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Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and the Privileges or Immunities Clause

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Office of the Attorney General
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Our nation's Constitution firmly establishes specific individual rights, enumerated in its original text and subsequent amendments. Many of these have come to be regarded as among our most cherished civic possessions -- the right to speak freely, to assemble peaceably, to petition our government for a redress of grievances, to a trial by jury, to vote regardless of our race or sex. Other constitutional rights are less well known to the general public, but are nonetheless vital to what we stand for as a people. Among these, one could cite freedom from ex post facto laws, the right to hold public office without submitting to a religious test, and the use of compulsory process to secure witnesses in our favor in criminal proceedings.

What all of these rights -- both the familiar and the less well known -- have in common is their explicit recognition in the text of the Constitution. While reasonable people may disagree about the precise application of certain constitutional guarantees, no one can question their existence and general meaning because of their indisputable basis in the Constitution's language.

At various periods in our history, however, there has been significant debate over whether the Constitution also provides for "unenumerated" rights, rights which are not set forth explicitly in the document's language. This debate has usually taken the form of a discussion about whether the Fifth and Fourteenth Amendments' Due Process Clauses prohibited the state and federal governments from passing particular kinds of laws.

Recently, there has also been increased discussion over whether the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment are sources of unenumerated rights. For the foreseeable future, it seems that the debate over unenumerated rights will begin increasingly to focus on these two provisions as well as the Due Process Clauses.

The present study, "Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and the Privileges or Immunities Clause," is a contribution to that debate. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues.

This study will generate considerable thought on a topic of great national importance, a topic about which there are several reasonable points of view. It will be of interest to anyone concerned about a provocative and informative examination of the issues.

Edwin Meese III

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Attorney General

Executive Summary

The attached paper examines the language, history, and purpose of the Ninth Amendment and the privileges or immunities clause of the Fourteenth Amendment. It concludes that neither provision can fairly be interpreted to permit judicial recognition or creation of extra-textual rights limiting valid exercises of state or federal powers.

With respect to the Ninth Amendment, the paper concludes that the unenumerated rights retained by the people are those aspects of the people's original sovereignty not delegated to the federal government. Accordingly, by definition, such unenumerated rights cannot conflict with or override the delegated powers. This conclusion is consistent with the plain meaning of the text, which is phrased as a rule of construction, not as a substantive limitation on federal power. The conclusion is also supported by contemporaneous understandings of "rights" as "powers reserved" to individuals, and with the legislative history of the amendment, which shows that the language was intended to prevent over-broad construction of federal powers.

With respect to the privileges or immunities clause of the Fourteenth Amendment, the paper concludes that the protected privileges or immunities most likely consist of (1) those that arise elsewhere in the Constitution and laws duly enacted thereunder, and (2) a requirement of nondiscrimination in the extension of privileges or immunities under state law.

The first of these categories of privileges or immunities is consistent with the Supreme Court's decision, issued just five years after the amendment's ratification, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), limiting the reach of the privileges or immunities clause to those that owe "their existence to the Federal government, its National character, its Constitution, or its laws." The Court has not retreated from this position, and has, in fact, declined to recognize under the clause any privilege or immunity that is not explicitly or implicitly founded elsewhere in the Constitution or laws of the United States.

The second type of protected rights, the nondiscrimination requirement, is supported by a considerable body of historical evidence. The clause was perceived by many to extend the interstate nondiscrimination principle of the privileges and immunities clause of article IV, section 2 of the original Constitution to relations between a state and its own citizens.

There is also much evidence that the privileges or immunities clause and the Civil Rights Act of 1866 were directed at the same evil — the black codes — and were viewed by many as essentially equivalent. Although the Supreme Court has not adopted this interpretation, it has accomplished the same end through its equal protection jurisprudence.

There is much less evidence that the privileges or immunities clause incorporates the Bill of Rights against the states. Even if that is the case, however, the protected rights remain ascertainable by reference to the Constitution itself.

Finally, it appears there was no consensus that the privileges or immunities clause created any minimum standards of state conduct on the basis of natural or fundamental rights theories. Even if that were the correct interpretation, however, that would not make the privileges or immunities clause "open-ended," because, in 1866, such theories had relatively circumscribed meanings, and were not viewed as bottomless sources out of which new rights could be created against the states.

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WRONG TURNS ON THE ROAD TO JUDICIAL ACTIVISM: THE NINTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE

The recently reinvigorated debate regarding whether the Constitution should be interpreted in accordance with its original meaning has drawn renewed attention to the Ninth Amendment[1] and, to a lesser extent, the privileges or immunities clause of the Fourteenth Amendment.[2]

Interpretivists maintain that, in passing on the constitutional validity of an action by the federal government, courts should determine the scope of governmental powers and individual rights based on the words of the Constitution, interpreted in accordance with their original meaning. Similar principles apply in examining actions of state governments, except that the state powers, and the protection of individual rights not mentioned in the federal Constitution with respect to the states, are matters of state law.

Non-interpretivists, although not usually disavowing entirely the text of the Constitution, look to concepts and principles outside the Constitution in passing on the validity of governmental actions. Non-interpretivists assert that courts should not restrict themselves, in deciding constitutional issues, to the powers and rights set forth in the Constitution, but should also protect rights and values based on such amorphous concepts as "the dignity of full membership in society," "the national will," or "deeply embedded cultural values."[3]

Some advocates of non-interpretivism increasingly point to the Ninth Amendment or to the privileges or immunities clause as evidence

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[1] *See, e.g.*, Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention"*, 74 Georgetown L.J. 1719 (1987).

[2] *See, e.g.*, Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 Harv. Civ. Rights -Civ. Lib. L. Rev. 95, 102 (1987).

[3] *See generally* Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* (1987).

that the Constitution itself calls for the injection of extra-constitutional rights and values into the decision of constitutional questions. They contend that those provisions are open-ended, allowing courts to recognize or create rights unlisted in the Constitution and use them to trump federal (or state) governmental powers.

Nothing could be further from the truth. As will be discussed below, the Ninth Amendment is a rule of construction that creates no rights, but makes clear that those rights of the people not surrendered by the delegation of limited powers to the federal government are retained by the people, whether or not explicitly mentioned elsewhere in the Constitution. Moreover, the amendment simply has no application to the states.

Similarly, the privileges or immunities clause is no blank check for courts to use in creating rights enforceable against the states. The text and history of the clause show that the protected privileges or immunities of United States citizens most likely consist of (1) those that arise elsewhere in the Constitution and laws duly enacted thereunder and (2) a requirement of nondiscrimination in the extension of privileges or immunities under state law. The evidence is not as strong that the Bill of Rights is made applicable by the privileges or immunities clause against the states. Even if it is, however, the privileges or immunities protected by the clause remain ascertainable by reference to the Constitution and federal statutes, and no license is granted to the courts to create new rights.

After reviewing the current debate over the Ninth Amendment and the privileges or immunities clause as those clauses relate to judicial authority, this paper will analyze the words, history and purpose of each to demonstrate that the clauses do not authorize the judicial creation of rights enforceable against the federal or state governments.

I. Background: The Debate Concerning "Open-Ended" Clauses

A. The Ninth Amendment

In recent times, the Ninth Amendment often has been cited for the proposition that courts may with perfect propriety create or "recognize"

rights elsewhere unmentioned in the Constitution and protect them from government infringement. Professor John Hart Ely, for example, maintains that the "conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights [including rights that cut across or trump powers] beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."[4] Professor Laurence Tribe argues that the Ninth Amendment "at least states a rule of construction pointing away from the reverse incorporation view that only the interests secured by the Bill of Rights are encompassed within the fourteenth amendment, and at most provides a positive source of law for fundamental but unmentioned rights."[5] Professor Thomas Grey contends that the Ninth Amendment is "a license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein."[6]

These scholars usually argue that the rights listed in the Constitution provide, in effect, a floor, below which courts may not go in enforcing rights, and that the Ninth Amendment authorizes judicial protection of additional, unspecified rights. Just three years before *Griswold v. Connecticut* was decided in 1965, Professor Norman Redlich suggested that the Ninth Amendment, and the Tenth Amendment's reservation of powers to the people, could be used to support a right to marital privacy, applicable to the states through the Fourteenth Amendment, to strike down Connecticut's birth control law then under review in the courts. He claimed that "[t]o assert that the people have certain rights other than those specifically mentioned in the Constitution would not dilute the Bill of Rights but would add to it."[7] Professor Redlich further maintained that the unenumerated rights are "of a nature comparable to the rights enumerated," that is, they are "adjacent to, or analogous to, the pattern of rights . . . in the Constitution."[8]

Some scholars on the right also look to the Ninth Amendment in hopes of implementing a conservative judicial activism. For instance,

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[4] J. Ely, *Democracy and Distrust* 38 (1980).

[5] L. Tribe, *American Constitutional Law* 570 (1978).

[6] Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703, 709 (1975).

[7] Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. Rev. 787, 795 (1962).

[8] *Id.* at 810, 812.

Professor Stephen Macedo, in his monograph, *The New Right v. The Constitution*, argues that "the Ninth Amendment explicitly calls upon constitutional interpreters not to 'deny or disparage' the existence of rights not stated explicitly in the Constitution."[9] To determine what those rights are, he argues that one must rely on the Constitution's "text, structure, and precedent," and "our political traditions and . . . moral philosophy,"[10] which then should be used to engage in what Macedo calls "principled judicial activism."[11]

As will be seen, until it was "rescued . . . from obscurity"[12] by Justice Goldberg's 1965 concurring opinion in *Griswold v. Connecticut*,[13] the Ninth Amendment was rarely cited by courts and was uniformly rejected as a ground of decision.[14] In his *Griswold* concurrence, however, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, relied explicitly[15] on the Ninth Amendment to show "that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[16] Justice Goldberg clarified that he did not suggest that the Ninth Amendment applied to the states by virtue of the Fourteenth Amendment, nor did he imply that the amendment "constitute[d] an independent source of rights protected from infringement by either the States or the Federal Government."[17] Rather, he asserted that the amendment "simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amend-

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[9] S. Macedo, *The New Right v. The Constitution* 38 (1986).

[10] *Id.* at 8.

[11] *Id.* at 43-50.

[12] Berger, *supra*, at 1.

[13] 381 U.S. 479, 486 (1965)(Goldberg, J., concurring).

[14] *See, e.g., United Public Workers, supra*; *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). *See also* B. Patterson, *The Forgotten Ninth Amendment* 27-35 (1955); Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627, 628-29 (1956).

[15] The majority opinion in *Griswold* listed the amendment as one within the penumbra of which a right of marital privacy could be found, but did not rely on the Ninth Amendment itself (and did not rely exclusively on the penumbra of the Ninth Amendment). 381 U.S. at 484.

[16] *Id.* at 488.

[17] *Id.* at 492.

ments."[18] Thus, he concluded that "[t]o hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . is to ignore the Ninth Amendment and give it no effect whatsoever."[19]

The Ninth Amendment was cited 15 years later by the Supreme Court's plurality opinion in *Richmond Newspapers, Inc. v. Virginia*[20] in rebutting the state's argument that the right of the public to attend criminal trials is not protected because it is not spelled out in the Constitution. The opinion argued that the "possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed."[21] In a footnote, the opinion asserted that Madison's efforts to avoid the exclusion of unmentioned guarantees culminated in the Ninth Amendment.[22] The opinion then concluded that those concerns have "been resolved [because] fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined."[23]

Other recent Supreme Court decisions alluding, with little explanation, to possible Ninth Amendment rights include *Roe v. Wade*,[24] *Buckley v. Valeo*,[25] and *Lubin v. Panish*.[26] In addition, the Ninth Amendment has not escaped the notice of lower federal and state courts,

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[18] *Id.*

[19] *Id.* at 491.

[20] 448 U.S. 555 (1980).

[21] *Id.* at 579.

[22] *Id.* at 579 n.15.

[23] *Id.* at 580. The Court's reference to the Ninth Amendment was dictum, however, inasmuch as its holding that the public had a right to attend criminal trials was bottomed on the freedoms of speech, press and assembly which are explicitly guaranteed by the First Amendment. *See id.* at 575-80.

[24] 410 U.S. 113, 153 (1973) (alluding to possibility that right of privacy may be a right reserved to the people by the Ninth Amendment).

[25] 424 U.S. 1, 59 n.67, 84 n.113 (1976) (per curiam) (campaign spending limits may implicate Ninth Amendment rights).

[26] 415 U.S. 709, 721 n. (1974) (Douglas, J., concurring) (right to vote in state elections).

which have used the amendment as support for protecting, *inter alia*, parental rights and the right of school boys to wear long hair.[27]

As will be seen, while we have no quarrel with the view of these opinions and commentators that there are protected rights not enumerated in the Constitution, the nub of the dispute is whether, when these unenumerated rights conflict with the delegated powers, the rights trump the powers. As to this issue, the text, history, and purpose of the Ninth Amendment all demonstrate that those unenumerated rights do not prevail over the delegated powers.

B. The Privileges or Immunities Clause

The privileges or immunities clause is, in the view of some commentators, a source of unspecified rights enforceable against the states (and, by reverse incorporation, against the federal government[28]). The courts, to date, have rejected attempts to use the clause for this purpose.

As will be described in greater detail, just five years after the amendment's ratification, in the *Slaughter-House Cases*,[29] the Supreme Court held 5-4 that the protected privileges or immunities of United States citizens were limited to those that owed "their existence to the Federal government, its National character, its Constitution, or its laws."[30] The Court has not retreated from this position since. Moreover, with the exception of one case,[31] which was overruled five years later,[32] the Court has declined to recognize any privilege or immunity that is not explicitly or implicitly founded elsewhere in the Constitution or federal law.[33]

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[27] *See, e.g., In re J.P.*, 648 P.2d 1364 (Utah 1982) (parental rights to maintain parental ties to children); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (right to wear long hair).

[28] *See, e.g.*, Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 Suffolk U.L. Rev. 61, 110 (1976).

[29] 83 U.S. 36 (1873).

[30] *Id.* at 79.

[31] *Colgate v. Harvey*, 296 U.S. 404 (1935)(recognizing a protected right to engage in interstate business).

[32] *Madden v. Kentucky*, 309 U.S. 83 (1940).

[33] *See generally* Benoit, *supra*.

In a *Slaughter-House* dissent joined by all four dissenting Justices, Justice Field argued that the privileges or immunities clause "secured . . . equality . . . between citizens of the United States";[34] *i.e.*, that the clause served a nondiscrimination function. While the Court has never adopted this interpretation of the clause, it has accomplished essentially the same result through its equal protection jurisprudence.

Two of the *Slaughter-House* dissenters contended in an opinion by Justice Bradley that the clause secured not just equality rights, but other, "fundamental" rights, including, but not limited to, the rights set forth in the Bill of Rights. It bears emphasis that this "fundamental" rights view was, in effect, rejected 7-2 by the Court, since only two Justices joined in it. They constituted a minority within a minority.

Justice Black, many years later, became perhaps the most prominent proponent of full incorporation of the Bill of Rights against the states.[35] Although he was initially vague on this point, he eventually settled on the privileges or immunities clause as the vehicle through which incorporation was accomplished.[36] The Court has never embraced full incorporation, but it has applied most of the Bill of Rights against the states through the due process clause.

Similarly, although the Court has never adopted Justice Bradley's minority view that the privileges or immunities clause protects "fundamental" rights that may not be enumerated in the Constitution, it has used the due process clause to divine such unenumerated "fundamental" rights as the "right to contract" of the *Lochner* era and the "right to privacy" in the era of *Roe v. Wade*.

It is, perhaps, because scholars advocating judicial activism recognize the difficulties in the creation of such substantive due process rights, that a number of scholars have argued that the Court's recognition of unexpressed constitutional rights may preferably be founded on the privileges or immunities clause (or the Ninth Amendment).

Professor Tribe, for example, has suggested that "the entire line of privacy and autonomy cases" creating rights beyond those "derivable from direct incorporation" of the Bill of Rights "might better have been

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[34] 83 U.S. at 100-01.

[35] *See Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

[36] *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

cast in terms of the 'privileges' or 'immunities' of national citizenship," rather than as part of the "liberty" component of the due process clause.[37] Professor Philip Kurland has written that the privileges or immunities clause is "an empty and unused vessel which affords the Court full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses."[38] In particular, he hoped that "that most fundamental of rights, still without a base in the Constitution," the right to privacy, would be found "among the privileges or immunities of citizenship."[39] Professor Ely posits that "the most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding."[40]

Although the original meaning of the privileges or immunities clause is not as clear as that of the Ninth Amendment, Justice Bradley's "natural rights" view (or that of those viewing the clause as "open ended") finds the least support in the text and history of the clause. The evidence strongly supports limiting the clause to *Slaughter-House* and nondiscrimination rights.

II. The Ninth Amendment

The Ninth Amendment historically has been interpreted as a rather narrow technical rule of construction precluding the expansion, by implication, of federal power because of the enumeration of specific rights elsewhere in the Constitution. Justice Story explained that the Ninth Amendment "was manifestly introduced to prevent any perverse

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[37] Tribe, *supra*, at 102.

[38] Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U.L.Q. 405, 420.

[39] *Id.* at 419.

[40] J. Ely, *supra*, at 28. Professor Michael Conant uses both the Ninth Amendment and the privileges or immunities clause to argue that "freedom from government-supported monopolies" was a right of citizens protected by the Ninth Amendment and made applicable against the states via the privileges or immunities clause. Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendment:* Slaughter-House Cases *Re-examined*, 31 Emory L.J. 785, 789-90 (1982).

or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others."[41]

Edward Dumbauld, in his book, *The Bill of Rights and What It Means Today*, put the matter more bluntly.

> The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to forestall the possibility of misinterpretation of the rest of the document . . . . It is destitute of substantive effect.[42]

To be sure, advocates of the traditional view do not deny that the Ninth Amendment implies the existence of unenumerated rights. The unenumerated retained rights, however, are those that remain after subtracting from the original sovereignty of the people the powers delegated to the federal government. The retained rights, then, by definition, cannot trump the granted powers. As Justice Reed, writing for the Supreme Court, explained, "when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth . . . Amendment[ ], the inquiry must be directed toward the granted power under which the action of the Union was taken. If the granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth . . . Amendment[ ], must fail."[43]

Accordingly, although the Ninth Amendment is written in terms of rights, it has as much to do with federal powers as with rights. Justice Black, in his dissent in *Griswold v. Connecticut*, wrote that, "as every student of history knows," the Ninth "Amendment was passed, not to broaden the powers of this Court or any other department of 'the general government' but . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."[44] Professor Raoul Berger put it this way, "The ninth amendment demonstrably was not custom-

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[41] J. Story, *Commentaries on the Constitution of the United States* § 1905, at 624-25 (4th ed. 1873).

[42] E. Dumbauld, *The Bill of Rights and What It Means Today* 63-64 (1957).

[43] *United Public Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947).

[44] 381 U.S. 479, 520 (1965).

made to enlarge federal enforcement of 'fundamental rights' in spite of state law; it was merely declaratory of a basic presupposition: all powers not 'positively' granted are reserved to the people."[45]

Among the rights expressly retained by the people is the ability to amend the Constitution.[46] In this light, Dean Roscoe Pound argued that the Ninth Amendment may also be viewed as

> a solemn declaration that natural rights are not a fixed category of reasonable human expectations in civilized society laid down once and for all in the several sections of the Constitution. Those not expressly set forth are not forever excluded but are, if the Ninth Amendment is read with the Tenth, left to be secured by the states or by the people of the whole land by constitutional change, as was done, for example, by the Fourteenth Amendment.[47]

A. The Words of the Ninth Amendment

The Ninth Amendment provides: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." A proper analysis of the amendment begins with its words, which will be discussed slightly out of order.

1. "Shall Not Be Construed"

"To construe" today, as in 1789, means to interpret or explain.[48] It follows that the Ninth Amendment is a rule of interpretation, or construction, of the Constitution. It does not create any substantive rights or powers, but merely forbids a particular construction of the Constitution based on the enumeration of certain rights.[49]

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[45] Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 23 (1980).

[46] U.S. Const. Art. V.

[47] R. Pound, Introduction to B. Patterson, *The Forgotten Ninth Amendment* at iv (1955).

[48] *See Samuel Johnson Dictionary* (1755); *Random House College Dictionary* 288-89 (1980).

[49] *See* Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 815 (1966) [hereinafter cited as *Uncertain Renaissance*]; *see also Griswold v. Connecticut*, 381 U.S. at 492 (Goldberg, J., concurring).

2. "The Enumeration, in the Constitution, of Certain Rights"

a. "Rights"

A "right" was defined in *Samuel Johnson's Dictionary* of 1755 to include a power, prerogative, immunity, privilege, or interest. The right to jury trial, the privilege of habeas corpus, and the right of the people through Congress, state legislatures and conventions to amend the Constitution,[50] would be examples of "powers, prerogatives, immunities, and privileges", enumerated in the Constitution.[51]

In addition, in the late Eighteenth Century, a right was often understood to be a "power reserved" to individuals, or an area in which the government had no power. Thus, in debates before the Pennsylvania convention on the ratification of the Constitution, James Wilson explained that a "bill of rights annexed to a constitution is *an enumeration of powers* reserved."[52]

Similarly, in introducing in the House what became the Bill of Rights, James Madison stated that "the great object in view [of bills of rights] is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[53] In a letter to George Washington during the debates in Virginia on the Bill of Rights, Madison wrote, "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended."[54]

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[50] Art. I, sec. 9; art. III, sec. 2; art. V; amends. 6 & 7.

[51] These might also be referred to as "positive rights" which, in Madison's words, "cannot be considered as . . . natural right[s], but . . . right[s] resulting from the social compact which regulates the action of the community." 12 *Papers of James Madison* 204.

[52] 2 *Elliot's Debates* 436 (1836) (emphasis in original).

[53] 12 *Papers of James Madison* 204.

[54] Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459. Professor Leslie Dunbar argues, in a somewhat obscure passage, that although referring to rights as "powers reserved" was a "common usage of the time," "Madison did not follow it." Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627, 638 (1956). He suggests that "Madison knew better" than to believe a line could be drawn between rights and powers, but believed that the

The clearest examples of "powers reserved" in the Constitution include the religion, speech, press, and assembly clauses of the First Amendment. The prohibition on ex post facto laws, bills of attainder, and unreasonable searches and seizure are also examples of "powers reserved."[55]

b. The Subject of the Rule of Construction

It is the enumeration, or specifying, of particular rights in the Constitution that gives rise to the Ninth Amendment's rule of construction. The Ninth Amendment does not forbid *any* construction of the Constitution that might deny some unenumerated rights; it forbids only the construction of the enumeration of rights to reach that result. Thus, as a restricted rule of construction (rather than an absolute rule), the Ninth Amendment differs from two other contemporaneously adopted rules of construction in the Constitution.

For example, article IV, section 3, clause 2 identifies no specific subject, but flatly states that "*nothing* in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." (Emphasis added.) Similarly, the Eleventh Amendment flatly declares, without identifying a subject, that the "Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State . . . ."

By way of contrast, the Ninth Amendment does not forbid all constructions of the Constitution that might deny or disparage a particular unenumerated right. Rather, the amendment only forbids a construction, based upon the *enumeration of certain rights*, to deny or disparage unenumerated rights. Thus, significantly, the amendment would not, by its terms, forbid a construction of the *enumerated powers* (or other provisions of the Constitution) to deny or disparage in some manner unenumerated rights.

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two coexisted and could be defined independently. *Id.* at 634-37. Whether Madison thought rights should be defined independently of powers or not, however, the above-quoted passages from Madison show that his use of the word was consistent with the common conception that a "right" referred to an area in which the government had no power to act.

[55]Art. I, secs. 9 & 10; amend. 4.

3. "To Deny or Disparage Others Retained by the People"

a. The Words

"To deny", then and now, means to withhold, to disregard, or not to grant.[56] "To disparage" means to treat with contempt, to mock or flout.[57] Accordingly, the construction forbidden by the Ninth Amendment is one that would withhold, disregard, or treat with contempt certain rights retained by the people.

The Ninth Amendment does not apply to any and all unenumerated rights that individuals might possess, but only to those "retained by the people." "To retain", then and now, means to keep, to continue to hold or have, or not to lose or lay aside.[58] The unenumerated retained rights were thus limited to those that the people had not lost, surrendered, or laid aside in some manner, such as by entering into the original Constitution, and that they continued to have at the time the Bill of Rights was adopted.

Because the Ninth Amendment does not specify which rights were retained by the people, confusion has arisen over whether any of those rights overlap the delegated powers. It is on this point that the traditional and activist interpretations significantly diverge.

b. The Traditional Interpretation

Under the traditional interpretation, one simply examines the Constitution to determine which rights were delegated in forming the federal government; only those rights that were not so surrendered would be eligible for protection by the Ninth Amendment's rule of construc-

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[56] *See Samuel Johnson Dictionary* (1755); *Random House College Dictionary* 356 (1980).

[57] See *Samuel Johnson Dictionary* (1755); *Random House College Dictionary* 382 (1980). The only recorded debate in Congress over the words of the Ninth Amendment was with respect to "disparage." The *Annals of Congress* reports:

> Mr. Gerry said, it ought to be "deny or impair," for the word "disparage" was not of plain import; he therefore moved to make the alteration, but not being seconded, the question was taken on the clause, and it passed in the affirmative.

1 *Annals of Congress* 783 (proceedings of August 17, 1789).

[58] *See Samuel Johnson Dictionary* (1755); *Random House College House Dictionary* 1126 (1980).

tion.[59] For example, because the Constitution empowered Congress to regulate "Commerce . . . among the several States," it follows that the people surrendered any preexisting right to engage, in an unregulated manner, in interstate commerce, and that right was not among the Ninth Amendment's unenumerated rights retained by the people. Thus, where a preexisting unenumerated right conflicts with a power delegated by the Constitution to the federal government, the unenumerated right was not "retained by the people", and the governmental power prevails.

This interpretation gives full force to the delegation of powers to the federal government, subject only to the specific exceptions and limitations thereon set forth in the Constitution. It is also consistent, as discussed above, with the plain statement in the Ninth Amendment that it is the enumeration of *rights*, not the enumeration of *powers*, that should not be construed to deny unenumerated rights. And, as so interpreted, the Ninth Amendment is not superfluous, but affirms that the unenumerated rights that the people have not delegated to the federal government are not to be denied, disparaged, or deemed surrendered, simply because they are not enumerated in the Constitution.

c. The Activist Interpretation[60]

Those advocating judicial activism, on the other hand, argue that the rights retained by the people include rights that overlap the enumerated powers, and that these rights were retained because they were inalienable or secured by natural law, or for some other reason. These retained rights trump delegated powers where the rights and powers overlap; otherwise, activists suggest, the retained rights would be denied or disparaged when compared with the enumerated rights.[61]

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[59] *See United Public Workers*, 330 U.S. at 95-96 (quoted, *supra*, at 14).

[60] The position that courts may enforce rights unspecified in the Constitution to override otherwise valid exercises of governmental powers is, for ease of reference, occasionally referred to as the "activist" view. This improper form of "activism" should not be confused with the determination by courts whether, in cases properly before them, the government has exceeded its delegated powers or transgressed the rights protected by the Constitution (which is a proper form of judicial activism).

[61] *See, e.g.*, Patterson, *supra*, at 19-22; J. Ely, *supra*, at 36, 39; Grey, *supra*, at 716. Many expansionists do not bother to address the question how a right that trumps a power could have been "retained by the people" when the power was expressly delegated to the government. *See* Redlich, *supra*, at 804-05; *Richmond Newspapers*, 448 U.S. at 579; Mitchell, *supra*, at 1729-34.

There are at least three difficulties in squaring this interpretation with the language of the Constitution. First, it assumes that the delegations of power to the federal government do not mean what they say — *i.e.*, that they are subject to unwritten exceptions that trump the powers[62] —and thus, the interpretation directly conflicts with the Constitution's delegation provisions. Second, because the activist view presupposes that fundamental or natural law, or some other overarching principles override the express language of the Constitution, it is inconsistent with article VI, which provides that the Constitution, not some "higher" law, is to "be the supreme Law of the Land." Third, it converts what is written as a restricted rule of construction of enumerated rights into an absolute rule of construction. It rewrites the Ninth Amendment to say, in effect, that "nothing (not even the express delegation of powers) in the Constitution shall be construed to deny or disparage certain unenumerated rights retained by the people."

Not only is the activist view inconsistent with the Constitution's language, but the history and purposes of the Ninth Amendment, as will be described below, also demonstrate that the rights retained do not overlap and trump the delegated powers.

B. The History and Purposes of the Ninth Amendment

1. The Principal Purpose of the Ninth Amendment Was To Avoid an Implied Extension of Federal Power

As sent to the states for ratification, the Constitution contained explicit protections of certain rights from infringement by the federal and state governments,[63] but it did not include a general bill of rights. A motion was made near the end of the constitutional convention to have a

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[62] It is important to bear in mind that, as a rule of construction, the Ninth Amendment created no rights, or exceptions to powers, that did not already exist. *See* p. 10 *supra*. Therefore, the expansionist view presupposes that, even without the Ninth Amendment, certain unwritten exceptions existed with respect to the written delegations of powers.

[63] *E.g.*, art I, sec. 9 (limitations on federal government concerning habeas corpus, ex post facto laws and bills of attainder); art. I, sec. 10 (limitations on state governments concerning contracts, ex post facto laws, and bills of attainder).

committee prepare a bill of rights, but the motion was rejected, without receiving the vote of a single state.[64]

The omission of a bill of rights provoked considerable opposition to the ratification of the Constitution.[65] In response, federalists made two principal arguments to explain the absence of a bill of rights. First, they argued that a bill of rights was unnecessary because the federal government was a government of limited, delegated powers. In a widely republished speech, James Wilson explained that every power

> which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.[66]

That rights were intended to be reserved by the enumeration of certain powers was confirmed in the transmittal letter of the Constitution to Congress, in which the Constitution was described as drawing "the line between those rights which must be surrendered, and those which may be reserved."[67]

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[64] 2 M. Farrand, *Records of the Federal Convention of 1787* 587-88 (1966).

[65] *See* G. Wood, *The Creation of the American Republic 1776-1787* 536-43 (1969); E. Dumbauld, *supra*, 10-33.

[66] Speech of James Wilson, (October 6, 1787), 13 *The Documentary History of the Constitution* 339-40 (1981). Alexander Hamilton made the same argument the following year in *The Federalist*, No. 84, the last installment of which was published after New York, the eleventh state, had ratified the Constitution, and thus had little effect on the ratification process. *The Federalist*, No. 84, at 578-79 (J. Cooke ed. 1961); *see* Rogge, *Unenumerated Rights*, 47 Calif. L. Rev. 787, 788 (1959). On the floor of the Pennsylvania ratification convention, Wilson also noted that "in this Constitution, the citizens of the United States appear dispensing a part of their original power in what manner and what proportion they think fit. They never part with the whole; and they retain the right of recalling what they part with." Thus, he concluded, "[t]o every suggestion concerning a bill of rights, the citizens of the United States may always say, We reserve the right to do what we please." 2 *Elliot's Debates* 437.

[67] 1 *Elliot's Debates* 17. That passage reads in full as follows:

> It is obviously impracticable, in the federal government of these states, to secure all

The federalists also maintained that an enumeration of rights, or powers reserved, might imply that all other rights and powers had been delegated to the government, which would be inconsistent with the notion of a government of limited powers. Wilson expressed the argument this way:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an *enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.[68]

Opponents of the Constitution argued, *inter alia*, that a bill of rights was necessary because there was no statement in the Constitution reserving undelegated powers to the states and because in all other governments unspecified rights were deemed delegated to the government. Patrick Henry explained,

> I repeat, that all nations have adopted this construction — that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers.
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> . . . It was expressly declared in our [Articles of] Confederation that every right was retained by the states, respectively, which was not given up to the government of the United

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rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and, on the present occasion, this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests.

[68] 2 *Elliot's Debates* 436-37 (emphasis in original). *See The Federalist*, No. 84, at 579-80 (Hamilton) (referring to a bill of rights as "dangerous" for that reason).

> States. But there is no such thing here. You, therefore, by natural and unavoidable implication, give up your rights to the general government.[69]

Ultimately, to secure ratification of the Constitution, the federalists reluctantly agreed to amend it, after its ratification, to include a bill of rights.[70] Massachusetts, South Carolina, New Hampshire, Virginia, New York, and North Carolina all proposed amendments, in the nature of bills of rights, as part of their ratifications.[71]

Each of those proposed sets of amendments included, in various forms, predecessors of the Tenth Amendment, reserving to the states those powers not delegated to the federal government.[72] Virginia, New York, and North Carolina also proposed a separate amendment specifically to rebut the federalists' argument that an enumeration of rights would implicitly expand the powers of government beyond those set forth in the Constitution.

Virginia's and North Carolina's first proposed amendment reserved to the states "every power, jurisdiction, and right" not delegated to the federal government this way:

> That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.[73]

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[69] 3 *Elliot's Debates* 445-46. Similarly, James Winthrop of Massachusetts argued that "[w]hen the people institute government, they of course delegate all rights not expressly reserved." *Essays on the Constitution of the United States* 112 (Ford ed. 1892) *quoted in Uncertain Renaissance*, *supra*, at 818.

[70] *Uncertain Renaissance*, *supra*, at 819-20; Letter from James Madison to Richard Peters (August 19, 1789), 12 *Papers of James Madison* 347 (referring to "tacit compact" under which the Constitution was ratified in many states).

[71] E. Dumbauld, *supra*, at 11. Rhode Island also proposed amendments as part of its ratification, but its ratification and amendment proposals were submitted after the federal government had commenced to function and the first Congress had adopted the articles that became the Bill of Rights, and thus had no influence in the drafting of the Bill of Rights. *Id.*

[72] *See* E. Dumbauld, *supra*, at 163.

[73] 3 *Elliot's Debates* 659 (Virginia); 4 *Elliot's Debates* 244 (North Carolina).

Virginia's seventeenth and North Carolina's eighteenth proposed amendment precluded an implicit expansion of federal powers in this manner:

> That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner, whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.[74]

New York's proposed amendment both reserved to the states and people every non-delegated "Power, Jurisdiction and right" and forbade an extension of federal powers by virtue of the bill of rights:

> [T]hat every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution.[75]

Virginia, North Carolina, and New York thus proposed, in effect, a double-barrelled assurance that the federal government would be one of limited powers: (1) a provision specifying that all non-delegated rights, powers and jurisdictions, were retained by the states or the people, and (2) a provision stating that the specific limitations on Congress' power did not implicitly extend its powers in other areas.

During the first Congress, Madison introduced proposed amendments to the Constitution that became the Bill of Rights. The proposal that became the Ninth Amendment read as follows:

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[74] 3 *Elliot's Debates* 661 (Virginia); 4 *Elliot's Debates* 246 (North Carolina) (punctuation differs from Virginia draft).

[75] *Reprinted in* E. Dumbauld, *supra*, at 189.

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater Caution.[76]

Madison explained the purpose of the proposal as follows:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution [quoted above][77]

Madison's draft (and explanation) of the rule against the implicit expansion of federal powers differed from the state proposals by including a reference to the "just importance of other rights retained by the people" as well as to the "powers delegated by the constitution." The thrust of the draft remained the same, however: the breadth of government powers was not to be extended nor the scope of retained rights restricted by virtue of the enumeration of exceptions to powers in favor of rights; those exceptions were to be read only as actual limitations or as included for greater caution. Moreover, the reference to "rights retained" may be seen as a logical incorporation of the states' proposed declaration that rights, powers, and jurisdictions not delegated to the federal government were "retain[ed]" by, or "remain[ed]" in, the states and people.[78]

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[76] 12 *Papers of James Madison* at 201-02.

[77] *Id.* at 206.

[78] Russell Caplan makes a persuasive case that the Ninth Amendment descends from both the first and seventeenth amendments proposed by Virginia, quoted above, not just the seventeenth. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 254-55 (1983).

As reported by the House Select Committee, the proposed language was shortened to read, "The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[79] No explanation was given for the change in language from Madison's proposal. The amendment was passed, with the addition of commas and changing "this" to "the", by the House and Senate, and forwarded to the states for ratification.

The change in focus from "powers" to "rights retained" was the cause of some opposition. Hardin Burnley reported in a letter to Madison that what became the Ninth and Tenth Amendments were initially rejected by the Virginia Assembly. Governor Randolph led the opposition, arguing that it was not possible to determine which rights were retained by the people.

> His principal objection was pointed against the word *retained* . . . and his a[r]gument if I understood it was applied in this manner, that as the rights declared in the [first eight amendments] were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia [which were predecessors to the Ninth and Tenth Amendments], that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.[80]

In a letter to George Washington, Madison responded to Randolph's argument, contending that it raised, in essence, a distinction without a difference.

> The difficulty [stated] against the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is still a greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights

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[79] I *Annals of Congress* 707.

[80] Letter from Hardin Burnley to James Madison (November 28, 1789), 12 *Papers of James Madison* 456 (original spelling retained) (emphasis in original).

> retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.[81]

Madison thus confirmed his understanding that, notwithstanding the reference to rights instead of powers, the Ninth Amendment continued to operate as a restriction on the implied extension of federal powers.

2. The Unenumerated Rights Do Not Trump Powers Delegated to the Federal Government

In his statement on the House floor introducing the resolutions that, with revisions, became the Bill of Rights, Madison spoke of the role of the courts in enforcing rights.

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but does it not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights *expressly stipulated for* in the constitution by the declaration of rights.[82]

This contemporaneous explanation contemplates that courts will serve as an "impenetrable bulwark" against (1) unconstitutional expansions of power and (2) infringement of "expressly stipulated" rights in the Constitution. There is no suggestion that courts are to create and enforce exceptions to granted powers in favor of unenumerated retained rights. Of course, if, as the traditional interpretation maintains, the retained unenumerated rights are those not delegated to the federal government, then, to the extent courts are an "impenetrable bulwark" against every

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[81] Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459.

[82] 12 *Papers of James Madison* 206-07 (emphasis added).

"assumption of power" beyond those granted the government, no other specific protection of unenumerated rights is required.[83]

Activists argue that the focus on rights, rather than powers, in the Ninth Amendment and in Madison's statement introducing his draft,[84] implies that the amendment means something more than that federal powers are limited. Professor Ely, for example, after quoting Madison's explanation, contends "that even here Madison, though he may have linked them in a way that seems unnatural today, made both [points] — that he wished to forestall *both* the implication of unexpressed powers *and* the disparagement of unenumerated rights. What is more important is that just as the Tenth Amendment clearly expresses the former point, the Ninth Amendment clearly expresses the latter."[85] The point appears to be that unless unenumerated rights trump granted powers, the Ninth Amendment is superfluous.

As quoted above, however, Madison's response to Randolph's objections to use of the words "rights retained," shows that the change in wording from "powers" to "rights" was not meant to alter the thrust of the Ninth Amendment. Under Madison's (and the traditional) interpretation, although the Ninth Amendment is a companion to the Tenth Amendment, it is not redundant. The Tenth Amendment affirms that powers not delegated to the federal government are reserved to the states and the people; in other words, it is a statement of *who* possesses undelegated powers. The Ninth Amendment, on the other hand, concerns the *location* of the line between delegated powers and unenu-

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[83] In a recent article, Lawrence Mitchell makes the dubious suggestion that Madison meant the opposite of what he said. Mitchell, *supra*, at 1740. Mitchell baldly asserts that this passage "reflects Madison's fear that *unenumerated* rights would thereby be left unprotected and suggests that the ninth amendment was proposed, if not adopted, to prevent precisely [this] narrow reading." *Id.* (footnote omitted) (emphasis in original).

It is difficult to see how Mitchell can wrest this meaning out of Madison's statement. Madison was not expressing any "fear" at all, much less a "fear" about the absence of a Ninth Amendment. Rather, he was responding to the argument that bills of rights were ineffectual, and reporting the way in which courts would protect rights. Moreover, the "provision" Madison proposed as a bill of rights included the predecessor of the Ninth Amendment (whose purpose he had explained in the paragraph immediately preceding the discussion of judicial review). Madison's statement thus confirms that, even with the Ninth Amendment, courts are to enforce only "expressly stipulated" rights in limitation of granted powers.

[84] Quoted at p. 21 *supra*.

[85] J. Ely, *supra*, at 36 (emphasis in original).

merated individual rights, and commands that the line not be moved by virtue of the enumeration of some rights.

Activists sometimes argue that the Ninth Amendment addresses Madison's concern, articulated in a letter to Jefferson before the First Congress came into session, that "a positive declaration of most essential rights could not be obtained in the requisite latitude."[86] Madison explained, "I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power."[87] The Ninth Amendment, one might argue, was Madison's backdoor way of assuring that rights, enumerated or not, would be protected "in the requisite latitude," notwithstanding a "public definition" that might, in his view, be too restrictive. Because the rights stated in the "positive declaration" trump powers, the argument would continue, the unenumerated rights in their requisite latitude would also trump powers.[88]

Madison, however, made no claim at the time he introduced what became the Ninth Amendment (or thereafter) that the amendment was intended to expand the express rights to an unspecified, but "requisite latitude."[89] Moreover, Madison's letter, read carefully, shows that the rights in the "requisite latitude" that he had in mind would not overlap granted powers. As noted above, to illustrate his concern, Madison said he feared that rights of conscience, "if submitted to public definition, would be narrowed much more than they are likely ever to be by *an assumed power.*"[90] In other words, Madison thought that the rights of conscience might be better protected by the *absence* of a granted power to regulate such matters (precluding infringement by an "assumed power") than by an inadequate *positive statement* of the right. Understood in this light, the Ninth Amendment means that if, without regard to the specific

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[86] Letter from James Madison to Thomas Jefferson (October 17, 1788), 11 *Papers of James Madison* 297.

[87] *Id.*

[88] *See* Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government:* Griswold v. Connecticut; South Carolina v. Katzenbach, 40 Tul. L. Rev. 488, 499 (1966). *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 579; J. Ely, *supra,* at 35.

[89] Caplan, *supra,* at 253 n.123 ("the historical record is devoid of such an expressed purpose"); *Uncertain Renaissance, supra,* at 824-25.

[90] Letter from James Madison to Thomas Jefferson (October 17, 1788) (emphasis added), 11 *Papers of James Madison* 297.

rights listed in the Constitution, the granted powers of the federal government do not reach a certain right, the fact that the right is not listed in the Constitution does not, by implication, authorize the government to deny or disparage it.[91]

Some argue that the "rights retained by the people" refer to "natural rights," theories of which were popular among some at the time of the ratifications of the Constitution and Bill of Rights, and that those unwritten "natural rights" trump powers.[92] Many who signed the Declaration of Independence, with its reference to "inalienable rights," also signed the Constitution, and there were a number of cases prior to the Constitutional Convention in which legislative acts were voided for violating natural law principles.[93]

The Constitution, however, nowhere mentions natural law or contains any suggestion that natural, fundamental, or any sort of higher law is superior to it. To the contrary, as previously noted, article VI provides that the "Constitution," not some higher law principles, "shall be the supreme Law of the Land."

Moreover, the Framers, for the most part, were not particularly enamored of natural law theory as a substitute for positive law. As Robert Cover has written:

> [T]hose giants who managed the awesome transition from revolutionaries to "constitutionaries" — men like Adams and Jefferson; Dickinson and Wilson; Jay, Madison, Hamilton, and, in a sense, Mason and Henry —were seldom, if ever, guilty of confusing law with natural right. These men, before 1776, used nature to take the measure of law and to judge their

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[91] For example, if, in the original Constitution, none of the three branches of government had been granted power to abridge freedom of religion, the fact that the positive prohibitions of the First Amendment apply only to Congress would not, by implication, empower the executive or judicial branch to abridge that right. *See* E. Dumbauld, *supra*, at 63 n.9.

[92] Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 152 (1928); B. Patterson, *supra*, at 19-22; *Uncertain Renaissance*, *supra*, at 816.

[93] *See* Corwin, *supra*, at 367-74, 394-95, 399; G. Wood, *supra*, at 455-63.

own obligations of obedience, but not as a source for rules of decision.[94]

Further, both the proponents and opponents of the Bill of Rights assumed that rights worthy of protection could be surrendered to the general government through the Constitution and made no distinction between "alienable" and "inalienable" rights. As noted above, those favoring adding a bill of rights to the Constitution argued that otherwise rights would be implicitly surrendered to the government. Conversely, opponents contended that if rights were enumerated, unenumerated rights could be deemed surrendered.[95] If rights worthy of protection could *implicitly* be surrendered, it surely follows that they could *explicitly* be surrendered by express grants of power to the government.

C. Application To The States

The Ninth Amendment, on its face, does not restrict itself to rights with respect to the federal government. Indeed, because the *subject* of the amendment ("the enumeration . . . of certain rights") includes rights against the states,[96] it may be argued that the *object* ("others retained by the people") must also.[97] On the other hand, the amendment's failure expressly to refer to the states could reasonably be interpreted to restrict the force of the amendment to the federal government, the body that the Constitution establishes and directs.[98] Moreover, as has been reviewed above, there is considerable historical evidence that the Ninth Amendment was directed against the federal government, not the states.[99]

Even if the Ninth Amendment does apply to the states by its terms or through the Fourteenth Amendment,[100] the retained federal rights

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[94] R. Cover, *Justice Accused* 27 (1975); *see* Dunbar, *supra*, at 640 n.47.

[95] *See* p. 17-18 *supra*.

[96] *See* art. I, sec. 10.

[97] *See* B. Patterson, *supra*, at 39-40; Comment, *The Ninth Amendment*, 30 Alb. L. Rev. 89, 95 (1966).

[98] The Framers knew how to direct rights against the states when that was intended. *See* U.S. Const. art. I, sec. 10; *Barron v. Baltimore*, 32 U.S. 242, 248-49 (1833).

[99] *See* Berger, *supra*, at 3-5; Redlich, *supra*, at 805 n.87.

[100] *Compare* Redlich, *supra*, at 806 *with* Berger, *supra*, at 8-14. One could also argue, as did Justice Goldberg in *Griswold*, that even if the Ninth Amendment is not incorporated into the Fourteenth, the Ninth Amendment's concept of unenumerated

logically cannot override state powers. As discussed above, the unenumerated federal rights are "retained" and protected from federal infringement only because the powers of the federal government are limited and do not, by their own terms, reach those rights. The powers of state governments, however, are not limited in the same manner as the federal powers, so that a right retained with respect to the federal government may not be retained with respect to a state. Whether the right has been retained depends upon the allocation of governmental powers and individual rights under that state's constitutional law; in other words, the only "rights retained" against the states are state law rights, not federal rights, and one would not look to the Constitution or the federal courts for their origin, description, or enforcement. The natural reading of the Ninth Amendment, in this context, then, is that the Constitution's enumeration of certain rights does not deny, disparage, expand, or restrict the rights, unenumerated in the Constitution, that are retained by the people under state law.[101]

D. Conclusion: Ninth Amendment

The words, history, and purpose of the Ninth Amendment demonstrate that it is not a "bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion."[102] It is, instead, a rule of construction that confirms that the federal government is one of limited powers, and that rights not delegated by the people to the federal government are not to be denied or disparaged simply because they are not enumerated in the Constitution. By definition, then, the "rights retained" do not overlap or trump granted federal powers, nor do they override state powers.

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rights is evidence that Fourteenth Amendment rights are not limited to those enumerated in the Bill of Rights. 381 U.S. at 493. *But see* Berger, *supra*, at 12 (distinction is "purely semantic").

[101] Caplan reaches a similar conclusion by focusing on the state-law basis of rights at the time of the Constitution's ratification. He argues that the "rights retained" in the Ninth Amendment refer only to state-based rights, that those state-based rights do not trump federal powers because of the Supremacy Clause, and that it is logically impossible to "incorporate" the Ninth Amendment through the Fourteenth against the states, because the amendment was intended to protect, not circumscribe, state-based rights and enactments. Caplan, *supra*, at 260-62.

[102] Berger, *supra*, at 2 (characterizing Goldberg's concurrence in *Griswold*).

III. The Privileges or Immunities Clause

A. The Text of the Clause

Section 1 of the Fourteenth Amendment provides:

> 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.

While the first sentence of section 1 defines "citizens of the United States," the amendment contains no definition of the privileges or immunities of citizens that are protected from abridgment by state law.

The then-current dictionary definitions of "privileges" and "immunities" shed some light on, but do not resolve, the question. Noah Webster's 1828 edition of *An American Dictionary of the English Language* notes first that the word "privileges" is derived from the Latin term *privilegium*, which meant a "private law [or] some public act, that regarded an individual."[103] The dictionary then gives as its first definition of "privilege," as then in usage, a "particular and peculiar benefit or advantage enjoyed by a person, company, or society beyond the common advantages of other citizens." It explains that a privilege may "be a particular right granted by law or held by custom," such as the privilege of nobles of Great Britain to be tried by their peers only, or an "exemption from some burden to which others are subject," such as the privilege of "members of parliament and of our legislatures . . . of exemption from arrests in certain cases."

The second definition of privilege is similar to the first: "Any peculiar benefit or advantage, right or immunity, not common to others of the human race." This includes "national *privileges*, and civil and political *privileges*, which we enjoy above other nations," and "ecclesias-

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[103] *Privilegium*, in turn, was derived from the Latin terms *privus*, meaning separate or private, and *lex*, meaning law.

tical and religious *privileges* secured to us by our constitution of government."[104]

It follows, then, that a "privilege" of a United States citizen would be a right, advantage, or an exemption from burdens, that is enjoyed by such citizens and that others do not hold.

The 1828 dictionary tells us that the word "immunity" comes from the Latin "immunitas," meaning free or exempt.[105] The dictionary's first definition of "immunity" is "[f]reedom or exemption from obligation," such as an "exempt[ion] from observing the rites or duties of the church." The second definition is "[e]xemption from any charge, duty, office, tax or imposition [or] a particular privilege," such as the "*immunities* of the free cities of Germany" or the "*immunities* of the clergy."[106]

It follows, then, that an "immunity" of a United States citizen is a freedom or exemption from an obligation, charge, duty, or tax to which the citizen might otherwise be subject.

Having determined that "privileges or immunities" means rights, benefits, exemptions, and freedoms does not resolve which rights, benefits, exemptions, and freedoms belong to United States citizens and are protected from state abridgment. As alluded to at the outset of this paper, there are four principal positions taken by courts and commentators on this issue.

One possible source of the protected "privileges or immunities" is the Constitution and laws enacted thereunder. This is essentially the position taken by the Supreme Court in the *Slaughter-House Cases*[107] and followed to this day. Thus, if a provision of the Constitution protects a privilege or immunity from state infringement — such as the Contracts Clause —then that is a privilege or immunity of United States citizenship which is also protected under section 1 of the Fourteenth Amendment.

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[104](Emphasis in original). Samuel Johnson's 1755 Dictionary similarly defines "privileges" as a "1. peculiar advantage [or] 2. immunity, public right."

[105]"Immunitas" in turn is derived from the prefix "in," meaning not, and "minus," meaning charge, office, or duty.

[106](Emphasis in original). Samuel Johnson's 1755 dictionary similarly defines "immunity" as "1. discharge from any obligation[;] 2. privilege, exemption [; or] 3. Freedom."

[107]83 U.S. 36 (1873).

Or, if a valid federal statute creates a privilege or immunity, such as a patent or copyright, that also would be a privilege or immunity protected by section 1. Of course, such a statutory privilege or immunity would be protected from state abridgement by the Supremacy Clause, in any event, even if there were no Fourteenth Amendment. Under this view, section 1 clarifies or emphasizes that federal constitutional and statutory privileges and immunities extended to citizens may not be abridged by the states. Apart from this clarification or emphasis, section 1 would be largely redundant.

A second possible source of privileges or immunities would be the rights specifically protected by the Constitution against *federal* infringement, *i.e.*, rights secured in the first through eighth amendments and other rights enunciated in the Constitution. Under this view, advocated by Justice Black, Professor Crosskey, and others, the privileges or immunities clause "nationalizes" or "incorporates" the Bill of Rights, and protects those rights, formerly applicable only against the federal government, from state infringement. While the Supreme Court has never embraced this position, it has, nevertheless, applied most of the Bill of Rights to the states through the due process clause of section 1.

A third possible source would be the so-called "fundamental" privileges or immunities under *state* law, extended without discrimination on the basis of race or color to all United States citizens within the states. Under this view, most forcefully advocated by Professor Berger, section 1 simply constitutionalized the Civil Rights Act of 1866. That Act extended to "citizens of every race and color" the "same right . . . as enjoyed by white persons" (1) "to make and enforce contracts, [2] to sue, be parties, and give evidence, [3] to inherit, purchase, lease, sell, hold, and convey real and personal property, [4] to full and equal benefit of all laws and proceedings for the security of person and property, and . . . [5] to like punishment, pains, and penalties, and to none other."

One variant of this position would extend all, not just fundamental, privileges or immunities under state law to every citizen without regard to race or color. Another would forbid discrimination on other bases, such as on gender, national origin, or religious grounds. Under Professor Berger's position, or any of these variants, the clause does not prescribe a nationally applicable floor of civil rights protection, but forbids states only from discriminating among the citizens in its jurisdiction with respect to the rights that are covered. While the Supreme Court has not adopted this interpretation of the privileges or immunities clause, it has

accomplished basically the same result, and perhaps more, through its application of the equal protection clause.

Finally, the fourth possible source of privileges or immunities would be natural law, fundamental law, or some other source apart from positive state or federal law. Rather than merely protecting United States citizens against discrimination in the enjoyment of privileges or immunities under state law, under this view, the amendment established certain minimum rights, rights that are not, moreover, otherwise specified in the Constitution or other federal law. Those minimum rights may be based on natural rights as then understood, including the rights of personal security, personal liberty, and private property; the fundamental rights described in *Corfield v. Coryell*,[108] which are similar to those natural rights; or rights derived by a court on some other basis.

Each of these interpretations finds some support in the language and history of the privileges or immunities clause. For the reasons to be described, however, alternatives 1 and 3, reaffirming that privileges and immunities derived from federal statutes and from other provisions of the Constitution may not be abridged, and proscribing discrimination in the privileges or immunities extended under state law, fit most closely the language and history of the clause. There is much less evidence in support of Alternative 2, incorporation of the Bill of Rights.

It should be emphasized that none of these first three interpretations makes the privileges or immunities clause open ended, or warrants the judicial creation of enforceable rights against the states. Only the fourth interpretation has the potential of authorizing courts to engage in activism by importing natural or fundamental rights into the privileges or immunities clause. As will be seen, however, we think that there was simply no consensus among the Congress that proposed the amendment (or the ratifiers) that the clause was intended to create, or authorize courts to create, nationally applicable minimum rights (apart from, perhaps, the Bill of Rights), whether based on natural rights, fundamental rights or some other principle.[109]

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[108] 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825).

[109] Even if this interpretation is correct, that would not necessarily make the clause open-ended. *See* p. 98 *infra*.

B. Privileges or Immunities Before 1866

1. The Comity Clause

a. The Text

The words "privileges" and "immunities" are used in one other place in the Constitution, article IV, section 2. The first clause of that section provides:

> The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The article IV privileges and immunities clause, sometimes known as the Comity Clause, in turn, is based on a somewhat lengthier provision in article IV of the Articles of Confederation.

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

Thus, the purpose of the Articles of Confederation's article IV, by its own terms, was "to secure and perpetuate friendship and intercourse among the people of the different States in this Union," in other words, to promote national unity and diminish localism.[110] Article IV contained no explicit definition of the "privileges and immunities of free citizens."

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[110] *See* Comment, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism?*, 15 Cap. U.L. Rev. 493, 497 (1986); Simson, *Discrimination Against Non-residents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 383 (1979).

The enumeration of certain privileges ("free ingress and regress to and from" other states and "all the privileges of trade and commerce"), however, illuminates somewhat the scope of the preceding general clause ("all privileges and immunities of free citizens"), but it is not at all clear whether that enumeration was intended to be exclusive or non-exclusive.[111] The provision was in effect such a short time that no cases were decided under it.

James Madison criticized the lack of clarity of article IV of the Articles of Confederation. In *The Federalist*, he noted that, under article IV, "free inhabitants" who were not citizens of their home state were entitled in other states to the privileges and immunities of "free citizens," in other words, "to greater privileges than they may be entitled to in their own state."[112]

The privileges and immunities clause of article IV, section 2 of the Constitution was proposed in the Constitutional Convention by Charles Pinckney of South Carolina, and that clause was adopted virtually without debate.[113] Pinckney wrote, in a pamphlet published contemporaneously with the Constitution, that the clause was "formed exactly upon the principles of the 4th article" of the Articles of Confederation.[114] It follows that the purpose of article IV of the Articles of Confederation — to promote national unity —continued to inform its successor. As

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[111] Professor Berger argues that the listing was intended to be exclusive, thus severely limiting the general privileges and immunities clause. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 Ind. L. J. 277, 291-92 (1979). James Madison, on the other hand, was puzzled by the clause, submitting that "what was meant by superadding 'to all privileges and immunities,' — 'all the privileges of trade and commerce,' cannot easily be determined." *The Federalist* No. 42, at 288 (J. Cooke ed. 1961). Professor Chester Antieau asserts that the two clauses are completely separate, the first guaranteeing uniform "basic, fundamental, natural rights" to all free inhabitants, throughout the several states, and the second providing for comity or interstate equality to protect merchants in states other than their own. Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article IV*, 9 Wm. & Mary L. Rev. 1, 3 (1967). Professor Antieau's claim for the reach of the general privileges and immunities clauses goes well beyond and is inconsistent with the principal purpose of the clause — to promote national unity as distinct from establishing individual rights. *See* Comment, *supra* note 110, at 497.

[112] *The Federalist* No. 42, at 285-86.

[113] 1 *Elliot's Debates* 149.

[114] *The Records of the Federal Convention of 1787*, at 112 (M. Farrand. ed. 1911).

Alexander Hamilton put it, the privileges and immunities clause "may be esteemed the basis of the union."[115]

b. Case Law

By the time of the framing of the Fourteenth Amendment, the Supreme Court had not attempted to define the privileges and immunities of the Comity Clause, but several lower courts had. Perhaps the best known of these cases, and the decision most frequently cited by the participants in the debates on the Fourteenth Amendment, was *Corfield v. Coryell,*[116] a district court case decided by Justice Bushrod Washington sitting on Circuit.

In that case, the plaintiff brought an action in trespass, alleging that the defendant had wrongfully seized and sold plaintiff's boat. The defense was that the seizure was in accordance with New Jersey law, which made it unlawful for "any person who is not at the time an actual inhabitant or resident" of the state to gather oysters in New Jersey waters, and required the forfeiture of any vessel used in such unlawful activity. Plaintiff argued that this New Jersey statute violated the Comity Clause "by denying to the citizens of other states, rights and privileges enjoyed by those of New Jersey."[117]

The court rejected plaintiff's argument, reasoning that the right to gather oysters was not among the privileges and immunities protected by article IV, section 2.[118] Justice Washington began by addressing the scope of the clause:

> The inquiry is, what are the privileges and immunities of citizens in the several states? 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

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[115] *The Federalist*, No. 80, at 537.

[116] 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

[117] *Id.* at 549

[118] Justice Washington's discussion of Article IV, Section 2 was actually dictum because he ultimately held that plaintiff could not bring the action for trespass, in any event, because he had rented the boat to another person at the time it was seized. *Id.* at 555.

> compose this Union, from the time of their becoming free, independent, and sovereign.

Having generally described them, Justice Washington then categorized the protected privileges and immunities.

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. 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; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Justice Washington then gave the following examples of protected privileges and immunities.

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. 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."

Nonetheless, the protected privileges and immunities were not without limit.

> But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.

Thus, in Justice Washington's view, the Comity Clause did not require a state to extend all of the privileges and immunities to citizens of other states that it did to its own, but only those privileges and immunities that were deemed "fundamental." He suggested that those "fundamental" privileges and immunities were calculated to "secure and perpetuate mutual friendship and intercourse" among the states. In making a partial listing of such fundamental privileges and immunities, Justice Washington imported to the clause something of a natural rights reading. He referred to "privileges and immunities which are, *in their nature*, fundamental." (Emphasis added). The "general heads" under which he stated the privileges and immunities were comprehended also have a natural rights flavor: "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; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

By way of contrast, two state court decisions interpreting the privileges and immunities clause that were also cited with some frequency in the debates on the Fourteenth Amendment and the 1866 Civil Rights Act did not refer to natural or fundamental rights at all.

Campbell v. Morris[119] involved an action brought in Maryland against an out-of-state debtor. Maryland law provided creditors an attachment on the property of persons who were not citizens or residents of the state, and on the property of local citizens who had actually absconded. The defendant argued that this distinction in the treatment of non-local citizens violated the Comity Clause. Justice Samuel Chase, sitting in the General Court with Justice Gabriel Duval rejected the contention.

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[119] 3 H. & McH. 535 (Maryland General 1797).

The court began by defining the principal terms of the clause,[120] and observing that a main purpose of the clause was to allow citizens to own property in other states.[121]

> It seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operations is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, *in the same manner as the property of the citizens of the state is protected.* It means, such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.[122]

The court thus held that the privilege and immunities protected by the Comity Clause related to property rights and were measured by local law, not some natural or national standard.

The court then noted that the purpose of the attachment provision was to secure the appearance of the defendant. Because the defendant could dissolve the attachment by appearing and giving bail, and thus be

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[120] *Id.* at 553:

> Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.

[121] *Id.* at 553-54:

> By taking a retrospective view of our situation antecedent to the formation of the first general government, or the confederation in which the same clause is inserted *verbatim*, one of the great objects must occur to every person, which was the enabling the citizens of the several states to acquire and hold real property in any of the states, and deemed necessary, as each state was a sovereign independent state, and the states had confederated only for the purpose of general defence and security, and to promote the general welfare.

[122] *Id.* at 554 (emphasis added).

treated the same as an in-state citizen, the court held that there was no violation of the Comity Clause.[123]

In *Abbot v. Bayley*,[124] a married woman who had established her domicile in Massachusetts, after her husband had driven her from her home in New Hampshire 23 years before, brought suit in a state court. Under Massachusetts law, a married woman could not sue in her own capacity, even if separated from her husband. However, the woman argued that her case should be governed by *Gregory v. Paul*,[125] in which the court had held that a woman who was driven from her home in England, and whose husband remained there (both husband and wife were British subjects), was allowed to sue as *femme sole*. Defendant, on the other hand, argued that the Comity Clause required the court to treat the New Hampshire husband as if he were in Massachusetts, rather than in a foreign jurisdiction.

The court found for the plaintiff, holding that for purposes of the regulation of marriage and divorce, New Hampshire should be considered a foreign jurisdiction. In so doing, the court gave the following reading of the Comity Clause:

> The privileges and immunities secured to the people of each state in every other state, can be applied only in case of removal from one state into another. By such removal they become citizens of the adopted state without naturalization, and have a right to sue and be sued as citizens; and yet this privilege is qualified and not absolute, for they cannot enjoy the right of suffrage or of eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the state into which they shall remove. They shall have

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[123] More specifically, the court noted that if the defendant appeared and gave bail,

> he would be in the same situation with any citizen of this state taken on a *capias ad respondendum*, who appears and gives bail to the suit, and so will his property.
>
> It would be a strange complaint for a citizen of *Pennsylvania* to make, that he was not allowed the same immunities and privileges with a citizen of *Maryland*, which he is informed he may enjoy by conforming to the laws of the state, in appearing and giving bail to the suit commenced against him.

Id. at 555 (emphasis in original).

[124] 6 Pick. 89 (Mass. 1827).

[125] 15 Mass. Rep. 31.

> the privileges and immunities of citizens, that is, they shall not be deemed aliens, but may take and hold real estate, and may, according to the laws of such state, eventually enjoy the full rights of citizenship without the necessity of being naturalized.

The court viewed the protected privileges and immunities as quite limited.

> The constitutional provision referred to is necessarily limited and qualified, for it cannot be pretended that a citizen of Rhode Island coming into this state to live, is *ipso facto* entitled to the full privileges of a citizen, if any term of residence is prescribed as preliminary to the exercise of political or municipal rights. The several states then, remain sovereign to some purpose, and foreign to each other, as before the adoption of the constitution of the United States, and especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction.[126]

Thus, the court in *Abbot v. Bayley* viewed the privileges and immunities under the Comity Clause as restricted to access to the courts, real property rights, and the ability to become citizens without being naturalized. There was no reference to any natural or fundamental law standard.

Justice Story, in his *Commentaries*, maintained that the Comity Clause privileges and immunities were determined by local law, applied without discrimination. The Clause was "plain and simple in its language," he wrote, "and its object is not easily to be mistaken . . . The intention of this clause was to confer on [the citizens of each state], if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizen of the same State would be entitled to under the like circumstances."[127]

In *Dred Scott v. Sandford*,[128] Chief Justice Taney wrote in *dicta* that

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[126] *Id.* at 92-93

[127] 2 Story, Commentaries § 1806 (4th ed. 1873).

[128] 60 U.S. 393 (1857).

the protections of the clause were limited to out-of-state citizens who were temporarily within the state, without taking up their residence. He also opined that if blacks were citizens of the United States, a state could not deny the protected privileges and immunities to out-of-state black citizens temporarily within the state, even if that state denied those privileges to free blacks permanently within the states. The scope of those privileges and immunities would, however, be measured by those extended to white citizens within the state. Thus, Chief Justice Taney explained that, if blacks were citizens, the Comity Clause would

> give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction to sojourn there as long as they pleased to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law *for which a white man would be punished*; and it would give them the full liberty of speech in public and in private *upon all subjects upon which its own citizens might speak*; to hold public meetings upon political affairs and to keep and carry arms wherever they went.[129]

In another passage Chief Justice Taney noted some of the limitations on the scope of the Comity Clause.

> But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State, as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State.

If blacks were citizens, the Comity Clause would command the extension to out-of-state blacks of those privileges and immunities.

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[129] *Id.* at 417 (emphasis added)

> And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them.[130]

In *Paul v. Virginia*, a decision issued less than six months after the ratification of the Fourteenth Amendment, a unanimous Supreme Court confirmed the prevailing view that the privileges and immunities of the Comity Clause were limited to those rights granted by a state to its own citizens. Justice Field[131] (one of the future dissenters in the *Slaughter-House Cases*) wrote the Court's opinion:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.[132]

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[130] *Id.* at 422-23.

[131] 75 U.S. 168 (1868)

[132] *Id.* at 180.

c. The Comity Clause and Abolitionist Legal Theory

The Comity Clause also played a role in the development among some abolitionists of a theory of paramount national citizenship, with attendant privileges and immunities. Even under this theory, although the concept of national citizenship informed the Comity Clause, the privileges or immunities protected by the clause were measured by state law.

Briefs in *Crandall v. State*[133] provide perhaps the earliest example of abolitionist use of the Comity Clause to develop a theory of national citizenship. In that case, Connecticut law prohibited the establishment of private boarding schools for the education of "colored persons . . . not resident of this state" without the written consent of a "majority of the civil authority and . . . the selectmen of the town." Prudence Crandall, who had established a private boarding school for black young women, was convicted under the statute for "harboring" and "boarding" a black 17-year old pupil from Rhode Island.

In an appeal to the Supreme Court of Errors of Connecticut, Crandall's lawyers, William Ellsworth and Calvin Goddard, relied heavily on the Comity Clause. They argued that free blacks were citizens of their native states, and that the Comity Clause of the Constitution therefore secured to "them the right of residing in Connecticut and pursuing the acquisition of knowledge, as people of color may do who are settled here."[134]

In making their argument, they articulated a general concept of national citizenship. Ellsworth maintained that the Comity Clause secured to an out-of-state citizen the

> right to come here, and *remain* here, if he offends against no general law, he cannot be whipped out, nor carried out of the state because he has no legal settlement: he may present the shield of the Constitution, and as Paul claimed the immunity

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[133] 10 Conn. 339 (1834).

[134] Report of the Arguments of Counsel in the Case of Prudence Crandall, Plff. in Error vs. State of Connecticut, Before the Supreme Court of Errors, at Their Session at Brooklyn, July Term 1834, at 7, 11, *quoted in* Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479, 500-01.

> of a Roman citizen, he may claim the immunity of an *American* citizen . . . . If he has fled from justice, and is demanded, under the Constitution he must be delivered up, but while he is here, unoffending, the state cannot drive him out: it could were it not for the Constitution of the U[nited] States: *he is a citizen, and that is his protection* . . . . Of all, *all* citizens, I say, they are in *their* country, be they in it where they will; they have one *common tie*, one *allegiance*, and one *citizenship*.[135]

Although there was considerable emphasis in the briefs on national citizenship, in the end, the privilege sought for — the right of an out-of-state black to attend a private boarding school —was a privilege extended by local law to local citizens. In other words, Crandall's lawyers did not argue that the privileges and immunities protected by the Comity Clause were greater than the privileges and immunities granted by a state to its own citizens. The court reversed Crandall's conviction in 1834, relying on the insufficiency of the indictment, and avoided the constitutional question completely.

The following year in Ohio, a committee of the Ohio Anti-Slavery Convention used the Comity Clause to argue that the state's restrictions on immigrating blacks were unconstitutional. Ohio law forbade free blacks from migrating to and settling in the state unless they provided a $500 bond to guarantee their good behavior and support, and prohibited residents from "employ[ing], or conceal[ing]" any who had not provided the bond. Blacks were not permitted to give evidence in the courts where either party, or the defendant in a criminal prosecution, was white, and were flatly excluded from the common schools.

In its report criticizing those laws, the committee (sometimes known as the Olcott Committee) relied principally on references in the Ohio Constitution to "natural, inherent, inalienable rights" to life, liberty, property, happiness and safety. The report then turned to the Comity Clause, and argued that free blacks were "citizens" within the meaning of the United States Constitution. The report concluded that "inasmuch as no state can pass any law, in contravention of the laws of the United States, which shall be binding on an individual, we hence infer that those enactments, in the Ohio Legislature, imposing disabilities upon the free blacks migrating from other states are *entirely unconstitution-*

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[135] *Id.* at 14, *reprinted in* Graham, *supra*, at 502.

al."[136] Again, although reference is made to citizenship under the United States Constitution, as distinct from state law, the focus is on disabilities imposed on those migrating from other states; there is no intimation that the privileges and immunities granted to such migrants should be different from those established under state law.[137]

d. Other Uses of the Comity Clause

Reacting to fears of possible slave uprisings, the Southern States passed laws prohibiting advocacy of abolition.[138] Apart from these laws, threats of violence kept many abolitionists out of the South.[139] In addition, to preclude free black sailors from agitating the slave population, many Southern States passed laws requiring all free black sailors whose ships were in port to be imprisoned until their ships left, at which time the captains of the ship were to pay the costs of the sailors' imprisonment. Efforts at the state level having failed to procure relief from these laws, 150 citizens of Boston submitted a memorial to Congress urging it to take action.[140]

The House Committee on Commerce issued its report in 1843. The majority report, submitted by Representative Winthrop, agreed with the memorialists that the black sailor imprisonment laws violated, among other things, the Comity Clause.

> [S]ome of the States . . . recognize no distinction of color in relation to citizenship . . . In Massachusetts, . . . the colored man has enjoyed the full and equal privileges of citizenship since . . . nine years before the adoption of the Constitu-

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[136] Proceedings of the Ohio Anti-Slavery Convention Held at Putnam 36-40 (1835), *quoted in* Graham, *supra* at 495-96.

[137] It is not clear whether the Comity Clause attack was directed at those restrictions applicable only to black immigrants, or whether the attack also included prohibitions imposed on all blacks in Ohio. Even if the report is construed to claim that the Comity Clause required Ohio to grant certain rights (i.e., to testify in court and attend common schools) to out-of-state blacks that it denied to in-state blacks, the privileges and immunities would still be measured under state law, albeit by the privileges and immunities granted to whites, rather than black citizens. This is the approach taken by Chief Justice Taney in *Dred Scott. See* pp. 40-41 *supra.*

[138] M. Curtis, *No State Shall Abridge* 30-31 (1986).

[139] *Id.*

[140] A. Avins, *The Reconstruction Amendments Debate* ii (2d ed. 1967).

> tion . . . The Constitution . . . therefore . . . found the colored man of Massachusetts a citizen of Massachusetts, and entitled him, as such, to all the privileges and immunities of citizens in the several States. And of those privileges and immunities, the acts set forth in the memorial constitute a plain and palpable violation.[141]

The majority report concluded that, although the black sailor laws violated the Constitution, Congress was without power to afford relief; "[t]he Judiciary alone can give relief from the oppression of these laws while they exist, and the States which enacted them are alone competent to strike them from their statute books."[142]

Representative Rayner submitted the minority report. He emphasized his understanding that the privileges and immunities protected by the Comity Clause were those of the state "*in* which, and not the State *from* which, the citizen happens to be." "It cannot be," he continued, "that a citizen of Massachusetts, on going to South Carolina, carries with him all the privileges and immunities which he possesses at home, or *vice versa* . . . . The meaning of the Constitution must be, that South Carolina, and every other State, is bound to extend to the citizens of each and every State, the same privileges she extends to her own under like circumstances."[143] Thus, in his view, South Carolina was not obligated to extend any privileges and immunities to out-of-state free blacks that it did not extend to its own.

Rayner also noted that the memorialists' interpretation of the Comity Clause was a two-edged sword. "If Congress has the power to enforce, in the slaveholding States, the same relations between the white and colored man, that exist in the non-slaveholding States, it must have the right to enforce in the non-slaveholding the same which exist in the slaveholding."[144]

Perhaps in response to the majority reports' comment that the "judiciary alone can give relief," the following year, the Massachusetts authorities sent Samuel Hoar, a prominent lawyer and former representa-

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[141] H.R. Rep. No. 80, 27th Cong., 3d Sess. 2 (1843).

[142] *Id.* at 6.

[143] *Id.* at 39 (quoting 2 Story, Commentaries § 1806 (4th ed. 1873)).

[144] *Id.* at 39-40.

tive to Charleston, South Carolina, to challenge the constitutionality of the black sailor law. The visit caused considerable controversy and excitement. The local authorities refused to protect him from violence and suggested that he leave. The state legislature passed resolutions calling for his expulsion. As South Carolina Senator Butler later put it, Mr. Hoar left without instituting the suit, "under a polite invitation, with a significant determination to enforce the invitation, in the event of his refusal to disregard [*sic*] it; and it may have been that, in going away, he was a *volunteer by compulsion.*"[145]

The expulsion greatly angered Northerners and, even 22 years later, it was referred to several times in the Reconstruction Congress debates as evidence of the federal government's inability to protect its citizens' rights.[146]

2. Paramount National Citizenship

In the 1840's, some abolitionists began to assert a constitutional theory of paramount national citizenship, separate and independent of state citizenship. Lysander Spooner and Joel Tiffany were its principal exponents. They premised their theory on the Preamble of the Constitution and on Lockean and Jeffersonian notions of the origins and purposes of government.[147] The phrase "We the people" not only defined the constituent authority of the Constitution, but was evidence that all inhabiting the United States were to be its citizens, as would be those born within its jurisdiction or naturalized by Congress. Having defined national citizenship, Tiffany then addressed its attendant rights.

> What then are the privileges and immunities which the American citizen has a right to demand of the federal government? The answer is, he has a right to demand, and have full and ample protection in the enjoyment of his personal security, personal liberty, and private property, . . . protection against the oppression of individuals, communities and nations, foreign

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[145] A. Avins, *supra*, at ii, 2 (emphasis in original).

[146] The black sailor laws were eventually upheld in *Roberts v. Yates*, 20 Fed. Case. 937 (No. 11, 919) (C.C.D.S.C. 1853).

[147] J. tenBroek, *Equal Under Law*, 108-09 (1965).

> nations and domestic states: against lawless violence exercised under the forms of governmental authority.[148]

Tiffany distinguished these privileges and immunities from the various constitutional guarantees, which were, in his view, intended to secure them. Thus, he maintained that "to secure to each citizen the blessings of personal liberty" certain rights were guaranteed to "all persons under the jurisdiction of the federal government." Those included

> the right to petition, the right to keep and bear arms, the right to be free from unreasonable searches and seizures, the right not to be held answerable for infamous crimes without indictment or presentment, the right to a speedy public jury trial and to confrontation of witnesses; immunity from double jeopardy, compulsory self-incrimination,and deprivation of "life or liberty, etc., without due, legal process."[149]

Thus, notwithstanding *Barron v. Baltimore*, Tiffany believed the Bill of Rights to bind the States as well as the federal government. The privileges and immunities of national citizenship, as distinct from those specific guarantees, however, he believed to be matters primarily within the domain of the states.

> We do not hold that the federal government is bound to enact laws to see that those rights are observed between citizen and citizen in the same state. It is peculiarly the province of the state governments to do that; and they will be presumed to have performed that duty, except in those cases where, by positive enactments, they have authorized a violation of these rights.[150]

3. John A. Bingham's View

Representative John A. Bingham, a principal drafter of section 1 of the Fourteenth Amendment, appears to have been influenced significantly by antislavery legal theory, including the theory of paramount national citizenship. As Howard Jay Graham points out, Bingham's congressional district had been a pioneer antislavery stronghold, and Bingham had been a

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[148] Quoted in *id.* at 110.

[149] TenBroek, *supra*, at 110.

[150] Quoted in *id.* at 111.

student at Franklin College, the "fountainhead of abolitionist sentiment in eastern Ohio," when an antislavery revivalist campaign was at a high pitch and antislavery thought was undergoing some of its important early development.[151]

In an explanation of the Comity Clause in 1859, Bingham stressed the federal nature of the privileges and immunities protected by the Comity Clause. In opposing the admission of Oregon as a state that year, Bingham attacked on Comity Clause grounds a provision in its proposed constitution that would preclude any blacks, not residing in the state upon the adoption of its constitution, from migrating to the state, holding real property, making contracts, or bringing lawsuits. Bingham gave this explanation of the Comity Clause in that context:

> The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several States" that it guaranties.
>
> This guaranty of the Constitution of the United States is senseless and a mockery, if it does not limit State sovereignty and restrain each and every State from closing its territory and its courts of justice against citizens of the United States.[152]

Later, in commenting on the proposed constitution's prohibition of the bringing suit by black free men migrating to Oregon after the Constitution's adoption, Bingham observed,

> A suit is the legal demand of one's right, and the denial of this right by the judgment of the American Congress is to be sanctioned by law! But, sir, I maintain that the persons thus excluded from the State by this section of the Oregon

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[151] Graham, *supra*, at 623-24.

[152] Cong. Globe, 35th Cong., 2d Sess. 984 (1859).

> constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; and therefore I hold this section for their exclusion from that State and its courts, to be an infraction [of the Comity Clause].[153]

Bingham thus believed that the Comity Clause protected "privileges and immunities of citizens *of the United States*," and that those privileges and immunities were not derived "exclusively from State authority or State legislation." The protected privileges and immunities included the "rights of life and liberty and property, and their due protection in the enjoyment thereof by law."

Although Bingham's statements strongly suggest that the Comity Clause privileges and immunities have some federal content, his application of that theory would merely have extended to out-of-state blacks the same state-created or regulated rights (property, contract, court-access, migration) that were available to whites or to blacks who were in the state upon the adoption of that state's constitution.

4. Summary: Privileges and Immunities Before 1866

As will be seen, participants in the debates on the Fourteenth Amendment and the Civil Rights Act of 1866 made frequent reference to the Comity Clause privileges and immunities. As has been described, the predominant view of the Comity Clause by the time the debates opened was that it protected only some privileges and immunities of citizenship (the formulation of the protected rights varying from case to case). The clause applied only to out-of-state citizens temporarily in another state; it had no application to the relation between a state and its own citizens. Finally, the privileges and immunities protected by the clause were created and measured by state law, not by a natural rights or other national standard. In essence, the clause simply proscribed discrimination against out-of-state citizens with respect to certain privileges and immunities.

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[153] *Id.*

A small portion of anti-slavery activists had a slightly different view of the clause, contending that it must be informed by the notion of national citizenship. Yet this group did not seem to dispute that the protected privileges and immunities (though available as a right of national citizenship to out-of-state citizens) were ultimately created and measured by state law.

Another minority group among anti-slavery activists advocated a theory of national citizenship based on provisions of the Constitution other than the Comity Clause. They argued that United State citizens were entitled, as a matter of federal constitutional law, to minimum levels of privileges and immunities — from their own, as well as other, states —in such areas as life, liberty, and property, and as an ancillary matter, to the benefit of the Bill of Rights. Even these theorists, however, recognized that states must play the principal role in defining and protecting the privileges and immunities.

As will be seen, all of these views find some representation in the 1866 debates, and frequently participants created hybrid views, or mixed bits and pieces of the various views together.[154]

C. The Reconstruction Debates

1. The Civil Rights Bill

The Fourteenth Amendment was a product of the same Congress that enacted, over President Johnson's veto, the Civil Rights Act of 1866. Consideration of the Civil Rights bill and the Fourteenth Amendment proceeded on roughly parallel tracks. Indeed, as Professor Fairman points out, "[o]ver and over in [the debate on the Fourteenth Amendment], the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other."[155] Much of the

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[154] Representative Bingham's 1859 speech, recounted above, against the admission of Oregon, is a forerunner of such hybrid arguments to come. Thus, Bingham maintained that the Comity Clause supported the concept of national citizenship with its associated privileges and immunities as a matter of federal constitutional law, but the rights he contended must be extended to free blacks were actually those extended under *state* law to white citizens. Pp. 48-49 *supra*.

[155] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 44 (1949).

debate on the Civil Rights bill accordingly sheds light on the meaning of section 1 of the Fourteenth Amendment, in particular the discussions of the Comity Clause and the meaning of the phrase "civil rights and immunities."

The 39th Congress convened on December 4, 1865, not long after the close of the Civil War and just two days before the ratification of the Thirteenth Amendment, prohibiting slavery and involuntary servitude, was completed. Soon after the Congress convened, a Joint Committee on Reconstruction was established, with nine members appointed from the House, and six from the Senate, "[to] inquire into the condition of the States which formed the so-called confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress."[156]

In reaction to the abolition of slavery, many Southern states enacted "black codes," which severely restricted the civil rights of the freed slaves. In many respects, the conditions of the freed blacks under the black codes were little better (or perhaps worse) than under slavery. To remedy these conditions, Congress passed the Freedman's Bureau Bill, which was successfully vetoed by President Johnson, and the Civil Rights Act of 1866, which was enacted over the veto of the President.

What became the Civil Rights Act was introduced on January 5, 1866, by Senator Trumbull as S. 61, a bill "to protect all persons in the United States in their civil rights and furnish the means of their vindication," and referred to the Committee on the Judiciary.[157] The Committee reported the bill, with minor changes, on January 11,[158] and the debate commenced on January 29.[159] Section 1 of the bill as reported, with one further amendment offered by Senator Trumbull, read as follows:

> That all persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United

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[156] Cong. Globe, 39th Cong., 1st Sess. 6, 24-30, 46-47 (1866).

[157] *Id.* at 129.

[158] *Id.* at 184, 211-12.

[159] *Id.* at 474.

> States on account of race, color, or previous conditions of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.[160]

Apart from declaring that all former slaves and their descendants born in this country are United States citizens, the bill (1) banned discrimination in "civil rights and immunities" on the basis of race, color, or previous condition of slavery, and (2) explicitly provided for equality with respect to certain specified rights. As will be seen, concerns that the phrase "civil rights and immunities" might be given a "latitudinarian construction not intended" eventually lead to its deletion, so that the bill, as enacted, provided for equality only as to the specified rights.

At the outset of the debate, Senator Trumbull, the bill's sponsor, observed that "[t]here is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect." One example he cited was the Comity Clause and Samuel Hoar's earlier attempt to represent black sailors in South Carolina. "Of what avail," Trumbull inquired rhetorically, "was it to the citizen of Massachusetts, who, a few years ago, went to South Carolina to enforce a constitutional right in court, that the Constitution of the United States declared that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States?"[161] He also suggested that the Declaration of Independence's statement that "all men are created equal" with "inalienable rights" including "life, liberty, and the pursuit of happiness" had been of little avail to the slaves before emancipation, and that the Thirteenth Amendment's abolition of slavery was of scant use "if in the late slaveholding States laws are to be enacted and enforced

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[160] *Id.* at 474.

[161] *Id.*

depriving persons of African descent of privileges which are essential to freemen."[162]

It was the intention of the bill, he said, to secure such rights. In particular, the bill would "give effect" to the Thirteenth Amendment and "secure to all persons within the United States practical freedom."[163]

In his discussion of liberty and the definition of citizenship, Trumbull turned to the Comity Clause. He quoted Story's comment that the clause confers on citizens "a general citizenship" entitling them to the privileges and immunities that "citizens of the same state would be entitled to under like circumstances." He referred to or quoted from *Campbell v. Morris*,[164] *Abbot v. Bayley*,[165] and an unnamed Indiana case,[166] all of which made plain that the Comity Clause extended to out-of-state citizens certain privileges and immunities to the same degree as local citizens. He then quoted at length from *Corfield v. Coryell*,[167] including its list of the types of rights protected by the Comity Clause. Trumbull noted that the *Corfield* opinion went further than the bill, because it suggested that, under the Comity Clause, "a person who is a citizen in one State and goes to another is even entitled to the elective franchise[. B]ut at all events," Trumbull continued, "he is entitled to the great fundamental rights of life, liberty, and the pursuit of happiness, and the right to travel."[168]

Trumbull, then argued, that if out-of-state citizens are entitled to those rights when traveling in another state, "how much more are the native-born citizens of the State itself entitled to these rights!"[169] He believed that because, in the former slaveholding States, blacks were not regarded as citizens, "on that principle many of their laws making discriminations between the whites and the colored people are based." He believed it competent for Congress to correct that misconception and

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[162] *Id.*

[163] *Id.*

[164] *See* pp. 36-38 *supra*.

[165] *See* pp. 38-39 *supra*.

[166] Globe, *supra*, at 474.

[167] *See* pp. 34-36 *supra*.

[168] Globe, *supra*, at 471.

[169] *Id.*

declare all persons born in the United States to be citizens, entitling them "to the rights of citizens," which "are the very rights . . . set forth in this bill."[170]

Trumbull, thus, shared the standard understanding of the Comity Clause as extending to out-of-state citizens certain of the rights extended by a state to its own citizens.[171] He apparently saw the Civil Rights bill as a sort of *intra*-state Comity Clause, providing to freed slaves certain of the rights provided to white citizens of the state. And these rights, he believed, were the rights that appertain to citizens of the United States.

In his defense of the bill, Representative James Wilson, Chairman of the House Committee on the Judiciary, hinted that, in his view, the Comity Clause might also apply to relations between a State and its own citizens. He asserted "that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law . . . . We are reducing to statute form the spirit of the Constitution . . . . It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen."[172] If every state, he continued, would follow and enforce the Comity Clause, as interpreted in *Corfield*, Story's Commentaries, and *Campbell v. Morris*, "we might safely withhold action." He then added, "if above all, . . . the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the several States."[173]

It is not clear from this passage whether Wilson thought the Comity Clause itself applied to the relation between a State and its own citizens or that more general principles of national citizenship, such as those expressed by some abolitionists, required states to recognize fundamental rights in their own citizens. In later describing the sources of congressional power to enact the Civil Rights bill, however, he did not include the

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[170] *Id.*

[171] *See id.* at 600 (Trumbull: Comity Clause cases relate "entirely to the rights which a citizen in one State has on going into another state, and not to the rights of the citizens belonging to the State").

[172] *Id.* at 1117.

[173] *Id.* at 1117-18.

Comity Clause, but referred to section 2 of the Thirteenth Amendment and a general duty, implicit in the Constitution as a whole, to protect fundamental rights of citizens.[174]

In any event, in Wilson's view, the principal dereliction of the states in meeting this duty was in discriminating on the basis of race.

> This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.[175]

Wilson also explained his understanding of the phrase "civil rights and immunities" in the bill. He began by stating that the requirement of equality in "civil rights and immunities" did not mean "that in all things civil, social, political, all citizens . . . shall be equal." He specifically denied that suffrage, jury composition, or school attendance were covered by the terms. Rather, citing Kent, Wilson said that "civil rights" were "the absolute rights of individuals," such as the rights to personal security, personal liberty, and to acquire and enjoy property.[176] Civil rights had, to quote *Bouvier's Law Dictionary*, " 'no relation to the establishment, support, or management of government,' " but were, instead, the "natural rights of men." "Immunity" meant an exemption, so that under the bill, a "colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted. Whatever exemptions there may be shall apply to all citizens alike."[177]

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[174] *Id.* app. at 157.

[175] *Id.* at 1118.

[176] Later in the same speech, Wilson said, citing Blackstone and Kent, that these were also "fundamental rights." *Id.*

[177] *Id.* at 1117.

Representative William Lawrence of Ohio argued that there was a national citizenship and that national citizens were entitled to the rights of life, liberty, and property. "It has never been deemed necessary to enact [these rights] in any constitution or law," he maintained. "These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions."[178] Lawrence also suggested that the Comity Clause implicitly applied to relations between a state and its own citizens, at least where a State denied to a class of its citizens fundamental rights.

> Now, when this condition of affairs has been reached, I maintain that Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property, and the means essential to that end, by penal enactments to enforce the observance of the provisions of the Constitution, article four, section two, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State.[179]

Lawrence drew this implication, after reviewing the views of *Corfield*, Kent, and Story, by noting first, that the Comity Clause asserts two things:

> 1. That there are "privileges and immunities of citizens."
>
> 2. That "the citizens of each State" if they remove from one State to another "shall be entitled to all privileges and immunities of citizens" of the United States "in the" State to which they remove.[180]

Lawrence acknowledged that the Constitution does not define "privileges and immunities," but he maintained that the Comity Clause contemplated the existence of only one level of such privileges and immunities.

> This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of "some class," or "some race," or "of the least favored class," or "of the most favored class," or of a particular complexion, for these distinctions

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[178] *Id.* at 1833.

[179] *Id.* at 1835.

[180] *Id.* at 1836.

were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice.

This clause of the Constitution therefore recognizes but one kind of fundamental civil privileges equal for all citizens. No sophistry can change it, no logic destroy its force. There it stands, the palladium of equal fundamental civil rights for all citizens.[181]

The Civil Rights bill itself, he noted, did

not confer any civil right . . . . [b]ut . . . provide[s] that as to certain enumerated civil rights every citizen "shall have the same right in every State and Territory."

. . . . . .

The bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws.[182]

Thus, while the bill itself did not establish any rights, merely requiring equality as to certain rights, in Lawrence's view there were certain "inherent and inalienable" rights that states could not abolish.

Representative Bingham was among those opposing the bill, because he believed Congress was without constitutional authority in that area. He believed that

the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials

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[181] *Id.*

[182] *Id.* at 1832.

> acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States . . .
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> The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised. The prohibitions of power by the Constitution to the States are express prohibitions, as that no State shall enter into any treaty, &c., or emit bills of credit, or pass any bill of attainder, &c. The Constitution does not prohibit States from the enactment of laws for the general government of the people within their respective limits.[183]

Although others had argued that the phrase "civil rights and immunities" did not include political rights, such as the right to vote, Bingham maintained that "the term 'political rights' is only a limitation of the term 'civil rights' . . . [so that] political rights [are] all embraced in the term 'civil rights.' " It was apparently because of this concern that Bingham moved to strike from the bill the general nondiscrimination provision as to "civil rights and immunities."[184]

Bingham did believe that requiring equality as to the listed rights in the bill was sound policy, but thought that it should be brought about by constitutional amendment.

> I say, with all my heart, that that should be the law of every State, by the voluntary act of every State. The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.[185]

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[183] *Id.* at 1291.

[184] *See id.* It seems that Bingham was content to leave control of the voting franchise to the States. Bingham later voted for the readmission of Tennessee, notwithstanding its limitation of suffrage to white males, declaring that "When [blacks] shall vote rests with the people of the State. There I leave it." *Id.* at 3978-80.

[185] *Id.* at 1291.

As will be described below, in the meantime, Bingham had introduced an amendment, which had been reported by the Joint Committee, that would empower Congress to "secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Bingham noted that even this amendment would leave states with the primary role of protecting life, liberty, and property.

> [T]he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.[186]

In response to the objections of Bingham and others, the bill was recommitted to the Committee on the Judiciary, and when it reemerged, the general clause requiring equality of "civil rights and immunities" had been deleted, leaving only the clause specifying certain protected rights. Wilson explained, "I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended."[187] The bill passed the House 111-38, with Bingham voting against it, presumably because of his doubts about its constitutionality.

2. The Bingham Amendment

In the midst of the deliberations on the Civil Rights bill, the Joint Committee reported a proposed constitutional amendment primarily authored by Representative Bingham. The amendment would have empowered Congress "to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities

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[186] *Id.* at 1292. Bingham also stated, later in the same speech, "I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe." *Id.* at 1293.

[187] *Id.* at 1366.

of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property."[188] Thus, the proposed amendment would have granted two types of legislative power to Congress: (1) to enforce the Comity Clause, and (2) to secure equal protection to all persons in life, liberty and property rights.

The proposed amendment was quite controversial from the outset. In the Joint Committee, two of the more conservative Republicans joined with the Democrats in opposing the amendment.[189] The measure was not debated in the Senate, but ordered to lie on the table, where it remained.[190]

The proposed enforcement of the Comity Clause generated little controversy. Those who commented on that part of the proposal generally gave it the traditional interpretation. Representative Higby, for example, said that had the Comity Clause been enforced, a citizen of New York would have

> been treated as a citizen in the State of South Carolina; a citizen of Massachusetts would have been regarded as a citizen in the State of Mississippi or Louisiana. The man who was a citizen in one State would have been considered and respected as a citizen in every other State of the Union.
>
> But, sir, that provision of the Constitution has been trampled under foot; it has been considered in certain States of this Union as nugatory and of no force whatever. The intent of this amendment is to give force and effect and vitality to that provision of the Constitution which has been regarded heretofore as nugatory and powerless.[191]

Representative Price, another supporter of the amendment, said,

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[188] *Id.* at 1034.

[189] Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 Ohio St. L.J. 933, 946 (1984).

[190] Globe, *supra*, at 806.

[191] *Id.* at 1054.

> I understand it to mean simply this: if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that he would have had he lived there for ten years.[192]

Even Bingham's explanation at the clause seems to confine its questions to out-of-state citizens. He asked how anyone could suppose

> that any State has the right to deny to a citizen of *any other State* any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution.[193]

Representative Hotchkiss said that the first clause of Bingham's amendment "is precisely like the present Constitution; it confers no additional powers."[194]

The opposition focused on the grant of legislative power to secure equal protection in life, liberty, and property. Representative Hale, a somewhat conservative Republican who voted for the Civil Rights Act, was concerned that the provision could be construed to authorize Congress not just to rectify inequality in state laws, as Representative Stevens had suggested,[195] but to legislate directly to protect "life, liberty, and property, simply qualified with the condition that it shall be equal legislation."[196] Such a congressional power, he maintained, would be "an utter departure from every principle ever dreamed of by the men who framed our Constitution."[197] Hale directed no criticism at, and specifically declined to comment on, the Comity Clause portion of the proposal.[198]

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[192] *Id.* at 1088.

[193] *Id.* at 1089 (emphasis added).

[194] *Id.* at 1095.

[195] *Id.* at 1083.

[196] *Id.* at 1064.

[197] *Id.* at 1063.

[198] *Id.* at 1064-65.

Representative Davis, a member of the Unionist party, also objected to the second clause of the proposed amendment, contending that it was "a grant for original legislation by Congress .... [by which it could] arrogate those powers of legislation which are the peculiar muniments of State organizations and which cannot be taken from the States without a radical and fatal change in their relations."[199]

Even Representative Hotchkiss, a radical, raised the same objection, pointing out that if the opposition party gained control of the Congress, it might pass uniform laws "as I should be unwilling to be governed by. Should the power of the Government ... pass into the hands of the rebels, I do not want rebel laws to govern and be uniform throughout this Union."[200] In any event, Hotchkiss proposed that it would be wiser strategy to pass a constitutional amendment that would itself proscribe State discrimination against "any class of its citizens."

Shortly after Hotchkiss concluded his remarks, consideration of the amendment was postponed by a vote of 110-37, with Bingham joining the majority.[201]

3. Consideration In The Joint Committee On Reconstruction

After the postponement of consideration of Bingham's proposed amendment and after Congress overrode the President's veto to enact the Civil Rights Act, Representative Stevens, on April 21, 1866, introduced in the Joint Committee a Reconstruction plan devised by Robert Dale Owen, a well-known English humanitarian. Section 1 of the proposed amendment provided:

> No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.

Sections 2 and 3 of the proposed amendment prohibited discrimination in suffrage based on race on and after July 4, 1876, and exclusion from the basis of representation before that date of classes of persons denied suffrage because of race. Section 4 forbade payment of the confederate

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[199] *Id.* at 1087.

[200] *Id.* at 1095.

[201] *Id.*

war debt and claims for emancipated slaves, and section 5 provided congressional enforcement power.[202]

Bingham immediately moved to amend section 1 by adding at the end: "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." The proposal was defeated 5-7.[203]

Later the same day, Bingham proposed that a new section 5 be inserted as follows:

> Sec. 5. 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.[204]

His motion carried 10-2. Four days later, however, on April 25 the Committee voted 7-5 to strike this section,[205] and also voted down 4-8 Bingham's proposal offered later that same day to report the section as a separate amendment.[206] Undaunted, at the following meeting on April 28, Bingham moved to substitute his section for section 1 (which banned discrimination in civil rights based on race). The motion carried this time, 10-3,[207] and with this, and other alterations, the proposed constitutional amendment was reported to both Houses on a vote of 12-3.[208]

The voting patterns on section 1 are somewhat puzzling. As Professor Maltz points out, the "positions of the various committee members changed with almost dizzying speed" on the proposed language, and that of those who participated in all the votes, "every

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[202] B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 83-84, 295-96 (1914).

[203] *Id.* at 85.

[204] *Id.* at 87.

[205] *Id.* at 98.

[206] *Id.* at 99.

[207] *Id.* at 106.

[208] *Id.* at 114.

Republican except Bingham himself voted for the proposal on at least one occasion and against the proposal on at least one occasion."[209]

Professor Maltz, in his article carefully analyzing the political dynamics of the Joint Committee, posits that the substitution of Bingham's section for the original Owen version was viewed as a moderate measure. All three Democrats voted for the substitution, as did virtually all the conservatives and moderate Republican members of the committee. The radicals were split almost evenly. As Maltz puts it, "[o]ne would hardly expect such near unanimity [among the conservative and moderate factions] unless the proposal softened the language of section one."[210]

The substitution for, rather than the addition to, section 1 by Bingham's proposal had two important consequences. One, it eliminated any reference to race in the amendment,[211] which was consistent with Bingham's earlier stated concerns that the rights of white Union loyalists in the South be protected.[212] Second, rather than protecting "civil rights" generally, section 1 now protected "privileges or immunities," "due process" and "equal protection" rights. The latter formulation of section 1 rights was probably considered narrower than the earlier language. It will be recalled that the general reference to "civil rights and immunities" in the Civil Rights bill was similarly dropped because of a concern, expressed by Bingham and others, over its potential for "latitudinarian" construction, particularly with respect to political rights. Further, as Professor Maltz notes, the only explanation for the Democratic shift in favor of Bingham's substitute that is consistent with the Republican voting pattern is that Bingham's version "must have been aimed at a narrower class of rights than the Owen proposal."[213]

4. Debate on the Fourteenth Amendment

Representative Stevens, chairman of the House delegation to the Joint Committee, introduced the proposed Fourteenth Amendment on

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[209] Maltz, *supra*, at 960.

[210] *Id.* at 963.

[211] The other previous references were in the suffrage and representation sections, which had been deleted or revised.

[212] Globe, *supra*, at 1065.

[213] *Id.* at 964.

the floor of the House. In explaining section 1, he focused entirely on equality.

> This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.[214]

Stevens acknowledged that some may assert that the Civil Rights Act accomplished the same thing. "That is partly true," he said, "but a law is repealable by a majority . . . . This amendment once adopted cannot be annulled without two thirds of Congress. That [the opposition] will hardly get."[215]

Representative James Garfield also emphasized the objective of section 1 to enshrine the Civil Rights Act in the Constitution:

> I am glad to see this first section here which proposes to hold over every American citizen without regard to color, the protecting shield of law . . . . The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that [Democratic] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it.[216]

Representative Thayer reached the same conclusion.

> As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which

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[214] *Id.* at 2459.

[215] *Id.*

[216] *Id.* at 2462.

> has lately become a law, . . . in order . . . that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States.[217]

Representative Broomall emphasized the congruence of the Civil Rights Act with section 1, and argued that the amendment should be ratified to be doubly sure of the constitutional authority for the Act.[218]

Representative Raymond, a conservative Republican from New York who had voted against the Civil Rights Act, also believed that "[t]he principle of the first [section] . . . secures an equality of rights among all citizens of the United States." He had voted against the Civil Rights Act because he doubted Congress' power to enact it. The proposed amendment would "amend the Constitution as to confer upon Congress the power to pass it." Because he was in favor of the principle of equality, asking only "that it should be done by the exercise of powers conferred upon Congress by the Constitution," he said he would "vote very cheerfully for this proposed amendment . . . which I trust may be ratified by States enough to make it part of the fundamental law."[219]

Representative Thomas Eliot, a Massachusetts Republican, favored the amendment as settling beyond question Congress' authority to enact the Civil Rights Act.[220] In addition, in summarizing section 1, he

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[217] *Id.* at 2465.

[218] *Id.* at 2498:

> We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one. The fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition in another shape, in the civil rights bill, shows that it will meet the favor of the House. It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman from Ohio [Mr. Bingham] may answer this question. He says the act is unconstitutional. Now, I have the highest respect for his opinions as a lawyer, and for his integrity as a man, and while I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.

[219] *Id.* at 2502.

[220] *Id.* at 2511:

appeared to characterize the privileges or immunities clause in terms of a non-discrimination provision.

> I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation [1] *discriminating against classes of citizens* or [2] depriving any persons of life, liberty, or property without due process of law, or [3] denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.[221]

Representative Randall, a Democrat from New Jersey who opposed the entire amendment, believed the thrust of section 1 was "to make an equality in every respect between the races," which he opposed because "there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States."[222]

Representative Rogers, a Democrat from New Jersey who was a member of the Joint Committee, argued

> that the first section of this programme of disunion is the most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.
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> This section of the joint resolution is *no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill.*[223]

I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.

[221] *Id.* (emphasis and numbering added).

[222] *Id.* at 2530.

[223] *Id.* at 2538 (emphasis added).

Rogers also interpreted the phrase "privileges and immunities" quite broadly.

> Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. If a negro is refused the right to be a juror, that will take away from him his privileges and immunities as a citizen of the United States, and the Federal Government will step in and interfere, and the result will be a contest between the powers of the Federal Government and the powers of the States.[224]

Although the view of Democrats Rogers and Randall of the rights protected may have been broader than the Republican proponents had,[225] it is noteworthy that they agreed with the Republicans that the impact of section 1 was equality of rights, in effect constitutionalizing the Civil Rights Act.

Representative Farnsworth contended that all of section 1 but the equal protection clause was already in the Constitution. "But a reaffirmation of a good principle will do no harm, and I shall not therefore oppose it on account of what I may regard as surplusage."[226]

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[224] *Id.*

[225] Exaggerating the impact of a legislative or constitutional proposal is, of course, a common tactic used by those opposing such proposals.

[226] Globe, *supra*, at 2539. Although this statement evidences an understanding that equal protection was a primary objective of Section 1, it does not shed much light on Farnsworth's view on what the "surplusage" accomplished. In implying that the "privileges and immunities" and "due process" clauses were already in the Constitution, Farnsworth may have had reference to the Comity Clause and the Fifth Amendment (notwithstanding *Barron v. Baltimore*). Unfortunately Farnsworth does not explain what he believed those clauses, "reaffirmed" in section 1, meant to him. *Cf.* M. Curtis, *supra*, at 125-26 (Farnsworth may have adhered to radical abolitionist thought).

In his concluding remarks on the proposed amendment, Representative Bingham barely mentioned the equality objective of section 1, and did not mention its relationship to the Civil Rights Act at all. Section 1, he said, would provide

> power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[227]

Bingham did not attempt to give a comprehensive list of privileges or immunities protected by the clause, but he did specify one privilege that was *not* protected and three that were.

After arguing that the amendment "takes from no State any right that ever pertained to it," because "[n]o State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic," Bingham flatly declared that the amendment did not cover suffrage.[228] Suffrage was thus not a protected privilege or immunity of United States citizenship.

In reaching this conclusion, he intimated at the existence of another privilege or immunity.

> The second section [reducing a state's representation if it withholds suffrage from a class of people] excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican govern-ment and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to

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[227] Globe, *supra*, at 2542.

[228] *Id.*

> a despotic government, and thereby deny suffrage to the people.[229]

The right to a republican government under the Guarantee Clause of the Constitution (which does not address its enforcement) thus appears to be among the privileges or immunities protected by section 1.

To those who might argue that if suffrage was not covered, there was no need of the amendment, Bingham responded

> that many instances of State injustice and oppression have already occurred in the State legislation of this union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever.[230]

This suggests a concern with privileges that are guaranteed, by the Constitution or some other means, but for which no enforcement power existed in the federal government. Bingham continued,

> Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.[231]

This passage may be read in two ways. It may be read to mean that Bingham believed that the eighth amendment's proscription of "cruel and unusual" punishment already applied in some manner to the states, and that the federal government previously did not have, but would now have, power to enforce it. (This would be consistent with an incorporation, or selective incorporation, theory.)

On the other hand, the passage may mean that the "express letter" of the Constitution only proscribes "cruel and unusual punishments" for "sacred duty done." The "express letter" and "sacred duty" may be these described in the immediately succeeding passages.

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[229] *Id*

[230] *Id.*

[231] *Id.*

> Sir, the words of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" include, among other privileges, the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property. Next, sir to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.[232]

The Comity Clause, including in its unlisted privileges a right to bear allegiance, may be the "express letter" to which he refers.

> The time was in our history, thirty-three years ago, when, in the State of South Carolina, by solemn ordinance adopted in a convention held under the authority of State law, it was ordained, as a part of the fundamental law of that State, that the citizens of South Carolina, being citizens of the United States as well, should abjure their allegiance to every other government or authority than that of the State of South Carolina.[233]

Bearing allegiance to the United States may be the "sacred duty done," and forbidden by state law.

Bingham thought it quite ironic that, while Congress had power and acted to protect federal officials and revenues against South Carolina's "nullification" attempts, it did not have power to protect United States citizens from the State's allegiance law.

> Why was the act to provide for the collection of the revenue passed, and to protect all acting under it, and no protection given to secure the citizen against punishment for fidelity to his country? But one answer can be given. There was in the Constitution of the United States an express grant of power to the Federal Congress to lay and collect duties and imposts and to pass all laws necessary to carry that grant of power into execution. But, sir, that body of great patriotic men looked in vain for any grant of power in the Constitution by which to give protection to the citizens of the United States resident in

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[232] *Id.*

[233] *Id.*

> South Carolina against the infamous provision of the ordinance which required them to abjure the allegiance which they owed their country. It was an opprobrium to the republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law.[234]

Bingham concluded his treatment of section 1 by stating that that great want

> of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.[235]

Bingham's discourse suggested that the sole purpose of section 1 is to protect from state infringement rights the citizens and others already had under the Constitution, but that Congress, or the government as a whole, had not previously had power to enforce against the state. The three rights he used as examples were either already explicitly enforceable against the states (the Guarantee Clause), explicitly enforceable against the federal government ("cruel and unusual punishment"), or implicitly enforceable under the Constitution with respect to the States (the right to bear allegiance inherent in the Comity Clause).

The amendment passed the House 123-37.

On the Senate side, because Senator Fessenden, the Senate Chairman of the Joint Committee on Reconstruction, was ill, it fell to Senator Howard (who had in the earlier Committee deliberations voted against the substitution of Bingham's version for section 1) to present the amendment. Senator Howard began by analyzing section 1 clause by clause. "The first clause," he said, "related to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United Sates." In defining "citizen of the United States", he recounted that prior to the Constitution

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[234] *Id.* at 2543. The "degrading punishment" referred to in this last sentence may be the "cruel and unusual punishment" for "sacred duty done" that Bingham described.

[235] *Id.*

"the citizens of each State were, in a qualified sense, aliens to each other." To avoid confusion, he said,

> and to put the citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

This constituted each of the citizens of "the original States citizens of the United States," entitling them "to all the privileges and immunities of citizens in the several States." Wherever they go "within the limits of the several States," the United States citizens "may assert . . . these privileges and immunities, and ask for their enforcement."

Howard thought that "[i]t would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States," but he did not propose "to go at any length into that question" because he believed "[i]t would be a somewhat barren discussion." He noted that the Supreme Court had not yet defined "either the nature or extent of the privileges thus guarantied," but "we may gather some intimation of what probably will be the opinion of the judiciary" by referring to *Corfield v. Coryell*. He then quoted at length from Justice Washington's opinion in that case. Following that quotation, Howard explained,

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution.[236]

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[236] *Id.* at 2765. He continued by listing some of those rights. They included, he said,

> the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury

It is not entirely clear whether, by adding to the *Corfield* privileges and immunities the rights under the first eight amendments, Howard meant that the latter rights were also protected by the Comity Clause or, more likely, that those amendments provided a separate source of privileges and immunities of United States citizens. More importantly, it is not certain whether Howard's lumping the Comity Clause and the amendments together meant that the kinds of protection they offered were of the same nature, contrary to the general understanding of the time.

As discussed above, the Comity Clause privileges and immunities, which *Corfield* purports to catalog to a degree, were traditionally viewed as *nondiscrimination* rights. That is, the clause did not establish a minimum level of rights to be granted to out-of-state citizens, but whatever of the protected privileges and immunities were granted in-state citizens were required to be extended out-of-state citizens. The rights in the first eight amendments were, on the other hand, minimum rights applicable against the federal government. If Howard meant that the kinds of protection that the Comity Clause and the amendments offered were of the same nature, that could mean that the Comity Clause set some floor on the protected privileges and immunities, as well as protecting against discrimination[237] or, alternatively, that the first eight amendments protected only against discrimination.[238] Of course, it could well be that Howard did not mean that the kinds of protection provided by the different provisions were of the same nature at all, and recognized that the Comity Clause rights protected against discrimination and that the Bill of Rights contained minimum rights.

Having listed those privileges and immunities, Howard made some generalizations about the law governing their application to the states.

> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaran-tied by the Constitution or recognized by it, are secured to the citizen solely as a

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of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

[237] This would be consistent with Tiffany's theory of paramount national citizenship. See pp. 46-47 supra .

[238] *I.e.*, that states were required to protect out-of-state citizens in those rights to the same degree it protected its own.

citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year.

Howard's claim that *all* these privileges and immunities "do not operate in the slightest degree" upon state legislation is puzzling if it is meant to include the Comity Clause as well as the Bill of Rights. The Comity Clause was viewed as binding on the states and enforceable through the judiciary (but not necessarily Congress), else there would have been no *Corfield* or other decisions interpreting the clause. The statement may reflect carelessness on Howard's part, or it may be that that paragraph had reference only to the Bill of Rights. The second of the quoted paragraphs, however, noting a lack of "powers on the part of Congress to give them full effect" against the states could apply to the Comity Clause as well as the Bill of Rights.

After making the foregoing observations about the Comity Clause's and first eight amendments' privileges, immunities, and rights, Howard explained,

> The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have

> remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have the power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.[239]

In Howard's view, then, the privileges or immunities protected by section 1, in conjunction with section 5, were the *Corfield*-type rights and those in the first eight amendments.

As did Bingham, and virtually everyone else who addressed the topic, Howard also clearly stated that suffrage was not among the privileges and immunities protected by section 1.[240] After briefly explaining the due process and equal protection clauses, Howard summarized the purpose of section 1:

> It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal

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[239] *Id.* at 2766.

[240] *Id.*:

> But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.

> protection under the shield of the law, there is no republican government and none that is really worth maintaining.[241]

There was no further discussion on the Senate floor on section 1 (although heated debates regarding the other sections took place) until after a caucus among Republicans that was held from May 24-29, in an attempt to shore up unity in support of the amendment. The debate thereafter, at least among the Republicans, was somewhat muted. As a result of the caucus, section 1 was amended to include what is now its first sentence, defining citizenship. This led to some debate over the propriety of the definition, with occasional reference to the privileges or immunities of citizenship.

In arguing that the definition should exclude "Indians not taxed," Senator Doolittle, a Republican from Wisconsin, referred to the definition of citizenry contained in the Civil Rights Act, "which was the forerunner of the constitutional amendment, and to give validity to which this constitutional amendment is brought forward."[242]

Some Senators took offense at Doolittle's suggestion that they had passed the Civil Rights Act without proper constitutional authority, which led to a discussion of the purpose of the amendment with regard to the Act. Senator Howard repeated the same analysis that had been used several times in the House on this point.

> We desired to put this question of citizen-ship and the rights of the citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.[243]

Later in the debate, Senator Poland, a Vermont Republican, opined that the privileges or immunities clause secured nothing beyond what was intended by the Comity Clause. But, he said, the institutions of slavery and the doctrine of States' rights

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[241] *Id.*

[242] *Id.* at 2896.

[243] *Id.*

> led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter.

In light of the "social and political changes" resulting from the Civil War and the Thirteenth Amendment, Poland believed it would now be "eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance."[244]

This passage is not as helpful as it may appear at first blush, because it does not indicate whether Poland adhered to the consensus understanding of the Comity Clause as proscribing discrimination or believed it to establish a minimum level of protection.[245] However, to those who subscribed to the traditional understanding of the clause, it would be viewed as evidence that the clause only proscribed discrimination.

Senator Howe, a radical Union Republican from Wisconsin, thought section 1 was necessary because, although most states did not abridge the privileges and immunities of citizenship, among some of the Southern States there was "an appetite so diseased as such to abridge these privileges and these immunities, which seeks to deny to classes of its citizens the protection of equal laws."[246] He illustrated his assertion this way.

> It is known to the wide world now that but for the authority which has been exerted on the part of the United States most of these communities which now seek the right to participate in our legislation would have denied to a large portion of their respective populations the plainest and most necessary rights of citizenship. The right to hold land when they had bought it and paid for it would have been denied them; the right to collect their wage by the processes of the law when they had earned their wages; the right to appear in the courts as suitors for any wrong done them or any right denied them; the right

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[244] *Id.* at 2961.

[245] *See* M. Curtis, *supra*, at 127.

[246] *Id.* app. at 217.

> to give testimony in any court, even when the facts might be within their knowledge — all these rights would have been denied in most if not all of these communi-ties but for the fact, for which I have once before rendered and now again render thanks to the President of the United States, that he sat [*sic*] his face against these provisions or most of them, and said he would not tolerate them nor allow them to be sanctioned in any one of these communities.[247]

Howe said that "[m]ost of these pretenses have been abandoned in most of these communities," but that those were not the "only rights that can be denied [or] the only particulars in which unequal laws can be impaired." He then gave as an example a Florida statute under which blacks and whites were taxed to support white schools, but only blacks were taxed for black schools. He concluded by asking rhetorically whether, "if in view of one such fact as that you dare hesitate to put in the Constitution of the United States a positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed."[248] In the view of Senator Howe, then, the prime objective of the privileges or immunities and equal protection clauses was to eradicate the black codes and other racial discrimination.

Senator John Henderson, a Republican from Missouri, argued that section 1 would "leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Governments." The remainder of the section, he said, "merely secures the rights that attach to citizenship in all free governments."[249] Henderson argued at some length that *Dred Scott* was wrongly decided, and that blacks were United States citizens. As part of the argument, he referred to the Comity Clause. Blacks, he said, being citizens of their states and having become citizens of the United States, could not be deprived of that citizenship by the states.

> They therefore remained citizens of the States in which they might reside, and when they desired to remove from one State to another they had a right to claim in the State of their

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[247] *Id.* It is not clear why Howe does not refer to the effect of the Civil Rights Act in these matters.

[248] *Id.* app. at 218.

[249] *Id.* at 3031.

> domicile the privileges and immunities of "citizens in the several States."[250]

Later he refers to the Civil Rights Act as designed

> to give the right to hold real and personal estate to the negro, to enable him to sue and be sued in courts, to let him be confronted by his witnesses, to have the process of the courts for his protection, and to enjoy in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself. It was simply to carry out that provision of the Constitution which confers upon the citizens of each State the privileges and immunities of citizens in the several States.[251]

While Henderson's views on the scope of the privileges or immunities are less than clear, it appears that, in his view, there was some congruence between them and those protected by the Civil Rights Act.

Senator Richard Yates, a radical Republican from Illinois, would have preferred an amendment granting black suffrage. He agreed with Senator Fessenden, however, that "if he cannot get the best proposition he will take the next best proposition." Yates particularly liked the first sentence of section 1.

> But above all there is in the first section a clause that I particularly favor. It is this:
>
> > All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.

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[250] *Id.* at 3032. Henderson thought that among those protected privileges and immunities was the right to suffrage.

> I have already shown that in five States of the Union the negro enjoyed the right to vote when the Constitution was adopted. He was therefore a citizen in those States, and the Constitution declared that, being a citizen in one State, he should have the privileges and immunities of citizenship in every other State. Having the right, therefore, to vote in one State, the right would attach to him on equal terms with the white man whenever he removed his domicile to another State.

Id. at 3033. Nonetheless, he seemed to realize that suffrage was not covered by section 1. *Id.* at 3035.

[251] *Id.* at 3035.

> And then it goes on to provide that their rights shall not be abridged by any State. We have here, in the Constitution of the United States of America, a guarantee which protects us from future judicial tyranny such as we have experienced under the decisions of the Supreme Court.[252]

Unfortunately, apart from evincing Yates' antipathy to "judicial tyranny," the Yates speech does not declare what the rights are that may not be abridged.

Some Democrats in the Senate saw section 1 as intended essentially to ensure equality of the races. Senator Saulsbury, from Delaware, said,

> I do not presume that any one will pretend to disguise the fact that the object of this section is simply to declare that negroes shall be citizens of the United States. There can be no other object in it, I presume, than a further extension of the legislative kindness and beneficence of Congress toward that class of people.[253]

Senator Davis, from Kentucky, argued that the "real and only object" of the first sentence of section 1, as amended, was

> to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle.[254]

The privileges or immunities clause, he maintained, was unnecessary, because the principle was stated in "better and broader language" in the Comity Clause.

Two Democratic Senators suggested section 1 lacked clarity. Senator Hendricks of Indiana contended that

> What citizenship is, what are its rights and duties, its obligations and liabilities, are not defined or attempted to be

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[252] *Id.* at 3038.

[253] *Id.* at 2897.

[254] *Id.* at S.p. app. 240.

> defined; but these vexed questions are left as unsettled as during all the course of our history, when they have occupied the attention and taxed the learning of the departments of Government.[255]

Shortly before the debate closed, Senator Reverdy Johnson, a Democratic member of the Joint Committee, said he favored most of section 1, but he thought it "quite objectionable to provide that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' simply because I do not understand what will be the effect of that."[256]

No further mention was made of section 1, and the amendment was passed 33-11.[257] The amendment, as revised by the Senate, was returned to the House, where it passed 120-32.[258] No further comment was made there with respect to the scope of the privileges or immunities clause.

5. Summary of the Congressional Debate

A major and minor theme may be seen in the congressional debates on section 1 of the Fourteenth Amendment. The predominant view of section 1 was that its purpose was to require nondiscrimination — on the basis of color, state of origin, or loyalty to the Union. This theme is seen by the constant reference to its relationship with the Civil Rights Act, with some claiming that the purpose of the amendment was to assure a constitutional basis for the Act, and many others, radical and conservative alike, asserting that the amendment simply constitutionalized the Act, disabling future legislative majorities from overturning it without going through the amendment process. Others saw the privileges or immunities clause, together with section 5, as assuring the protection promised by the Comity Clause to Northerners traveling in the South. Some thought the Comity Clause already proscribed racial discrimination as to privileges and immunities, but that the amendment would clarify and authorize congressional enforcement of that protection. Others believed there was a need for protection of white loyalists in the

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[255] *Id.* at 2939.

[256] *Id.* at 3041.

[257] *Id.* at 3042.

[258] *Id.* at 3149.

South, which would be supplied by section 1 (which made no explicit reference to race).

A much less prevalent theme, but one for which there is some evidence, is that the privileges or immunities clause establishes certain minimum civil rights standards. Senator Howard's remarks support the application of the Bill of Rights as substantive and procedural limitations on the states. Representative Bingham's comments on enforcing the "bill of rights," while somewhat ambiguous, provide some evidence for incorporation, as do other, occasional references in the debates to some of the rights protected under the first eight amendments.

It is less clear from Howard's opening speech whether he understood, or others understood him to mean, that the privileges or immunities clause established a minimum content with respect to the *Corfield* "fundamental" privileges and immunities —which he said never could be "fully defined" — or merely prohibited discrimination in the definition and enforcement of those rights. A floor on the fundamental rights would be consistent with Tiffany's theory of paramount national citizenship, which theory may be reflected in Howard's and some of the speeches, but there is nothing particularly helpful in the debates on where precisely to draw the line in determining whether a State has violated those rights. There is, however, considerable evidence that it was contemplated that the States would continue to have the primary role in defining and protecting the fundamental privileges and immunities.

D. Media Coverage and the Campaign of 1866

Newspaper coverage of the congressional debates reflected some of the divergence of opinion as to section 1's scope. For example, the *New York Times*[259] and *New York Herald*[260] published almost verbatim Senator Howard's opening statement which referred to the *Corfield* privileges and immunities and the Bill of Rights. The *Boston Daily Advertiser*, in summarizing Howard's speech, did not include those references, but emphasized coverage of fundamental rights and nondiscrimination.

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[259] N.Y. Times, at 1, col. 4 (May 24, 1866).

[260] N.Y. Herald, at 1, col. 2 (May 24, 1866).

> The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government. There was now no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations, and the States were not restricted from violating them, except by their own local constitutions and laws. The great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful. This does not give the right of suffrage which has always been regarded, not as a natural fundamental right, but as a creation of law.[261]

In summarizing its understanding of section 1, the *Cincinnati Commercial* referred to the non-discrimination objective:

> The object of this amendment is clear enough. It throws around all classes—native and naturalized—the protecting arm of the Constitution. Being citizens of the United States no legislation hostile to any class, and calculated to deprive it of the rights and immunities to which a citizen is entitled, will be valid. All will be equal before the federal law, and all citizens of a State equal before its laws. With this section engrafted upon the Constitution it will be impossible for any Legislature to enact special codes for one class of its citizens, as several of the reconstructed citizens, as several of the reconstructed citizens, as several of the reconstructed States have done, subjecting them to penalties from which citizens of another class are exempted if convicted of the same grade of offense, or confer privileges upon one class that it denies to another. It is evident if the great Democratic principle of equality before the law is to be enforced in this country, an amendment to the Constitution imperatively enforcing it is required.[262]

Similarly, in the congressional election campaign of 1866, some emphasized nondiscrimination and others the protection of fundamental

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[261] Boston Daily Advertiser, at 1 Col. 2 (May 24, 1866).

[262] Cincinnati Commercial, at 4, col. 2 (June 21, 1866).

rights. For instance, in a speech at a Republican rally, Senator Trumbull urged that section 1 was equivalent to the Civil Rights Act.

> The first [Section] . . . declares the rights of the American citizen. It is a reiteration of those rights as set forth in the "Civil Rights Bill"—an unnecessary declaration, perhaps, because all those rights belong to the citizen now, but to avoid cavil it was thought proper to put in the fundamental law the declaration that all the citizens were entitled to equal rights in this Republic, and that all—whether they were born here or came from a foreign land and were naturalized—were to be deemed citizens of the United States, and in every State where they might happen to dwell.[263]

Others indicated that the privileges or immunities had some substantive content. Representative Lawrence said, borrowing the language of *Corfield*, that the protected privileges or immunities were "confined to those privileges and immunities which are in their nature fundamental, which belong of right to citizens of all free Governments . . . . They may be comprehended under the following 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." By way of example, Lawrence mentioned the right to pass through and reside in a state, to claim the right of habeas corpus, access to courts, and to be exempt from higher taxes than other state citizens.[264]

In one of his campaign speeches, Representative Bingham hinted that certain First Amendment rights might be within the scope of section 1.

> I hazard nothing, I think, in saying to the American people that the adoption of that amendment by the people, and its enforcement by the laws of the nation is, in the future, as essential to the safety and the peace of this Republic, as is the air which surrounds us essential to the life of the people of the nation. Hereafter the American people can not have peace, if, as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for

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[263] Chicago Tribune at 4, col. 2 (Aug. 2, 1866).

[264] Cincinnati Daily Gazette, at 1, cols. 3-9 (Aug. 18, 1866).

> teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.[265]

Records of the consideration by state legislatures of ratification of the amendment are sparse. Fairman and Curtis have both analyzed the records that do exist in making their cases for and against incorporation. As in the congressional debates, the media coverage, and campaign speeches, evidence to support the themes of nondiscrimination and some level of substantive rights may both be found in the records.[266]

E. The Slaughter-House Cases

The Supreme Court first construed the privileges or immunities clause in 1873 in the *Slaughter-House Cases*.[267] That case involved a law enacted by the Louisiana legislature establishing a slaughter-house corporation and granting it the exclusive right to maintain slaughter-houses within an 1154 square mile area that included New Orleans. A number of butchers challenged the monopoly, alleging, among other things, that the statute violated the privileges or immunities clause of the Fourteenth Amendment.

By a 5-4 vote, the court rejected the claim. Justice Miller wrote the majority opinion. There were three dissenting opinions; Justice Fields' dissent was concurred in by three other Justices, Justice Bradley's was joined only by Justice Swayne, and Justice Swayne's dissent received no concurring votes.

Justice Miller, for the majority, began his discussion of the constitutional issues by observing that the reconstruction amendments must be construed in light of "their unity of purpose, when taken in connection with the history of the times."[268] The Fourteenth Amendment, he explained, was prompted by the black codes, which "imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property, to such an extent that their freedom was of little value, while they had lost the protection

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[265] Cincinnati Commercial at 1, col. 3 (Aug. 27, 1866). The 1866 campaign speeches are treated more extensively in Fairman, *supra*, at 70-78; M. Curtis, *supra*, at 131-45.

[266] Fairman, *supra*, at 81-126; M. Curtis, *supra*, 145-53.

[267] 83 U.S. 36 (1873).

[268] *Id.* at 67.

which they had received from their former owners."[269] These circumstances gave rise to "the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much."[270] This was not to say that only blacks were entitled to the protection of the amendment, but that "in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution."[271]

Justice Miller then explained that the first sentence of section 1 of the Fourteenth Amendment was designed to overrule *Dred Scott* and establish "a clear and comprehensive definition of citizenship . . . of the United States and also citizenship of a State."[272] That definition "clearly recognized and established" a distinction between state and United States citizenship.[273] The privileges or immunities clause, however, protected only "'the privileges or immunities of citizens of *the United States*,'"[274] whatever those were, and not those of the citizens of a state. The privileges and immunities of state citizenship must therefore "rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment."[275]

Justice Miller then traced the history of the Comity Clause from the Articles of Confederation through the Court's then recent decision in *Paul v. Virginia*. In doing so, he cited *Corfield* approvingly, observing that its definition had been adopted "in the main" by the Court in *Ward v. Maryland*.[276] He emphasized that the Comity Clause did not create any of the rights it protected, and provided "no security for the citizen of the State in which they were claimed or exercised." Its sole purpose was to declare that "whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on

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[269] *Id.* at 70.

[270] *Id.*

[271] *Id.* at 72.

[272] *Id.* at 73.

[273] *Id.*

[274] *Id.* at 74 (emphasis supplied by the Court).

[275] *Id.* at 75.

[276] *Id.* at 76 (citing *Ward v. Maryland*, 79 U.S. 418 (1870)).

their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."[277] Thus, with the exception of a few express limitations contained in the Constitution, prior to the Fourteenth Amendment "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government."[278]

The Court did not believe that the privileges or immunities clause was intended "to transfer the security and protection of all [those] civil rights . . . from the State to the Federal government," nor that the enforcement power of section 5 was intended "to bring within the power or Congress the entire domain of civil rights heretofore belonging exclusively to the States." That result

> and more must follow, if the proposition of plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions . . . . And still further, such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.[279]

Justice Miller admitted that an argument based on the severe consequences of a particular construction of constitutional language was not "the most conclusive," but

> when . . . these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore

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[277] *Id.* at 77.

[278] *Id.*

[279] *Id.* at 77-78.

"was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." The Supremacy Clause, he pointed out, already protected such rights from state infringement.[283]

As had the majority, Justice Field reviewed the history of the Comity Clause, and quoted approvingly the definition of protected privileges and immunities in *Corfield*. He then gave this reading of the Fourteenth Amendment's privileges or immunities clause:

> What the [Comity C]lause did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.[284]

Justice Field then made an argument, not relevant here, why he believed that the slaughter-house monopoly violated the equality requirement of the privileges or immunities clause.

Justice Bradley, joined by Justice Swayne, argued that although the "right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, . . . there are certain fundamental rights" that may not be infringed. The State may "prescribe the manner of their exercise, but it cannot subvert the rights themselves." In describing those fundamental rights, Justice Bradley referred to "the rights of citizens of any free government," to the rights of Englishmen brought by the colonists to this country as established in the Magna Carta and various acts of the Parliament, to the references to rights in the Declaration and Resolves of the first Continental Congress and in the Declaration of Independence, and to the definition of privileges and immunities in *Corfield*.[285]

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[283] 83 U.S. at 96.

[284] *Id.* at 100-01.

[285] *Id.* at 114-17. Justice Bradley hinted that he doubted that the Comity Clause secured "only an equality of privileges with the citizens of the State in which the parties are

> universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.
>
> We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.[280]

The Court then "venture[d] to suggest" some privileges and immunities that owed "their existence to the Federal government, its National character, its Constitution, or its laws," and thus were protected by section 1.[281] One was the right, recognized in *Crandall v. Nevada*,[282] of traveling to "the seat of government" to conduct any business a citizen has with it, and of free access to its seaports, offices, and courts of justice. Another was the privilege of demanding the "care and protection of the Federal government over his life, liberty, and property when on the high seas" or in a foreign land. The "right to peaceably assemble and petition for redress of grievances," and the "privilege of the writ of *habeas corpus*" were also within the privileges and immunities protected by the clause. Others included the right "to use the navigable waters of the United States," the rights secured by treaties of the United States, and the rights specifically secured by the reconstruction amendments.

Because the Court concluded that the right claimed by the plaintiffs to be free of the slaughter-house monopoly was not a privilege or immunity of national citizenship, it held that the clause had no application in the case.

In his dissenting opinion, joined by three other Justices, Justice Field wrote that if the majority was correct that the clause protected only "such privileges or immunities as were before its adoption specially designated in the Constitution or necessarily implied," then the clause

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[280] *Id.* at 78.

[281] *Id.* at 79.

[282] 73 U.S. 35 (1867).

Justice Bradley also maintained that the rights specified in the Constitution against either state or federal infringement were among the privileges and immunities of citizens of the United States. That listing, as it stood before the reconstruction amendments, specified only a "few of the personal privileges and immunities of citizens, but they are very comprehensive in character." In listing some of those rights, he gave particular emphasis to the due process clause, which he said "includ[ed] almost all the rest." He also argued that even if those specific guarantees were not included in the Constitution, the fundamental privileges and immunities of citizens, as such, would "be no less real and no less inviolable than they are now."[286]

Justice Bradley acknowledged that prior to the Fourteenth Amendment, "the protection of . . . fundamental privileges and immunities . . . was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency or the State governments themselves."[287] But those fundamental privileges and immunities were now subject also to federal protection through the Fourteenth Amendment. Justice Bradley downplayed the majority's concerns that his construction would lead to a significant diminution in the roles of the states and federal interference with internal state affairs.

> In my judgment no such practical inconveniences would arise. Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect. Like the prohibition against a law impairing the obligation of a contract, it would execute itself . . . . As the privi-leges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal courts.[288]

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found." The language of that clause was "fairly susceptible of a broader interpretation" that would guaranty to citizens in a state the fundamental privileges and immunities of citizens as such, as distinct from the privileges and immunities that the state grants its own citizens. *Id.* at 117-18.

[286] *Id.* at 118-19.

[287] *Id.* at 121.

[288] *Id.* at 123-24.

Justice Swayne submitted a separate dissent, which no one else joined, describing in general the purposes of the amendment, but referring to Justice Fields' and Justice Bradley's opinions for analysis as to why the slaughter-house monopoly violated section 1.[289]

Three principal theories are represented in the *Slaughter-House Cases* opinions. In the majority's view, the "fundamental" privileges and immunities traditionally defined and protected by the States are not covered by section 1's privileges or immunities clause, but that clause protects only rights implicitly or explicitly established by the Federal Constitution and laws. In the view of four Justices, as explained in Justice Field's opinion, the clause required an equality among state citizens as to the "fundamental" rights. In the view of Justices Bradley and Swayne, the clause provides federal protection of a minimum level of those fundamental privileges and immunities.

F. Analysis of the Principal Interpretations of the Privileges or Immunities Clause

1. The Slaughter-House Majority

The interpretation of the privileges or immunities clause proffered by the *Slaughter-House Cases* majority is perfectly consistent with the text of the clause. In determining what are the privileges or immunities of citizens of the United States, it is natural to look to the Constitution, as amended, and to other federal laws establishing or protecting privileges or immunities.

Justice Field's complaint that the majority interpretation made the clause "vain and idle" is overstated. First, the privileges or immunities clause, when combined with section 5, authorizes *Congress* to enact legislation to enforce certain Federal rights — like the Comity Clause right against interstate discrimination —that it otherwise may not have. Second, the majority's interpretation of the clause affirms that there are certain rights that flow from the structure and nature of the federal government, although not necessarily expressly stated in the Constitution — such as the right of access to federal seaports, offices, and courts of justice —that may not be abridged by the states. And third, as a rule reaffirming the supremacy clause and the invulnerability of federal

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[289] *Id.* at 124-30.

privilege and immunities to state abridgment, the clause performs a declaratory function similar to the Ninth and Tenth Amendments.[290]

At least one prominent contemporary constitutional scholar, Thomas M. Cooley, reached essentially the same conclusion as the majority. In his 1873 revision of Story's Commentaries, published apparently before the *Slaughter-House* decision, he insisted that the "privileges which pertain to citizenship under the general government are as different in their nature from those which belong to citizenship in a State as the functions of the one are different from those of the other."[291]

Moreover, there are portions of the legislative history of the amendment that lend some support to this interpretation. For example, two of the three rights listed by Bingham as examples of the privileges and immunities — in his only speech on the wording finally adopted by Congress — were either explicitly or implicitly set forth in the Constitution: the right to republican government under the Guarantee Clause and the right to bear allegiance to the general government implicit in the Comity Clause. The third example, the prohibition or cruel and unusual punishments, may, as described above, have related only to punishments for exercising those explicit or implicit rights.[292]

Similarly, Governor Thomas Fletcher's message to the Missouri legislature explaining the Fourteenth Amendment also seems consistent with the *Slaughter-House* view.

> The first section of the proposed amendment secures to every person, born or naturalized in the United States, the rights of a citizen thereof in any of the States. It prevents a State from depriving any citizen of the United States of any of the rights *conferred on him by the laws of Congress*, and secures to all persons equality of protection in life, liberty and property, under the laws of the State.[293]

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[290] *See* McAffee, *Constitutional Interpretation —The Uses and Limitations of Original Intent* 12 U. Dayton L. Rev. 275, 283-84 (1986); *see also* Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954).

[291] 2 J. Story, *supra*, § 1937, at 658-59.

[292] Pp. 70-72 *supra*.

[293] Mo. Sen. J. 14 (1867) (emphasis added).

On the whole, however, the legislative history of the privileges or immunities clause suggests an intent to go beyond the *Slaughter-House* rights. On this, virtually all modern commentators are in agreement,[294] although they are not in agreement as to how far beyond those rights go.

2. Equality

The text of the privileges or immunities does not, on its face, refer to equality. As Professor Ely points out, the language of the clause seems to contemplate "substantive entitlement."[295] Yet read against the background of the Comity Clause, as it was generally understood at the time, the privileges or immunities clause is compatible with an equality construction.

As discussed above, one of the reasons proffered by Chief Justice Taney for denying citizenship to freed African slaves or their descendants was the effect the Comity Clause would have on their rights in Southern States if they were considered citizens. He argued that, if blacks were citizens, a free black citizen from one state, residing temporarily in a Southern state, would be entitled under the Comity Clause to the privileges and immunities of white citizens. (Because this result seemed improper, but required under the Comity Clause, Taney concluded that the premise — black citizenship —must be wrong). If, however, the black person resided long enough in the state to become a citizen, the Comity Clause would no longer apply, and the individual's privileges and immunities would revert to those granted free blacks in the state.[296]

Against this background, section 1 does two things. First, it affirms the United States citizenship of freed slaves and their descendants, so that under the Comity Clause, they are entitled to the privileges and immunities of white citizens when visiting other states. Second, because section 1's privileges or immunities clause is not, on its face, limited to

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[294] *See e.g.*, 81 C. Fairman, *Reconstruction and Reunion 1864-88*, pt. 1, at 1349-55 (1977); Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1 (1954); R. Berger, *Government by Judiciary* 20-51 (1977), M. Curtis, *supra*; J. Ely, *supra*, at 22-30; Grey, *supra*, at 716; L. Tribe, *supra* at 418-21; Currie, *The Constitution in the Supreme Court: Limitations on State Powers 1865-1873*, 51 U. Chi. L. Rev. 329, 352 (1984); *but see* H. Meyer, *The History and Meaning of the Fourteenth Amendment* 107-08 (1977).

[295] J. Ely, *supra*, at 24, n.45.

[296] *See* pp. 40-41 *supra*.

citizens of one state visiting the others, it requires each state to extend the privileges and immunities of white citizens to black citizens of the state itself, *i.e.*, an intrastate counterpart to the interstate equality concept. As Justice Field stated, the inhibition on hostile interstate discrimination contained in the Comity Clause was by the privileges or immunities clause extended to protect each citizen from "hostile and discriminating legislation against him in favor of others" from the same or a different state.[297]

It may be argued that the equal protection clause accomplishes the same object. It is not the purpose of this paper to present an authoritative construction of the equal protection clause, but at least two observations are in order. First, under this construction, the privileges or immunities clause only applies to citizens of the United States; the equal protection clause extends some measure of equality of protection to all persons within the states' jurisdiction, including aliens, but necessarily would not extend to aliens the privileges or immunities of United States citizenship. Second, the equal protection clause may be seen as directed principally at executive and judicial enforcement of the laws, while the privileges or immunities clause may be viewed as addressing primarily legislation ("no State shall make or enforce any law").

As has been addressed at length above, non-discrimination was the principal theme addressed in the debates on the privileges or immunities clause and related issues. At the same time that many desired to provide a modicum of federal protection of privileges and immunities that had previously been protected by the states, it was intended that those fundamental privileges and immunities would continue to be principally the domain of the states. Indeed, concern that Bingham's earlier version of section 1 — authorizing Congress to enforce the Comity Clause and to assure equal protection of life, liberty, and property —would shift power to legislate in the areas of life, liberty, and property from the states to Congress contributed significantly to its failure to be adopted.[298] Providing for nondiscrimination in privileges and immunity of citizenship under state law provides the modicum of federal protection necessary to right the evils at which the amendment was directed, yet leaving the principal control of those privileges and immunities in the hands of the states. As Professor Harold Hyman has written:

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[297] 83 U.S. at 100-01.

[298] *See* pp. 61-62 *supra*.

> Instead of formulating positively national civil-rights minima, as some Republican Radicals preferred to do, the Amendment forbade unequal deprivations of the broad, uncodified, vague mass of civil-rights practices which a state professed to afford equally to the generality of its citizens. Thus the Amendment assumed the familiar negative cast of the 1787 Constitution's Bill of Rights without specifying bills of wrongs for every state. The states would do that job. At a given moment a state's laws, constitutions, procedures, and customs would be the catalogue of what a state must not deny selectively to its free Americans. As in the Civil Rights law, states could turn off a national presence by equalizing official intrastate life styles.[299]

3. Incorporation of the Bill of Rights

Much has been written on whether the privileges or immunities clause applies the first eight amendments to the states. Justice Black started the recent debate over the issue, arguing in 1947 in a dissenting opinion in *Adamson v. California*,[300] that the Fourteenth Amendment incorporated the Bill of Rights. In 1968, he settled on the privileges or immunities clause as the clause through which incorporation was accomplished.[301]

In 1949, Professor Fairman responded to Justice Black's 1947 opinion in a 134-page law review article[302] in which he exhaustively examined the debates in Congress, newspaper reports, records of state legislatures considering ratification, and state constitutions before and after ratification. He concluded that section 1 was not understood to nationalize the Bill of Rights, although he opined that selective incorporation would be consistent with the original understanding.[303]

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[299] H. Hyman, *A More Perfect Union* 467-68 (1973).

[300] 332 U.S. 46 (1947) (Black, J., dissenting).

[301] *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

[302] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 Stan. L. Rev. 4 (1949).

[303] *Id.* at 139.

Five years later, Professor Crosskey responded in a 143-page article,[304] analyzing in detail Professor Fairman's claims, and concluding that the amendment was intended to incorporate the Bill of Rights. Other scholars entering the fray include Graham,[305] tenBroek,[306] and Berger,[307] who have maintained that full (or in Berger's case, any) incorporation was not intended, and Avins[308] and Curtis,[309] who have contended that it was.

As can be seen from the split of scholars, the issue is not an easy one to resolve. For the reasons set forth above, we think the evidence that the privileges or immunities clause was understood to establish civil rights minima is not as strong, even with respect to the traditionally recognized rights that are secured in the first eight amendments, as the evidence that the clause was understood to proscribe discrimination. However, even if it is concluded that all such rights are incorporated in the privileges or immunities clause, this does not, in itself, make the clause "open-ended"; the clause would then extend no further than the scope of the Bill of Rights.

4. Other Fundamental Rights

Some of the evidence supporting incorporation of the Bill of Rights supports the existence of other "fundamental rights." As noted above, Senator Howard lumped the first eight amendments together with the *Corfield* privileges and immunities in describing the coverage of the privileges or immunities clause. There are also frequent references in the debates on the Civil Rights bill and the Fourteenth Amendment to "inalienable," "inherent," or "fundamental" rights of citizenship. Most of these statements were made in the context of criticizing slavery or the black codes, however, making those statements as consistent with a nondiscrimination construction of the clause, as with a fundamental rights interpretation. But some of the statements suggest that certain

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[304] Crosskey, *supra*. Professor Fairman wrote a short reply published in the same issue. Fairman, *A Reply to Professor Crosskey*, 22 U. Chi. L. Rev. 144 (1954).

[305] Graham, *supra*, at 660.

[306] J. tenBroek, *supra*, at 238.

[307] R. Berger, *supra*, at 134-56.

[308] Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates*, Harv. J. Legis. 1 (1968).

[309] M. Curtis, *supra*.

rights may not be abridged, even on a nondiscriminatory basis, suggesting that, in the minds of some, the privileges or immunities clause may have established a floor on such rights to be protected by the federal government. That was also apparently the view of Justice Bradley in the *Slaughter-House Cases.*

Nevertheless, there does not appear to have been a consensus in Congress that the clause established any floor to be federally enforced. The prime consensus was that section 1 established a constitutional principle of nondiscrimination, but that subject to that (and other constitutional) limitations, the states were free to define and protect the privileges and immunities of their citizens. Indeed, there were many statements that section 1 was equivalent to the Civil Rights Act, limiting the clause to a nondiscrimination function. The validity of the minimum fundamental rights theory was further cast in doubt when it was rejected, soon after the adoption of the Fourteenth Amendment by seven of the nine Justices on the *Slaughter-House* Court, all but one of whose members had been appointed by Presidents Lincoln and Grant.

Even if the natural or fundamental rights alternative were correct, that would not make the clause an "empty vessel" into which judges could pour their policy preferences. As Professor Berger has pointed out, at the time of the framing of the Fourteenth Amendment, natural rights and the rights of "life, liberty, and property" had a fairly narrow ascertainable meaning.[310] Moreover, those rights were not, according to the most frequently cited authorities, "absolute" in the sense of being immune from state regulation, but were subject to definition and regulation by the states.[311]

In light of all of this evidence, the privileges or immunities clause of the Fourteenth Amendment simply cannot be construed as authorizing the judicial creation of rights unmentioned in the Constitution.

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[310] R. Berger, *supra*, at 35. *See* Globe, *supra*, at 471 (statement of Representative Wilson) (rights of citizenship are "the very rights . . . set forth in this [Civil Rights] bill").

[311] *See Corfield v. Coryell, supra*, at 551-52 (privileges or immunities "subject . . . to such restraints as the government may justly prescribe for the general good of the whole"); 1 Blackstone, *Commentaries on the Laws of England* 125-36 (1765-1769); 2 Kent, *Commentaries on American Law* 12-37, 326-40 (1866).

IV. Conclusion

Neither the Ninth Amendment nor the privileges or immunities clause licenses courts to engage in judicial activism by creating new rights out of whole cloth or based on some amorphous extra-constitutional standard.

The Ninth Amendment is a rule of construction, emphasizing that ours is a federal government of limited powers, and that the individual rights not delegated to the government are not to be denied or disparaged simply because they are not explicitly mentioned. By definition, then, those unenumerated retained rights cannot conflict with or override the delegated powers.

The original meaning of the privileges or immunities clause is not entirely clear. The text and history most strongly support interpreting those rights to include the ones recognized in the *Slaughter-House Cases*, and the principle of nondiscrimination described above. There is less evidence supporting an interpretation that the clause incorporates the Bill of Rights, and the evidence strongly militates against an interpretation of the clause that would establish minimum natural or fundamental rights not mentioned in the Constitution that are to be protected from state abridgment. But even if both of these latter views are correct, the clause would not be open-ended. The protected privileges or immunities still would extend no further than those reflected in the Bill of Rights or other provisions of the Constitution, and to the rights of life, liberty, and property, as these were understood in 1866 (and which, according to the most frequently cited authorities) were subject to regulation in accordance with law.

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