

⁶ U.S. CONST. amend. XIV, § 1.

⁷ 83 U.S. (16 Wall.) 36 (1872).

⁸ To be sure, the Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999), which invalidated a statute that discriminated against newly arrived residents by denying government benefits, suggests that the Clause might still have some life in it. Nevertheless, it is hard to imagine the current Court extending *Saenz* and applying the Privileges or Immunities Clause outside the context of the right to travel or the few other rights protected

Section 1's core ideas—that citizens have substantive rights as citizens that no government may abridge—has no firm textual foundation. The Court has filled this void by turning to the Due Process Clause to protect substantive liberties,⁹ but the text of the Due Process Clause says nothing at all about citizenship and concerns procedural, not substantive, rights. The result is that modern constitutional law does not grapple with questions about which substantive liberties attach to citizens by virtue of citizenship, and the Court's cases protecting substantive liberties under the rubric of substantive due process are often castigated as illegitimate attempts to perfect the Constitution by bringing it into line with the Justices' political predilections.¹⁰

Second, the Court interprets Section 1's remaining guarantees—principally the Equal Protection and Due Process Clauses—in isolation from one another. The Court's due process and equal protection jurisprudences are like two ships passing in the night, each ignoring the other. This distorts both bodies of law. By decoupling the Due Process and Equal Protection Clauses from the larger whole of which they are a part, the Court treats each as a conceptually distinct limitation on what the government may do to the individual,¹¹ forgetting that both guarantees play a central role in protecting marginalized social groups from the tyranny of local majorities. Those who framed Section 1 guaranteed both liberty and equality because each tends to reinforce and strengthen the other. The two protections work hand in hand to make the constitutional concept of citizenship meaningful.

This Article is rooted in a familiar theme of constitutional interpretation: the text matters. Taking the text seriously requires a commitment to understanding the words of the document and the first principles underlying

under the *Slaughter-House Cases*' stingy reading of the Clause. *Id.* at 503 (noting "common ground" that the Privileges or Immunities Clause protects the right to travel); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 182 (1999) ("*Saenz* needed to protect only a right that even . . . the *Slaughter-House Cases* acknowledged to be secured by the Privileges or Immunities Clause that it was otherwise decimating.").

⁹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–50 (1992).

¹⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court . . . that has largely signed on to the so-called homosexual agenda . . ."); *Casey*, 505 U.S. at 984 (Scalia, J., dissenting) ("It is not reasoned judgment that supports the Court's decision; only personal predilection.").

¹¹ See *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995) (requiring strict scrutiny of racial classifications to "ensure that the *personal* right to equal protection of the laws has not been infringed"); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (analyzing substantive due process as a resting on "the balance which our Nation, built on the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society").

the text. In the case of constitutional amendments, it requires us to understand what came before, why we as a people decided to amend the Constitution, and how the words we chose changed our constitutional order.¹² There is something close to universal agreement that the text matters, yet we continue to miss important lessons the text of the Fourteenth Amendment offers because of our insistence on focusing on the meaning of particular clauses and phrases rather than considering the text in a more holistic light. If we are to take the constitutional text seriously, we need a better understanding of how its various provisions relate to and inform one another. Looking at the Fourteenth Amendment's rights-guaranteeing provisions—all contained in Section 1—as a unit gives us a better understanding of the Amendment's first principles.

This Article analyzes Section 1 as a whole, both in general terms and as applied to the constitutional right of women to terminate their pregnancies. Reading Section 1 holistically is of special importance in considering the Court's cases decided under the rubric of the right to privacy.¹³ Virtually every statute invalidated in the Court's privacy jurisprudence involves a twin constitutional harm—an invasion of liberty and a denial of equality. But the Court's leading privacy cases, from *Meyer v. Nebraska*¹⁴ to *Griswold v. Connecticut*¹⁵ to *Roe v. Wade*,¹⁶ rest on the liberty protected by the Due Process Clause and ignore the remainder of Section 1. *Meyer* protected the liberty of parents to educate their children in modern foreign languages, ignoring that Nebraska's ban on teaching those languages was a form of national origin discrimination enacted to prevent immigrants from educating

¹² See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28–30 (2000). Under Amar's broad definition of textualism, the reader cannot limit him or herself to the four corners of the document; understanding the text requires us to understand the enactors' history, what Amar calls the "[e]pic events [that] gave birth to the Constitution's words." *Id.* at 29. Both text and context must be considered, but this is not a jurisprudence of original intent. We do not consult history to enforce the framers' understanding of the words they chose; rather, we look at the history and the epic events that motivated the framers to write or amend the Constitution because it sheds light on the Constitution's first principles. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1170 (1995) ("Courts should consult . . . history not to discern what some set of authoritative speakers would have said about the interpretive questions that judges alone must answer, but to illuminate the core ideas that underlie the constitutional language.").

¹³ There is a question whether these cases are best conceptualized in terms of privacy, and the Court's recent cases express hesitation about the privacy label, focusing on liberty rather than privacy. See, e.g., Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1106 (2004) (making this observation about *Lawrence*).

¹⁴ 262 U.S. 390 (1923).

¹⁵ 381 U.S. 479 (1965).

¹⁶ 410 U.S. 113 (1973).

their children in the language of their homeland.¹⁷ Both *Griswold* and *Roe* protected the individual right to choose whether or not to bear children, saying next to nothing about how contraception and antiabortion laws force women into the maternal role long seen as women's destiny.¹⁸ If there is a payoff in reading Section 1 as a whole, it will be here.

To be sure, the Court's two most recent privacy cases—*Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁹ and *Lawrence v. Texas*²⁰—signal a trend in favor of constitutional fusion. In both cases, the Court located the right in the liberty protected by the Due Process Clause, yet analyzed the right in language that evoked the spirit, if not the letter, of the Equal Protection Clause.²¹ The Court protected the liberty of women and gay and lesbian persons as both individuals and members of marginalized groups, affirming their freedom to shape their destiny and to differ from the state's conception of their proper roles and expected behavior.²² But the Court's equality analysis ended there. Its holding in both cases rested only on the Due Process Clause. The Court's steps away from clause-bound adjudication were only baby steps.

This Article argues that Section 1, read as a unit, protects a woman's right of reproductive freedom. Grounding this right in the whole of Section 1 provides a better textual hook to protect the right to choose abortion and allows

¹⁷ See 262 U.S. at 399, 401. Only much later in a heady act of constitutional revisionism did the Court characterize *Meyer* as a discrimination case. See *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938) (characterizing *Meyer* as invalidating a "statute[] directed at particular . . . national . . . minorities").

¹⁸ In response to these omissions, a number of scholars developed a set of equal protection arguments for protecting the abortion right. For equality-centered arguments for protecting the right to choose abortion, see, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992). I advanced similar arguments in David H. Gans, Note, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875 (1995). Many of these same arguments apply equally to anti-contraceptive statutes, which, like antiabortion statutes, force women to bear children.

¹⁹ 505 U.S. 833 (1992).

²⁰ 539 U.S. 558 (2003).

²¹ For discussion of *Casey*'s attempts at constitutional fusion, see Gans, *supra* note 18, at 1892–94; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–200 (1992). For discussion of fusion in *Lawrence*, see Hunter, *supra* note 13, at 1123–36; Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1450–58 (2004); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902–07 (2004). For a critique of the Court's failure to ground *Lawrence* in the Equal Protection Clause, see Catherine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081 (2004).

²² See *Lawrence*, 539 U.S. at 573–75, 578; *Casey*, 505 U.S. at 852.

us to make manifest the connections between citizenship²³ and reproductive freedom. As citizens, women have a constitutional right to shape their destiny and place in the American community. Antiabortion laws violate women's equal citizenship by forcing pregnant women to be mothers, coercing them into conforming to the stereotype that a woman's proper role is to bear and raise children. This coercion is both a violation of the liberty of citizens protected by the Privileges or Immunities Clause and the antidiscrimination and antisubordination mandates of the Equal Protection Clause.

I. TOWARDS A UNITARY READING OF SECTION 1 OF THE FOURTEENTH AMENDMENT

To understand Section 1 of the Fourteenth Amendment as a whole, we must start with the text. Section 1 reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁴

As explained above, Section 1 contains four guarantees: (1) citizenship as a birthright of all Americans, (2) constitutional protection of the substantive rights and liberties that flow to each American by virtue of citizenship, (3) procedural fairness, and (4) a guarantee of equality. This Part asks a set of questions: Why did the framers of the Fourteenth Amendment join these four provisions together in Section 1? What is the relationship between and among the four provisions of Section 1? What do we learn about the meaning of Section 1 if we look at its four provisions as a unit?

A. *Section 1 and the Equal Citizenship Principle*

As a whole, Section 1 was designed to make the former slaves into citizens, guaranteeing their status and assuring them the constitutional protections that attach to all citizens. This is the equal citizenship principle identified in

²³ In focusing on the meaning of citizenship, my argument owes an obvious debt to Charles Black, who argued for a robust understanding of citizenship. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 33–66 (1969).

²⁴ U.S. CONST. amend. XIV, § 1.

Kenneth Karst's groundbreaking work.²⁵ Karst was correct that equal citizenship is the conceptual core of Section 1. With the republic of the eighteenth century—rooted in slavery—torn asunder by the Civil War, the Fourteenth Amendment created a new republic founded on the ideal of free and equal citizenship.

The theme of ensuring equal citizenship for all Americans runs throughout the text of the Amendment. First, and most obviously, the opening sentence of Section 1 speaks explicitly to citizenship. From the very first words of the Amendment, we know that citizenship is the key constitutional value. The Amendment confers national citizenship as a birthright; all persons born or naturalized in the United States are citizens of the United States and the state in which they reside. At a minimum, this sentence overrules the Supreme Court's reviled holding in *Dred Scott*²⁶ that a former slave was not a citizen under the Constitution.²⁷ By overruling *Dred Scott* and replacing it with an all-inclusive definition of citizenship, Section 1 defines the stakeholders in the new republic broadly.

Second, under the Amendment, citizenship carries with it rights and liberties that no government—federal, state, or local—may infringe. Immediately after defining citizenship as a birthright, the Amendment prohibits states from infringing those rights and liberties—called privileges or immunities in the words of the Amendment²⁸—that belong to every American citizen.²⁹ Before the Civil War, states had virtually free rein to violate the

²⁵ See Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). As Karst explained, “The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.” *Id.* at 4. Although Karst discussed a number of different clauses in Section 1, he located the equal citizenship principle in the Equal Protection Clause. For Karst, this was primarily a strategic move. Because the Warren Court used the Equal Protection Clause as the primary vehicle for enforcing a guarantee of equal citizenship, Karst argued that we should not disturb matters by switching to a different clause. *Id.* at 43–44.

²⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

²⁷ Karst, *supra* note 25, at 12–13, 16–17.

²⁸ See AMAR, *supra* note 2, at 166–69; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1089–138 (2000).

²⁹ Many Republicans believed that the Thirteenth Amendment itself guaranteed to the former slaves all the rights and privileges of citizens. See Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237, 250 (1982). Under the Thirteenth Amendment, in the words of one senator, “the freedman becomes a free man, entitled to the same rights and privileges as any other citizen of the United States.” CONG. GLOBE, 39th Cong., 1st Sess. 1780 (1866). The difficulty with this theory was that the Thirteenth Amendment is silent about what rights the slaves would have once freed. Democrats voiced this very objection when Republicans sought to enact the Civil Rights Act of 1866 pursuant to the declaration of

rights set out in the Constitution, and they did so regularly. Northerners time and again complained about the “slave power” that not only abused slaves but violated virtually every liberty enshrined in the Bill of Rights to protect the institution of slavery.³⁰ Supreme Court doctrine, however, blessed this state of affairs. Constitutional rights, the Court ruled in 1833, protected individuals only vis-à-vis the federal government, except for the few provisions that explicitly limited the conduct of state governments.³¹ Constitutional rights, in *Barron’s* formulation, were closely tied to federalism; they limited only what the national government could do.³² The Fourteenth Amendment nationalized the rights and freedom of citizens.

The framers of the Fourteenth Amendment did not work out many of the implications of the new republic they were creating, and many of their practices seem to us facially inconsistent with the vision of a polity of free and equal citizens that underlies Section 1.³³ But their genius—if that description is appropriate—was that, like their eighteenth century counterparts, they did not enumerate in the document a set of rights they sought to protect or a set of practices they sought to prohibit. They did not write any exceptions into the text of Section 1 to permit practices such as segregation that at least some of the framers did not consider a violation of Section 1.³⁴ Instead, they created a document that established a set of principles which could and would evolve over time—a document “intended to endure for ages to come, and . . . to be

freedom that they read as implicit in the Thirteenth Amendment. See Curtis, *supra*, at 271–73 (discussing Democratic objection to the Civil Rights Act of 1866); 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 411 (James D. Richardson ed., 1903) (veto message of President Johnson). The Privileges or Immunities Clause ended all debate on the matter, providing that all persons, former slaves included, would have all the rights and privileges of citizens.

³⁰ See AMAR, *supra* note 2, at 160 (“The structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women too.”); Curtis, *supra* note 29, at 242–44 (discussing critique of the slave power).

³¹ See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). For discussion of *Barron*, see AMAR, *supra* note 2, at 140–62.

³² 32 U.S. at 247–48, 250.

³³ See Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958–59 (2002) (making this point in explaining why an equal protection jurisprudence focusing on the original intent of the framers narrowly defined would be improper).

³⁴ See Amar, *supra* note 12, at 63–64 (“The text calls for equal protection and equal citizenship, pure and simple. There is no textual exception for segregation, no clause that says ‘segregation is permissible even if unequal.’”).

adapted to the various *crises* of human affairs”³⁵—as new threats to equal citizenship emerged.³⁶

One stain on the framers’ vision—and a major one at that—was the status of women. Although the text of Section 1 includes women within its definition of citizens and each of the guarantees of Section 1 protects women,³⁷ Section 2 of the Amendment established sex discrimination as a constitutional principle by providing for a penalty to be assessed against states that denied their male inhabitants the right to vote, thus legitimizing and reinforcing the denial of the vote to women.³⁸ On a broader reading, Section 2 authorized states to discriminate against women in many other facets of life, not simply in the voting context.³⁹ Indeed, the Amendment’s framers did not intend Section 1 to nullify the plethora of existing state laws that sharply limited the rights and freedoms of married women.⁴⁰

Women immediately began agitating against their second-class citizenship. What followed was a fifty-year struggle about the meaning of the Constitution, the type of citizenship it created, and women’s place within the American constitutional order, which culminated with the ratification of the Nineteenth Amendment in 1920.⁴¹ The Nineteenth Amendment erased the gender line that Section 2 of the Fourteenth Amendment had written into the Constitution,

³⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

³⁶ See ELY, *supra* note 2, at 23–24, 28, 30, 31–32; Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59–63 (1955); Karst, *supra* note 25, at 17. Justice Kennedy made the same point in *Lawrence*:

Had those who drew and ratified . . . the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

³⁷ For an argument emphasizing the inclusion of women in Section 1, see AMAR, *supra* note 2, at 216, 239–41, 245–46, 260–61.

³⁸ See Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL’Y 351, 355 (1996).

³⁹ *Id.* (“Section 2 does tell us that, in [the voting] context at least, racial classifications were seen as invidious and gender classifications were not. It is reasonable to conclude that race was generally seen as different from gender in other contexts as well.”).

⁴⁰ See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230, 1254–60 (2000).

⁴¹ For an exhaustive discussion of this history, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

explicitly prohibiting states from denying the vote—perhaps the preeminent symbol of citizenship—to women. Under the Nineteenth Amendment, women are equal citizens, fully protected by the Fourteenth Amendment’s equal citizenship principle.⁴²

B. Section 1’s Tripartite Protection of Equal Citizenship

Section 1 not only mandates equal citizenship, but also lays out a tripartite scheme to protect the principle: (1) it protects substantive constitutional rights (the Privileges or Immunities Clause); (2) it prohibits racial and other forms of class-based discrimination and subordination (the Equal Protection Clause); and (3) it ensures the use of fair procedures before the state takes away an individual’s life, liberty, or property (the Due Process Clause).⁴³

1. The Substantive Rights of Citizenship

We are often accustomed to thinking about the Fourteenth Amendment only in terms of due process and equal protection. This is entirely natural; virtually all the constitutional rights the Fourteenth Amendment protects today spring from one of those two clauses. It is easy to forget about the first half of Section 1 because the Citizenship Clause does not explicitly grant any protections⁴⁴ and the *Slaughter-House Cases* decimated the Privileges or Immunities Clause more than one century ago.

But this excision matters. In a Fourteenth Amendment dominated by due process and equal protection, the notion that judges should protect substantive constitutional rights seems a strange one. The words of those two clauses speak directly to procedural fairness and equality; they cannot easily be read to protect a citizen’s exercise of substantive constitutional rights. Even though there is a long history of interpreting due process to reach both substance and

⁴² See Amar, *supra* note 12, at 51–52; Dorf, *supra* note 33, at 979–82; Siegel, *supra* note 41, at 1040–44.

⁴³ As should be apparent, this Article’s argument is that Section 1 protects the substantive liberties of citizens in the Privileges or Immunities Clause. That is the most natural way to read the text of Section 1. Of course, the *Slaughter-House Cases* rejected that reading, and the Due Process Clause, since then, has done much of the work of protecting the substance of citizenship. Nothing in this argument turns on which clause protects the liberties inherent in citizenship. The important point is that Section 1 created the concept of national citizenship and recognized that inherent in citizenship are rights and liberties that no government may deny.

⁴⁴ But see BLACK, *supra* note 23, at 33–69 (arguing that the Citizenship Clause might support many of the constitutional rights protected under the rubric of due process and equal protection).

procedure dating back to the nineteenth century,⁴⁵ John Hart Ely's argument that substantive due process is a contradiction in terms—akin to “green pastel redness”—has a powerful appeal.⁴⁶ Whatever the doctrine says, using due process to protect substantive rights seems forced and unnatural, a lawyer's trick.⁴⁷

Viewing Section 1 holistically corrects that impression. Read as a whole, Section 1 is not merely a guarantee of fairness and equality. It protects the substantive constitutional rights of citizenship, forcing us to ask what rights and liberties inhere in citizenship. Reading Section 1 holistically demolishes Justice Scalia's argument that “[t]he Fourteenth Amendment *expressly allows* States to deprive citizens of ‘liberty,’ *so long as ‘due process of law’ is provided.*”⁴⁸

Section 1's three guarantees reinforce one another. If the aim of each is to ensure a polity of free and equal citizens, each takes a different route to reach that end. The Privileges or Immunities Clause is an entitlement provision. It announces that, by virtue of citizenship, individuals have fundamental rights as a constitutional entitlement, which no government may take away.⁴⁹ Charles Black celebrated the Clause as one of the great foundations for our constitutional law of human rights;⁵⁰ Robert Bork ran from its words, treating it, like the Ninth Amendment, as an inkblot.⁵¹ If Black and Bork could agree on anything, it is the Clause's sheer breadth. The Clause does not limit the set of protected rights in any manner. It does not require that the government action be the product of racial or other discrimination. Rather, by its very

⁴⁵ For a discussion of the historical precedents, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999).

⁴⁶ ELY, *supra* note 2, at 18.

⁴⁷ This is manifest in the common refrain that the Court “comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution” and that “[t]here should be, therefore, great resistance to expand the substantive reach of th[e] Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental.” *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986); *accord* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *id.* at 542–44 (White, J., dissenting). In other words, because substantive due process rests on shaky foundations, the Court should be loathe to invoke it to invalidate a statute. For a nice discussion of this point drawing on *Moore*, see CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 100–05 (1997).

⁴⁸ *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

⁴⁹ See ELY, *supra* note 2, at 23–24.

⁵⁰ BLACK, *supra* note 23, at 23–27.

⁵¹ See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW 166, 181 (1990).

words, the Clause encompasses both discriminatory and nondiscriminatory denials of the fundamental rights that inhere in citizenship.

A comparison of the Clause with the text of the Fourteenth Amendment's statutory predecessor and analogue, the Civil Rights Act of 1866,⁵² and the Fifteenth Amendment highlights the Clause's broad scope. Both the Civil Rights Act of 1866 and the Fifteenth Amendment are far narrower prohibitions. Both protect specific enumerated rights and only prohibit racial discrimination in the exercise of those rights. Section 1 of the Civil Rights Act prohibits racial discrimination in the exercise of certain fundamental rights, including the right to make and enforce contracts, the right to sue, and the right to own property.⁵³ The Fifteenth Amendment is of a similar character. It declares that the right of citizens to vote may not be denied "on account of race, color, or previous condition of servitude."⁵⁴ The Privileges or Immunities Clause is strikingly different. Using broad, capacious language, it protects all the rights that inhere in citizenship, including rights specifically listed in the Bill of Rights⁵⁵ as well as others that do not appear elsewhere in the Constitution's text.⁵⁶ Indeed, the canonical definition of privileges or immunities—spelled out by Justice Washington in *Corfield v. Coryell*⁵⁷ and invoked time and again during debates over the Fourteenth Amendment—was nothing if not sweeping, encompassing both rights written in the Constitution's text and unnamed rights.⁵⁸

⁵² For discussion of the Civil Rights Act of 1866 and its relationship to the Fourteenth Amendment, see Karst, *supra* note 25, at 13–15.

⁵³ Civil Rights Act, ch. 31, § 31, 14 Stat. 27 (1866).

⁵⁴ U.S. CONST. amend. XV, § 1. The Fifteenth Amendment, in essence, is a specific refinement of the antidiscrimination principle expressed in the Fourteenth Amendment's Equal Protection Clause, and, for that reason, modern doctrine treats both as outlawing racial discrimination in voting. See *Rice v. Cayetano*, 528 U.S. 495, 511–14 (2000) (discussing Fifteenth Amendment); *Hunter v. Underwood*, 471 U.S. 222, 227–33 (1985) (invalidating criminal disenfranchisement statute enacted for a racially discriminatory purpose). For a recent discussion of the relationship between the two Amendments, see Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 YALE L.J. 2015, 2019–35 (2006).

⁵⁵ See AMAR, *supra* note 2, at 163–294; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 66–74 (1993); Curtis, *supra* note 29, at 258–94.

⁵⁶ See ELY, *supra* note 2, at 28–30; see also AMAR, *supra* note 2, at 298 (observing that in the Privileges or Immunities Clause, like the Ninth Amendment, "the written Constitution seems to gesture beyond itself, toward rights not textually specified in the document itself").

⁵⁷ 6 F. Cas. 546 (C.C.E.D. Pa. 1823). For discussion of *Corfield*, see AMAR, *supra* note 2, at 176–78; BLACK, *supra* note 23, at 49–51; ELY, *supra* note 2, at 28–30.

⁵⁸ ELY, *supra* note 2, at 30 ("[I]t is no mistake to take the clause at face value, as a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in the document.").

In this respect, the Privileges or Immunities Clause mimics the Ninth Amendment's command that the Constitution protect certain rights not specifically enumerated in the text with one important difference. The Ninth Amendment is best read as a rule of constitutional construction; it tells us that there are rights protected by the Constitution that are not spelled out in the text.⁵⁹ It rules out of bounds the argument that a right is not protected simply because it is not mentioned in the Constitution's text. But the text of the Ninth Amendment only reveals that the Constitution protects certain unwritten rights "retained by the people"; it does not explain how to identify those rights.

The Privileges or Immunities Clause, on the other hand, helps us to determine which rights fall within the set of unnamed yet protected constitutional rights. The Clause forces us to confront the substance of American citizenship by demanding that we ask what rights and liberties inhere in American citizenship. That inquiry has both a normative and a historical component. As a normative matter, citizenship's underlying values—participation, respect, and responsibility—guide us in fleshing out what rights inhere in citizenship.⁶⁰ Complementing this normative analysis is a historical one focusing on the paradigm cases that led to the enactment of the Fourteenth and Nineteenth Amendments.⁶¹ The citizenship the Fourteenth Amendment created and the Nineteenth Amendment extended to women did not emerge in a vacuum. Both were written to outlaw specific practices inconsistent with citizenship. The paradigm cases that led to these constitutional amendments give content to the rights that inhere in citizenship.

The Privileges or Immunities Clause—Section 1's first substantive guarantee—looks forward to and links up with the Equal Protection Clause that ends Section 1. Protecting liberty is (and was consciously designed to be) equality enhancing. By protecting the rights and liberties that inhere in citizenship, the Privileges or Immunities Clause guarantees equality of citizenship by ensuring a constitutional baseline that defines the liberties that all citizens possess.⁶² There are no higher and lower classes of citizens; every American—regardless of his or her social standing or beliefs—possesses the same rights and liberties as a citizen. In this way, the Clause can be a powerful tool to protect marginalized social groups from the tyranny of the majority.

⁵⁹ On the Ninth Amendment as a rule of reading, see ELY, *supra* note 2, at 38; Neuborne, *supra* note 2, at 2034–39.

⁶⁰ For a discussion of citizenship centered on these three values, see Karst, *supra* note 25, at 5–11.

⁶¹ On the importance of paradigm cases, see Rubenfeld, *supra* note 12, at 1169–71.

⁶² See ELY, *supra* note 2, at 23–24.

Enforcing the Clause's promise of equal liberty offers a way to annul laws and practices that subordinate those at the bottom of the social ladder by taking away their liberty.⁶³

In fact, the Court's cases often explicitly invoke this idea of equal liberty, though not in the name of enforcing the Privileges or Immunities Clause. For example, the Court's abortion cases protect the right to choose abortion on the theory that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government" and that "promise extends to women as well as to men."⁶⁴ The right to choose abortion, the Court explained, must be protected if women are to have the right to intimate decisional autonomy and bodily integrity in the same way men do.⁶⁵ *Lawrence*, too, rests on a principle of equal liberty. The Court emphasized that "[p]ersons in a homosexual relationship may seek [sexual] autonomy . . . just as heterosexual persons do," and it overruled *Bowers* because that decision "would deny them this right."⁶⁶ Finally, ensuring equal liberty runs through many of the most famous First Amendment cases vindicating the rights of society's racial and religious minorities.⁶⁷ Liberty in these cases is equality enforcing.

This is exactly in line with the framers' vision of the Privileges or Immunities Clause. The Republicans who pushed for the Fourteenth Amendment knew that subordination and liberty are rarely compatible. The South was not content simply to enslave African-American persons; to maintain the slave system, it sought to suppress every exercise of liberty that sought to undermine slavery. This was the "slave power" that the Republicans railed against.⁶⁸ They wrote the Privileges or Immunities Clause in response to

⁶³ For a nice discussion of this point highlighting how due process victories helped to protect the equality of gay and lesbian persons, see Eskridge, *supra* note 2, at 1192–211.

⁶⁴ See *Thornburgh v. Am. Coll. of Obstetrics & Gynecology*, 476 U.S. 747, 772 (1986).

⁶⁵ *Id.*

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Id.

⁶⁶ See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

⁶⁷ See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁶⁸ See *supra* note 30 and accompanying text.

this dynamic to ensure that all citizens—not merely those privileged to control political power—enjoyed all the fundamental rights that inhere in citizenship.⁶⁹

2. *Equal Protection and Equal Citizenship*

If the Privileges or Immunities Clause protects equality indirectly by ensuring that all citizens possess the same set of liberties, the Equal Protection Clause pursues the equality strategy directly. It manifests no concern with the fundamental rights citizens must possess. Rather, it protects citizens from governmental discrimination and subordination.⁷⁰ On its face, of course, the Equal Protection Clause applies to persons, and thus protects both citizens and aliens.⁷¹ But, despite this broader reach, the provision's main import is to protect the rights of citizens. Section 1's overriding goal was to make the former slaves into free and equal citizens in the reconstructed nation, and the Equal Protection Clause obviously plays a central role in that project. It is important to highlight how the Equal Protection Clause complements and reinforces Section 1's two citizenship provisions.

Section 1 opens by defining a unitary class of citizens. Any person born or naturalized in the United States is a citizen of both the United States and the state in which he or she resides. The Equal Protection Clause ensures the integrity of that constitutional definition of citizenship, forbidding government from legislating favored and disfavored classes of citizens. The first Justice Harlan elegantly captured this idea in his famous *Plessy* dissent.⁷² “[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”⁷³ Justice Harlan's point was that the Equal Protection Clause gives teeth to the Citizenship Clause's declaration of citizenship. If the government had the power to discriminate against and subordinate disfavored groups, it could

⁶⁹ See Curtis, *supra* note 29, at 251–58, 274–81.

⁷⁰ There is, of course, a long-running debate about whether the Equal Protection Clause should be read as expressing an antidiscrimination rule (as the Court has concluded) or an antisubordination rule (as many critics have contended). See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003). The Court's adoption of an antidiscrimination rule, however, does not mean that antisubordination values play no role in modern equal protection jurisprudence. As Balkin and Siegel point out, even under the antidiscrimination rule that governs today, antisubordination values play an important role in giving content to the antidiscrimination principle. *Id.* at 10, 24–33. Thus, however we read the Clause, we need to take both sets of concerns into account.

⁷¹ See *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

⁷² *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

⁷³ *Id.*

undercut Section 1's declaration that citizenship is a birthright. Armed with such a power, the government could create higher and lower classes of citizens and thus effectively displace the Citizenship Clause's declaration that every person born or naturalized in the United States is a citizen.

Justice Harlan's words are the foundation of what Cass Sunstein calls the "anticaste principle,"⁷⁴ and Justice Harlan's use of the word "caste" calls to mind the image of the Indian Brahmins and untouchables. But the term, as used by Justice Harlan, captures a wider set of inequalities.⁷⁵ It is part and parcel of the idea of "class legislation" that the framers of the Fourteenth Amendment often invoked. The purpose of Section 1's grant of equal citizenship is to ensure that there are no groups in society with fixed social roles. Everyone, by birth, is a citizen, and thus is free to participate on an equal basis in society. Class legislation violates this precept by singling out groups for adverse treatment, fixing into law their proper roles and behavior and labeling them as social inferiors.⁷⁶

This Article argued above that the Privileges or Immunities Clause looks forward to and links up with the Equal Protection Clause. The relationship also works in the other direction. Just as Section 1's guarantee of liberty protects equality indirectly by ensuring that all citizens have the same opportunity to exercise the fundamental rights of citizenship, Section 1's equal protection guarantee indirectly protects liberty. In other words, liberty under Section 1 is equality enforcing, and equality under Section 1 is liberty protecting. In this respect, liberty and equality under Section 1 are seamless.

Many, though certainly not all, equal protection violations deprive a subordinate group of their liberty and autonomy by fixing into law the proper roles and expected behavior of the group and sanctioning group members who refuse to conform. When the Court—in the name of enforcing the equal protection mandate—bars the government from enacting legislation to force certain groups into the role of social subordinate, it promotes human liberty, freeing each person to participate, achieve, and contribute to society on his or her own terms. The seminal equal protection case of the modern era, *Brown v.*

⁷⁴ See generally Sunstein, *supra* note 5.

⁷⁵ See Balkin, *supra* note 5, at 2358 (suggesting that the word "caste" in constitutional theory "is really a metonym . . . to describe a set of different forms of unjust social hierarchy, of which true caste relations would be only a very extreme example").

⁷⁶ On class legislation, see *id.* at 2347–48; Sunstein, *supra* note 5, at 2435–36. The Black Codes, which sought to force the former slaves to continue to work on the plantations after the demise of slavery, is the paradigm case of class legislation. See Sunstein, *supra* note 5, at 2435–36.

Board of Education, illustrates this point.⁷⁷ *Brown*'s dismantling of the Jim Crow regime was liberty enhancing in important respects, freeing African-American persons to use the wide range of public facilities previously denied them⁷⁸ and allowing both African-American and white persons to interact as social equals in countless avenues of American life.⁷⁹ *Brown* granted African-American persons their right as citizens to "mix[] in the general public life of the community."⁸⁰ Similarly, the Court's gender discrimination jurisprudence maximizes the liberty of men and women by forbidding states from legislating based on "fixed notions concerning the roles and abilities of males and females."⁸¹ That mandate frees men and women to pursue a place in the world appropriate for them, regardless of whether that choice comports with the behavior expected of women or men as a class.

3. *Due Process and Procedural Fairness*

Finally, we come to the Due Process Clause. If the Privileges or Immunities Clause protects the substantive constitutional rights of citizens (a role currently played by the Due Process Clause), what role does that leave the Due Process Clause to play in guaranteeing equal citizenship? The Due Process Clause complements and supplements the mutually reinforcing protections of liberty and equality with a mandate of procedural fairness. This is itself an important protection of equal citizenship. If the State could use unfair procedures to deprive individuals of their life, liberty, or property, it could subvert both the liberties protected by the Privileges or Immunities Clause and the equality demanded by the Equal Protection Clause.⁸² This

⁷⁷ 347 U.S. 483 (1954). Here I invoke *Brown* broadly as a decision outlawing state-mandated segregation in all walks of life, not simply in the educational setting. The Court quickly adopted this broad reading in a series of minimalist per curiam opinions in the years immediately following *Brown*. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (invalidating segregation on public buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (invalidating segregation on public golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (invalidating segregation on public beaches).

⁷⁸ See, e.g., *Wright v. Georgia*, 373 U.S. 284 (1963) (overturning conviction against African-American children for playing basketball in a public park).

⁷⁹ See, e.g., *Lombard v. Louisiana*, 373 U.S. 267 (1963) (overturning conviction of African-American and white persons who sought to eat at a restaurant counter reserved for whites).

⁸⁰ See Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960).

⁸¹ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

⁸² Reading the Fourteenth Amendment's Due Process Clause as a guarantee of procedural fairness is in line with the text of the Fifth Amendment, which mandates procedures the government must follow to deprive an individual of life, liberty, or property. For a structural reading of the Fifth Amendment emphasizing its role in regulating law enforcement, see Neuborne, *supra* note 2, at 2033, 2043–44. Even the Takings Clause, which seems closest to a substantive right, has a procedural focus. It does not forbid the government from

intuition was a familiar one to Section 1's framers, who railed against laws that dispensed with fair procedures to protect the institution of slavery⁸³ and witnessed the South's failure to enforce procedural guarantees in the oppression of former slaves and their Republican allies at the end of the Civil War.⁸⁴

This dynamic relationship between fairness and the substantive guarantees of liberty and equality is a constant theme throughout constitutional law. Two examples illustrate the point. The first is the vagueness doctrine, which demands that the legislature draft clear laws as a matter of basic fairness. "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'"⁸⁵ Absent clear statutory terms, police, prosecutors, judges, and juries make the law in the guise of enforcing it, confounding all the process rights designed to ensure a fair criminal justice system. But the doctrine's animating concern is not fairness per se, but rather that vague laws will chill the exercise of protected liberties and will allow covert discrimination against marginalized persons.⁸⁶ In practice, the vagueness doctrine often functions as a second-order strategy for challenging statutes whose unclear terms threaten liberty or equality.

The second example of this dynamic is the Warren Court's criminal procedure jurisprudence, which ramped up procedural guarantees as a tool to promote racial equality. Overturning the convictions of African-American defendants mistreated by the police or denied a fair trial on due process grounds was part and parcel of the Warren Court's equal protection

taking property; it simply insists that if it does, it must comply with a set of procedures to compensate the owner. U.S. CONST. amend. V.

⁸³ Antebellum arguments about slavery often turned on questions of procedure. For example, in the years before the Civil War, northern antislavery advocates loudly complained that the Fugitive Slave Act denied persons alleged to be runaway slaves the right to a jury trial as well as a host of other basic fair trial rights. See AMAR, *supra* note 2, at 269–71, 278–79; Curtis, *supra* note 29, at 244.

⁸⁴ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 199–200, 204 (1988). Michael Curtis cites a telling example from Southern unionists, who complained in 1866 that "[c]itizens have been arrested on the charge of having told negroes that they were rightfully entitled to vote, thrown into prison, retained for months, tried by a judge without a jury, refused time to send for witnesses or counsel, convicted and sentenced to punishment in the penitentiary." Curtis, *supra* note 29, at 285.

⁸⁵ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

⁸⁶ See David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1356–59, 1368–72 (2005); John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 213–16 (1985); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75, 80 (1960).

jurisprudence condemning state laws and practices that subordinated African-American persons.⁸⁷

C. *Plessy and the Unitary Fourteenth Amendment*

Today, we routinely ignore the integrated vision of Section 1's three guarantees described above. But it was not always so. In his justly famous *Plessy* dissent, Justice Harlan found Louisiana's segregation statute violated Section 1 as a whole because it contravened both the "equality of rights which pertains to citizenship" and the "personal liberty enjoyed by every one within the United States."⁸⁸ It discriminated based on race, making it a crime for a white man and a black man to choose to sit together on a railroad car on the assumption that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."⁸⁹ This, Justice Harlan reasoned, was a race-based infringement of personal liberty that directly contravened Section 1.

Justice Harlan's dissent is important on two levels. First, it forces the reader of the Fourteenth Amendment to shift his or her focus away from particular clauses and towards Section 1 as a whole. Modern constitutional jurisprudence is awash in constitutional doctrines and complicated multipart tests that determine how courts analyze claims and shape the content of our constitutional conversations.⁹⁰ One consequence of this enormous body of doctrine is that we often lose sight of connections between different parts of the Constitution. There is one set of tests for liberty claims arising under the Due Process Clause and another set of tests for claims arising under the Equal Protection Clause. This makes it easy to ignore the connections between the two. Justice Harlan's dissent takes the other path. He does not force us to choose between the clauses that make up Section 1. He simply finds a violation of Section 1.

⁸⁷ See Eskridge, *supra* note 2, at 1195–97; David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005).

⁸⁸ *Plessy v. Ferguson*, 163 U.S. 537, 555 (Harlan, J., dissenting).

⁸⁹ *Id.* at 560.

⁹⁰ See, e.g., Amar, *supra* note 12, at 46.

Contrast th[e Constitution] with the more than 500 volumes of the *United States Reports*, filled with a mindnumbing array of formulas, tests, prongs, and tiers, often phrased in highly abstract legal jargon . . . that insulates and anesthetizes. . . . [O]ften doctrine-speak becomes an end in itself, displacing candid discussion of substantive constitutional values and distancing the people from our supreme law.

Id.

Second, Justice Harlan's dissent deepens our understanding of the relationship between the clauses that make up Section 1. His opinion makes a simple point: The personal liberties that inhere in citizenship cannot be regulated based on race. For that reason, it is up to white and African-American citizens to choose with whom they sit on a train car. Implicit in Justice Harlan's opinion is the individual's control over his or her place in the community. Citizenship implies both liberty to choose one's social role and freedom from being placed in the role of inferior. Social roles fixed by law cannot be squared with a Constitution that "neither knows nor tolerates classes among citizens."⁹¹

As a matter of liberty, the Constitution grants all citizens freedom of movement and association.⁹² Plessy's freedom—as a citizen⁹³—to associate with whom he wishes includes the liberty to throw off the assumption that he must sit with other African-American persons because he does not have the social standing to sit with white persons. The same principle holds as a matter of equal protection. The "Constitution is color-blind"⁹⁴ and does not permit states to force African-American persons to sit in separate quarters to enforce a legislative decree of their inferior status. Under Justice Harlan's unitary reading of Section 1, the rights of social groups and the roles they play in society are at the heart of Section 1's protections. Louisiana's statute was an affront to Section 1 because it sought to write into law the notion that African-American persons are of lower social status and force them to behave accordingly. That is why it compromised both liberty and equality.

As Justice Harlan's *Plessy* dissent illustrates, liberty and equality so often work together because "the government rarely takes a fundamental right away from all persons."⁹⁵ A denial of liberty often contains within it the seeds of a denial of equality. The government denies a marginalized or disfavored group the full exercise of liberty to express a judgment of that group's inferiority and to prescribe the proper roles and expected behavior of members of that group.

⁹¹ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

⁹² Although Justice Harlan is not explicit, he seems to locate the right to free movement and association in the Privileges or Immunities Clause. *Id.* at 557 (discussing the "personal freedom of citizens").

⁹³ Harlan's focus is very much on the rights of citizens. Over and over again, Harlan frames the case as one about the right of citizens. *See, e.g., id.* at 563 (concluding that statute is "inconsistent with the personal liberty of citizens"). The issue is whether the statute violates the rights of citizens, not the rights of persons.

⁹⁴ *Plessy*, 163 U.S. at 559.

⁹⁵ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 439 (6th ed. 2000). For a discussion of the relationship between liberty and equality drawing on this observation, see Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1491–92, 1512 (2002).

Likewise, a denial of equality often contains within it the seeds of a denial of liberty. Discriminatory laws often force the members of a marginalized or disfavored group to forfeit their liberty to conform to majority assumptions about their proper roles and expected conduct.

The facts of *Plessy* illustrate these connections between liberty and equality. Louisiana denied the rights of African-American and white persons to associate with one another both to express a judgment of white superiority and African-American inferiority and to refuse African-American persons the opportunity to interact with white persons as social equals. Denying African-American persons the freedom to choose with whom to sit on a railway car was a means of forcing them to conform to the role of subordinate. True to this story, Louisiana made an exception to its segregation statute for nurses attending children, thus permitting African-American nurses to ride the rails with the white children for whom they were caring.⁹⁶ This association was consistent with Louisiana's vision of the roles and expected conduct of African-American persons, and thus fell outside the statute.⁹⁷

What would modern constitutional law look like if we regularly read Section 1 as a whole, as Justice Harlan did in *Plessy*? What practical differences follow from adopting a unitary reading of Section 1?

First, we would overrule the *Slaughter-House Cases* and reinvigorate the Privileges or Immunities Clause, making it the basis for protecting fundamental human liberties. That clause is an explicit textual direction to protect the fundamental rights of citizens. The Privileges or Immunities Clause would require States to abide by the fundamental liberties laid out in the Bill of Rights,⁹⁸ as well as the unwritten fundamental rights of citizens. By and large, we would not have a different set of fundamental constitutional rights. We would still have the fundamental rights spelled out in the Bill of Rights supplemented by a handful of unwritten fundamental rights.⁹⁹ But the

⁹⁶ *Plessy*, 163 U.S. at 541 (majority) (describing exception).

⁹⁷ One oddity in the exception was that it only applied to a nurse taking care of a child. As Harlan noted, "A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal attention of such servant." *Id.* at 553 (Harlan, J., dissenting).

⁹⁸ On incorporation, see *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring) (arguing that the Privileges or Immunities Clause was "an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States"); AMAR, *supra* note 2, at 137–294; ELY, *supra* note 2, at 24–30.

⁹⁹ If citizenship is the constitutional metric, we might recognize affirmative constitutional rights to education, housing, and other necessities of life on the theory that these affirmative rights are necessary to make the promise of citizenship a real one for all persons. Compare BLACK, *supra* note 47, at 131–39

Supreme Court would be working from a text that demands that it protect the fundamental rights that inhere in citizenship, and that would change how it justifies its rulings. The Court would reason about rights in relation to citizenship, relying principally on the fundamental citizenship values of participation, respect, and responsibility, and the first principles drawn from the Fourteenth and Nineteenth Amendment's paradigm cases.¹⁰⁰

Second, constitutional law would pay much more attention to Section 1's overarching purpose of protecting marginalized social groups from the tyranny of the majority. The Court would analyze Section 1's guarantees of liberty, equality, and procedural regularity as seamless protections of the rights of both individuals and the social groups to which they belong, not merely as guarantees of the personal rights of solitary individuals. Its jurisprudence would highlight how Section 1's protections reinforce one another, illustrating that abiding by the guarantee of liberty helps ensure equality while enforcing equality maximizes human liberty.¹⁰¹

This does not necessarily mean that the Court would only invoke Section 1 as a unit and would never invoke its clauses individually. The Supreme Court has and should have wide latitude in deciding how to convert the text's lofty phrases into enforceable law.¹⁰² Some cases, of course, will implicate only one of Section 1's three guarantees.¹⁰³ In others, the Court may have pragmatic reasons for focusing on a single clause, such as the desire to keep a majority of the Court united behind a single opinion. At the same time, the Court has a

(arguing for an affirmative constitutional duty on Congress to provide a decent livelihood for all persons), *with* Karst, *supra* note 25, at 11 (arguing that "the principle of equal citizenship is not a charter for sweeping economic leveling"). Whether these affirmative rights should be constitutionally protected is beyond the scope of this Article.

¹⁰⁰ See *supra* notes 60–61 and accompanying text.

¹⁰¹ A unitary reading of Section 1 might also counsel in favor of upholding some state laws that implicate constitutional rights. Under a holistic reading of Section 1, courts arguably should not recognize individual rights claims when doing so subverts Section 1's goal of protecting equal citizenship. For example, Justice Thomas has argued that courts should not protect cross burning as a form of free expression because burning a cross is and has been a tool of intimidation wielded against racial minorities to prevent them from participating in the life of the community on an equal basis. See, e.g., *Virginia v. Black*, 538 U.S. 343, 388–95 (2003) (Thomas, J., dissenting). This issue, as well, is beyond the scope of this Article.

¹⁰² On the Court's role in implementing the Constitution, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

¹⁰³ A First Amendment challenge to a state criminal law that bans indecent speech is an example of such a case. Assuming the legislature has clearly defined the prohibited conduct, the law's validity turns on the contours of the constitutional right of freedom of speech; there is no plausible equality or fairness component to the case.

duty to honor Section 1's text and first principles, and that requires the Court to take Section 1's holistic vision much more seriously than its constitutional jurisprudence currently does. Section 1 is not simply a collection of clauses, a menu from which the Court can choose in fashioning a ruling. Its three guarantees all work together in establishing equal citizenship as a constitutional mandate. The Court distorts Section 1 when it invokes only one of those clauses and ignores how the remainder of Section 1 buttresses the result.

II. REPRODUCTIVE FREEDOM AND THE UNITARY FOURTEENTH AMENDMENT

If this review of Section 1 and its three guarantees teaches us anything, it is the primacy of citizenship. Section 1's overarching goal is to protect equal citizenship, and each of its three guarantees takes a different, but complimentary, path to that end. Yet the Fourteenth Amendment's protection of citizenship hardly plays any role in the Court's reproductive freedom jurisprudence. In fact, this is true of virtually all Fourteenth Amendment jurisprudence. Because the *Slaughter-House Cases* decimated the Privileges or Immunities Clause long ago, the Court has never had to consider the Constitution's protection of citizenship. The same is more or less true of the scholarly literature on *Roe* and its progeny. With virtually all the attention focused on the Due Process and Equal Protection Clauses, scholars have poured their energies into explaining how and why these two Clauses protect the right to choose abortion. By and large, they have ignored the citizenship clauses of Section 1 and how citizenship infuses all of Section 1's guarantees. This Part develops the argument that the right to choose abortion is properly grounded in women's citizenship as protected by the Fourteenth and Nineteenth Amendments. As citizens, women have the right to shape their destiny and the course of their lives, what we might call a right of self-government.¹⁰⁴ Antiabortion laws contravene this guarantee by forcing pregnant women to be mothers. For this reason, antiabortion laws violate Section 1.

A. *Citizenship and Social Roles*

This Part's argument begins by returning to the unitary reading of Section 1 in Justice Harlan's *Plessy* dissent. Justice Harlan's focus on social roles points

¹⁰⁴ For an argument that the Privileges or Immunities Clause should be read to protect a right of self-government, see Tribe, *supra* note 8, at 185–89.

us in the right direction, for the most promising arguments made in support of protecting the right to choose abortion focus on the ways antiabortion laws dictate women's social roles, enforcing the notion that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."¹⁰⁵ Typically, such arguments sound in equal protection. The Court has a long history of invalidating statutes that rest on stereotypical notions of women's proper roles under the Equal Protection Clause.¹⁰⁶ Indeed, if there is a central principle that unifies the Court's gender-discrimination cases, it is that sex-role stereotyping violates the Equal Protection Clause.¹⁰⁷ The story of why courts focus on stereotyping in equal protection doctrine is a familiar one. Laws that force women into narrow social roles violate equal protection, Justice Ginsburg explained in *United States v. Virginia*, because they deny women "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."¹⁰⁸

But these conclusions are not simply judgments about women's equality and the demands of the Equal Protection Clause. They are, simultaneously, judgments about the meaning of citizenship and the liberties that inhere in citizenship, and they should be recognized as such. Implicit in *Virginia's* conception of equality is a matching conception of citizenship and the

¹⁰⁵ *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975). This is not to discount other theories for grounding the right to choose abortion, which emphasize that antiabortion laws intrude into women's bodily integrity and decision-making autonomy. *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (emphasizing constitutional protection for bodily integrity and personal autonomy over family and parenting decisions). These theories have been ably discussed in both the case law and literature. This Article focuses on a different argument: Antiabortion laws violate Section 1 because they force pregnant women to be mothers, coercing them to perform social roles long associated with their subordinate status. Of course, there is a substantial overlap between this Article's argument about a woman's right to control her role in society and bodily integrity and autonomy arguments. By forcing pregnant women to bear children, antiabortion laws intrude on their bodily integrity and deny them autonomy over family and parenting decisions.

¹⁰⁶ *See United States v. Virginia*, 518 U.S. 515, 541–45 (1996); *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982); *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *Orr v. Orr*, 440 U.S. 268, 279–80 (1979). A similar concern with stereotypical judgments underlies the Court's race cases. *See Miller v. Johnson*, 515 U.S. 900, 928 (1995); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 226 (1995); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 632 (1990) (Kennedy, J., dissenting).

¹⁰⁷ *Gans*, *supra* note 18, at 1875–81. For recent statements of this principle, see *Virginia*, 518 U.S. at 541 ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" (quoting *Hogan*, 458 U.S. at 725)); *J.E.B.*, 511 U.S. at 130–31 ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.").

¹⁰⁸ 518 U.S. at 532; *Gans*, *supra* note 18, at 1879.

freedoms inherent in the citizenship the Constitution grants to all. The individual's freedom to shape and control her role and place in society is a key part of what it means to be a citizen. Courts and scholars, however, tend to focus on stereotyping as a violation of equality. Yet, it is equally an affront to the freedom that inheres in citizenship. Laws that force women into narrow social roles violate not only equal protection but also the liberty of citizens protected by the Privileges or Immunities Clause. Liberty, no less than equality, denies government the power to force individuals into constricted social roles not of their choosing.

The normative underpinnings of citizenship and the Fourteenth and Nineteenth Amendments' historical gloss on citizenship help explain why.¹⁰⁹ As a normative matter, citizenship implies membership in a community. To be a citizen, at the very least, means to participate in the public life of the community. That type of participation requires freedom to make choices about the role one will play in that community. We can understand the meaning of participation along two dimensions. First is the public face of citizenship—citizenship entails the right to participate in public debate, to have a voice in deciding one's representatives, to participate in governmental institutions, and more broadly to choose how one will contribute to the public life of society.¹¹⁰ The second is more private, concerning the cast and character of the individual's family, the intimate and other associations he or she will form, the values he or she will inculcate and pass on to children and others. Although we often equate citizenship with the first of these conceptions, the second was equally important to the framers of Section 1, who railed at the ways slavery tore apart families and denied African-Americans the right to educate their kin, seeking to protect the former slaves in their right to establish families.¹¹¹

Citizenship not only implies a freedom to shape one's destiny, but also respect for the life choices that other members of the community make. In a community of many different peoples, individuals inevitably will make different decisions about the roles they want to play and the values they want to inculcate. Human flourishing depends on respect for these kinds of choices, absent some showing that these choices themselves harm others or some other persuasive reason. For this reason, laws that force individuals to occupy social roles of the government's choosing are inconsistent with Section 1's promise

¹⁰⁹ See *supra* notes 60–61 and accompanying text.

¹¹⁰ See Karst, *supra* note 25, at 8–10.

¹¹¹ Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297, 1338–57 (1998); see also Curtis, *supra* note 29, at 251, 261, 287–88.

of citizenship unless supported by a governmental interest of the highest order.¹¹²

This ethic of respect resembles and draws upon our First Amendment antiorthodoxy tradition, which itself is an important protection of citizenship. It is conventional wisdom that, where expression is concerned, the government cannot compel adherence to an orthodoxy. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹¹³ As Justice Jackson emphasized, this is not merely true of petty matters. “[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”¹¹⁴ *Barnette*’s antiorthodoxy principle follows, at least in part, from the respect due citizens under the Constitution. Governments cannot “coerce uniformity”¹¹⁵ of belief and thought from its citizens without violating the very premises of citizenship—participation in a community of equals and respect for differing values and conceptions of the good life. This same principle should apply when the government seeks to constrict the roles citizens may play in our society. Just as government cannot coerce uniformity of belief and expression under the First Amendment, government cannot command an orthodoxy of the roles its citizens play in society under the Fourteenth Amendment.

The history of the Fourteenth and Nineteenth Amendments complements this normative understanding of the rights of participation and respect that are at the core of citizenship. We might think of the citizenship the Fourteenth Amendment created in opposition to slavery’s regime. Slavery dictated the roles slaves could serve—they were workers. Their function was to work for their masters, either in the fields, the master’s house, or the reproductive work of bearing future generations of slaves. After slavery died, first informally by the actions slaves took during the Civil War and formally with the enactment of the Thirteenth Amendment, many southern states tried to create a new legal apparatus, the Black Codes, to control the newly freed slaves and force them back into the roles they had played before the Civil War.¹¹⁶ The Fourteenth

¹¹² On the relationship between citizenship, participation, and respect, see Karst, *supra* note 25, at 5–8.

¹¹³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 640.

¹¹⁶ See FONER, *supra* note 84, at 198–202.

Amendment was a direct response to these attempts to continue a system of forced labor.¹¹⁷ The Fourteenth Amendment made the former slaves into citizens, giving them all the rights inherent in citizenship and empowering them to make decisions about the roles they would play in the reconstructed nation.

The Nineteenth Amendment's history, too, helps us see why the freedom to choose one's role in society is a critical component of women's citizenship under the Constitution. No account of women's citizenship under the Constitution would be complete without some discussion of the Nineteenth Amendment.

Women were citizens under the Fourteenth Amendment, but their citizenship was watered down—a poor imitation of the version men enjoyed. Men—specifically the male head of the household—governed women, and represented their interests in the larger society.¹¹⁸ Women were, first and foremost, mothers, not self-governing actors free to pursue their conception of the good life, a lesson Myra Bradwell learned when her plea to become an attorney was met with the shrift response that a woman's calling is “the noble and benign office[] of wife and mother.”¹¹⁹ In short, women were citizens in name only.

The Nineteenth Amendment shattered this conception of women's status and role in the American republic. The Amendment not only erased the Fourteenth Amendment's sex-discriminatory text, but also affirmed that women's destiny was not limited to bearing and raising children. Women could not be barred from voting on the theory that their duty was to bear and raise children. Women were voters, not only mothers. Of course, on one level, the Amendment only conferred the right to vote; its text did not alter any other discriminatory practices. But the Nineteenth Amendment—once situated and understood in relation to the Fourteenth Amendment—stands for much more. It recognizes that women are equal citizens, entitled to the same rights of participation and respect as men. It recognizes that women's rights, as citizens, should not be denied based on a fixed conception of women's proper role.

¹¹⁷ *Id.* at 256–57; Sunstein, *supra* note 5, at 2435–36.

¹¹⁸ For a discussion of the theory of women's virtual representation, see Siegel, *supra* note 41, at 981–87.

¹¹⁹ *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

B. *Abortion and Equal Citizenship*

With this understanding of citizenship, we see why antiabortion laws violate Section 1.¹²⁰ Antiabortion laws, very simply, force pregnant women to be mothers. They deny women the ability to shape their destiny, and determine the course of their lives and the family they want to have. Bearing and raising a child is labor and time intensive, especially in our society where men often do not, and are not expected to, share the work of child rearing. Forcing a woman to bear an unwanted child may prevent her from continuing her education, pursuing the career she desires, or escaping grinding poverty, to name three reasons why a woman might choose to terminate an unwanted pregnancy. In short, antiabortion laws constrain, in very substantial ways, the ways in which women are able to participate in American life. Forbidding abortion alters, shapes, and controls women's lives by dictating both the ways they participate in their communities and the kind of family they will have.¹²¹ This coercion violates both the liberty of citizens protected by the Privileges or Immunities Clause and the antidiscrimination and antisubordination mandates of the Equal Protection Clause.

Casey, in fact, comes close to embracing this theory. The *Casey* joint opinion recognizes, at least partially, the connections between liberty and a citizen's right to shape her destiny and choose her roles in society. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹²² The joint opinion explains why the state cannot ban abortions:

[A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹²³

¹²⁰ The focus here is a woman's right to decide whether or not to terminate a pregnancy prior to fetal viability for any reason of her choosing. Her right to choose abortion to safeguard her life or health is not considered here. For discussion of these two rights in the case law, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869–78 (1992) (discussing pre-viability right to choose); *id.* at 880 (discussing a woman's right to choose abortion to safeguard her health).

¹²¹ For discussion of this point, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 788 (1989).

¹²² *Casey*, 505 U.S. at 851.

¹²³ *Id.* at 852.

But *Casey*'s joint opinion has two flaws. First, it invokes only the Due Process Clause, the clause of Section 1 about procedural fairness, and ignores the Privileges or Immunities and Equal Protection Clauses, the two clauses in Section 1 that explicitly safeguard liberty and equality. Second, the *Casey* joint opinion is unclear about the exact reasons why the right to choose abortion is constitutionally protected.

There is a tension in the joint opinion, present in the above passage, between two different theories for protecting the right to choose abortion. The first is that the abortion decision is intimate and personal and must be protected from government intrusion. As the joint opinion explains, decisions about “[childbearing] matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹²⁴ The second emphasizes the woman’s right to shape her role in society. The joint opinion’s language locates this liberty, too, in the personal and intimate nature of the abortion decision. The state cannot dictate a woman’s role, the joint opinion writes, because “[h]er suffering is too intimate and personal.”¹²⁵ But a woman’s right to choose whether to have an abortion in order to control her role in society has nothing to do with the fact that the decision itself is among “the most intimate and personal choices a person may make in a lifetime.”¹²⁶ Rather, it lies in the coercive effect that antiabortion laws have on women’s lives and the roles women play in the world.

There is no necessary connection between whether a decision is intimate and whether it is part of the individual’s liberty, as a citizen, to shape his or her role in society. The right of citizens to control their place in society extends to choices both intimate and otherwise. Consider Myra Bradwell’s decision to seek admission to the bar of the State of Illinois, or Joe Hogan’s decision to enroll in advanced nursing classes at the Mississippi University for Women.¹²⁷ Neither decision could fairly be described as intimate, at least as that term is used in the Court’s abortion cases. Both decisions, however, properly fall within Section 1’s guarantee of substantive liberty. Bradwell’s decision to practice law and Hogan’s decision to enroll in nursing school were part of

¹²⁴ *Id.* at 851.

¹²⁵ *Id.* at 852.

¹²⁶ *Id.* at 851.

¹²⁷ See *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

larger, most likely long-term, commitments about the course of their respective lives, about how they would participate in and contribute to the communities to which they belonged. Both represented efforts to control their roles in the community, roles that cut against the grain of what was expected or proper for women (in *Bradwell*'s case) or men (in *Hogan*'s).

We tend to think of both *Bradwell* and *Hogan* as cases about the meaning of equality, and they are rightly regarded as such. As a matter of sex equality, the government may neither deny Myra Bradwell admission to the bar nor Joe Hogan the opportunity to pursue nursing school classes because such denial coerces the individual to conform to stereotypical notions of his or her proper role. But that coercion is equally a violation of the liberty all citizens possess.¹²⁸ If an important aspect of citizenship is the individual's freedom to shape his or her destiny in society, choices about the work one performs daily should be protected as part of the freedom inherent in citizenship.¹²⁹ At a minimum, the government cannot, as it sought to do in both *Bradwell* and *Hogan*, force individuals to assume roles of the government's choosing on the grounds that the individual's choices were not appropriate for their sex.¹³⁰ That entails a violation of both liberty and sex equality.

Thus, the crucial question in *Bradwell* and *Hogan* is not whether the decision to become a lawyer or a nurse is personal or intimate. The Constitution condemns the state's efforts in both cases not because the decisions are intimate, but because part of the liberty granted to all citizens is the right to shape the role one plays in society, and included in that liberty is

¹²⁸ In fact, *Bradwell*'s argument rested not on the Equal Protection Clause, but the Privileges or Immunities Clause. Under that Clause, she argued, Illinois could not deem all women or, for that matter any class of citizens, ineligible to practice law. By virtue of her citizenship, it was *Bradwell*'s right to choose her vocation. See *Bradwell*, 83 U.S. at 133–37 (describing counsel's argument).

¹²⁹ See *Schwabe v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238–39 (1957); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (explaining that liberty protected by Section 1 of the Fourteenth Amendment includes "the right . . . to engage in any of the common occupations of life").

¹³⁰ Illinois rejected *Bradwell*'s admission to the bar because women could not be trusted to work as attorneys. "[I]n view of the peculiar characteristics, destiny, and mission of woman," Justice Bradley declared, Illinois could classify the practice of law as among the "offices, positions, and callings [that] shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Bradwell*, 83 U.S. at 142 (Bradley, J., concurring). Likewise, Mississippi denied Joe Hogan the opportunity to pursue nursing school classes because nursing was a woman's profession and thus not appropriate for him. Applying heightened scrutiny "free of fixed notions concerning the roles and abilities of males and females," *Hogan*, 458 U.S. at 724–25, the Court readily concluded that the exclusion of men from the nursing school did not correct discrimination, but perpetuated it. *Id.* at 729. It "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 730.

the right to throw off stereotypical notions of a group's proper role. Indeed, that thread joins *Plessy*, *Bradwell*, and *Hogan*, for in each case, part of the plaintiff's liberty was freedom from fixed notions of the proper behavior of African-American persons (*Plessy*), women (*Bradwell*), and men (*Hogan*). Antiabortion laws violate Section 1 under the same analysis: They force pregnant women to be mothers, in line with the traditional assumption about women's proper roles.¹³¹

This analysis offers three payoffs. First, it roots the right to choose abortion more firmly in a constitutional text, namely Section 1's citizenship and equal protection provisions. This textual anchor is important given the constant claims that nothing in the Constitution's text supports the right to choose abortion. The Court's continuing reliance on the Due Process Clause—which seems on its face to guarantee fair process, not substantive rights—gives added heft to the notion that the Court is rewriting, not interpreting, the text. Of course, the text emphasized here does not alone compel the conclusion that Section 1 protects the right to choose abortion. But that is hardly surprising. Virtually no constitutional rights flow ineluctably from the text of Section 1 because it sets out broad, enduring commitments, not narrow rules about specific rights. For the foregoing reasons, on the best reading of Section 1's equal citizenship guarantees, the right to choose abortion is part of women's equal citizenship.

Second, this reading makes sense of Section 1 as a whole, how the liberty and equality it guarantees complement and reinforce each other, an understanding of which is missing from *Casey*'s equality-infused due process analysis. *Casey* invokes both liberty and equality but does not explain how the two concepts relate to one another. This Article's reading of Section 1 shows how liberty and equality are seamlessly connected. Indeed, Section 1 protects the right to choose abortion for the same reason under both a liberty and equality analysis. Antiabortion laws violate Section 1 because they force pregnant women to be mothers, coercing them to conform to stereotypical notions of what it means to be a woman while denying them agency in choosing the roles they will play in society.

¹³¹ There is, of course, the additional question of whether the state's interest in potential life is a compelling interest sufficient to outweigh the woman's right. Although a full discussion of that question is beyond the scope of this Article, states cannot invoke an interest in protecting fetal life in order to extinguish the abortion right. For discussion of this issue, see the opinions of Chief Justice Balkin, Justice Siegel, and Justice Rubinfeld in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 31–62, 63–85, 109–20 (Jack M. Balkin ed., 2005).

Third, this account properly grounds the right to choose abortion in the wide sweep of our nation's constitutional history. It is a common refrain in constitutional law and theory that the Supreme Court's role in constitutional adjudication is to enforce our nation's most enduring constitutional commitments, and this necessarily requires mining our whole history—not merely the framers' history but everything that has come since.¹³² *Casey* echoes this idea, explaining that “[o]ur Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.”¹³³ Yet, *Casey*'s discussion of the right to choose abortion is firmly rooted in the present. It rejected the idea that the Fourteenth Amendment left untouched practices that existed at the time of the framing.¹³⁴ And it rejected traditional notions of women's duty to be mothers.¹³⁵ It rejected—instead of drawing upon—the past.

In so doing, the joint opinion overlooked the history behind the Fourteenth and Nineteenth Amendments. This history is important—it is the history of the equal citizenship principle. This history counsels suspicion of governmental efforts to dictate the roles marginalized groups may play in society. The Fourteenth Amendment's paradigm case was the post-Civil War Black Codes, which sought to force the former slaves into the role they played during slavery. Section 1 decreed that the former slaves were citizens, not merely

¹³² E.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5–7, 33–76 (1998).

¹³³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992). This is a point about constitutional legitimacy. Our understanding of what the Constitution means is not simply the dead hand of the past. When the Court announces the meaning of the Constitution, it is not simply deciding in a vacuum what the best understanding of the constitutional right entails, but it is reflecting and applying the lessons about the meaning of various constitutional rights learned over the course of our nation's history. Thus, constitutional fidelity is not simply a matter of remaining faithful to traditions in place at the framing of a particular constitutional text; rather it is fidelity to the commitments reflected in our entire constitutional history. See Friedman & Smith, *supra* note 132, at 7 (“If fidelity is our goal, then it is to all of our constitutional history—and not just the Founding—that we must be faithful.”); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”). This is the joint opinion's answer to the dissenters who maintained that no right to abortion exists because of the long history of criminal bans on abortion, including those in existence at the time of the Fourteenth Amendment's framing and ratification. *Casey*, 505 U.S. at 848–50; *id.* at 952–53 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 980 (Scalia, J., concurring in part and dissenting in part).

¹³⁴ *Casey*, 505 U.S. at 848.

¹³⁵ *Id.* at 852, 896–97.

workers.¹³⁶ The Nineteenth Amendment teaches a similar lesson. That Amendment invalidated the practice of confining the vote to men on the theory that women's role was to bear and raise children and not to partake in our system of democratic self-governance. The history of these two Amendments is an important part of the story about why the Constitution protects the right to choose abortion. They teach that women must be free to shape their role and destiny in society. Laws that force women to bear children contravene this equal citizenship principle emerging from both Amendments.

CONCLUSION

Born out of the effort to make the former slaves into citizens, Section 1 of the Fourteenth Amendment wrote into our constitutional text a powerful vision of equal citizenship. As a birthright, all Americans are citizens with the right to exercise the full panoply of liberties that inhere in that status. All Americans are free from governmental efforts to subjugate any class of citizens or to fix into law their proper role in society, thereby preventing governments from creating upper and lower classes of citizens. Finally, Section 1 ensured all Americans that state and local governments would operate under fair principles and procedures, and thus prevents them from using arbitrary procedures to undermine the liberty and equality granted to all.

This unified vision of Section 1 is missing from much of constitutional law and jurisprudence. Rather than looking at the Fourteenth Amendment holistically, we divide the Amendment's substantive guarantees into the specific clauses that make up the whole. Constitutional law is full of specific doctrinal rules that apply depending on which particular clause in Section 1 a plaintiff invokes. These rules make it difficult for courts to look beyond the specific clause invoked and to the Amendment as a whole. This narrow approach, in turn, prevents us from recognizing how Section 1's guarantees work together. The result is that we lose sight of the constitutional vision underlying the whole of Section 1.

This Article argues that one important way to restore the holistic vision of Section 1 is to focus on the individual's right to shape the role he or she plays in the community. Inherent in the citizenship that Section 1 established is the right to control one's role in society. Citizenship entails both the right to participate in the community and respect for how an individual chooses to

¹³⁶ See *supra* Part I.A.

participate in that community. This necessarily means that the government cannot establish an orthodoxy of the roles different people will play in the American constitutional community. The same holds true when we focus on Section 1's equal protection mandate. The government violates equal protection when it disadvantages a group by legislating the roles and expected behaviors of that group. States cannot decree into law the roles that African-Americans or women or other marginalized groups must play. Indeed, the Fourteenth Amendment was enacted as a response to precisely such efforts.

A focus on the individual's right to control his or her role, of course, cannot decide every case arising under the Fourteenth Amendment, nor is it meant to do so. There is no single principle or reading of Section 1 that will account for all cases. It does, however, help us see why antiabortion laws violate Section 1. They do so—as a matter of both liberty and equality—because they force pregnant women to bear children, demanding that they conform to the traditional notion that a woman's role is to bear and raise children. Antiabortion laws force pregnant women to be mothers and control the path of their lives in a constitutionally impermissible way.