

# “The Extinction of the Dred Scott Principle”: Francis Lieber, Juridical Rights, and African American Citizenship

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On June 12, 1863, just one day before the Confederate victory at the Second Battle of Winchester would sweep Union troops from the Shenandoah Valley and pave Robert E. Lee's path towards Gettysburg, Francis Lieber was already thinking about Reconstruction.[1] In an unpublished memo titled “Amendment of Constitution,” the German-born professor of History and Political Science at Columbia University laid out a stark choice between programs for national reunification.[2] The first option was the violent prosecution of the Confederate leaders who had engineered a treasonous split from the federal union: “Either you must execute, banish, burn,” Lieber reasoned.[3] “Or you must carry off as the prize of victory a change of the Constitution. No slavery, national army, negro citizenship.”[4] While Lieber would go on to formally publish a set of proposed amendments to the U.S. Constitution in 1865, his brief articulation here seems to be an early iteration of his conviction that only the constitutional amendment process could address the most pertinent legal, political, and moral questions of the Civil War. Between constitutional amendments and the trial and punishment of

prominent Confederates, Lieber believed, “this alternative is absolute, the one or the other.”[5]

Each of Lieber’s three suggested amendments would have radically altered the constitutional order of the United States. Yet only one, his amendment concerning “negro citizenship,” stands out for its political ramifications as well as its centrality to his legacy. Lieber’s first proposed amendment, a provision for the establishment of a national army, might seem intuitive in order to secure the Union’s victory. After all, the Civil War had fractured the American military establishment, as many War Department officials with ties to the South resigned their posts through 1860 and 1861, the height of the secession crisis.[6] However, the Constitution effectively banned the establishment of a national standing army by granting Congress the power “to raise and support Armies” but limiting to just two years the “appropriation of money to that use.”[7] According to Joseph Story, the Supreme Court Justice famous for his majority opinion in *The Amistad* case, this constitutional prohibition on a standing army was derived, at least in part, from the Framers’ fear that a permanent national militia placed beyond civilian control would reproduce the experience of colonial subjects under the British crown and thus “was a sure introduction to despotism.”[8] Although Lieber remained a strong proponent of American political nationalism throughout his intellectual career, he dropped this proposal; his other writings on the subject of national reunification do not return to the need for a national army, nor does such an amendment appear in his published pamphlet.

Lieber’s next amendment, on the eradication of slavery, aligned with the broader political climate in Congress at the time. Lincoln’s final Emancipation Proclamation, published on January 1, 1863, just six months before Lieber wrote his memo, had declared free the enslaved persons in the eleven states then engaged in rebellion against the United States. Republicans in Congress then sought to solidify Lincoln’s proclamation with a greater legal permanence than was achieved by an executive order during wartime.[9] By December 1863, Representative James Mitchell Ashley of Ohio introduced a constitutional amendment to abolish slavery and guarantee “perpetual freedom.”[10] Shortly thereafter, James F. Wilson of Iowa put forward a similar abolition

proposal that included a clause enabling Congressional enforcement through appropriate legislation.[11] In the Senate, John Henderson of Missouri, a staunch Democrat and former slave owner, proposed a joint resolution for a constitutional abolition amendment in early January 1864, mainly as a vehicle to end the political divisiveness that slavery had unleashed onto the nation.[12] Hence, Lieber's June memo was written as Republicans in both chambers, and even some war-weary Democrats, were already seeking to make the provisions of Lincoln's earlier proclamation constitutionally permanent.

Lieber's sweeping third amendment raises the central concern of his political theory. Ironically, it is also distinctive for its lack of specificity. He highlighted the phrase "negro citizenship" as a crucial constitutional guarantee of the post-slavery political order but did not explain what such a status would entail. He did not specify whether this meant state or national citizenship, what the rights of citizenship included, nor how such a status would be enforced. Neither does the U.S. Constitution. Before the passage and ratification of the Fourteenth Amendment, the word "citizen" appeared thirteen separate times in the original Constitution without much of an indication of the protections guaranteed by it. It is clear that only a "natural-born citizen" can be considered for the Presidency,[13] and that privileges and immunities held by a citizen in one state must be guaranteed in each of the other states,[14] but the legal and political content of citizenship was left largely undefined by the Framers.[15] The Bill of Rights, while largely understood as an articulation of specific protected rights, does not include the word "citizen," but rather enumerates protections accorded to "persons"[16] or to "the people." [17] Lieber clearly believed that establishing African American citizenship through constitutional amendment was vitally important, but his memorandum offered maddeningly few details enunciating what that status afforded or guaranteed.

What, then, can be discerned about the political thought of Columbia's own Francis Lieber, one of the most consequential political theorists and public intellectuals of the 19th century, on the rapidly evolving political, legal, and intellectual conceptualizations of African American citizenship after the Civil War? The archival

record shows Lieber advanced an expansive idea of American citizenship that included African Americans. And yet, his political pamphlets and relevant correspondence predicated citizenship on the narrow plank of equal access to legal or juridical rights, such as the right to sue and be sued, to testify in court, and to serve on juries.

Why did *juridical* rights, and these rights alone, so insistently drive Lieber's conception of citizenship and its privileges? The answer seems to lie in Chief Justice Roger Taney's majority decision in the Supreme Court case *Dred Scott v. Sanford*, handed down in 1857. Historical emphasis is often placed solely on Taney's eventual holding: that African Americans, free or enslaved, had not been and could not be citizens of the United States, and that they had "no rights which the white man was bound to respect."<sup>[18]</sup> Less often discussed in Taney's sweeping decision is his judgment that the United States Court of Appeals for the Eighth Circuit in St. Louis had erred by even allowing Scott to sue in federal court. *This* right, Taney reasoned, was denied to him on the basis of race, since as black Americans, in Taney's judgement, could not be considered national citizens. While the Circuit Court was willing to adjudicate Scott's freedom suit on the *merits* (it still ruled against him), Taney's decision rested upon his conviction that the lower federal court had made a procedural and jurisdictional error by even allowing Scott to sue in the first place.<sup>[19]</sup>

It is *this* right, or set of rights, that preoccupied Lieber. Throughout the archival record, he persistently opposed what he called the "Taney principle" or the "Dred Scott principle," instead insisting that equal access to juridical rights should not be denied based on race or color. Repeatedly, Lieber asserted the Taney principle must be extinguished from American law. The issue loomed so large for him, in fact, that by the summer of 1863, he had identified the process of constitutional amendment as the best mechanism to overturn *Dred Scott*, thus positioning the guarantee of juridical rights as the *sine qua non* of citizenship for black Americans. It was the odiousness of Taney's decision in *Dred Scott* that impelled Lieber's thought on African American citizenship, elevating juridical rights over and above any others as the measure and mechanism of American political belonging.

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Francis Lieber is no stranger to historiographic attention. In the fields of political theory, significant literature has examined Lieber's political (and personal) preference for the United States to move away from a federal system of shared powers and instead model itself after the emerging, centralized nation-states of mid-19th century Europe, like Lieber's own Germany.[20] Military historians celebrate Lieber's General Order No. 100, known colloquially as "Lieber's Code", which refers to Lincoln's legal directive composed and published in May 1863, to establish uniform standards for the behavior of Union soldiers in the field.[21] More recent historiography has discussed the significance of Lieber's Code in radically reconceptualizing the boundary between civilians and combatants during wartime, especially the long-established assumptions of civilians' (including female civilians') innocence and non-engagement with combat.[22] Major works, moreover, detail the intellectual evolution of Lieber's political theory,[23] drawing on his voluminous correspondence as well as his published and unpublished writings.[24] In 1947, historian Frank Friedel published the seminal biography of Lieber.[25]

Scholars have also examined Lieber's affiliation with Columbia. In a previous iteration of the Columbia University and Slavery seminar, Samara Trilling wrote a comprehensive account of Lieber's academic career, delineating his journey between the two Columbias (in South Carolina and New York) that frame his intellectual trajectory.[26] Essays for the Columbia and Slavery Project have also discussed Columbia's place within New York City – spatially, intellectually, and politically – during the Civil War.[27] Despite the expansive historiography, the relevant literature has yet to identify the *Dred Scott* litigation and its continuing significance on American politics and jurisprudence as a commanding motive for Lieber's political thought.

By the time the Supreme Court handed down its decision in *Dred Scott v. Sandford* in March 1857, the interested parties had been engaged in contentious

litigation for more than a decade. But the conflict began in the early 1830s. In December 1833, Dr. John Emerson, a St. Louis doctor serving in the U.S. Army, moved to Illinois, a free state, bringing with him Dred Scott, who had been born a slave.[28] Prior to statehood, slavery had been prohibited in the Illinois Territory pursuant to the Northwest Ordinance of 1787, which outlawed the institution in a vast territory that encompassed parts of six contemporary states.[29] As Illinois entered the Union in 1818, it incorporated the Ordinance's prohibition of slavery into its first state constitution.[30] Emerson and Scott remained in Illinois for close to three years until Emerson was transferred to Fort Snelling, located west of the Mississippi River in the Wisconsin Territory.[31] Close to the current site of St. Paul, Minnesota, Fort Snelling fell within the boundaries of the area acquired in the Louisiana Purchase; for Dred Scott, this meant that, after being held in a free state for a considerable period of time, he was now to be taken to a region where the Missouri Compromise had prohibited the institution of slavery.

The winter in the Wisconsin Territory was too brutally cold for Emerson. In the spring of 1837, he wrote to the Surgeon General requesting to be relocated and by November had arrived at Fort Jesup in western Louisiana, with Scott remaining in Fort Snelling. By February 1838, both Emerson and Scott had been married: Scott to an enslaved woman named Harriet Robinson, whom Emerson likely purchased, and Emerson to Eliza Irene Sanford in Louisiana.[32] Emerson returned to St. Louis in 1842 but died soon after, leaving Dred and Harriet Scott to his widow.[33]

On April 6, 1846, Dred and Harriet Scott filed petitions in the Circuit Court of St. Louis County against Mrs. Emerson, arguing that their considerable residence in both a free state and a territory made free by the Missouri Compromise had accorded them their freedom.[34] Tumultuous litigation followed over the next six years in both the state and federal courts. The first trial in the lower state court, heard in June 1847, ruled in favor of Mrs. Emerson. But, when her counsel and Scott's filed conflicting motions regarding the possibility of a new trial, the Missouri Supreme Court intervened in 1848 and ruled that the new trial could continue.[35] After a second trial in the St. Louis Circuit Court in 1850 and a second appeal, the Missouri Supreme Court finally ruled in

1852 that Scott's slave status, while unenforceable in free areas, had reattached to him immediately upon his return to Missouri.[36]

The case, however, did not end in the highest court in Missouri. Over the course of the litigation, Mrs. Emerson had married Calvin D. Chaffee, a Know-Nothing congressman, and settled in Massachusetts. According to the state law, her new residence precluded her from acting in any capacity over her first husband's estate, leaving her brother-in-law, John A. Sanford of New York, as the named defendant in the proceedings.[37] In November 1853, Scott filed suit in the federal Circuit Court for the District of Missouri against Sanford, alleging that Sanford had physically assaulted him and unlawfully held him as a slave.[38] Crucially, Scott's lawyers contended that the case should be heard in federal court under the diversity of citizenship jurisdiction, a civil procedure that enables federal courts to hear civil cases should the interested parties be "diverse" in their citizenship, usually by state or nationality.[39] Their argument to move the case from state courts to the federal judiciary rested on the contention that Scott was a citizen of Missouri, a status that was inaccessible to slaves.[40] Despite eventually ruling that Scott remained a slave under Missouri law, the federal Circuit Court held that the plaintiff's claim to redress under the diversity of citizenship jurisdiction was valid and that Scott had the right to sue as a citizen in federal court.[41] This holding would be a flashpoint when the case reached the U.S. Supreme Court in February 1856.

Over the course of these proceedings, Francis Lieber became an established academic and political thinker in the United States. A young Lieber had arrived in New York City from Germany in 1827 and soon after moved to Boston, securing a series of positions teaching physical education and publishing the *Encyclopedia Americana* from 1829 to 1833.[42] The encyclopedia sold exceedingly well, which significantly elevated Lieber's visibility within elite American political circles; even President Andrew Jackson was said to have the latest volume displayed on a table in the White House.[43] It also likely contributed to Lieber's increasing sense of Americanization: on February 17, 1832, he presented himself before the United States District Court of Massachusetts

and renounced his allegiance to the King of Prussia, becoming a citizen of the United States.[44]

Lieber's residence in Boston ended in 1835 when he relocated to the most unlikely of destinations: Columbia, South Carolina. Nicholas Biddle, a well-connected Philadelphian, helped Lieber secure a position as the chair of political science at South Carolina College, now the University of South Carolina. While there, Lieber published his most renowned work of political philosophy, *Civil Liberty and Self-Government*, in 1853.[45] He also bought and owned his first two slaves, Betsy and her daughter Elsa. Although he repeatedly condemned slavery in his correspondence and political writing, these two were the "first in a succession of Lieber slaves." [46] This glaring moral duplicity seems not to have troubled his rise in abolitionist politics.[47]

Restless and ambitious, Lieber traveled frequently throughout his adopted country. In a curious historical twist that may have implications for his later political theory on the question of African American citizenship, Lieber met and socialized with John McLean and Benjamin Curtis, the only two Justices of the United States Supreme Court who would issue dissenting opinions in *Dred Scott*. As the United States began a territorial war with Mexico in May 1846, Lieber traveled to Ohio that summer to deliver an address to students at Miami University on political ethics entitled the "Character of the Gentleman." During the trip to Ohio, Lieber was introduced to Justice McLean in Cincinnati, whose later dissent in *Dred Scott* would most closely resemble Lieber's own thought.[48] The jurist offered to purchase the leading Whig periodical in Cincinnati and install Lieber as the editor.[49] After the Mexican-American War, debates in Congress raged unendingly over the conditions by which acquired territory should enter the Union and the status of slavery in such areas. Against that backdrop, Lieber traveled to Washington in the summer of 1850 and dined with an assortment of prominent federal officials, including Justice Benjamin Curtis.[50] Further research is needed to conclusively discern the extent of Lieber's relationship with the two justices who would later dissent from Taney's logic.

The year 1857 was a critical turning point for both Lieber and the *Dred Scott* case. When Lieber said privately that he would prefer Republican John C. Fremont win



the Presidency over Buchanan in 1856, and word of this comment reached the Board of Trustees, his loyalty to the South was questioned by his colleagues. He was passed over for the position of college president.[51] Enraged, Lieber resigned his position and arrived in New York City, unemployed, in January 1857.[52] That spring, the Trustees of Columbia conveniently decided to split a single professorship that previously covered philosophy, politics, *and* literature into three new positions, and the new chair of history and political economy was offered to Lieber.[53] While thrilled to be employed, Lieber corresponded with Hamilton Fish, the Chairman of the Trustees, to request that the title of the professorship be changed to “Professor of History and Political Science.”[54] Lieber felt that “political science” would sound more impressive.[55]

Away from New York City, the Supreme Court of the United States handed down a sweeping decision on March 6, 1857 to settle the question of Dred Scott’s freedom suit once and for all. Writing for a 7-2 court, Chief Justice Roger Taney argued that neither Scott, nor any person descended from African slaves, could be considered a citizen of the United States and all African Americans were thereby denied the privileges and immunities of citizenship.[56] To frame his argument, Taney proposed that the central question before the Court was not substantive but jurisdictional: whether “the Circuit Court of the United States [had the jurisdiction] to hear and determine the case between these parties.”[57] By adjudicating Scott’s freedom suit on the merits, the U.S. District Court in St. Louis had affirmed both Scott and Sanford had standing to sue in a federal court, implying that both were citizens of their respective states and could claim legal redress under the diversity of jurisdiction principle. However, if it could be determined that the federal appeals court had proceeded in error, mistakenly granting the right to sue in federal court to a party to whom such a right should have been denied, then the Supreme Court could avoid adjudicating the case on its merits altogether.

The category of race provided Taney a way to decide the case on jurisdictional grounds and establish far-reaching Constitutional principles, from the definition of national citizenship to the authority of Congress to prohibit slavery in acquired territories. Beneath his question concerning the jurisdiction of the Circuit Court lay a far

more sinister query: “The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?”[58] Taney answered in the negative and substantiated this claim by arguing that state and federal citizenship were distinct from one another and thereby carried with them unique protections and privileges. Since state and federal citizenship were distinct, Taney reasoned, the historical process by which such a status was acquired was appreciably different: every person who, at the time of the ratification of the Constitution in 1789, was recognized “as citizens of the several states” automatically became a national citizen upon the creation of the federal Union. However, any person who acquired state citizenship *after* 1789 did not enjoy national citizenship status.[59]

In his historicist reasoning, Taney contended that free blacks, purely on the basis of race, were not considered to be citizens of the several states before the ratification of the Constitution, and therefore had not been included in those automatically elevated to national citizenship in 1789. Presenting his own version of American history before constitutional ratification, Taney reasoned that African Americans were uniformly understood in the early republic to be “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”[60] In turn, Taney argued that early state law discerned this inferior position by precluding blacks, as a class of persons, from the standard rights of citizenship, such as the right to vote, hold public office, and sit on juries.[61] Given their uniform exclusion from state citizenship at the moment of ratification, Taney concluded that African Americans were not included under the word “citizen” as it appeared in a national sense. As a result, blacks could never be considered members of the national polity and claim the rights and privileges derived from such a status: “It is not a power to raise to the rank of a citizen anyone born in the United States, who, from birth or parentage, by the laws of

the country, belongs to an inferior and subordinate class.”[62] Overnight, Taney had rendered the term “black citizens” an oxymoron.[63]

And this reasoning was invoked to deny the national citizenship of *free* blacks, let alone people who were currently enslaved and litigating for their freedom. On the specific question of Scott’s freedom suit, Taney extended his jurisprudential logic to not only find Scott still enslaved but excluded from legal redress of any kind. Since they lacked the standing of national citizenship, Taney argued, the rights and privileges of African Americans were entirely dependent on local state law. That state may, at its own discretion, accord its black residents with certain privileges, but such rights were entirely dependent on the goodwill of the state and, crucially, carried no legal nor constitutional authority outside of the boundaries of that state.[64] Upon arrival into a new jurisdiction, the legal rights of African Americans immediately conformed to their new place of residence. Since Dred Scott was still a slave according to the state law of most recent residence, his former residence in free areas had no bearing on his legal status in the state of Missouri.[65] As such, his claim to be a citizen of Missouri, the crucial claim in his federal lawsuit against John Sanford, was wholly invalid, rendering Scott “incapable of suing in the character of a citizen” and excluded from redress by the federal judiciary.[66]

Taney’s sweeping opinion was affirmed by the Court’s majority, often on nearly identical grounds. In his exceedingly brief concurring opinion – it was but a paragraph in length – Justice Robert Cooper Grier, a Northerner, subscribed to Taney’s notion that the litigation had been erroneously adjudicated in a federal circuit court, seeing as “the plaintiff cannot sue as a citizen of Missouri in the courts of the United States.”[67] In a much lengthier concurring opinion, Justice John A. Campbell, a Southerner who resigned from the Court after the bombardment on Fort Sumter, rejected Scott’s claim to Missouri citizenship and to federal legal protection under the diversity of jurisdiction doctrine: “Upon this record, it is apparent that this is not a controversy between citizens of different States; and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had a capacity to maintain a suit in the courts of the United States.”[68]

*Dred Scott* was not a unanimous decision. Two Justices challenged different aspects of Taney's questionable juridical and historical logic in their comprehensive dissents. Currents of both dissenting opinions would later manifest in Lieber's writing on the subject. Some historical commentary has argued that Justice John McLean largely avoided the question of African American citizenship altogether, instead focusing on the "Congressional power over slavery in the territories." [69] However, McLean's opinion did reject Taney's claim that Scott was beyond the purview of the federal judiciary simply because Scott was African American. [70] This, in McLean's estimation, was a defective reason to exclude Scott from the federal courts: "He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court." [71] McLean substantiated this claim by contending that the status of being a fully enfranchised citizen, with the right to vote for elected representatives, was wholly distinct from the right to sue under federal law, and the denial of the elective franchise did not necessarily imply the denial of the right to sue. [72] In an allusion to birthright citizenship, a concept that would be expanded upon in Justice Curtis' dissent, McLean contended that Scott's birth within a state, Missouri, that differed from Sanford's residence in New York, entitled him to be considered a citizen under federal law, including the right to sue: "Having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him." [73]

As McLean's dissent focused on Taney's claim that Scott could not sue in federal court, Justice Benjamin Curtis focused on the relationship between state and federal citizenship. In Taney's opinion, the two were distinct legal statuses, with national citizenship being granted immediately to anyone recognized as a citizen of the several states at the moment of constitutional ratification in 1789. In Taney's history, free blacks were not considered state citizens, and therefore had been left out of national citizenship in 1789. Curtis, too, looked to pre-ratification history and the period of early statehood, but found more legal precedent to support birthright citizenship. Curtis reminded the Court that the Articles of Confederation explicitly stated that "the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the

several States,” making no distinction on race or color.[74] As states entered the federal union, many codified this principle of citizenship into their own state laws: according to the state constitutions of Massachusetts, New Hampshire, New Jersey, New York, and North Carolina, all “free native-born inhabitants,” regardless of color or ancestry, were citizens.[75] In Curtis’ estimation, free blacks were, under the Articles of Confederation and at the time of constitutional ratification, entitled to citizenship in certain states, and were thereby included in receiving the “privileges and immunities of general citizenship of the United States.”[76] It was not lost on Curtis that this position, a stark rebuke of Taney’s logic, amounted to birthright citizenship: “My opinion is that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.”[77]

The *Dred Scott* decision left Francis Lieber incensed. Taney’s sweeping decision, particularly its uniform denial of juridical rights to all black Americans, elicited strong condemnation in his correspondence beginning in his first few years in New York. Carl Joseph Mittermaier, a prominent German jurist of the 19th century, shared Lieber’s sharp criticism of the *Dred Scott* case; in their correspondence, Lieber lamented to Mittermaier that Taney’s decision on black citizenship was the legal foundation of the “slave-aristocracy” that dominated antebellum American politics, enabling minority political rule.[78] As his professional responsibilities at Columbia expanded in 1860 – he reluctantly accepted a position at the newly-formed law school in addition to his existing teaching load at Columbia College – Lieber maintained his fiery critique of Taney’s decision: “Chief Justice Taney’s information is valuable to me... Thank him for it. You need not add how illegal, unjuridical, unphilosophical, and unethical I hold his decision in the *Dred Scott* case.”[79]

As he settled in New York, Lieber became increasingly involved in Northern unionist and Republican politics.[80] Still, even with an expanding political profile in the city, *Dred Scott* remained omnipresent in Lieber’s thought on American jurisprudence and the potentiality of African American citizenship. In 1862, he received a letter from Edward Bates, Lincoln’s Attorney General, presenting him with an extraordinary chance

to participate in the development of an alternative jurisprudence to overturn the intolerable *Dred Scott* precedent. In late November, Bates wrote to Lieber with what seemed like a rather inconsequential matter of naval or commercial law; Bates questioned Lieber on the capacity of African American men to pilot ships along the nation's coast.[81] And yet, as Bates very well knew, the ability for black men to navigate American waters depended, at least to a certain extent, on their citizenship status and the extent to which the navigation and commercial laws of the United States protected these black sailors.[82] For Bates, the legal question therefore became the following: "Can a colored man be a citizen of the U.S. so as to be qualified to command a vessel in the coasting trade?"[83] Despite the seriousness of the question, Bates explained that he had "not [the] time to give to the subject," which suggests that his letter was intended to solicit legal and political advice from the Columbia scholar.[84]

Immediately recognizing the potential power of Bates' opinion in repudiating *Dred Scott*, Lieber was emphatic. On the question posed by the Attorney General, he affirmed that "there is not even a shadow of a doubt" that African Americans could qualify for national citizenship so as to be qualified to navigate a ship.[85] Foreshadowing some of his later writings, Lieber included a short definition of American citizenship that presented such a status as a birthright: Citizen "means every non-alien – everyone born in the state and therefore entitled to the protection of the government." [86] While, in this context, this "protection of the government" may seem to refer solely to the right to sail a ship in coastal waters, Lieber also seemed to refer to the protection accorded to citizens by the federal courts. To substantiate his position that black Americans could be citizens within this narrow marine context, he explicitly argued against Taney's ruling that black Americans were excluded from legal rights and contended that the constitutional Framers had not accorded Taney any historical justification whatsoever: "Our Framers did not even inspect the possibility of the *Dred Scot* [sic] outrage and the Taney connection of the commonest protection for which all civil society exists with the idea of color. I execrate that opinion from the bottom of my soul and the depth of my mind." [87]

By all accounts, Bates took Lieber's advice seriously. Just four days after Lieber sent his reply forcefully affirming black citizenship and condemning the majority opinion in *Dred Scott*, Bates issued an opinion of his own.[88] Reviewing legal and political arguments from the previous forty years of American jurisprudence, including Taney's opinion just five years prior, Bates concluded that any free inhabitant, if native-born, ought to be considered a citizen of the United States regardless of race or color. He argued that the inability to exercise certain rights, such as the right to vote or hold office, did not disqualify a native-born free inhabitant from citizenship, since white women and children, for example, could not exercise such rights but were nonetheless considered national citizens.[89] The same status, Bates reasoned, belonged to free African Americans.

To reconcile the denial of certain rights to members of the body politic, citizens by birth, Bates carefully navigated a distinction between citizenship rights and political privileges. All citizens, Bates thought, were entitled to certain inherent rights, such as the right to protection from the national government, but only certain classes hold the privileges of suffrage or office-holding.[90] Bates rejected Taney's ruling as a precedent that permanently denied the status of citizenship to African Americans and further wrote that the circuit court in St. Louis had not proceeded in error by considering Scott a citizen of Missouri and qualified to sue in federal court.[91]

While it is not entirely clear how significant Bates' opinion was in catalyzing a material change in American citizenship law or jurisprudence, the clear rejection of Taney's juridical logic prompted the *New York Times* to report that "the *Dred Scott* opinions are pronounced void and of no authority." [92] In its coverage of Bates' opinion, which historian Martha Jones heralded as "the strongest treatise in support of black citizenship" since the late 1830s, the *Times* remarked that the writing of the Attorney General was "marked by a great analytic power and literary interest, and the author seems to have concentrated with it the *ripe accumulations of reflection and research*" (italics added).[93] The archival record reveals that his correspondence with Lieber comprised, at least in part, Bates' "reflection and research" on the question of black citizenship.

The *Dred Scott* opinion spurred Lieber's writing and political activism through the course of the Civil War. While his remarkable influence on the 1862 opinion of Attorney General Bates was perhaps Lieber's most consequential intervention into American politics during the period, Taney's infamous opinion was central to Lieber's evolving political thought on the nature of the U.S. Constitution. In early February 1865, just a few days after the passage of the Thirteenth Amendment in Congress, Lieber published a pamphlet entitled "Amendments of the Constitution: Submitted to the Consideration of the American People."<sup>[94]</sup> The pamphlet was published through the Loyal Publication Society, an ardently pro-Union literary society based in New York City.<sup>[95]</sup> Tasked with "the dissemination, North and South, of well-considered information and principles, to aid the national government in the suppression and final extinction of slavery, by Amendment to the Constitution of the United States," the organization amassed a network of senior administrators and pamphlet writers that connected some of the most recognizable public intellectuals, political theorists, and social reformers of the age with a subscriber base comprised of the political and economic elite of New York City.<sup>[96]</sup> Lieber served as President from February 13, 1864 until its adjournment two years later, mobilizing its membership and likely facilitating many of the connections that made the group so influential. He was also one of the Society's most consistent pamphlet writers himself.<sup>[97]</sup>

In this pamphlet, Lieber argued that the constitutional amendment process was the appropriate mechanism to adjudicate the pressing legal questions of the Civil War and presented seven original amendments of his own. Critically, Lieber's political (and personal) revulsion over the *Dred Scott* decision was present throughout. In the lengthy political treatise that preceded his proposed amendments, Lieber contended that the constitutional Framers were mortal, fallible men who were cognizant of their own intellectual limitations and intended for Americans of subsequent generations to amend the Constitution.<sup>[98]</sup> In his discussion of the Framers, Lieber did not neglect an opportunity to condemn Chief Justice Taney, arguing that his decision in *Dred Scott* was entirely incongruent with the intentions of the Founding Fathers:



We have been told by a Chief Justice on the high bench of the United States, that although colored people joined in our struggle for independence, and although the Constitution and the early laws do not declared that the Government of the United States is not made for the descendant of the African, yet such had been the development of ideas that it must now be declared to be the spirit of the Constitution; from which unhistorical, hard, illogical, and illegal decision, so much political cynicism was soon after evolved that, besides holding the unhistorical fact that the Government of the United States was established *by* white people alone, the illogical conclusion was also draw that, therefore, it is *for* white people alone (italics his).[99]

Just before he presented his proposed Amendments, Lieber further argued the denial to African Americans of the right to testify in court was such a naked injustice that it should be remedied through a constitutional amendment, rather than through Congressional legislation, in order to place it beyond the possibility of repeal.[100]

His proposed amendments sought to address the most pertinent and confounding political questions raised by the war and the coming Reconstruction, including “the end of slavery, the supremacy of the nation over the states, and the punishment of treason.”[101] However, it is Lieber’s final proposed amendment that aimed to constitutionally overturn *Dred Scott* and affirm American citizenship as a birthright status: “Amendment G: The free inhabitants of each of the States, Territories, Districts, or places within the limits of the United States, either born free within the same or born in slavery within the same and since made or declared free, and all other inhabitants who are duly naturalized according to the laws of the United States, shall be deemed citizens of the United States, and without any exception of color, race, or origin, shall be entitled to the privileges of citizens, *as well in Courts of Jurisdiction as elsewhere*” (italics added).[102] From Justice Curtis’ dissenting opinion, as well as countless political treatises written by African Americans in the antebellum period, it is clear that Lieber was not the first political theorist to propose the concept of birthright citizenship.[103] Nevertheless, his citizenship amendment drew an inextricable link

between “the privileges of citizens,” which will not be denied on the basis of race or color, and access to the “Courts of Jurisdiction.”[104]

Still, Lieber’s political thought did not begin with birthright citizenship. Shortly after he composed his July 1863 memo, which referred solely to the general category of “citizenship,” Lieber began to draft his pamphlet of proposed amendments for eventual publication.[105] By March 1, 1864, eleven months before his pamphlet appeared in published form, Lieber informed Charles Sumner, the longtime anti-slavery Senator from Massachusetts, that just “this moment I have finished my paper on the Amendments.”[106] In the letter, Lieber promised to send Sumner, as well as prominent Philadelphia lawyer Horace Binney, a copy of the seven proposed amendments in hopes of soliciting the feedback of the two men. Never one to miss an opportunity to express his antagonism towards the Court’s decision in *Dred Scott*, Lieber concluded the letter to Sumner by reflecting on the vast carnage of the Civil War, noting “a good deal of dying here. Everyone dies except Taney.”[107]

The first draft of Lieber’s amendments were sent four days later. After seeking Sumner’s opinion on potential titles for the pamphlet – should the seven amendments be “proposed” or “suggested” by Francis Lieber?[108] – the Columbia professor presented the Massachusetts Senator with his preliminary thought on black citizenship. The text of his Amendment G, which would articulate birthright citizenship in the published version, contains no such articulation in the original draft. Instead, Lieber presented his citizenship amendment to Sumner as a constitutional means to overturn *Dred Scott* and guarantee juridical rights regardless of race or color.[109] Among the primary reasons for a series of constitutional amendments, Lieber argued “that slavery must be extinguished and that what I will call for clarity’s sake the Taney principle must be wiped out.”[110] In comparison with the published version, the text of Lieber’s original citizenship amendment showed his narrow juridical focus regarding the rights of citizens: “Amendment G: No human being shall be excluded from the courts of justice as parties to actions, as indicted for offences or crimes, or as witnesses on account of race or color.”[111] Thus, Lieber’s original amendment also revealed his seemingly singular political ambition to nullify *Dred Scott* through the amendment process.

To make sense of the appreciable change in Lieber's thought on the question of black citizenship – an evolution from a narrow focus on juridical rights in March 1864 to an embrace of birthright citizenship by February 1865 – one must look to Lieber's correspondence with Horace Binney. A prominent lawyer from Philadelphia, former congressman, and member of the 1787 Constitutional Convention, Binney entered the political and legal discourse of the Civil War era through three pamphlets defending President Lincoln's decision to suspend the writ of *habeas corpus*.<sup>[112]</sup> Binney was one of two recipients of Lieber's preliminary draft of the amendments, and it was Binney who advised Lieber to expand from a narrow guarantee of legal rights to a more sweeping articulation of birthright citizenship.<sup>[113]</sup>

In their correspondence, Binney agreed with Lieber that a constitutional amendment was necessary to overturn Taney's opinion and permanently establish equal access to the federal courts regardless of race: "It might happen that after slavery was abolished and men of color every where in the land made free, Taney would say again, that the offspring of an African slave, tho' free was not a citizen, and excluded to sue in the federal courts."<sup>[114]</sup> However, Binney crucially diverged from Lieber on whether equal access to legal rights needed to be guaranteed in an entirely separate amendment, as Lieber's first draft had done. In Binney's thinking, a constitutional amendment that established birthright citizenship would imply all the juridical rights that were central to Lieber's thought: "By declaring them citizens, the jurisdiction of the federal courts will be as open to them as to whites."<sup>[115]</sup> Put simply, Binney offered a birthright citizenship amendment as a more efficient means to guarantee legal standing and access to black Americans. The inclusion of a birthright citizenship amendment into Lieber's pamphlet (and into the U.S. Constitution) would, in Binney's estimation, render a separate amendment to guarantee juridical rights to black Americans effectively redundant. The final version of Lieber's citizenship amendment copied Binney's language nearly verbatim, although Lieber retained the phrase "Courts of Jurisdiction," which again suggests how central *Dred Scott* was in driving his thinking and personal politics.

Over the course of his revisions, Lieber omitted a right that others in his time considered fundamental to citizenship: the right to vote. Lieber's pamphlet, in both the original and

the published version, contained language that closely mirrored the text of the Thirteenth Amendment and considered the need to constitutionally establish a definition for citizenship, foreshadowing the Fourteenth Amendment. Notably absent from Lieber's thought, however, was any language similar to the Fifteenth Amendment, which established in 1870 that the right to vote shall not be "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." [116]

Relative to his unrelenting focus on juridical rights, the archival record affirms that Lieber did not regard suffrage as an essential element of American citizenship. In two letters to Charles Sumner, he suggested a conservative viewpoint on African American suffrage. He first contended that the right to vote must remain subject to state regulation, rather than be a national guaranteed right. [117] In his second letter, he expressed a motivation perhaps more strategic than substantive: in the fall of 1865, Lieber advised Sumner against pushing for black suffrage in Congress because its lack of political popularity could alienate potential allies of progressive civil rights legislation. [118] Instead of pushing for suffrage, he argued that Sumner's legislative priority should be to guarantee the right to testify in court to black men, another indication of Lieber's unrelenting focus on juridical rights and his eagerness to repudiate *Dred Scott*. [119]

Why the resistance to extending suffrage to African American men? One could contend that Lieber's position reflected his intellectual community. Some of his closest associates maintained that the right to vote could be reasonably denied to a class of persons who were otherwise considered citizens. Attorney General Bates wrote that the limitation of suffrage to free white male citizens in several states "thus inevitably [implies] that there may be citizens who are neither free, nor white, nor male." [120] For Bates, the denial of the right to vote to certain citizens, namely those that are not free, not white, and not male, did not altogether invalidate the citizenship status of those persons. His final published opinion on citizenship, while repudiating *Dred Scott*, nevertheless maintained the distinction between rights of citizenship that cannot be abridged and a set of political privileges that only certain classes of citizens can

regularly exercise: “I have already shown that suffrage and eligibility [to hold office] have no necessary connection with citizenship, and that one may, and often does, exist without the other.”[121] Binney, like Bates, thought the privilege of suffrage could be separated from other fundamental rights of citizenship. In the same letter as he proposed a birthright citizenship amendment as a means to establish equality of legal rights, Binney argued against the right to vote as inherent to the status of citizenship, asserting that suffrage was not “contained in the word.”[122] While less is known about his continued relationship with Lieber, Justice McLean, too, conceived of suffrage as apart from other necessary and inherent citizenship rights.[123]

Lieber’s opposition to women’s suffrage strengthens the possibility that he considered political privileges as distinct from the rights of American citizens. After the Civil War, as rumors swirled within Republican circles that Democrats would try to propose women’s suffrage at the New York State constitutional convention in 1867, Lieber resolutely opposed granting the right to vote to women.[124] As a foundation for his opinion, he relied on traditional conceptualization of separate, divinely-ordained spheres for men and women within society, contending that “women belonged to the realm of marriage and the family, not politics or the state.”[125] Despite his military code’s acknowledgement that women’s wartime engagement had challenged the traditional assumptions of civilian innocence, he claimed that women had acted solely as patriotic “mothers and sisters and daughters” during the Civil War.[126] In a particularly bizarre articulation, Lieber contended that women’s suffrage would defile the sanctity of the American political process, converting polling places into brothels and brothels into polling places: “Adopt women’s voting and I suppose the voting places will be, occasionally at least, in those cellars which advertise ‘ready made love’ by red ribbons gathering the door curtains.”[127] It seems possible, therefore, that Lieber’s political silence on black suffrage was not as much a blindspot but a deliberate calculation, since the extension of suffrage to African American men might suggest that the vote should be granted to women as well.

Whether motivated by pragmatism, social conservatism, or political theory, Lieber incorporated all of Binney’s feedback, both stylistic and substantive, and published his

pamphlet on the amendments in New York City on February 5, 1865. Like the original draft, Lieber maintained his political silence on black suffrage. While the Loyal Publication Society reported significant distribution of its political writing in 1865, with over 470,000 pamphlets distributed around the country, it is challenging to determine the intellectual or material influence of Lieber's pamphlet on the proceedings of the 39th Congress.[128] Some historians have cautiously connected Lieber's seven amendments to the political and intellectual underpinning of the Civil Rights Act of 1866 and especially of the Fourteenth Amendment, but further research on this question is needed, as documentary evidence to support this claim remains thin.[129] Although the specific outcomes of Lieber's influence are difficult to discern, his political thought remains admirable in its passionate conviction, even if frustratingly narrow in its scope. Unmistakable, however, is his intellectual consistency. Whatever its blemishes and blindspots, whether inadvertent, expedient, or disingenuous, Lieber's thought emanated from a clear catalyzing source. His animus toward the infamous *Dred Scott* decision was an insistent force in both his political and intellectual career.

As a result, Francis Lieber leaves behind an ambivalent legacy for Columbia. On the one hand, his successful justification of the constitutional amendment process as the appropriate mechanism to abolish slavery and guarantee black citizenship positions a Columbia professor among the primary intellectual architects of a post-slavery political order. Yet the intellectual genesis of this approach had never been explored. Despite a vast historiography, no relevant scholarship had previously identified the *Dred Scott* decision as the engine of Lieber's thinking on the issue of citizenship. Lieber's outrage over that ruling was total, and a constitutional amendment was the best available remedy for such an injurious Supreme Court precedent. So thoroughgoing was Lieber's outrage, however, that it may have overwhelmed his consideration of the many constitutional quandaries concerning black citizenship introduced by abolition. Ultimately, then, his revulsion over *Dred Scott* also drives a mixed historical legacy. The separation of suffrage from citizenship would later serve as a political and legal cudgel aimed at obliterating black political power as the promise of Reconstruction receded into the trials of Redemption and Jim Crow. Thus, Lieber binds Columbia to the achievement of African American citizenship as well as to the potent ongoing efforts to undermine it.



## Endnotes

[1] David J. Eicher, *The Longest Night: A Military History of the Civil War* (New York: Simon & Schuster Paperbacks, 2002), 493.

[2] Francis Lieber, memorandum, June 12, 1863, Folder LI 168, Huntington Library (hereafter HEH.)

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] Mark W. Johnson, *That Body of Brave Men: the U.S. Regular Infantry and the Civil War in the West* (Cambridge, MA: Da Capo Press, 2003), xxviii.

[7] U.S. Const. Art. 1. Sec. 8, Cl. 12.

[8] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co, 1833), 113.

[9] Michael Vorenberg, *Final Freedom: The Civil War, The Abolition of Slavery, and the Thirteenth Amendment* (New York: Cambridge University Press, 2004), 48.

[10] Vorenberg, *Final Freedom*, 49.

[11] CG, 38th Cong., 1st Sess. (December 14, 1863), 21. Wilson's proposal consisted of the following language: "Sec. 1. Slavery, being incompatible with a free government, is forever prohibited in the United States' and involuntary servitude shall be permitted only as a punishment for crime. Sec. 2. Congress shall have power to enforce the foregoing section of this article by appropriate legislation.

[12] Vorenberg, *Final Freedom*, 52.

[13] U.S. Const. Art. 2. Sec. 1.

[14] U.S. Const. Art. 4. Sec. 2.



[15] For a more comprehensive analysis of the often nebulous legal and political parameters of American citizenship, see James H. Kettner, "Citizenship and the Problem of Federal Relations," in *The Development of American Citizenship, 1608-1870* (Chapel Hill, NC: University of North Carolina Press, 1978), 248-286.

[16] U.S. Const. amend. V.

[17] U.S. Const. amend. II; U.S. Const. amend. IV; U.S. Const. amend. IX; U.S. Const. amend. X.

[18] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[19] Kettner, *The Development of American Citizenship*, 327.

[20] For primary sources documents detailing Lieber's political nationalism and vision for the United States as a centralized nation-state, see Francis Lieber, "What is Our Constitution – League, Pact, or Government?: Two Lectures on the Constitution of the United States Concluding a Course on the Modern State, Delivered in the Law School of Columbia College, during the Winter of 1860 and 1861". New York Historical Society (hereafter NYHS), Main Collection (JK320 .L65 1861 Non-circulating). For secondary literature, see Merle Curti, "Francis Lieber and Nationalism," *Huntington Library Quarterly* 4, no. 3 (April 1941): pp. 263-292.

[21] Francis Lieber, "Instructions for the Government of Armies of the United States in the Field," in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, (Washington, D.C.: Government Printing Office, 1898), Library of Congress (hereafter LOC) KF7221, <https://lccn.loc.gov/2011525467>. For a comprehensive account of the drafting, publication, and language in Lieber's General Order, see John Fabian, "To Save the Country," in *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2013), 220-249.

[22] Stephanie McCurry, "Enemy Women and the Laws of War in the American Civil War," *Law and History Review* 35, no. 3 (August 2017), 671.

- [23] Lewis R. Harley, *Francis Lieber: His Life and Political Philosophy*. (New York: Columbia University Press, 1899).
- [24] Thomas Sergeant Perry, ed. *The Life and Letters of Francis Lieber* (Boston: John R. Osgood and Co., 1882); Daniel Coit Gilman, ed., *Miscellaneous Writings by Francis Lieber* (Philadelphia: J.B. Lippincott, 1881).
- [25] Frank Friedel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge, LA: Louisiana State University Press, 1947)
- [26] Samara Trilling, "A Tale of Two Columbias: Francis Lieber, Columbia University and Slavery," Seminar Paper, Columbia University and Slavery, 2015, <https://columbiaandslavery.columbia.edu/content/tale-two-columbias-francis-lieber-columbia-university-and-slavery>
- [27] Eric Foner, "Columbia and the Civil War," Columbia University and Slavery, January 2017, [https://columbiaandslavery.columbia.edu/content/12-columbia-and-civil-war#/\\_edn4](https://columbiaandslavery.columbia.edu/content/12-columbia-and-civil-war#/_edn4),
- [28] Walter Ehrlich, "The Origins of the Dred Scott Case," *The Journal of Negro History* 59, no. 2 (April 1974), 132.
- [29] Reginald Horsman, "The Northwest Ordinance and the Shaping of an Expanding Republic," *The Wisconsin Magazine of History* 73, no. 1 (1989), 32.
- [30] Illinois Constitution of 1818, art. VI. sec. I., quoted in Richard V. Carpenter and J.W. Kitchell, "The Illinois Constitutional Convention of 1818," *Journal of the Illinois State Historical Society (1908-1984)* 6, no. 3 (October 1913), 380.
- [31] Don E. Fehrenbacher, *Slavery, Law, and Politics: the Dred Scott Case in Historical Perspective* (Oxford: Oxford University Press, 1981), 124.
- [32] Fehrenbacher, *Slavery, Law, and Politics*, 124.
- [33] Ehrlich, "The Origins of the Dred Scott Case," 132.
- [34] Fehrenbacher, *Slavery, Law, and Politics*, 129.

[35] Ibid, 131.

[36] Scott v. Emerson, 15 Mo. 576 (Mo., 1852); Kettner, *The Development of American Citizenship*, 325.

[37] Vincent Charles Hopkins, *Dred Scott's Case* (New York: Fordham University Press, 1951), 23.

[38] Hopkins, *Dred Scott's Case*, 23.

[39] Kettner, *The Development of American Citizenship*, 325.

[40] Responding to Scott's contention that he was a citizen of Missouri with the right to sue a citizen of New York, Sanford's lawyers in the U.S. circuit court argued that it was his race and national origin, not his enslaved status, that complicated his claims to state citizenship, arguing that Scott was "a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves". "Dred Scott v. John F.A. Sanford", Records, United States Supreme Court, quoted in Hopkins, *Dred Scott's Case*, 24.

[41] Kettner, *The Development of American Citizenship*, 325.

[42] Friedel, *Francis Lieber*, 57-58, 67-72; Trilling, "A Tale of Two Columbias", 2.

[43] Friedel, *Francis Lieber*, 80.

[44] Ibid, 82.

[45] Francis Lieber, *Civil Liberty and Self-Government* (Lippincott, Grambo, and Co., 1853).

[46] Friedel, *Francis Lieber*, 236.

[47] For a more thorough discussion of Lieber's thought on slavery, as well as his slave-holding, see Trilling, "A Tale of Two Columbias" (2015); Hartmut Keil, "Francis Lieber's Attitudes on Race, Slavery, and Abolition," *Journal of American Ethnic History* 28, no. 1 (2008); Frank Friedel, "Francis Lieber, Charles Sumner, and Slavery," *Journal of*

*Southern History* 9, no. 1 (February 1943): 75-93; and Brainerd Dyer, "Francis Lieber and the American Civil War," *Huntington Library Quarterly* 2, no. 4 (July 1939): 449-465.

[48] Justice McLean, Dissenting Opinion, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[49] Friedel, *Francis Lieber*, 224.

[50] *Ibid*, 251.

[51] Trilling, "A Tale of Two Columbias", 8.

[52] Friedel, *Francis Lieber*, 292.

[53] Diary of Francis Lieber, May 18, 1857, quoted in Perry, *Life and Letters of Francis Lieber*, 294.

[54] Lieber to Fish, May 20, 1857, HEH.

[55] Friedel, *Francis Lieber*, 294.

[56] Chief Justice Taney, Majority Opinion, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); U.S. Const. Art. 4. Sec. 2; Kettner, *The Development of American Citizenship*, 326.

[57] Taney, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 6.

[58] Taney, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 7.

[59] Taney, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 12; Kettner, *The Development of American Citizenship*, 326.

[60] Taney, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 10-11.

[61] Taney, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 28; Martha S. Jones, *Birthright Citizens: a History of Race and Rights in Antebellum America* (Cambridge: Cambridge University Press, 2018), 131.

[62] Taney, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 23.

- [63] Stephen Kantrowitz, *More than Freedom: Fighting for Black Citizenship in a White Republic, 1829-1889* (New York: Penguin Books, 2013), 224.
- [64] Kettner, *The Development of American Citizenship*, 327.
- [65] Taney, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 33.
- [66] Taney, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857); Kettner, *The Development of American Citizenship*, 327.
- [67] Grier, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 75; Kettner, *The Development of American Citizenship*, 328.
- [68] Campbell, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 123-124; Kettner, *The Development of American Citizenship*, 328.
- [69] Kettner, *The Development of American Citizenship*, 329.
- [70] McLean, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 137.
- [71] Ibid.
- [72] McLean, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 137.
- [73] McLean, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 137; Kettner, *The Development of American Citizenship*, 329.
- [74] Curtis, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 181.
- [75] Curtis, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 180; Kettner, *The Development of American Citizenship*, 330.
- [76] Curtis, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 182.
- [77] Curtis, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 182; Kettner, *The Development of American Citizenship*, 330-331.
- [78] Lieber to Carl Joseph Mittermaier, November 28, 1857, quoted in Perry, *Life and Letters of Francis Lieber*, 296.

[79] Lieber to Samuel Tyler, January 16, 1860, quoted in Perry, *Life and Letters of Francis Lieber*, 308-309.

[80] Friedel, *Francis Lieber*, 300.

[81] Bates to Lieber, November 22, 1862, HEH.

[82] Jones, *Birthright Citizens*, 148.

[83] Bates to Lieber, November 22, 1862.

[84] Ibid.

[85] Lieber to Bates, November 25, 1862, HEH.

[86] Lieber to Bates, November 25, 1862, HEH.

[87] Ibid.

[88] Edward Bates, *Opinion of Attorney General Bates on Citizenship* (Washington, D.C.: Government Printing Office, 1862).

[89] Ibid, 7.

[90] Bates, *Opinion of Attorney General*, 4; "The Attorney-General on Citizenship," *The New York Times*, December 27, 1862, 4.

[91] Bates, *Opinion of Attorney General*, 24-25.

[92] "News from Washington: Important Opinion of Attorney-General Bates," *The New York Times*, December 16, 1862.

[93] Jones, *Birthright Citizens*, 148; "News from Washington", *The New York Times*, December 16, 1862.

[94] Francis Lieber, *Amendments of the Constitution: Submitted to the Consideration of the American People* (New York: Loyal Publication Society, 1865).

[95] For a more comprehensive analysis of the Loyal Publication Society, its publishing and political activities, and the existence of similar societies across the North, see Adam I.P. Smith, "The Union Leagues and the Emergence of Antiparty Nationalism," in *No Party Now: Politics in the Civil War North* (Oxford: Oxford University Press, 2006), pp. 67-85 and Frank Friedel, "The Loyal Publication Society: A Pro-Union Propaganda Agency," *The Mississippi Valley Historical Review* 26, no. 3 (December 1939): pp. 359-376, <https://www.jstor.org/stable/1916465>.

[96] Proceedings at the First Anniversary Meeting of the Loyal Publication Society, February 13, 1864. NYHS, Main Collection (E463 .L97 1864 Non-circulating); Proceedings at the Second Anniversary Meeting of the Loyal Publication Society, February 11, 1865. NYHS, Main Collection (E463 .L96 no. 78 Non-circulating); Subscription List, 1865. Loyal Publication Society of New York. NYHS, Mss Collection (BV Loyal Publication Society Non-circulating).

[97] Dr. Lieber's Remarks on the Final Adjournment of the Loyal Publication Society, February 15, 1866. NYHS, Main Collection (E463 .L9 1865 Non-circulating).

[98] Lieber, *Amendments of the Constitution*, 6; John R. Vile, "Francis Lieber and the Process of Constitutional Amendment," *The Review of Politics* 60, no. 3 (1998), 530.

[99] Lieber, *Amendments of the Constitution*, 10.

[100] *Ibid*, 33.

[101] Lieber, *Amendments of the Constitution*, 36-38; Foner, "Columbia and the Civil War," 5.

[102] Lieber, *Amendments of the Constitution*, 39.

[103] For a comprehensive overview of African American political thought on the question of citizenship, specifically citizenship by birthright, see Jones, *Birthright Citizens* (2018) and Kantrowitz, *More than Freedom* (2013). For a more tailored analysis of Frederick Douglass' thought on *Dred Scott*, see James Oakes, "I Won't Stop Until I Reach the United States Senate," in *The Radical and the Republican: Frederick*

*Douglass, Abraham Lincoln, and the Triumph of Antislavery Politics* (New York: W. W. Norton & Company, 2008), 3-39.

[104] Vile, "Francis Lieber and the Process of Constitutional Amendment", 537. Vile wrote that Lieber's justification for the citizenship amendment was to rectify "the differential rules pertaining to the testimony given to whites and blacks in the courts".

[105] Lieber to Martin Russell Thayer, February 3, 1864, HEH. In the letter to Thayer, a Republican member of Congress from Pennsylvania, Lieber disclosed that he was "writing now the necessary amendments of the Constitution."

[106] Lieber to Charles Sumner, March 1, 1864, HEH.

[107] Lieber to Charles Sumner, March 1, 1864, HEH.

[108] Lieber to Charles Sumner, March 4, 1864, HEH.

[109] Lieber to Charles Sumner, March 5, 1864, HEH.

[110] Ibid.

[111] Ibid.

[112] Charles Chauncey Binney, "The Civil War Period," in *The Life of Horace Binney: With Selections From His Letters* (Philadelphia: J. B. Lippincott Company, 1903), 325-394.

[113] Horace Binney to Lieber, March 11, 1864, HEH. In the letter, Binney suggested the following language for Lieber's Amendment G, his citizenship amendment: "The free inhabitants of the United States, or of any State, Territory, District or place within the same, and whether born free therein, or born in slavery therein and since made or declare to be free, or duly naturalized according to law, shall be deemed and held to be Citizens of the United States, and without any exception of color, race, or origin, shall be entitled to all the rights of citizens under the Constitution, as well as Courts or without".

[114] Horace Binney to Lieber, March 14, 1864, HEH; Vorenberg, *Final Freedom*, 67.



[115] Horace Binney to Lieber, March 14, 1864, HEH.

[116] U.S. Const. amend. XV.

[117] Lieber to Charles Sumner, March 4, 1865, HEH.

[118] Lieber to Charles Sumner, October 5, 1865, HEH.

[119] Ibid.

[120] Bates to Francis Lieber, October 21, 1862, HEH.

[121] Bates, *Opinion of Attorney General*, 23.

[122] Binney to Francis Lieber, March 12, 1864, HEH.

[123] McLean, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), 137.

[124] Friedel, *Francis Lieber*, 385.

[125] McCurry, "Enemy Women and the Laws of War in the American Civil War", 708.

[126] Ibid.

[127] Lieber to Andrew Dickson White, February 28, 1867, quoted in Friedel, *Francis Lieber*, 385.

[128] Proceedings at the Second Anniversary Meeting of the Loyal Publication Society, NYHS, 11.

[129] Friedel, *Francis Lieber*, 378. Friedel wrote that Lieber's "definition of citizenship came to be embodied in the Fourteenth Amendment"; Also Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W.W. Norton, 2019), 26. Foner wrote that "Lieber's proposals seem to have influenced discussions of both the Thirteenth and Fourteenth Amendments".

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