

WELCOME TO CALIFORNIA, TOM JOAD: AN HISTORICAL PERSPECTIVE ON SAENZ V. ROE STIRRING THE PRIVILEGES OR IMMUNITIES CLAUSE FROM ITS SLAUGHTER-HOUSE SLUMBER

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INTRODUCTION

In May of 1999, the Privileges or Immunities Clause was stirred, but not entirely shaken, by the Supreme Court's decision in *Saenz v. Roe*.¹ The Court established a precedent in *Saenz* that removed the Privileges or Immunities Clause from its *Slaughter-House Cases*² reliquary and set the stage for a thorough reevaluation of the Four-

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1. 526 U.S. 489 (1999).

2. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The Supreme Court first interpreted the Fourteenth Amendment in the *Slaughter-House Cases*. *Id.* The Court ruled that the Privileges or Immunities Clause protects only the rights of U.S. citizenship, and not the rights of state citizens. *Id.* at 74. The Court limited the reach of the Privileges or Immunities Clause to rights enumerated in the Constitution, such as access to seaports, but not rights enumerated in the Bill of Rights. See *id.* at 75-76, 79. The *Slaughter-House* decision "eviscerated the Privileges or Immunities Clause" until *Saenz* revived it. Robert J. Kaczorowski, 1 (unpublished manuscript, on file with author) [hereinafter Kaczorowski, Unpublished Manuscript]. The four justices dissenting in the *Slaughter-House Cases* supported an interpretation of the Privileges or Immunities Clause as protecting federal rights, and included the Bill of Rights guarantees in these protected rights. *Slaughter-House Cases*, 83 U.S. at 93-98 (Field, J. dissenting). Subsequent Supreme Court decisions extended the protections of the Bill of Rights to protect against state violations of the rights of U.S. citizens, but the *Slaughter-House* decision forced this uneven and precarious protection to come through the Fourteenth Amendment's Due Process Clause. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 421, 424-25 (14th ed. 2001); see, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Abington Sch. Dist. v. Schempp*,

teenth Amendment. In *Saenz*, a seven-to-two majority of the Court³ determined that the Privileges or Immunities Clause of the Fourteenth Amendment guarantees the right to travel from state interference.⁴ Part of this right to travel, the Court held, included “the

374 U.S. 203 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 377 U.S. 643 (1961).

3. Justice Stevens wrote the majority opinion in which Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer, joined. Chief Justice Rehnquist and Justice Thomas each wrote dissenting opinions.

4. The Fourteenth Amendment provides:

Sec. 1. 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.

Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1-5 (emphasis added). See *Saenz*, 526 U.S. at 498 (noting that the right to travel “is so important that it is ‘assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all’” (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring))).

right to be treated like other citizens of [a] State” when a person leaves his prior state of residence and settles in a new one.⁵ The major import of this decision lies in its invitation to reevaluate the Privileges or Immunities Clause. This Note responds to this invitation with an examination of historical evidence, in an effort to uncover the meaning and effect of the Fourteenth Amendment as intended by its framers.⁶

The Privileges or Immunities Clause does not cover a precisely defined set of rights. The framers of the Fourteenth Amendment intended for the Privileges or Immunities Clause to protect all rights deemed fundamental by our society,⁷ and careful analysis of our legal tradition can distill what those rights are.⁸ Such analysis will show that the Privileges or Immunities Clause covers all rights that are presently fundamental to preserving life, liberty and property as well as all those that become fundamental to preserving those precepts as our society evolves and these rights change.⁹ Restoring the Privileges or Immunities Clause would give greater protection to fundamental rights and ensure sound interpretation of those rights by courts.¹⁰ Without a functioning Privileges or Immunities Clause, Congress’s power to enforce fundamental rights is limited to merely remedying violations by states as opposed to proactively asserting federal power to protect individuals’ rights.¹¹ History shows that the framers of the Fourteenth Amendment sought to grant Congress this plenary power, and that a limitation on Congress’s enforcement power to police only states, as opposed to individuals, is an inaccurate modern invention.¹² As will be demonstrated below, maintenance of the state action limitation might be necessary, however, to achieve consensus with judges who still contend that the Fourteenth Amendment protects none of the fundamental rights.

Saenz itself illustrates the need for an interpretive framework that can incorporate new and evolving rights in a manner consistent with historical constitutional principles. As alluded to above, the case involved a California statute that limited new California

5. Saenz, 526 U.S. at 500.

6. See *infra* Part I.

7. See *infra* Part I.B.

8. See *infra* Part I.A.

9. See *infra* Part I.C.

10. See *infra* Part II.A.ii.

11. See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 937-40 (1986) [hereinafter Kaczorowski, *Revolutionary Constitutionalism*].

12. See *infra* Part I.C.iii.

residents' welfare benefits for one year after their arrival in California to the level they would have received in their state of prior residence.¹³ California's welfare benefits are among the nation's most generous, and the state attempted to "make a relatively modest reduction in its vast welfare budget" by discriminating between newly arrived residents and those who had lived in the state for more than one year.¹⁴ The Court held that "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State . . . is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States."¹⁵ That is, new arrivals to California have a fundamental right under the Privileges or Immunities Clause of the Fourteenth Amendment to receive the same state benefits as state residents who have lived there for more than a year.¹⁶

Saenz, by itself, is not a radical decision and does not change the muddled jurisprudence surrounding the Fourteenth Amendment, but it does raise the possibility of grander things to come. The decision in Saenz technically only revived the doctrine of Slaughter-House, and the majority notes that its opinion is consonant with the Slaughter-House decision.¹⁷ The very fact that the Court "dusted off"¹⁸ the Privileges or Immunities Clause and used it at all, however, presages a profound shift in constitutional jurisprudence. The decision's real importance lies in revealing that all nine Justices agree on one important issue—that Slaughter-House was

13. Saenz v. Roe, 526 U.S. 489, 492-93 (1999).

14. Id.

15. Id. at 502.

16. See id. at 503-04.

17. See id. 503.

18. Nicole I. Hyland, Note, On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clause and How Far Will it Travel?, 70 FORDHAM L. REV. 187, 187 (2001) (noting that the decision in Saenz "dusted off an old, neglected constitutional clause, kicked its tires, revved its engine and drove it onto the constitutional highway for the first time in sixty-four years"). But see Laurence H. Tribe, Comment, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?, 113 HARV. L. REV. 110, 110 (1999) (arguing that Saenz does not effect or presage a shift in Fourteenth Amendment jurisprudence, but merely reveals problems with the current jurisprudence); Derek Shaffer, Note, Answering Justice Thomas in Saenz: Granting the Privileges or Immunities Clause Full Citizenship Within the Fourteenth Amendment, 52 STAN. L. REV. 709, 715 (2000) (arguing that Saenz does not radically change Fourteenth Amendment jurisprudence).

wrongly decided and that the Fourteenth Amendment has since been mired in confusion.¹⁹

Both sides of the Court appear ready to reconsider the Privileges or Immunities Clause. Even the two dissenters call for a reevaluation of the Slaughter-House decision with a view to bringing the Court's Fourteenth Amendment jurisprudence into line with the intent of the Thirty-ninth Congress.²⁰ The crux of any reevaluation of the Privileges or Immunities Clause, and what infuses the debate with ardent disagreement, is the attempt to determine and specify the intent of the Fourteenth Amendment's framers. In concrete terms, the question is: what are the fundamental rights protected by the Clause and how far may Congress go to protect them?

Justice Thomas contends, for example, that the Privileges or Immunities Clause protects only rights that were deemed fundamental in 1866 and cannot extend to "every public benefit established by positive law."²¹ In other words, the privileges or immunities of American citizens are frozen in place and cannot evolve as our society's conception of life, liberty and property progresses. Thus, while Justice Thomas's dissent appears inclined towards a reemergence of the Privileges or Immunities Clause, he would use it to displace and diminish the rights established by modern Fourteenth Amendment jurisprudence, rather than to augment them.²² That is, the Saenz dissenters would revive the Privileges or Immunities Clause only to use it as a roundabout means of protecting states' rights, while, this Note contends, the Clause clearly aims to protect the rights of individuals.²³

The principal question surrounding the Privileges or Immunities Clause involves whether it incorporates the Bill of Rights and the other constitutional guarantees against the states. Both sides of the debate use history to support their point of view. To that end, this Note examines the historical genesis of the Fourteenth Amendment and, more specifically, explores the meaning of the Privileges

19. While Justice Stevens's opinion does not expressly articulate the idea that Slaughter-House should be overturned, he treats Justice Bradley's Slaughter-House dissent as better expressing the notion that the Privileges or Immunities Clause requires the states to respect the fundamental rights of United States citizens, thereby subtly endorsing the Slaughter-House dissenters' views of the Fourteenth Amendment. See Saenz, 526 U.S. at 503-04. Justice Thomas, whose opinion the Chief Justice also joins, more clearly expresses the Court's unanimity that Slaughter-House should be reevaluated. See *id.* at 527-28.

20. *Id.* at 527-28.

21. *Id.* at 527.

22. Tribe, *supra* note 18, at 134 (quoting Saenz, 526 U.S. at 528).

23. See *infra* Part I.B. and I.C.

or Immunities Clause. Resolution of this debate will hopefully lead to a restoration of clarity in this area of the law after nearly 125 years, by letting the Privileges or Immunities Clause do the work its framers intended.

Part I examines what the framers of the Amendment intended to accomplish. To understand their objectives, Part I.A. explores the Thirty-ninth Congress Republicans' interpretation of the relationship between the federal Bill of Rights and the states prior to adoption of the Fourteenth Amendment. More specifically, Part I.A. examines the declaratory conception of the Bill of Rights, popular among many nineteenth century Republicans, and its reflection of a natural law political theory of society.²⁴

Also of critical importance to the renewed modern debate over the Privileges or Immunities Clause is what rights the Thirty-ninth Congress understood to be included in the privileges and immunities of American citizens. Part I.B. will explore the 1866 understanding of fundamental rights and will discuss the evolving nature of these rights.

Finally, to understand against whom the framers intended to enforce the protections of the Privileges or Immunities Clause, Part I.C. examines the change in our federal structure effected by the Clause; the change which allowed the Bill of Rights to operate against both states and individuals. Because this change in federalism coincided with the emerging predominance of federal citizenship after the Civil War, Part I.C. also considers this shift in citizenship as well as the Supreme Court decisions concerning federalism that the Thirty-ninth Congress relied on to define the scope of Congress's power.

Part II briefly examines the Slaughter-House misinterpretation of the Privileges or Immunities Clause, and the resulting damage to Fourteenth Amendment jurisprudence.

Finally, the Conclusion argues that a reevaluation of the Privileges or Immunities Clause should place renewed emphasis on individual rights that can evolve with society. Such a return to the intended framework of the Fourteenth Amendment will not only bring intellectual honesty to the Court's Fourteenth Amendment jurisprudence, but will also provide, for all Americans, a more stable and durable footing for the individual liberties contained in the Bill of Rights.

24. See *infra* Part I.A.i.

I

WHAT DID THE FRAMERS OF THE FOURTEENTH
AMENDMENT INTEND TO ACCOMPLISH?

“The great ‘object’ of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to ‘respect’ these great fundamental guarantees.”²⁵

Senator Jacob M. Howard

Prigg v. Pennsylvania, a case that significantly influenced the Republican members of the Thirty-ninth Congress in their conception of federal power,²⁶ teaches that because the Constitution is a compromise, there is no uniform method for its interpretation.²⁷ In looking for that compromise, however, the Court has an obligation to give effect to the Constitution with deference to the intent of the framers and their understanding of the language they employed.²⁸ This principle holds especially true for the Fourteenth Amendment, due to the facial ambiguity of the Privileges or Immunities Clause. Deference to the Fourteenth Amendment’s framers has, however, received scant adherence from courts and constitutional scholars. While incontrovertible proof that the Privileges or Immunities Clause applies the Bill of Rights against the states is impossible, when taken as a whole, it is the most reasonable interpretation of the debates of the Thirty-ninth Congress.²⁹

Senator Howard’s quote above seems to support application of the Bill of Rights to the states, but what exactly does this overwrought rhetoric teach us about applying the Privileges or Immunities Clause in court? This question manifests the basic problem in deciphering the scope of fundamental rights—the framers spent a great deal more time waxing rhapsodic about the glory of man’s liberties and the shameful travesties inflicted upon them by American slavery than actually giving courts technical guidance on how to

25. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

26. See Kaczorowski, Unpublished Manuscript, *supra* note 2, at 99-111.

27. 41 U.S. 539, 610 (1842) (“It will . . . probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions; that no uniform rule of interpretation can be applied to it [P]erhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history.”).

28. See *id.*

29. See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 217 (1986).

interpret the Amendment. Historians must, therefore, interpret the framers' intent, concealed in their rhetoric and translate it into clear guidance for the Court. The most supportable interpretation of the intent of the framers of the Fourteenth Amendment is that the Thirty-ninth Congress intended to make the rights included in the Bill of Rights, as well as other fundamental rights, enforceable against the states and private individuals. The broad reach of Congress's power to enforce these rights is the focus of this Part.

The following are some basic principles of constitutional interpretation generally and of the Fourteenth Amendment in particular. First, one should look to the proponents of an amendment before its opponents, as the former won the debate. Next, greater weight should be given to the Amendment's authors.³⁰ This is true not only because of the drafter's key role in shaping the interpretation of any piece of legislation, but also, in this particular case because the secrecy of the Joint Committee on Reconstruction's deliberations forced other members of the Thirty-ninth Congress to pay special attention to these men's views, in order to clarify the Fourteenth Amendment's effects.³¹ Thus not only should one give greater weight to the constitutional interpretations of the drafters and leading supporters, but one should also lend greater credence to the political and legal conceptions that guided their thought.

Third, political power and not the Privileges or Immunities Clause was the primary issue in the debates over the Fourteenth Amendment.³² Congressional Republicans did not want the South to dominate post-war national affairs on the backs of disenfranchised blacks whose numbers would bolster Southern representation in Congress.³³ The Privileges or Immunities Clause and the entire first section were secondary in importance to this political issue, making the legislative debates concerning the first section rel-

30. See *id.* at 13.

31. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 204 (1998).

32. When one looks at the full text of the Amendment, this preoccupation with political power becomes evident. See U.S. CONST. amend. XIV, §§ 2-4. The majority of the Amendment concerns voting and office-holding rights of former rebels. See *id.*

33. See CURTIS, *supra* note 29, at 14; CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Stevens explaining that the most important section in the Fourteenth Amendment fixes the basis of representation in Congress so that any state that excludes any of its citizens from the elective franchise will forfeit its right to representation in the same proportion). In other words, Republicans worried that the South, "which had lost the war," would "win the peace." CURTIS, *supra* note 29, at 131.

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atively scarce in comparison to the focus on the political sections. Lastly, the congressional debates provide the major source for interpretation of the Fourteenth Amendment because few records of the state legislature ratification debates exist, and those that do include only “perfunctory” discussion that “shed[s] little light” on the state legislatures’ understanding of the meaning of the Amendment.³⁴

These last two principles raise a major problem for interpretation of the Privileges or Immunities Clause—that of silence. The relative paucity of debate can either reveal a universal understanding of the Clause or a universal misconception. Either side of the debate can use silence to its advantage, thus highlighting the ambiguities of the historical record that have led to wildly divergent interpretations. That said, adherence to the above principles of interpretation does lead to a convincing explanation of the Privileges or Immunities Clause.

A brief look at the military outcome of the Civil War and the subsequent means used by the South to oppose freedmen’s rights will begin to put the debates of the Thirty-ninth Congress into perspective. The Civil War and the resulting change in our federalism represent an occasion when “by a rare chance, force was ranged on the side of justice.”³⁵ After the North’s military victory, southerners refused to recognize the abolition of slavery and passed the Black Codes to return blacks to de facto slavery: the “leopard [hadn’t] changed its spots.”³⁶ Under the Black Codes, black workers were not allowed to rent farm property and were essentially not allowed to leave the plantation. Thus, as a result of the war and out of fear for their entire social structure, Southern states had intensified their hostility towards blacks.³⁷ To remedy this refusal to accept the

34. CURTIS, *supra* note 29, at 145.

35. Georges Clemenceau, *The Power of Avenging Justice*, in RECONSTRUCTION 10, 16 (Staughton Lynd ed., 1967). The war was initially about secession from the Union, not a moral crusade against slavery, but as the North’s losses mounted, the Union required a moral justification to keep up morale. DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND THE LAW OF THE RECONSTRUCTION AMENDMENTS* 109-10 (1993).

36. CONG. GLOBE, 39th Cong., 1st Sess. 783 (1866) (Rep. Ward discussing the South’s recalcitrance); see also *id.* at 340 (Rep. Wilson arguing that the Black Codes have made freedmen “serf[s]” or “peons” and describing a provision in which blacks were allowed to lease lodgings only in large cities and had to do so within twenty days of the law’s passage or were declared vagrants and forced into work on plantations); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 48-49 (2d ed. 1994) (noting the impact of the vagrancy laws and the fear that southerners were attempting to reestablish slavery).

37. See FRANKLIN, *supra* note 36, at 58-59 (quoting testimony before the Joint Committee on Reconstruction that “[t]he spirit of whites against blacks in Vir-

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supremacy of federal authority, Congress attempted to codify the military victory of the Civil War into legally operative legislation by passing the Reconstruction Amendments, the Civil Rights Act of 1866 (“the Civil Rights Act”), and other supporting legislation.³⁸

Through this attempted codification of the war’s results, northern Republicans aimed to protect all Americans’ liberties by changing our federal structure, to enable federal law to predominate over state law. Slavery almost exclusively, and the Black Codes entirely, sprang from state law,³⁹ although there had been federal statutes that facilitated the former.⁴⁰ Once the Thirteenth Amendment remedied the initial problem of slavery, Congress realized with the passage of the Black Codes that state legislatures would still use state laws to infringe Americans’ liberties.⁴¹ The framers of the Fourteenth Amendment wanted to ensure national protection of such freedoms and rights via legislation that could overcome these state laws.⁴²

Congress passed the Civil Rights Act and the Fourteenth Amendment in order to prevent application of these state laws and to enforce the fundamental rights of all citizens, freedmen and whites.⁴³ The initial purpose of the Fourteenth Amendment was to secure the constitutionality of the Civil Rights Act—to enforce the fundamental rights listed in section one of that Act against state oppression.⁴⁴

The Fourteenth Amendment’s framers’ understanding of how the Bill of Rights operated with respect to the states suggests the most cogent way to interpret the interaction.

ginia is much worse than it was before the war’); *id.* at 3 (“If anything, the crushing defeat on the field of battle had solidified the whites in their determination to preserve the integrity of their way of life.”).

38. See CONG. GLOBE, 39th Cong., 1st Sess. 282 (1866) (Rep. Thayer arguing that the result of the war had effectively changed the law by overruling *Dred Scott*, 60 U.S. (19 How.) 393 (1856), and other pro-slavery decisions).

39. See FRANKLIN, *supra* note 36, at 49-52 (discussing passage of the Black Codes by state legislatures). R

40. See, e.g., The Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

41. *Id.* at 162; see CONG. GLOBE, 39th Cong., 1st Sess. 127 (1865) (Sen. Sumner describing the appalling conditions of Southern Blacks).

42. See AMAR, *supra* note 31, at 160. R

43. See CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866) (Rep. Bingham exhorting that “[t]he spirit, the intent, the purpose of our Constitution is to secure equal and exact justice to all men. That has not been done. . . . It has failed in respect of white men as well as black men.” (emphasis added)).

44. See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 11, at 881-84.

A. How the Framers of the Fourteenth Amendment Understood the Relationship Between the Bill of Rights and the States

The Fourteenth Amendment was meant as a “comprehensive blueprint for the Reconstruction.”⁴⁵ To remedy the oppression of individuals, the Thirty-ninth Congress sought to transform American society and American federalism. A “public deliberative constitutional debate” took place between 1860 and 1870,⁴⁶ the likes of which had not been seen since 1789. The nation rethought its constitutionalism and effected a “second revolution.”⁴⁷ The Republicans in Congress, as well as the nation at large, were keenly aware of the historical significance of the huge shift in federalism that the Fourteenth Amendment represented.⁴⁸

The framers sought radically to alter federalism in order to remedy a paradox embedded in the Constitution since its inception. The rhetoric of freedom rings throughout the Declaration of Independence and the Constitution, but an unavoidable tension arose between the Constitution’s protection of liberty and its tolerance of slavery.⁴⁹ This tension ultimately led to the Civil War, and the Fourteenth Amendment attempted to correct the hollow ring of this rhetorical liberty so that the conflict could finally cease to reverberate.⁵⁰ The Civil Rights Act and the Fourteenth Amendment initially meant to outlaw the Black Codes and affirm black and white unionist civil rights,⁵¹ but a larger design for reconstructing a more authoritative federalism was also clearly and consciously expressed.

45. AMAR, *supra* note 31, at 203.

46. See RICHARDS, *supra* note 35, at 109 (characterizing the Civil War and the attending debate about American constitutionalism as a second revolution).

47. *Id.* (quoting JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 75 (Miami, Mnemosyme 1969) (1849), which presaged this “second revolution”).

48. See CURTIS, *supra* note 29, at 53.

49. *Id.* at 19-20; CONG. GLOBE, 39th Cong., 1st Sess. 866 (1866) (Rep. Newell expressing the fundamental paradox of the Constitution—that liberty and slavery cannot coexist); see also CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom arguing that the Civil Rights Act of 1866 gives practical effect to the principles of the Declaration of Independence).

50. A certain irony lies in the fact that the constitutional structure that was supposed to be an improvement for liberty over the British Constitution kept slavery going “comparatively late (only Brazil and Cuba were later), after even Imperial Russia.” RICHARDS, *supra* note 35, at 120.

51. See CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (Rep. Wilson discussing the need to “annul” the Black Code vagrancy laws); Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 11, at 881-84.

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When the Thirty-ninth Congress poised itself to remedy the paradox between liberty and the de facto slavery allowed by the Constitution, the *Barron v. Baltimore*⁵² decision stood in its way. In *Barron*, Chief Justice Marshall had written that the Bill of Rights of the United States Constitution did not bind the states.⁵³ While to the modern legal mind the doctrine of *stare decisis* would decisively require a constitutional amendment to override the *Barron* holding, many Republicans of the Thirty-ninth Congress conceived the constitutional framework quite differently, allowing for a relaxation of the binding holding of this precedent.

i. The Declaratory Conception of the Bill of Rights and America's Natural Law Heritage

The "contrarian" view of the Constitution held that, contrary to the *Barron* decision, the Bill of Rights did restrict the states. The view that the Bill of Rights restricted the states began to circulate throughout American courts and among lawyers and legal scholars prior to *Barron*. Court opinions from as early as 1819 expressed the view that various provisions of the Bill of Rights did in fact limit the states.⁵⁴ Even one early U.S. Supreme Court decision, *Bank of Columbia v. Okely*,⁵⁵ suggests as much.

Even after the *Barron* decision came down, however, its holding did not seem to bind many contrarian courts. In fact, many lawyers were simply unaware of the opinion and took the general

52. 32 U.S. (7 Pet.) 243 (1833).

53. The constitution (sic) was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

Id. at 247; see also AMAR, *supra* note 31, at 140-41 (analyzing the *Barron* decision). *Barron* was a decision that had "promoted the [short-term] stability of the Union at the expense of liberty." CURTIS, *supra* note 29, at 23.

54. See AMAR, *supra* note 31, at 145.

55. 17 U.S. (4 Wheat.) 234, 240-42 (1819) (holding that a Maryland law allowing a state bank to make summary attachments on debtors' property does not violate the Seventh Amendment, but clearly indicating that the act could be void "under the restrictions of the [C]onstitution . . . of the United States").

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language of the Bill of Rights and the Constitution's other guarantees of liberty to mean that such liberties applied to the states as well.⁵⁶ The supremacy of state court common law over federal Supreme Court constitutional law in a lawyer's education in the nineteenth century and the relative scarcity of the United States Reports can partially explain this lack of knowledge.⁵⁷ In fact, treatises on the common law by Blackstone, Kent, Rawle and Story exerted greater influence over legal thinking in the mid-nineteenth century than did Supreme Court opinions.⁵⁸

Finally, it is important to note that Representatives John A. Bingham, Thaddeus Stevens, James F. Wilson, and Senator Jacob M. Howard, the principal supporters of the Fourteenth Amendment, all held the contrarian view.⁵⁹ When they articulated their conception of the Constitution, no other supporters spoke to deny explicitly their interpretations.⁶⁰

a. The Declaratory Theory of the Bill of Rights

Within the common law framework, the Bill of Rights, by its own legislative force, may not be technically legally binding against the states, but it declares certain fundamental rights that form the basis of our common law heritage.⁶¹ The states are bound to respect these fundamental rights, regardless of the direct legal effect of the Bill of Rights. This is what Rawle refers to when he indicates that "certain amendments [to the U.S. Constitution] 'form parts of the declared rights of the people.'"⁶² As Akhil Reed Amar writes:

To a nineteenth-century believer in natural rights, the Bill was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but rather a declaratory judgement by We the People as the Sovereign

56. AMAR, *supra* note 31, at 146.

57. *See id.* at 147 (distinguishing constitutional law (Supreme Court) decisions from state common law court opinions).

58. *See id.* *See infra* notes 65-74 and accompanying text for a discussion of the support for the declaratory conception of the Bill of Rights from Blackstone and Kent.

59. AMAR, *supra* note 31, at 186-87; *see infra* Part I.A.ii.

60. *See* CURTIS, *supra* note 29, at 15; AMAR, *supra* note 31, at 187.

61. *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (Rep. Lawrence asserting that all inhabitants of the American Colonies possess both natural rights and those rights granted under the British system and that the states cannot lawfully deprive them of these rights, even in the absence of the Fourteenth Amendment).

62. AMAR, *supra* note 31, at 147 (quoting WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120 (1825)).

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High Court that certain natural or fundamental rights already existed. Under this view, the First Amendment was not merely an interpretation of the positive-law code of the original Constitution, declaring that Congress lacked Article I, section 8-enumerated power to regulate religion in the states or to suppress speech. The amendment was also a declaration that certain fundamental “rights” and “freedoms” . . . preexisted the Constitution.⁶³

The claim that the Bill of Rights applied to the states prior to the Fourteenth Amendment may not have worked as a legalistic interpretation of the Constitution, but it did work as a statement of Lockean political theory. Lockean political theory asserts that all states’ legitimacy depends on their respecting fundamental rights, which in turn are derived from man’s natural rights.⁶⁴

Blackstone and Kent also incorporated this view into their expositions of civil liberties. Civil liberties, under their interpretations, are not the natural liberties of the savage, but what a person gets from the state in exchange for giving up his natural liberty.⁶⁵ Blackstone and Kent both contended that the rights of natural persons are twofold: absolute and relative.⁶⁶ These rights are absolute and inalienable in the sense that each person possesses an undeniable minimum of privileges and immunities, and relative in the sense that all citizens have a right to equal protection of any laws that provide rights above this minimum standard.

Kent implied that these “natural, inherent, and unalienable” rights predate the Constitution. The free enjoyment of these liberties was granted by “humanity, civility and Christianity,” which long predated constitutionalism and which were brought to the colonies as the privileges of English freemen.⁶⁷ That is, the Bill of Rights solidified a tradition of rights, but it did not establish or grant them.⁶⁸ Neither the American Revolution nor the devolution of

63. AMAR, *supra* note 31, at 148-49 (emphasis added). By ratifying the Constitution and the Bill of Rights, the states implicitly acknowledged the existence of these rights and could not deny their operation. *Id.* at 150-51.

64. See RICHARDS, *supra* note 35, at 119-21.

65. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull quoting Blackstone’s definition of civil liberties).

66. 2 WILLIAM BLACKSTONE, COMMENTARIES *123; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *1.

67. KENT, *supra* note 66, at *1-2.

68. It requires more than ordinary hardness and audacity of character to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommended themselves to the judgement of the world by their truth and simplicity; and which are constantly

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power to the states abrogated the English common law privileges and immunities—even if a state did not expressly adopt English common law rights, they formed part of that state’s law unless changed by statute.⁶⁹ According to both Blackstone and Lockean social contract theory:

[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were invested in them by the immutable laws of nature. . . . [C]ivil liberty . . . is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public.⁷⁰

Under this conception, civil rights are simply a balancing of the interests of the individual and those of society; the three basic categories of these civil rights are personal security, personal liberty, and private property.⁷¹

b. The Declaratory Theory as Shown in Early American Court Decisions

This interpretation of civil liberties suggests what Representative Wilson meant when he said, “civil rights are the natural rights of man.”⁷² His and others’ extensive citation of Blackstone and Kent undeniably links their understanding of the fundamental rights of United States citizens with this interpretation. The Fourteenth Amendment expresses the Lockean idea that all citizens should be guaranteed equal protection of their fundamental rights “as the reasonable reciprocal condition of the duties of allegiance.”⁷³ Since these absolute rights are founded on nature and reason, Blackstonian logic further maintains, they are at times subject to fluctuation and change.⁷⁴ That is, as our conception of what is natural and reasonable changes, so too can our rights. As one’s “duties of allegiance”⁷⁵ require ceding more of his natural liberty, society must reciprocate by expanding its protection of the individual with evolving rights.

placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction.
See *id.* at *8.

69. See *id.* at *27-28.

70. BLACKSTONE, *supra* note 66, at *124-25.

71. *Id.* at *129; KENT, *supra* note 66, at *1.

72. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

73. See RICHARDS, *supra* note 35, at 128.

74. BLACKSTONE, *supra* note 66, at *127.

75. RICHARDS, *supra* note 35, at 128.

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Several court opinions from the mid-nineteenth century express this declaratory conception of fundamental rights. In *Campbell v. Georgia*, the Georgia Supreme Court asserted that the great fundamental rights predate the U.S. government by centuries.⁷⁶ “[I]ndependently of written constitutions, there are restrictions upon the legislative power [of all governments], growing out of the nature of the civil compact and the natural rights of man.”⁷⁷ In the spirit of declaring and reiterating these fundamental privileges and immunities, the Bill of Rights became “our American Magna Charta.”⁷⁸ Thus, Justice Lumpkin asserted in his majority opinion that all of the first eight amendments, except possibly the Seventh, bound the states.⁷⁹

Other antebellum judicial opinions similarly contradicted the rule of *Barron*. In *Nunn v. Georgia*, the Georgia Supreme Court ruled that the Second Amendment to the U.S. Constitution protected a Georgia citizen’s right to carry arms in the absence of any similar provision in the Georgia state constitution.⁸⁰ The court asserted that “[t]he language of the Second Amendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning.”⁸¹ This opinion also linked the right to bear arms back to our English legal heritage.⁸² Interestingly, the *Nunn* court was fully aware of the effect of the *Barron* decision, but nonetheless relied on the Bill of Rights.⁸³ Thirteen other state and federal courts in the post-*Barron* period also implied that the Bill of Rights applies to the states.⁸⁴

76. 11 Ga. 353, 365 (1852).

77. *Id.* at 369.

78. *Id.* at 368.

79. The principles embodied in these amendments, for better securing the lives, liberties, and property of the people, were declared to be the ‘birthright’ of our ancestors, several centuries previous to the establishment of our government. It is not likely, therefore, that any Court could be found in America of sufficient hardihood to deprive our citizens of these invaluable safeguards. Still, our patriotic forefathers, out of abundant caution, super-added these amendments to the Constitution, so as to place the matter beyond doubt or cavil, misconception or abuse.

Id. at 365-67 (emphasis added)).

80. 1 Ga. 243 (1846).

81. *Id.* at 250.

82. *Id.* at 249 (“[T]his is one of the fundamental principles, upon which rests the great fabric of civil liberty, reared by the fathers of the Revolution and of the country. . . . [T]he Constitution of the United States . . . only reiterated a truth announced a century before, in the act of 1689 . . .”).

83. See CURTIS, *supra* note 29, at 24.

84. CURTIS, *supra* note 29, at 25 & 227 n.36 (citing W. W. Crosskey, Charles Fairman, ‘Legislative History,’ and the Constitutional Limitations on State Authority, 22 U.

This natural law conception of a declaratory Bill of Rights is easy to understand today, because it expresses the same conception that the modern layman has of his rights. It permeates our legal heritage.⁸⁵ To arrive at principles for applying the Fourteenth Amendment, we must interpret the Amendment as exemplifying these Lockean political ideals as well.⁸⁶

ii. John Bingham and the Republicans' Contrarian Interpretation of the Constitution

As discussed above, under the declaratory conception, the Bill of Rights is a combination "of the natural rights of man and the historic rights of Englishmen."⁸⁷ For the Republicans of the Thirty-ninth Congress, the concept of natural law rights overlapped with the rights protected by and identified in the Constitution,⁸⁸ and these protections limited all free governments.⁸⁹ Representative Wilson articulated this idea when he referred to the purpose of the Civil Rights Act of 1866 as ensuring to the freedman "that the rights and guarantees of the good old common law are his."⁹⁰ A citizen's

CHI. L. REV. 1, 142 n.266 (1954) as the source compiling this list of cases). Curtis cites several state court decisions that suggest the Bill of Rights might have constrained the states, even after the Barron decision. See, e.g. *Larshet v. Forgay*, 2 La. Ann. 524 (1847) (ruling that the Fourth Amendment confirms a common law principle that applies in the State of Louisiana); *Magill v. Brown*, 16 F. Cas. 408, 427 (C.C.E.D. Pa. 1833) (No. 8,952) (holding that "the first amendment to the constitution of the United States, . . . in our opinion, wholly prohibits the action of the legislative or judicial power of the Union on the subject matter of a religious establishment"); *Young v. McKenzie*, 3 Ga. 31, 41-45 (1847) ("[T]he amended Constitution of the United States . . . does not create or declare any new principle of restriction, either upon the legislation of the National or State government, but simply recognized the existence of a great common law principle, founded in natural justice . . ."); see also *Boring v. Williams*, 17 Ala. 510, 516 (1850); *Colt v. Eves*, 12 Conn. 242, 250 (1837); *Boyd v. Ellis*, 11 Iowa 97, 99 (1860); *State v. Barnett*, 3 Kans. 250, 251 (1865); *State v. Keyes*, 8 Vt. 57, 61 (1836); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 483 (1855); *State v. Schricker*, 29 Mo. 265, 266 (1860); *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451, 459 (1837); *State v. Paul*, 5 R.I. 185, 187 (1858); *State v. Shumpert*, 1 S.C. 85, 86 (1868); *Woodfolk v. Nashville & Chattanooga R.R. Co.*, 32 Tenn. 422, 431 (1852); *Rhinehart v. Schuyler*, 7 Ill. (2 Gilm.) 473, 522 (1845); *Cockrum v. State*, 24 Tex. 394 (1859).

85. Shaffer, *supra* note 18, at 732.

86. RICHARDS, *supra* note 35, at 145.

87. CURTIS, *supra* note 29, at 18.

88. *Id.* at 41; CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye).

89. CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866) (Rep. Bingham arguing that "[t]hat which is right and just limits every sovereignty"); CONG. GLOBE, 39th Cong., 1st Sess. 1075 (1866) (Sen. Nye contending that neither Congress nor the states can violate the Constitution's fundamental rights).

90. CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865).

“good old common law” rights were protected against violation by any government. “No state retained the legitimate authority to deprive citizens of their fundamental rights because government, at all levels, was designed to protect such rights.”⁹¹ The framers of the Fourteenth Amendment expressed this Lockean political theory when they articulated their declaratory view of the Constitution.⁹²

While the contrarians did not make up the majority of legal thinkers in the mid-Nineteenth century, they did provide a solid basis from which to argue that Barron should be overruled to make constitutional jurisprudence consonant with our legal heritage.⁹³ Among the Republican leadership, most members were contrarians⁹⁴ and thought the Bill of Rights applied to the states despite the Barron decision.⁹⁵

In addition, though not contrarians, a large number of the members of the Thirty-ninth Congress were ignorant of the Barron decision until Rep. Bingham brought the case to their attention during the debates over the Civil Rights Act of 1866.⁹⁶

The Republican contrarian ideology developed in the pre-war period despite the fact that the liberties guaranteed in the Bill of Rights had been traditionally protected by state constitutions and were deeply entrenched as fundamental rights of state citizens.⁹⁷ Since 1789, states had acted as the primary protectors of fundamental rights, although there was no settled legal authority declaring this a special prerogative of the states.⁹⁸ Republican opposition to this tradition grew as states increasingly failed to protect the freedom of speech, the right to trial by jury, the rights included in the Fifth and Eighth Amendments and many more.⁹⁹ Additionally, to

91. CURTIS, *supra* note 29, at 41; see CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (Rep. Bingham).

92. See RICHARDS, *supra* note 35, at 138.

93. See AMAR, *supra* note 31, at 156.

94. AMAR, *supra* note 31, at 204.

95. Cf. CONG. GLOBE, 39th Cong., 1st Sess. 573-74 (1866) (Sen. Trumbull arguing that the Civil Rights Act of 1866 is declaratory of what the law already requires and it should be passed merely to put the states' obligations under the Constitution beyond all dispute); *id.* at 1064 (Rep. Hale expressing a vague notion that the Constitution protects individual rights, even though he cannot cite any cases to that effect); *id.* at 1153 (Rep. Thayer contending that the Civil Rights Act of 1866 is authorized by Article I, Section Eight of the Constitution and the Fourteenth Amendment need not apply to the states for the act's passage); CURTIS, *supra* note 29, at 7.

96. See CURTIS, *supra* note 29, at 147.

97. See AMAR, *supra* note 31, at 205.

98. See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 11, at 872.

99. See CURTIS, *supra* note 29, at 27-28.

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protect slavery in the face of growing opposition, many states ignored the protections of their state constitutions with respect to white abolitionists, unionists and free blacks. The states' own bills of rights became mere "paper barriers," which they violated at will.¹⁰⁰

As the oppression by state governments grew, invocation of the Bill of Rights, despite *Barron*, gained importance in the pre-war anti-slavery crusade and became a solid part of Republican ideology.¹⁰¹ The importance of John Bingham's conception of the Constitution bears particular weight since he drafted the Privileges or Immunities Clause and served as its most ardent supporter in the House. In 1859, Rep. Bingham declared that the Constitution granted "'natural rights to all persons, whether citizens or strangers,'" articulating a belief that the Constitution's guarantees were meant to be declaratory, *Barron* notwithstanding.¹⁰² Representative Bingham also expressed the idea that all of the Constitution's guarantees were recognized against the states by the Comity Clause.¹⁰³

Bingham was, however, one of the few members of Congress who thought the body did not have the authority to pass the Civil Rights Act, nor the authority to actually enforce these constitutional guarantees, despite his belief that the states were bound by them.¹⁰⁴ He knew that the *Barron* decision necessitated an amendment specifically incorporating the Bill of Rights. During the debates over the Civil Rights Act, Bingham argued that Congress must amend the Constitution to place the guarantees of the people beyond the reach of the states. He suggested doing so by specifically authorizing congressional enforcement of the Act.¹⁰⁵

100. See *id.*; CONG. GLOBE, 39th Cong., 1st Sess. 207 (1866) (Rep. Farnsworth arguing that the ordeal of the Civil War has taught us that Congress must obtain security for the rights of men that the states were supposed to protect).

101. See CURTIS, *supra* note 29, at 29.

102. AMAR, *supra* note 31, at 182 (quoting CONG. GLOBE, 35th Cong., 2nd Sess. 983 (1859)).

103. CONG. GLOBE, 35th Cong., 2nd Sess. 982-84 (1859) (Rep. Bingham); see AMAR *supra* note 31, at 181-82. Although not universally accepted, this view of the Comity Clause as protecting the rights of United States citizens under federal law rather than the rights of state citizens under state law did have numerous supporters. See CURTIS, *supra* note 29, at 7. "[N]o state should be allowed to violate 'the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction.'" AMAR, *supra* note 31, at 182 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)).

104. See CURTIS, *supra* note 29, at 80; see, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (Sen. Cowan remarking that the Fifth Amendment already binds the states).

105. CONG. GLOBE, 39th Cong., 1st Sess. 123 (1866) (Rep. Bingham).

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Bingham's call for an amendment to grant Congress enforcement power seems to many scholars to contradict his declaratory view. In the debate over Oregon's admission to the Union noted above, Bingham had argued that the states could not abridge the rights of the citizens of the United States.¹⁰⁶ But in the debates over the Civil Rights Act he now appeared to argue that Congress could not enforce these guarantees against the states without a constitutional amendment. The declaratory view of the Bill of Rights seems absurd and ill-informed to the modern constitutional mind to begin with, but modern legal thinking has an even more difficult time with this seeming contradiction. The two views are reconcilable, however, when one understands that Bingham interpreted the Constitution to recognize fundamental rights against both the federal government and the states, while at the same time denying Congress the power to enforce those rights against the states.

The resolution of this contradiction holds the key to understanding the constitutional framework that Bingham envisioned for the Fourteenth Amendment. Part of the resolution comes from understanding Bingham's interpretation of the Comity Clause. Bingham contended that the Comity Clause contains an "ellipsis" which causes it to guarantee not state law rights, but all privileges and immunities of United States citizens.¹⁰⁷ Bingham argued that:

[I]n some sense, all the States of the Union have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens [G]o read, if you please, the words of the Constitution itself: "The citizens of each State (being ipso facto citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis 'of the United States') in the several States." This guarantee is of the privileges and immunities of citizens of the United States in, not of, the several States.¹⁰⁸

Many constitutional scholars have been unable to make sense of this argument because they fail to see how all its elements fit together and because it seems inconceivable that the fundamental guarantees of the Constitution could possibly have applied against the states before the Fourteenth Amendment.¹⁰⁹ But this is what

106. CONG. GLOBE, 35th Cong., 2nd Sess. 982-84 (1859) (Rep. Bingham).

107. See *id.*; CONG. GLOBE, 39th Cong., 1st Sess. 1089-90, 1292 (1866); *id.* at 158; CURTIS, *supra* note 29, at 60-61.

108. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (emphasis added).

109. See *infra* notes 236-247 and accompanying text (discussing the work of scholars who argue against incorporation of the Bill of Rights through the Privileges or Immunities Clause).

Bingham meant when he asserted that the Fourteenth Amendment will grant express power to Congress to enforce rights that all citizens had had since the “beginning” but which have been violated by the states because Congress had no power to enforce them.¹¹⁰ Modern scholars often disregard such statements as useless to interpreting the Fourteenth Amendment because they are too contradictory.

Bingham merely articulated a deficiency in our Constitution that Blackstone had noted, in 1776, as a potential flaw in any constitution — “in vain would [civil] rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment.”¹¹¹ While Bingham thought that the Comity Clause applied the Bill of Rights to the states, he knew that Barron prevented Congress from enforcing these rights against the states.¹¹² This argument was not Bingham’s own invention or his “pet” theory. The defendants in *United States v. Hall* argued the same theory,¹¹³ and the decision in *Barron* itself may support the distinction of recognition of the rights without any grant of security or guarantee.¹¹⁴ Bingham and the Republican leaders of the Thirty-ninth Congress sought to remedy this constitutional deficiency and to ensure that “hereafter there shall not be any disregard of that essential guarantee of your Constitution.”¹¹⁵

Armed with this understanding of the constitutional framework within which the framers labored, we can explore what rights the framers intended the Privileges or Immunities Clause to protect.

B. The Rights that the Framers of the Fourteenth Amendment Understood to be Included as “Privileges or Immunities” of Citizens

The preceding Part explained how the framers of the Fourteenth Amendment generally viewed the Bill of Rights and other

110. CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866).

111. BLACKSTONE, *supra* note 66, at *140-41; see also KENT, *supra* note 66, at *1 (arguing that the effectual enjoyment of the fundamental rights depends on the existence of civil liberty and on being protected and governed by laws made by the people’s representatives).

112. See CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866) (Rep. Bingham citing *Barron* as the primary reason why Congress should pass the Fourteenth Amendment and asserting that the Bill of Rights is a dead letter without the Amendment).

113. 26 F. Cas. 79, 80 (C.C.S.D. Ala. 1871) (No. 15,282).

114. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

115. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).

common law fundamental rights. This section will explore the expansive nature of these rights as incorporated against the states.

As far as the framers of the Fourteenth Amendment were concerned, “the war was not over until every man should have free and uninterrupted possession of every right guaranteed him by the Constitution.”¹¹⁶ To the Republicans in Congress, the Constitution protects the “great principles of English and American liberty.”¹¹⁷ These great principles are the common law natural rights, which include the Bill of Rights as well as other fundamental rights.¹¹⁸ The Privileges or Immunities Clause declared these rights as enforceable by the federal government and individuals against the states, but it did not grant, create, or define them.¹¹⁹ In order to understand the scope of the Privileges or Immunities Clause, we must analyze the debates that led to its adoption. Only by supplementing the record of the debates with an understanding of the framers’ legal thought can we come to grasp completely the scope of the Clause.

Blackstone defined privileges as rights “society hath engaged to provide in lieu of the natural liberties so given up by individuals.”¹²⁰ Immunities differ, in that they are the “residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience.”¹²¹ Bingham interpreted immunities to be an exemption from an unequal burden.¹²² The American Bill of Rights, as Blackstone said of the Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights, articulates many of the privileges and immunities of citizens, but not all.¹²³

The words “privileges or immunities” do not appear in the Bill of Rights, but they are synonyms for rights and freedoms and the words were used interchangeably in colonial charters and throughout our legal history.¹²⁴ While there is widespread support for the idea that the Bill of Rights makes up the privileges and immunities of United States citizens,¹²⁵ the Lockean political theory behind the

116. CURTIS, *supra* note 29, at 138 (quoting PHILA. INQUIRER, Sept. 5, 1866, at 8 (paraphrasing the governor of Connecticut)).

117. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (Sen. Cowan).

118. See *id.*

119. See AMAR, *supra* note 31, at 281.

120. BLACKSTONE, *supra* note 66, at *129.

121. *Id.*

122. See CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (Rep. Bingham).

123. Cf. BLACKSTONE, *supra* note 66, at *127-29 (discussing the English privileges and immunities).

124. See AMAR, *supra* note 31, at 166-67; CURTIS, *supra* note 29, at 64-65.

125. See AMAR, *supra* note 31, at 170.

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Fourteenth Amendment “expressly eschews” a distinction between enumerated and unenumerated rights, and leads to the conclusion that more rights than just the first eight amendments are included.¹²⁶ Bingham and others said, nearly a dozen times, that the Privileges or Immunities Clause included the Bill of Rights and other rights.¹²⁷ Bingham even read all of the first eight amendments word-for-word on the floor of the House to explain the meaning of the Fourteenth Amendment, saying that the privileges or immunities of citizens were “chiefly,” but not exclusively, defined in those amendments.¹²⁸

Bingham further iterated that the second draft of the Amendment included more protected rights than the first draft.¹²⁹ Bingham used phrases “sufficiently broad in meaning to include [not just] the Bill of Rights,” but “all of [the Constitution’s] guarantees.”¹³⁰ By articulating all of these “great fundamental rights” with the simple, yet highly charged and slightly amorphous, “privileges or immunities,” Bingham and the other framers merely followed Kent’s maxim that a declaration of rights is stronger if it lists only great principles, as this makes “future operations” with respect to unforeseen situations easier.¹³¹ The framers used the language of the Comity Clause¹³² to incorporate by reference the rights discussed in *Corfield v. Coryell*¹³³ and also to incorporate that deci-

126. RICHARDS, *supra* note 35, at 224.

127. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1088-94 (1866).

128. See CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871).

129. See *id.*

130. CURTIS, *supra* note 29, at 125.

131. See KENT, *supra* note 66, at *8-9.

132. The Comity Clause provides that: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” U.S. CONST. art. IV, § 2. See *infra* text accompanying notes 177-179 (discussing the rights that the framers of the Fourteenth Amendment understood the Comity Clause to include).

133. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *Corfield* held constitutional a New Jersey statute under which a Pennsylvania oyster boat was seized and sold for harvesting oysters in New Jersey. *Id.* at 550. Justice Bushrod Washington relied, in part, on the Comity Clause to reach his decision. His exposition of the “privileges and immunities” of the Comity Clause became the standard interpretation of this constitutional provision for most of the nineteenth century. In Justice Washington’s famous passage, he asserted:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.

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sion's reference to the indefinable character of fundamental rights.¹³⁴

The congressional debates also clearly indicate that the Fourteenth Amendment encompasses the rights included in the Civil Rights Act of 1866 and the Freedmen's Bureau Act. While the Amendment clearly carries into effect much of the substance of the these acts, the individual rights aspects of these acts do not delineate the Fourteenth Amendment's reach.¹³⁵ No responsible reading of the Fourteenth Amendment can limit the scope of the Privileges or Immunities Clause to the rights listed in Corfield and the Civil Rights Act.¹³⁶

While the Corfield list does not constitute an exhaustive recitation of the fundamental rights, its interpretations of the Comity Clause privileges and immunities came to be used as a "shorthand description of fundamental or constitutional rights."¹³⁷ Following the reasoning of the Corfield decision, which characterized the privileges and immunities of citizens as beyond enumeration,¹³⁸ Bingham did not explicitly write the Bill of Rights into the Fourteenth Amendment. In his view, the fundamental rights of United States citizens included other rights beyond the Bill. Thus outlining the Bill in the Fourteenth Amendment might have been seen to limit the Amendment to protection of only such enumerated rights, a limitation Bingham sincerely wished to avoid.¹³⁹

They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." *Id.* at 551-52.

134. Sen. Howard quoted a passage from Corfield and suggested that the privileges or immunities of the citizens of the United States "are not and cannot be fully defined in their entire extent and precise nature," but to these "should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

135. See CURTIS, *supra* note 29, at 103.

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136. See *id.* at 114.

137. *Id.* at 64.

138. See Corfield, 6 F. Cas. at 551.

139. See CURTIS, *supra* note 29, at 125. For example, the Privileges or Immunities Clause includes the right of habeas corpus and the rights included in Art. VII in addition to the first eight amendments. See AMAR, *supra* note 31, at 176.

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The framers did, however, set some explicit limits on the Privileges or Immunities Clause. They clearly spelled out that the Fourteenth Amendment incorporated only civil rights and not political rights like voting, holding office, or serving on a jury.¹⁴⁰ Representative Kasson, for example, articulated this moderate Republican view when he drew a distinction between “natural” rights and suffrage.¹⁴¹ The Privileges or Immunities Clause, moreover, operated independently of the Due Process or Equal Protection Clauses to apply the Bill of Rights against the states.¹⁴²

C. Change in Federalism: The Operation of the Privileges or Immunities Clause on States and Individuals

The first element in understanding the radical change in federalism that the Fourteenth Amendment effected is to see how the Amendment resolved the conflict over whether federal or state citizenship was the primary citizenship of residents of the United States. As discussed below, given the Amendment’s resolution in favor of federal citizenship, operation of the Fourteenth Amendment against the states and private individuals becomes apparent.

i. Federal Citizenship v. State Citizenship

The Fourteenth Amendment resolved a burning question that had plagued the Constitution since its inception: which predominated over the other, federal citizenship or state citizenship? A brief look at the evolution of citizenship in the United States will clarify the Fourteenth Amendment’s framers’ understanding of federal citizenship’s status in 1866, and how they proposed to change it.

From the English, the United States inherited a complex system of citizenship, a blend of the medieval and the modern.¹⁴³ Early in its history, different groups in England had had differing levels of rights and privileges according to each group’s respective position in the social hierarchy. These varying rights derived natu-

140. See CONG. GLOBE, 39th Cong., 1st Sess. 1117, 1294, 1832 (1866).

141. Id. at 237; see also id. at 282 (Rep. Thayer arguing that the right to vote is not a natural right); id. at 606 (vote taken in the Senate confirms 39-7 that the Civil Rights Act of 1866 does not confer the right to vote).

142. See CONG. GLOBE, 39th Cong., 1st Sess. 1088-89 (1866) (Rep. Bingham arguing that the first draft of the Amendment, which contained no equal protection or due process language, would allow enforcement of the Bill of Rights).

143. JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 3-5 (1978).

rally from the status into which an individual was born.¹⁴⁴ As a result of the rise of the English Lockean social contract concept, however, rights in England, and by this time, America, came to rest on a consensual contract between the new entrant and society.¹⁴⁵ Thus, the hierarchy of English rights and privileges varying with social status had, for the most part, eroded in America in the colonial period.¹⁴⁶

Applying the contemporary Lockean framework to the time period immediately preceding adoption of the Fourteenth Amendment, the dual nature of federal and state citizenship required that once blacks became citizens, both state and federal governments were obliged to protect fully their fundamental rights.¹⁴⁷

This new conception of egalitarian citizenship, however, clashed with racial prejudice, and blacks were forced to occupy a middle ground between the rights of slaves and the rights of white men.¹⁴⁸ This middle ground effectively reestablished the English hierarchy of privileges that had, supposedly, long ceased to exist.¹⁴⁹ The result of the Civil War and its codification in the Reconstruction Amendments finally brought coherence to the American concept of citizenship by affirming blacks' status as full citizens entitled to the same privileges and immunities as other citizens of the United States.¹⁵⁰ Whether this conception of citizenship would be governed by the states or the federal government was a critical issue after the Civil War.

*McCulloch v. Maryland*¹⁵¹ and *Martin v. Hunter's Lessee*¹⁵² formed the Fourteenth Amendment's framers' jurisprudential framework on the issue of citizenship—they accepted these Supreme Court cases as settling the issue in favor of the primacy of federal citizenship. The Republicans also believed that the Thirteenth Amendment had overruled *Dred Scott v. Sanford*, which had held that free blacks were not entitled to the same rights of citizen-

144. See *id.* at 4.

145. See *id.* at 9.

146. See *id.*; see also *id.* at 287 (noting that by about 1820 it became a central assumption of citizenship that members were entitled to fundamental privileges and immunities and that this assumption rested on individual consent and not on a natural hierarchy of individuals).

147. See *id.* at 312.

148. See *id.*

149. See *id.* at 322.

150. See *id.* at 350-51.

151. 17 U.S. (4 Wheat.) 316 (1819).

152. 14 U.S. (1 Wheat.) 304 (1816).

ship as whites.¹⁵³ The primacy of state citizenship had been dissolved by the war, along with slavery.¹⁵⁴ Since the war was fought over states' rights, the national power's victory made federal law supreme and undeniably gave the federal government the authority to secure the privileges and immunities of all citizens.¹⁵⁵

To protect the rights of federal citizenship, Congress first enacted the Civil Rights Act. The Civil Rights Act defined United States citizenship for the first time;¹⁵⁶ this privilege was now a birth-right. The Act contemplates concurrent jurisdiction between the federal government and the states over fundamental rights, while clearly asserting the primacy of U.S. citizenship over state citizenship. Federal rights create a minimum standard below which the states cannot go, but above which the states may add other rights, provided all citizens enjoy equal access to them.¹⁵⁷ The first section of the Fourteenth Amendment reinforces the affirmation of citizenship in the Civil Rights Act.¹⁵⁸ The Thirty-ninth Congress created a minimum of "inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws."¹⁵⁹ When Sen. Howard introduced the second draft of the Fourteenth Amendment, he similarly emphasized that the first section protects both the fundamental rights of U.S. citizens and equal enjoyment of additional rights granted by states.¹⁶⁰

153. 60 U.S. (19 How.) 393 (1856); CURTIS, *supra* note 29, at 48; see also CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866) (Rep. Bingham invoking Kent, Rawle, and Story to show that citizens of states are automatically United States citizens).

154. See CONG. GLOBE, 39th Cong., 1st Sess. 462 (1866) (Rep. Baker stating that

[I]s it not right that a final and unmistakable constitutional quietus should be given to both of those twin monstrosities, divinity of slavery and ascendancy of State over national sovereignty, which were blown up together by political demagogues and a prostituted clergy, until they finally exploded in wrath and blood and treason through the land?).

155. See CONG. GLOBE, 39th Cong., 1st Sess. 99 app. (1866) (Rep. Yates).

156. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 1.

157. See CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (Sen. Trumbull arguing that states can grant or reduce rights as long as they do not dip below the minimum of the "great fundamental rights").

158. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." U.S. CONST. amend. XIV, § 1.

159. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (Rep. Lawrence comparing the Civil Rights Act to the Magna Carta).

160. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

ii. Federal Rights v. State Law Rights

Construing federal citizenship as dominant over state citizenship led the framers of the Fourteenth Amendment similarly to consider citizens' fundamental rights as primarily federal rights. A recurring theme throughout the debates of the Thirty-ninth Congress involved the protection of United States citizens from state oppression.¹⁶¹ As one influential treatise writer put it, "[t]he object of the national government was to protect the natural and inalienable rights of each citizen, protection that extended against 'the encroachments of foreign nations, and domestic states,' since "'a state might assume the authority to rob a portion of her citizens of their dearest rights.'"¹⁶² Bingham asserted as clearly as possible that the Thirty-ninth Congress had established the means to enforce the "privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State."¹⁶³ The framers of the Fourteenth Amendment clearly did not wish to leave it to the freedmen's former masters to protect black civil rights—this would have been tantamount to letting the fox watch the henhouse.¹⁶⁴

Many of the Republicans in the Thirty-ninth Congress shared this idea that there are two kinds of privileges or immunities—those "inherent in every citizen of the United States, and such others as may be conferred by local law and pertain only to the citizens of the State."¹⁶⁵ The Slaughter-House decision badly skewed modern understanding of this dichotomy by asserting that the Fourteenth Amendment merely protects those federal law rights enumerated in the Constitution outside of the Bill of Rights. One influential scholar, Charles Fairman, continued this pandemic misinterpretation of the Fourteenth Amendment with a different, but still incorrect interpretation. Fairman argued that the Fourteenth Amendment incorporates the Civil Rights Act and nothing more,

161. See CURTIS, *supra* note 29, at 42; CONG. GLOBE, 39th Cong., 1st Sess. 123, 158, 1781, 2405, 67 app., 99 app.

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162. CURTIS, *supra* note 29, at 43 (quoting Tiffany, *supra* note 47, at 84-85).

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163. CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871).

164. See CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom); see also *id.* at 1263 (Rep. Broomall arguing that states have been violating individuals' civil rights for thirty years).

165. CONG. GLOBE, 39th Cong., 1st Sess. 1836 (Rep. Lawrence). Lawrence further cites *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), for the proposition that the federal government "is the depository of the power to enforce the enjoyment of these fundamental rights when denied or destroyed by State authority." *Id.*

and that the Act protects only state law rights.¹⁶⁶ Professor Fairman arrives at this conclusion by interpreting Comity Clause rights as purely state law rights and by discrediting Corfield¹⁶⁷ as a “badly confused” decision.¹⁶⁸ Fairman’s own confusion has been largely responsible for the modern misunderstanding of the Privileges or Immunities Clause and has engendered a slew of scholarship and court decisions that follow his analysis.¹⁶⁹

Regardless of how one interpreted the Comity Clause before the Fourteenth Amendment, the Fourteenth Amendment’s framers’ understanding of the Comity Clause is the only important interpretation with respect to understanding the Privileges or Immunities Clause. The framers understood the Comity Clause to protect the fundamental rights of United States citizens under federal law. Sen. Trumbull expressed this when arguing that the Civil Rights Act would protect the fundamental rights of U.S. citizens and that these rights were the same as those protected by the Comity Clause. Trumbull further maintained that in Corfield “[Justice Washington] enumerates the very rights belonging to a citizen of the United States which are set forth in the first section of [the Civil Rights Act].”¹⁷⁰ Corfield had held that the Comity Clause guaranteed that among “the rights of a citizen of the United States were certain great fundamental rights, such as the right to life, to liberty, and to avail one’s self of all the laws passed for the benefit of the citizen to enable him to enforce his rights.”¹⁷¹ Numerous other citations to Corfield reveal an almost uniform understanding of the Comity Clause as protecting federal rights.¹⁷²

166. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 44-45, 138 (1949).

167. See *supra* note 132 (discussing Corfield’s importance in nineteenth century Comity Clause jurisprudence).

168. CURTIS, *supra* note 29, at 92-93 (quoting Fairman, *supra* note 166 (unattributed)).

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169. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that the Fourteenth Amendment is essentially an act based on equal protection of state law rights, rather than a protection of substantive federal rights). For an analysis of Fairman’s confusion, see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 62, 66-73 (1993) (arguing that “Fairman, not Bingham, was confused about the Amendment’s purpose”).

170. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

171. *Id.* at 600. See *supra* note 133 for Justice Washington’s famous passage on the rights covered by the Comity Clause.

172. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (Sen. Howard); *id.* at 1835 (Rep. Lawrence); *id.* at 1117-18 (Rep. Wilson). In *United States v. Hall*, Judge Woods similarly interprets Corfield as defining the privileges and immunities of citi-

By incorporating their understanding of the Comity Clause into the Civil Rights Act and then into the Fourteenth Amendment, the framers of the Amendment protected federal law rights against encroachment by the states.

iii. Federal Power and the Application of the Bill of Rights Against States and Individuals

The framers of the Fourteenth Amendment primarily aimed to guarantee the rights listed in the Civil Rights Act of 1866 by overruling *Barron* and granting Congress the power to enforce the Bill of Rights against the states.¹⁷³ Consistent with this purpose, Congress declared a goal to enforce civil rights in the South.¹⁷⁴ This section will examine how the language of the Privileges or Immunities Clause operates to enforce fundamental liberties against the states and, given Congress's understanding of its power under the Constitution, against private individuals as well.

"No State shall" is the same language that limits state action in Article I, Section Ten of the Constitution.¹⁷⁵ Earlier drafts of the Privileges or Immunities Clause excluded this language, but Bingham specifically included it on the grounds that in order to grant Congress the power to enforce the Bill of Rights against the states, *Barron* required such explicit language.¹⁷⁶ Bingham asserted that "the amendment proposed stands in the very words of the Constitution Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress."¹⁷⁷ He drew from the Comity Clause and the Fifth Amendment to make a self-evident textual reference to the guarantees of the Constitution and the Bill of Rights. This shows how misguided the accepted modern reading is: Bingham's first draft failed to pass not because it was too broad, as Jus-

zens of all free states, suggesting that these are natural rights that flow from any form of republican government and are not the special province of the states to guarantee. 26 F. Cas. 79, 81-82 (C.C.S.D. Ala. 1871) (No. 15,282).

173. Sen. Stevens, among others, articulated this purpose of the Amendment very clearly. See CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) ("The first section prohibits the States from abridging the privileges and immunities of citizens of the United States . . . [which] are all asserted, in some form or other, in our Declaration [of Independence] or organic law.").

174. See CONG. GLOBE, 39th Cong., 1st Sess. 1032, 2724 (1866).

175. AMAR, *supra* note 31, at 163-64.

176. See *id.* at 164-65; *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248-49 (1833) (discussing express restrictions on state power in the Constitution and how those sections are worded).

177. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

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tice Kennedy asserts in *Boerne v. Flores*,¹⁷⁸ but rather because it lacked specific language to make it self-executing against the states and private individuals.¹⁷⁹

Does this mean that the framers of the Amendment intended a state action limitation; to limit Congress's authority to action merely against states, as opposed to against both states and private individuals? Bingham expressed his intent "to see the Federal judiciary clothed with the power to take cognizance of the question . . . inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every State."¹⁸⁰ While this statement does not clearly define Congress's enforcement capacity in twentieth century terms, we can interpret this and other statements by reference to the case law that the framers themselves relied upon to define this capacity.

Any modern interpretation of the Fourteenth Amendment must consider the scope of congressional authority articulated in *Prigg v. Pennsylvania* and *McCulloch v. Maryland*, as the Republicans in Congress relied largely on these two cases to define the scope of Congress's enforcement capacity under the Constitution.¹⁸¹ Both decisions accepted a broad view of federal power.¹⁸² To ignore these cases is to treat anachronistically the Fourteenth Amendment as though it were written with the same notion of congressional power that prevails in today's Supreme Court jurisprudence.¹⁸³ And, as evidenced by these cases, the framers' conception of congressional enforcement capacity was much more expansive than that of the modern Supreme Court. Reference to these cases, especially to *Prigg* and the Fugitive Slave Acts, could easily imply the absence of a state action requirement or limitation.

178. 521 U.S. 507, 520-22 (1997).

179. See CURTIS, *supra* note 29, at 63.

180. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).

181. See CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Rep. Wilson arguing that *Prigg* shows that Congress has the authority to enforce civil rights); *id.* at 1836 (Rep. Lawrence ascribing a *McCulloch*-type power to Congress's capacity to enforce civil rights, even in the absence of the Fourteenth Amendment); Robert J. Kaczorowski, Review Essay and Comment, *Reconstructing Reconstruction: The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 569-70 (1989) [hereinafter Kaczorowski, *Reconstructing Reconstruction*].

182. 41 U.S. 539, 610 (1842).

183. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (articulating a conception of federal power markedly different and weaker than the federalism of *McCulloch* or *Prigg*).

McCulloch gave us the idea that some powers are inherent in the nature of a sovereign government: even without the Necessary and Proper Clause, Congress has implied powers.¹⁸⁴ This conception accords with the framers' natural rights theory—by virtue of being a sovereign free government, the federal government can secure its citizens' basic fundamental rights.¹⁸⁵

To demonstrate: the Fugitive Slave Acts of 1793 and 1850 were passed without express constitutional authority, in accordance with the McCulloch view of congressional power, and, as Robert Kaczorowski has shown, the framers used the logic of this Act to construct the Fourteenth Amendment.¹⁸⁶ The Fugitive Slave Acts prohibited states from interfering with an owner's rights in his slaves. Thus it appears, from a superficial textual reading, to have addressed state action only.¹⁸⁷ Under this state action provision, however, a Congress composed largely of the original constitutional framers enacted the Fugitive Slave Act of 1793, which gave a civil action in debt against private individuals for compensation for the expense of recapturing a slave. Again in 1850, Congress relied on the Fugitive Slave Act to enforce slave owners' constitutional rights in their property against private individuals. Thus these acts prescribed a private tort remedy for a violation of the Constitution. The framers of the Fourteenth Amendment viewed the provisions in their Amendment in the same way.¹⁸⁸

Prigg further underscores this interpretation.¹⁸⁹ In this 1842 decision, the Supreme Court held unconstitutional a Pennsylvania statute that made the capture and return of fugitive slaves to their owners a criminal offense under state law.¹⁹⁰ The Court reiterated its holding that Congress may enforce a right that has become a fundamental right by virtue of its inclusion in the Constitution.¹⁹¹ Congress maintains plenary power and, in turn, has a duty to enforce any constitutional right against any violator of that right. This

184. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-10 (1819); CONG. GLOBE, 39th Cong., 1st Sess. (1866) (Rep. Lawrence citing McCulloch to explain the reach of federal enforcement power).

185. See CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (Rep. Thayer stating that fundamental rights are common to the "humblest citizen of every free State").

186. Kaczorowski, Unpublished Manuscript, *supra* note 2, at 88-98.

187. Kaczorowski, *Reconstructing Reconstruction*, *supra* note 181, at 565-66.

188. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull arguing the constitutional authority to pass the Civil Rights Act of 1866 is the same as that used to pass the Fugitive Slave Act of 1850).

189. Kaczorowski, Unpublished Manuscript, *supra* note 2, at 98-112.

190. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842).

191. *Id.* at 615, 618.

notion of the extent of federal protection of rights is a much more expansive view of federal power than a system of rights under which Congress can only enforce in reaction to state violations.¹⁹² Prigg also reiterates McCulloch's theory of broad constitutional delegation to Congress to enforce constitutional rights—the mere recognition of the right delegates to Congress the authority and the obligation to enforce it.¹⁹³ If there is no action against private individuals, Prigg asserts, then the right delegated to Congress has no teeth.¹⁹⁴ The Court could just as easily have read the Fugitive Slave Clause not to apply to individuals, but Story and even the dissenters chose not to do so.¹⁹⁵ The framers of the Fourteenth Amendment employed this argument, by citing Prigg to say that the Amendment would apply to private individuals.¹⁹⁶

Supporters of the “state action syllogism” argue that if the framers meant to include private individuals, they would have included a “private individuals clause.”¹⁹⁷ The answer to this cavil is that the primary goal of the Amendment's authors was to overrule Barron, even if many members of Congress remained ignorant of the decision's import, so as to put the fundamental rights of Americans beyond any means of state oppression. Bingham used “no state shall” to overturn this decision, not in an effort to limit the reach of the Fourteenth Amendment to state action. As additional proof of this goal, the language of the second draft of the Amend-

192. *Id.* at 616.

193. *Id.* at 615; Kaczorowski, Unpublished Manuscript, *supra* note 2, at 99.

194. Prigg, 41 U.S. at 614.

195. See *id.* at 539; see also Cong. Globe, 39th Cong, 1st Sess. 474 (Sen. Trumbull arguing that the Civil Rights Act (and thus the Fourteenth Amendment) guarantees “practical freedom,” implying a Prigg-like reach of congressional enforcement power).

196. Even though the Supreme Court has never expressly overruled the constitutional doctrine of Prigg, the case has fallen from the canon of constitutional law decisions, perhaps because the Thirteenth Amendment overruled the specific holding of the case. A perusal of the table of cases in GUNTHER & SULLIVAN, *supra* note 2, reveals no mention of this once-significant decision. That Prigg's holding clearly supports a view of congressional power diametrically opposed to the Slaughter-House majority's position somewhat explains Prigg's notable absence. The irony of employing the legal theory underlying a pro-slavery decision to enforce individuals' civil rights may also weaken the theory's utility to modern argument. This irony, however, does not detract from the decision's importance to the framers of the Fourteenth Amendment.

197. The “state action syllogism” is the argument that the Fourteenth Amendment prevents “states” from abridging privileges or immunities. Private individuals are not states, and the Fourteenth Amendment, therefore, does not reach private action. See CURTIS, *supra* note 29, at 158-59. All the assumptions underlying this argument are, of course, debatable.

ment was even more effectively designed to accomplish this end—to limit the states by the very terms of the Bill of Rights.¹⁹⁸ Finally, as discussed above, the results in *Prigg* also disprove the “state action syllogism,” and the framers of the Amendment explicitly cited *Prigg* to argue that the Fourteenth Amendment would apply to private individuals.¹⁹⁹

While many Republicans in Congress accepted this view of congressional power, there was not a complete consensus on the Fourteenth Amendment’s application to private individuals.²⁰⁰ For example, Republicans were split as to whether the government could indict mobs for depriving blacks of their fundamental rights. Even those Republicans who doubted the federal government’s power to prosecute private individuals, however, accepted that inaction by states could merit congressional retribution and correction by federal authorities.²⁰¹ Yet this division among some congressional Republicans should not obscure the fact that the framers and principal supporters of the Fourteenth Amendment adhered to the *Prigg* and *McCulloch* view of federal power.

We have seen that the framers of the Fourteenth Amendment intended to grant Congress the power to enforce a complicated and amorphous set of rights against the states. Incorporation of these rights came through the Privileges or Immunities Clause and not through other clauses of the Fourteenth Amendment. But, rather than grapple with the complex set of rights acknowledged in the Privileges or Immunities Clause, the Supreme Court has, for more than 100 years, misinterpreted this Clause to produce a muddled jurisprudence and a less-than-solid foundation for the rights of individuals in the United States. The next Part briefly examines this confused jurisprudence that began with the reactionary opinion in *Slaughter-House*.

198. See CURTIS, *supra* note 29, at 124.

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199. See CONG. GLOBE, 39th Cong., 1st Sess. (1836) (Rep. Lawrence); CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Rep. Wilson). While this conception of congressional enforcement capacity is historically accurate, a state action limitation, as a means of achieving a consensus on the modern reevaluation of the Privileges or Immunities Clause, might still have some effective force. See *infra* notes 261-262 and accompanying text.

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200. While the Democrats in Congress in 1871 accepted that the Bill of Rights applied against the state, many argued the Fourteenth Amendment did not give Congress the authority to pass the Ku Klux Klan Act. See CURTIS, *supra* note 29, at 166; CONG. GLOBE, 42nd Cong., 1st Sess. 454, 396, 384-85 (1871) (cited in CURTIS, *supra* note 29, at 166-67).

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201. See CURTIS, *supra* note 29, at 158; CONG. GLOBE, 39th Cong., 1st Sess. 67 app. (1866) (Rep. Garfield arguing that the nation needs to protect fundamental rights so mobs can no longer deprive citizens of their liberties).

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II.
THE SLAUGHTER-HOUSE MISINTERPRETATION OF THE
FOURTEENTH AMENDMENT AND SUBSEQUENT
INCORPORATION OF CITIZEN'S PRIVILEGES AND
IMMUNITIES THROUGH OTHER SECTIONS OF THE
FOURTEENTH AMENDMENT

A. Slaughter-House

“There is no area of current judicial interpretation of the Reconstruction Amendments more at war with their text and background history and political theory than the interpretation of the clauses of the fourteenth amendment bearing on the enforcement of fundamental rights against the states.”²⁰² There is no delicate way to put it — Slaughter-House was, from the vantage point of historical constitutional interpretation, simply decided wrongly. Slaughter-House “strangl[ed] the privileges-or-immunities clause in its crib” and forced incorporation of citizens’ privileges and immunities to arrive via the Due Process and Equal Protection Clauses.²⁰³ The Slaughter-House interpretation of the Fourteenth Amendment is utterly untenable when compared to the historical record.

i. Underlying Political Factors Driving the Slaughter-House Cases Majority

The real driving force behind the Slaughter-House Cases majority opinion likely lies in the Reconstruction movement’s perceived corruption, and the shift in public sentiment against the movement, black rights and Republicans in general. What began as the protection of black civil rights evolved into the protection of black political rights. These two noble causes eventually morphed into protection of the national viability of the Republican Party as the only means of perpetuating black civil rights.²⁰⁴ This last step crossed the line with popular opinion, which had already wavered in its support of the first two objectives. Additionally, the perceived inefficiency and corruption of the Republican government, although no worse than that of Democratic regimes, hastened its overthrow.²⁰⁵ Southern whites responded with violence, electoral fraud and gerrymandering to keep Republicans out of control in Washington and the South and to re-solidify white control.²⁰⁶

202. RICHARDS, *supra* note 35, at 199.

203. AMAR, *supra* note 31, at 213.

204. See William A. Dunning, The Undoing of Reconstruction, in RECONSTRUCTION 66 (Staughton Lynd ed., 1967).

205. See *id.* at 67.

206. See *id.* at 67, 73-74.

In particular, the Freedman's Bureau²⁰⁷ came to symbolize, for many, the problems with Republican Reconstruction. However accurate, the Freedman's Bureau Courts, which were established to protect blacks from unjust southern civil courts, were perceived as merely punishing whites—the balance to, but hardly better than, the southern white courts.²⁰⁸ Some amount of local despotism in the Bureau was allowed to go unchecked and the agency was perceived to be riddled with fraud.²⁰⁹ Similarly, whether or not ultimately true, federal officers were seen as using the 1870 Enforcement Act²¹⁰ as a “cover for a systematic intimidation and oppression of the whites.”²¹¹ These problems unfortunately lent force to the arguments of those who opposed the civil rights effort on principle.²¹² Many scholars argue that the South would have regressed to repressive white control out of racial prejudice, regardless of Republican corruption.²¹³ Without such repression, however, the Slaughter-House Court might not have so severely limited the Fourteenth Amendment.

ii. The Slaughter-House Cases Majority's Analysis and Its Aftermath

The Slaughter-House Cases majority opinion reintroduced the Barron distinction into federal individual rights jurisprudence—the decision asserted that the Constitution recognizes fundamental rights, but provides no means of enforcing them against the states, even under the Fourteenth Amendment.²¹⁴ This interpretation essentially destroys the purpose of the Fourteenth Amendment and reduces its legacy to nothing but the flowery rhetoric of the congressional debates.

The “Butchers,” appellants in the case before the Supreme Court, argued that a Louisiana statute prohibiting the slaughtering

207. See FRANKLIN, *supra* note 36, at 36-39 (detailing the work and purpose of the Freedman's Bureau).

208. See W. E. B. Du Bois, *Of the Dawn of Freedom*, in RECONSTRUCTION 24, 36-37 (Staughton Lynd ed., 1967). But see FRANKLIN, *supra* note 36, at 37-38 (noting that the Bureau used its courts cautiously).

209. See Du Bois, *supra* note 208, at 38. But see FRANKLIN, *supra* note 36, at 39 (arguing that President Johnson's refusal to fund the Bureau in addition to Southern hostility “did much to destroy the effectiveness of the Bureau”).

210. 114 Stat. 140 (1870). This Act was passed to enforce the rights of blacks to vote under the Fifteenth Amendment by imposing criminal and civil sanctions for interfering with the exercise of the franchise. *Id.*

211. Dunning, *supra* note 204, at 68.

212. See Du Bois, *supra* note 208, at 39.

213. See FRANKLIN, *supra* note 36, at 49-52 (discussing white repression of southern blacks before federal Reconstruction began).

214. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73-80 (1872).

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of animals in a large swath of southeastern Louisiana in and around New Orleans, except by a state-granted monopoly, was unconstitutional because it violated the Butchers' Fourteenth Amendment right to exercise their profession.²¹⁵ In response, the Court argued that the Fourteenth Amendment, as interpreted by the Butchers, was too much of a radical shift in, and almost an abolition of federalism, and that if Congress had intended this shift it would have spelled it out more explicitly.²¹⁶ Yet John Bingham had clearly articulated that the Fourteenth Amendment was not intended to do away with the dual system of government, but merely to shift authority over civil rights enforcement.²¹⁷ Opponents and proponents alike recognized this historical shift.²¹⁸ The Slaughter-House majority, however disingenuously, asserted that such a shift in federalism had not occurred and essentially gave victory to those who opposed passage and ratification of the Fourteenth Amendment. This was a reactionary Court upholding the rights of the majority over those of the individual.²¹⁹

The majority did, at least, interpret the Privileges or Immunities Clause to refer to the privileges or immunities of U.S. citizens.²²⁰ But the Court limited the privileges or immunities of U.S. citizens to a few non-essential rights by arguing that the extensive rights that *Corfield* had held the Comity Clause to protect are state law rights, and not federal rights protected by the Fourteenth Amendment.²²¹ Although whether *Corfield* rights are state law or federal law rights is still debated, the Court's interpretation conflicts with Hall,²²² numerous treatise writers, and most importantly,

215. See *id.* at 59-61.

216. See *id.* at 81-82.

217. See CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871); see also *id.* at 117 app. (Rep. Hoar contending that Congress was not trying to destroy federalism, but merely trying to protect fundamental rights).

218. See CURTIS, *supra* note 29, at 151-52. Representative Hale recognized the shift in federalism, stating that

It does seem to me that the tenor and effect of the amendment proposed here by this committee is to bring about a more radical change in the system of this Government, to institute a wider departure from the theory upon which our fathers formed it than ever before was proposed in any legislative or constitutional assembly.

CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

219. See Curtis, *supra* note 29, at 177 (noting that the Court's decision was seen as reactionary when it came down).

220. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1872).

221. *Id.*

222. See *supra* note 172 (discussing the importance of *United States v. Hall*, 26 F. Cas. 79, 81-82 (C.C.S.D. Ala. 1871) (No. 15,282)).

the framers' interpretation of the Fourteenth Amendment, to which the Court should have accorded deference on the issue.²²³ Under the majority's analysis, to seek redress for a violation of a fundamental right, citizens must go to state courts and hope that the right will be enforced under state law. Otherwise, citizens have no recourse for enforcement of fundamental rights dating back to the Magna Carta.

This interpretation of the Fourteenth Amendment distorted the American concept of citizenship and set it on a painful course of oppression and confrontation.²²⁴ Neither the Slaughter-House interpretation of fundamental rights as state law rights, nor a reading of Corfield to the same effect is enough to change permanently these heretofore common law rights, protected by all forms of free government, into rights exclusively within the province of state governments within a federal system. The Slaughter-House decision contradicts a long-running tradition of jurisprudence relied on by the framers of the Fourteenth Amendment.²²⁵

By 1876, only four years after the Slaughter-House decision, the Bingham-Howard reading of the Fourteenth Amendment was no longer broadly supported.²²⁶ Two unequivocal cases, *United States v. Cruikshank*²²⁷ and *Walker v. Sauvinet*,²²⁸ removed any vestiges of the broad reading of the Fourteenth Amendment left alive by Slaughter-House. These decisions, subsequent cases limiting individual rights, and concurrent political developments reflected a national shift toward the states' rights, limited view of federalism.²²⁹ In this anti-Republican climate, the Democratic candidate for president won the popular vote in 1876. The protection of blacks, once the cause of the Union, became a disruption of national unity. And the nation, reverting to old habits,²³⁰ turned back to economic matters, which more immediately affected whites in both the North and South.²³¹ Even within the Republican Party, the leadership had

223. See *supra* notes 170-172 and accompanying text. Even Taney's *Dred Scott* opinion saw Corfield rights as federal rights.

224. See KETTNER, *supra* note 143, at 348-49.

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225. See *supra* Part I.A.

226. CURTIS, *supra* note 29, at 169.

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227. 92 U.S. 542 (1875).

228. 92 U.S. 90 (1875).

229. See CURTIS, *supra* note 29, at 180.

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230. See ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* 220 (Charles P. Bouton ed., 1973) (noting that, in general, Americans regard "the exercise of their political duties . . . as an unfortunate distraction from their work").

231. See CURTIS, *supra* note 29, at 180; see also FRANKLIN, *supra* note 36, at 194 (noting that many Northern newspapers in the early to mid 1870s "attacked Radi-

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shifted to a new generation whose primary goals had not been the abolition of slavery or black civil rights.²³²

B. Post-Slaughter-House Incorporation

Three dominant views of incorporation of the Bill of Rights against the states have emerged in the Court's post-Slaughter-House jurisprudence. Justice Frankfurter interpreted the Fourteenth Amendment to incorporate none of the Bill of Rights against the states, incorporating against the states only those rights implicated by fundamental fairness and ordered liberty.²³³ Justice Black took nearly the opposite view, arguing for total incorporation of the entire Bill of Rights.²³⁴ Finally, Justice Brennan took the middle route and argued for selective incorporation of only those rights that the modern Court deems to be fundamental.²³⁵

As mentioned above, Professor Charles Fairman exercised considerable influence over the Court's twentieth century analysis of incorporation of fundamental rights against the states. He argues for Justice Frankfurter's fundamental fairness and ordered liberty approach.²³⁶ This denial of total incorporation of the entirety of citizens' fundamental rights, however, opened the door for another prominent scholar, Raoul Berger, to argue against incorporation of any rights enforceable against the states.²³⁷ These misguided interpretations emerge from the fact that the "[h]istorical sources" one must scrutinize in order to understand the Fourteenth Amendment "are initially confusing to minds steeped in modern approaches to Constitutional law."²³⁸ As one expert in the area argues: if one does

cal Reconstruction because it exacerbated the difficulties between the North and the South, and consequently, delayed the resumption of normal business relations of the sections"); *id.* at 214-15 (discussing the shift in concern towards building railroads and other economic issues).

232. Illustrative of this shift is a list of the Republican leaders who negotiated the "Wormley House Bargain" of Feb. 26, 1877 to resolve the Tilden-Hayes election: John Sherman, James A. Garfield, Charles Foster and Stanley Matthews, none of whom were leading supporters of the Civil Rights Act of 1866 or the Fourteenth Amendment. See FRANKLIN, *supra* note 36, at 207.

233. See AMAR, *supra* note 31, at xiv; *Adamson v. California*, 332 U.S. 46, 59-68 (1947).

234. See AMAR, *supra* note 31, at xiv; *Betts v. Brady*, 316 U.S. 455, 474 (1941) (Black, J., dissenting).

235. See AMAR, *supra* note 31, at xiv; *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960).

236. AMAR, *supra* note 31, at 188.

237. See Aynes, *supra* note 169, at 60 (discussing RAOUL BERGER, GOVERNMENT BY JUDICIARY 134-56 (1978) and its place in anti-incorporation scholarship).

238. CURTIS, *supra* note 29, at 4.

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not momentarily abandon modern constitutional law hang-ups, the true meaning of the Fourteenth Amendment, and especially the Privileges or Immunities Clause, will remain unclear and one will be left wondering how such inept legislators could ever have been left to keep watch over our Constitution.²³⁹

Asking twentieth century questions about a nineteenth century debate leads to erroneous conclusions.²⁴⁰ This misunderstanding generates particular problems when clothed with an alleged purpose of uncovering the original intent of the framers. When words are "stripped of their historical context," any attempt to arrive at a "plain meaning" is useless.²⁴¹ Interpreting texts without the guideposts of historical meaning gives the interpreter an empty vessel into which she may pour whatever substance suits her purpose (however righteous or nefarious). Fairman, for example, misuses Republican remarks that the powers of the Fourteenth Amendment are already in the Constitution, i.e., expressions of the declaratory theory of the Amendment,²⁴² to demonstrate that the Amendment provided for only those limited protections already found in the Constitution.²⁴³

Both leading anti-incorporation scholars, Berger and Fairman, base their interpretations of the Thirty-ninth Congress on the notion, popular among historians and the general public for much of the twentieth century, that Reconstruction was a corrupt, sadistic period and that John Bingham was incompetent in general and incapable of laying out or understanding a coherent constitutional framework.²⁴⁴ Contemporary sources, however, respected Bingham. "The New York Times called Bingham one of the most 'learned and talented members of the House.'"²⁴⁵ At the same time Fairman and his progeny deride Bingham's buffoonery, other

239. See, e.g., HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT* 90 (1977) (showing a misunderstanding of the nineteenth century constitutional framework when she argues that proponents of the Fourteenth Amendment were themselves confused about constitutional concepts).

240. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 11, at 866.

241. CURTIS, *supra* note 29, at 12.

242. See *supra* Part I.A.

243. See CURTIS, *supra* note 29, at 94.

244. See AMAR, *supra* note 31, at 302-03; see also Aynes, *supra* note 169, at 58 (contending that Fairman's conclusions rely on disregarding Bingham as unreliable); MEYER, *supra* note 239, at 95 (arguing that Bingham's speeches "confuse more than they enlighten").

245. CURTIS, *supra* note 29, at 58 (quoting the New York Times (citation unattributed)).

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states' rights arguments contend that Bingham was a shrewd and deviant plotter who, as a former railroad lawyer, cunningly pulled one over on the country by obtaining the same protections for corporations in the Fourteenth Amendment as for citizens.²⁴⁶ Berger and Fairman's kind of character assassination is not history—it is simply laziness, and reflects an unwillingness to take on the challenge of fully grasping the intellectual and jurisprudential mindset of the framers of the Fourteenth Amendment.²⁴⁷

In addition, while existing law rejects total incorporation, most of the first eight amendments have been incorporated against the states through the Due Process Clause.²⁴⁸ While these rights have been incorporated, their foundation will always rest on shaky and tortured interpretations of the Fourteenth Amendment until brought under the Privileges or Immunities Clause.

While Justice Black's dissent in *Adamson v. California*²⁴⁹ and the first Justice Harlan's dissent in *O'Neil v. Vermont*²⁵⁰ constituted the strongest expressions of the Privileges or Immunities Clause's possibilities since *Slaughter-House*, the Court chose instead, in the 1930s, to begin incorporating the Bill of Rights through the Due Process Clause.²⁵¹ The Warren Court later expanded the incorporation of the Bill of Rights through the Due Process Clause as well.²⁵²

The end result of this muddled jurisprudence is the outcome in *Boerne*, where the Court limited Congress to enforcing Fourteenth Amendment rights against discriminatory state law or discriminatory state action.²⁵³ A proper *Prigg* interpretation of the

246. See Howard Jay Graham, The "Conspiracy Theory" of the Fourteenth Amendment, in *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS* 107, 109-10 (Kenneth M. Stampp & Leon F. Litwack eds., 1969).

247. See RICHARDS, *supra* note 35, at 140 ("Fairman's cavalier attribution of confusion to . . . Bingham reflects less on Bingham than on Fairman's inability to take seriously the political theory Bingham propounded as the justification for extending a guarantee of basic rights against the states."); see also AMAR, *supra* note 31, at 291 (arguing that Bingham deserves a place in our national pantheon of constitutional heroes next to Madison).

248. See AMAR, *supra* note 31, at 269.

249. 332 U.S. 46, 74-75 (1947) (Black, J., dissenting).

250. 144 U.S. 323, 370-71 (1892) (Harlan, J. dissenting).

251. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931).

252. See, e.g., *Duncan v. Louisiana Co.*, 391 U.S. 145 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

253. See *Boerne v. Flores*, 521 U.S. 507 (1997).

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Privileges or Immunities Clause would allow Congress proactively to pass laws to enforce rights, instead of limiting it to merely reacting to state violations.

III. CONCLUSION: FUNDAMENTAL RIGHTS AND INTELLECTUAL HONESTY

Justice Thomas's view of the Privileges or Immunities Clause in his *Saenz* dissent simplistically ignores the evolution of our understanding of rights and liberties in the Constitution and the understanding of the Fourteenth Amendment's framers.²⁵⁴ The fundamental rights of American citizens were not immutably fixed in stone in 1789.²⁵⁵ Justice Thomas charges the words "privileges or immunities" with mystical and precise significance quite unintended by the framers of the Fourteenth Amendment.²⁵⁶ Using strained interpretations of the historical background of the Privileges or Immunities Clause, Justice Thomas tries to reinvent the Clause as a vehicle for his own modern doctrine.²⁵⁷

The Privileges or Immunities Clause does not identify some minute subset of fundamental rights, as Thomas indicates. Trying to pin down a precise definition of the rights encompassed in the Privileges or Immunities Clause is a futile exercise. The language of fundamental rights is vague because the notion of these rights expands over time.²⁵⁸ A revival of the Privileges or Immunities Clause under Justice Thomas's interpretation would fix the individual liberties of American citizens at something greater than the rights identified in *Slaughter-House* but less than the rights the framers of the Amendment intended.

To restore this maligned Clause, the Court will have to analyze carefully our legal tradition to determine if rights being litigated before it are fundamental and thus covered by the Privileges or Im-

254. See *Saenz v. Roe*, 526 U.S. 489, 526-27 (1999).

255. See *CURTIS*, *supra* note 29, at 208 ("[A]ny attempt to freeze understanding of liberty at a certain period in history confronts the historical fact of evolution.").

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256. See *Saenz*, 526 U.S. at 527 (contrasting fundamental rights with the benefits of positive law).

257. See *id.* at 522-27. Justice Thomas argues, of course, that the majority of the Court gives the Clause unintended meaning—his narrow positivist interpretation would refuse to guarantee to new citizens the same rights as old citizens. See *id.* at 521, 528.

258. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 11, at 926-27 (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 56-65 (1955)).

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munities Clause. Justice Thomas argues that fundamental rights are diametrically opposed to “public benefit[s] established by positive law,”²⁵⁹ i.e., the privileges given to citizens by legislatures can never become fundamental rights. Fundamental rights, however, must evolve somewhat or they would fail to encompass rights that have become essential parts of our current concept of life, liberty and property. Our legal tradition has evolved from the Magna Carta to the 1789 Bill of Rights, with some room for development still remaining. Changes in the positive law can lead to the inclusion of some benefits of law within fundamental rights. The Privileges or Immunities Clause is not open to the granting of any new right, but our notion of what is fundamental can be enhanced and expanded by the legislature and the positive law over time.²⁶⁰

In order for the reevaluation of the Privileges or Immunities Clause to reach a consensus that approaches the intent of the framers, a middle ground must be reached between a full implementation of their understanding of the Fourteenth Amendment and that of the anti-incorporationists. As recently as the 1980s, some federal judges still contended that none of the rights in the Bill of Rights apply to the states.²⁶¹ Correcting the misguided Privileges or Immunities Clause jurisprudence and properly enforcing the Bill of Rights against the states might necessitate a compromise with the states’ rights side of the argument, which has, after all, persisted in our society since 1789 and shows no sign of relinquishing. Even though this side lost the debate in 1866, their argument has persisted and been bolstered by Supreme Court interpretation beginning with *Slaughter-House* and continuing today. The modern Court could succeed in reaching the consensus between states’ rights and incorporationists that Republicans in 1866 were not forced to reach by virtue of the small number of Democrats in Congress.

When dealing with rights deemed fundamental in 1866, the framers clearly intended to apply those against the states and individuals. But when applying essentially judge-made protections and congressional statutes delving into areas entirely outside the 1866

259. *Saenz*, 526 U.S. at 527. Positive law is “[l]aw actually and specifically enacted or adopted by proper authority for the government of an organized jural society.” *BLACK’S LAW DICTIONARY* 1162 (6th ed., 1990).

260. Courts could, for example, examine the amount of legislation that Congress and other legislative bodies have considered on an issue and over what period of time the consideration has occurred to determine whether a right has become fundamental. From this perspective, welfare rights and the basics of the social safety net could arguably have become fundamental rights.

261. See *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104, 1119 (S.D. Ala. 1983) (cited in *CURTIS*, *supra* note 29).

conception, a little caution is in order. The modern Court should look to the unifying spirit of 1789 and 1866 and reach a consensus on where the greater threat to liberty lies—in a threat to majoritarian rights, state rights or individual liberties. While it is clearly anachronistic to apply a state action limitation to the Fourteenth Amendment by coloring it in the garb of the framers' intent,²⁶² the Fourteenth Amendment has, over time, become a much more invasive constitutional operation than merely applying the Fugitive Slave Act. In light of the expansive nature of this Amendment, a state action limitation might provide an appropriate balance to the natural law dangers of the Privileges or Immunities Clause. The framers of the Fourteenth Amendment did intend to change our federalism, but they did not intend for individual liberties to always and everywhere trump majoritarian rights. Only an open acknowledgement of this balancing process, however, will set the Court's jurisprudence on the right path.

As noted in the introduction, the need to reevaluate the Privileges or Immunities Clause is widely recognized.²⁶³ One of the best reasons for this reinterpretation lies in the need to correct our Fourteenth Amendment jurisprudence as a whole. Using equal protection and due process as vehicles for protecting fundamental rights grants judges greater discretion than the framers of the Fourteenth Amendment intended. These clauses are much "emptier vessels" than the Privileges or Immunities Clause into which judges can pour their own ideas of fundamental rights. Returning to the Privileges or Immunities Clause would allow the protection of individual rights without complete reliance on what particular judges are inclined to include as fundamental rights.

Congress's power to enforce penalties for violations of fundamental rights is also much greater under the Privileges or Immunities Clause than under the Due Process or Equal Protection Clauses. A Due Process Clause protection of fundamental rights can be read to grant Congress the power merely to remedy state violations of rights rather than the plenary power over fundamental rights inherent in the Privileges or Immunities Clause. Returning to the Privileges or Immunities Clause as the basis for Americans' fundamental rights would restore Congress's full authority to enforce these rights.

Even though the Court has incorporated much of the Bill of Rights through the other clauses of the first section of the Four-

262. Kaczorowski, *Reconstructing Reconstruction*, *supra* note 181, at 573-74.

263. See *supra* notes 20-23 and accompanying text.

teenth Amendment, the proper interpretation of the Privileges or Immunities Clause is important because this sideways incorporation has created a muddled fundamental rights jurisprudence that has allowed the Court nearly as much discretion as the natural law doctrine of *Lochner*.²⁶⁴ “The very vagueness of substantive due process analysis may so invite the ideological distortion of constitutional interpretation exemplified by *Lochner* that the judiciary, like a cured drunk, seeks salvation in total interpretive abstinence.”²⁶⁵

Using the Privileges or Immunities Clause would move the Court towards “a more sensibly temperate” mode of analysis of fundamental rights.²⁶⁶ The key to avoiding the *Lochner* problem, and thus the key to reviving the Privileges or Immunities Clause, is for the courts to learn to distinguish between judicial interpretation and unlimited judicial discretion. This requires establishing a coherent doctrine for identifying rights established by consensus and long recognition. A return to the Privileges or Immunities Clause would reestablish intellectual honesty in our Fourteenth Amendment jurisprudence and restore an historically accurate conception of federal power.

264. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York statute limiting the working hours of bakery employees to sixty hours per week); see RICHARDS, *supra* note 35, at 199-203. The decision was later much criticized as purely judge-made law that disregarded the proper judicial function. See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980) (describing the decision as “one of the most condemned cases in dereliction and abuse”).

265. *Id.* at 203.

266. *Id.*

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