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## The Original Public Understanding of Privileges or Immunities

James J. Ward\*

*[This soldier] desires to have his supper at your eating house, and as your house is a public one, it is expected at these headquarters that no distinction be made on account of color or race. If this soldier does not receive his meal, and is not treated in the same manner as any of your customers . . . your establishment will be closed . . .*<sup>1</sup>

*Unoffending citizens, in the pursuit of their private business, are rudely interfered with, and their houses closed, because they did not choose to admit negroes to their table upon the same footing as white men.*<sup>2</sup>

### I. A TEXTUAL ORPHAN

The Constitution tells us more about who we are as a people than its scant four thousand words would suggest. Its structure shows what the Framing generation wanted from government, and what they feared from it. The Amendments help chronicle the beginnings of the great democratization, the Radical moment in the 1860s and 70s, the Progressive moment, and the Executive crises of the mid-twentieth century. The document and its interpretation also tell us about who we are by illustrating the paths we chose not to follow, or perhaps the paths that were closed off from us.

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\* Associate, King & Spalding LLP. I wish to thank Laura Rawski and Alexis Zouhary for their input. I am particularly grateful to Fred Gedicks for his invaluable contributions and insight during the drafting of this article. *A.M.D.G.*

1. *Negro Equality—An Outrage upon the Rights of Citizens*, THE MEM. DAILY AVALANCHE, Feb. 2, 1866 (page 1). This source, and other newspaper sources from the late 1800s which are cited in this Article were retrieved from the Database of America's Historical Newspapers, available at [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required), and at various educational institutions around the country. Where the original sources did not include page numbers, the page number on which the cited material may be found in the database is indicated in the parenthetical following the date of the article.

2. *Id.* The author proceeds to cite the Third Amendment to the Constitution and remarks, with unintentional irony, "Such an instrument [the Constitution] was believed to exist, but we have heard little of it lately." *Id.*

After the end of the Civil War, Americans began to consider questions besides who would defeat Robert E. Lee. The convulsive effect of the Rebellion reached all aspects of American life, and the law was no exception. The entire legal superstructure that developed around African bondage, its badges, and its incidents was either to be destroyed or reconciled to the views of the victorious Union. Slavery, of course, would have to be abolished, but much more remained doubtful or at least questionable. Would the federal government be supreme over the states? Would blacks ascend to full participation in civil society? Would the South remain under occupation forever, with freedmen's rights secured only by the armies of bluecoats in her midst? The answers to these questions were not clear in the immediate aftermath of the struggle.

Soon, though, Andrew Johnson's management of Reconstruction would falter, and the Republican majorities in Congress would place their stamp on constitutional history without him. In a period of dizzying governmental activity, the Radical Republicans enacted sweeping reform—including the first Civil Rights Acts, the establishment of agencies for their implementation, and three constitutional amendments.<sup>3</sup> Among these, the Fourteenth Amendment was the clearest effort by Republicans to define the new order of government, and to re-orient individuals and states in their relationship to Washington.

The standard interpretation of the Fourteenth Amendment—as understood by the Supreme Court and most legal scholars—is that the Due Process<sup>4</sup> and Equal Protection Clauses<sup>5</sup> represent sources of modern liberty.<sup>6</sup> Most believe that the Privileges or Immunities Clause<sup>7</sup> had no radical or substantive effect at the time of passage, but instead reflected a traditional baseline of rights. Others suggest that the Privileges Clause might have had meaning, but, like a mute Lazarus, its resurrection would make no difference because courts

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3. See generally MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 34–46 (1986) (providing historical background for the Civil War Amendments).

4. U.S. CONST. amend. XIV, § 1, cl. 3 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

5. *Id.* cl. 4 (“nor deny to any person within its jurisdiction the equal protection of the laws.”).

6. Entire law school courses are taught about the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

7. U.S. CONST. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

would interpret the Clause to the same effect as the other Clauses in Section 1.<sup>8</sup>

These standard approaches—like many rules of thumb—are ideas that almost make sense. Unfortunately, because they are so reliant on law office history, misconceptions, and false dichotomies they ought to have fallen into disuse. One might conceive of a system in which the Constitution may be parsed to find those portions that are important (presumably the Commerce Clause) and those that are not (presumably the Congressional Adjournment Clause), but we cannot presume its authors to have written superfluous Clauses that ratifiers understood to be irrelevant. Consequently, if there is an appropriate and discernible reading of the Privileges or Immunities Clause, we should seek it with zeal.

Some believed that *McDonald v. City of Chicago*<sup>9</sup> presented the best opportunity to reexamine the Clause in generations. Chicago's severe restrictions on personal firearm ownership were challenged as a violation of both the Due Process and Privileges or Immunities Clauses.<sup>10</sup> Although both parties and several amici extensively briefed the Privileges or Immunities arguments,<sup>11</sup> the *McDonald* plurality opted to follow the more traditional route and incorporate the Second Amendment against the states.<sup>12</sup> Justice Thomas concurred that the Second Amendment applies to states, but grounded his opinion in the belief that “the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.”<sup>13</sup> His opinion—discussed in greater length below—squarely rejects the traditional approach embraced by the plurality

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8. See Jess Bravin, *Rethinking Original Intent*, WALL ST. J., Mar. 14, 2009, at A12 (quoting former Solicitor General Paul Clement and Professor Laurence Tribe as both believing that the reinvigoration of the Privileges or Immunities Clause would accomplish little more than moving the presently accepted Due Process rights to a different clause); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3029–30 (2010) (discussing scholarly debate over the meaning of the Privileges or Immunities Clause, but deciding against reconsidering the traditional interpretation).

9. 130 S. Ct. 3020.

10. See *id.* at 3027.

11. See Petitioners' Brief, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4378912; Brief of Amicus Curiae Institute for Justice, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099506.

12. The decision rested upon the holding in *District of Columbia v. Heller*, which explained that the Second Amendment expresses a right to personal firearm ownership outside of any service in the militia. 554 U.S. 570, 634–35 (2008).

13. *McDonald*, 130 S. Ct. at 3088 (Thomas, J., concurring).

and the dissenters and argues that the Court's jurisprudence has long neglected the appropriate reading of the Fourteenth Amendment. Justice Thomas examined Reconstruction-era documents to discern an original public understanding that the Fourteenth Amendment's textual guarantor of personal liberty was the Privileges or Immunities Clause—not the Due Process Clause.<sup>14</sup> While Justice Thomas's approach is a faithful account of the contemporary public's understanding of the Amendment when it was ratified, I suggest that it leaves out important elements of the national discussion and is therefore somewhat incomplete. Despite *McDonald*'s promise, then, there is a persistent gap in the originalist study of the most important Civil War Amendment.

Subject to the caveat that history is never certain, I suggest that the Fourteenth Amendment, as originally understood, ensured equitable governance in three ways. First, it required states to treat all citizens equally and ensure that they were not denied the privileges or immunities of the citizenry. Citizens were entitled to the protections of the first eight Amendments to the Constitution as well as certain citizenship rights. These citizenship rights were the fundamental tenets of Republican political theory, particularly Radical and abolitionist Republican theory that aimed at ensuring full civil and political participation in the state.

Second, states had to adjudicate fairly and in keeping with the privileges and immunities of the people, and not take actions that violate due process of law or the "law of the land."<sup>15</sup> Finally, states must provide all persons equal protection of the law—executing the laws in a manner that does not deprive any person of the law's uniform effect. Sections 3 and 4 were punitive,<sup>16</sup> and Section 5 does precisely what it says: enforces the foregoing powers, but does not grant Congress substantive rights-defining authority.<sup>17</sup> While

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14. *Id.* at 3071–83.

15. See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009).

16. For a description of the various clauses of the Fourteenth Amendment and the subsequent effect of its provisions, see AKHIL REED AMAR, AMERICA'S CONSTITUTION 349–402 (2005).

17. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (explaining that Congress's power under Section 5 is not substantive, but rather "congruent" and "proportional" to the ills to be remedied).

Congress may have prophylactic authority, such matters are beyond the scope of my argument.

The latter concepts are uncontroversial; the first requires significant explanation. Put briefly, we have had the Fourteenth Amendment all wrong, and we have had it very wrong indeed. The Privileges or Immunities Clause (“Privileges Clause”) embodied the substance of the Amendment, and its public understanding at the time of its ratification should control our application of it today. To that end, I have examined speeches, public statements, letters to the editor, newspaper articles, party platforms, and addresses at rallies in an attempt to gain insight into the public understanding of the Amendment in contemporary context.

The sources reveal a vigorous debate with no certain answer, but such historical indeterminacy should be unsurprising. Nevertheless, three schools of thought emerge. The first, or “narrow view,” embraces limited federal power and resurgent states’ rights theory. The second, or “consensus view,” demanded equal treatment of citizens by states and established a baseline of rights enforceable against trespassing state governments. Finally, the “radical view” went well beyond consensus and imagined an egalitarian society with muscular federal involvement in personal liberties.

Though there is no unquestioned winner in the struggle between these theories, I have not named one of them the “consensus view” without reason. In short, the sources strongly suggest that those in power in the United States and a very large segment of the population understood the Privileges Clause to incorporate the Bill of Rights and to convey a modicum of political rights. This conclusion comports with Justice Thomas’s concurrence, but with significant points of divergence.

In Part II, I examine the traditional approach to the Privileges Clause as well as modern revisionist interpretations. The former is the standard tale against which I argue; the latter is a far better account that I suggest should itself be revised. In Part III, I examine the sources themselves and demonstrate how they form the three views of the Amendment and the Privileges Clause. Part IV considers the arguments put forth in *McDonald* and examines the implications of my interpretation. Part V concludes.

## II. TRADITION AND REVISION

*A. Fairman and Berger's Conventional Story*

The Fourteenth Amendment underwent its first significant historical examination by Charles Fairman in 1949.<sup>18</sup> Fairman sought to answer whether the Fourteenth Amendment incorporated the Bill of Rights against the states, and the piece came at a propitious moment, given the recent debates in *Adamson v. California*.<sup>19</sup> Fairman's article begins by discussing the Privileges Clause and its interpretation.<sup>20</sup> For Fairman, the story of privileges *or* immunities is best explained by examining privileges *and* immunities. He rightly notes that the ratifiers of the Fourteenth Amendment "repeatedly quoted in the debates of 1866" certain authorities on the Privileges Clause.<sup>21</sup> The first of these sources, *Corfield v. Coryell*,<sup>22</sup> was mentioned in the floor debates, in contemporary newspapers, and in the courts. Like so many of those contemporaries, Fairman focuses on Justice Washington's list of what are "strictly speaking, privileges and immunities."<sup>23</sup> The (somewhat lengthy) explanation of what constitutes privileges and immunities does not impress Fairman, who explains how Justice Washington was "badly confused" in *Corfield*.<sup>24</sup> As euphonious as a list of fundamental rights may be, the appropriate inquiry into Article IV, Section 2 is confined to a limited range of rights.

Did [Washington] mean merely that of the rights being enjoyed by Marylanders, the visitor was entitled not to all . . . but only to the

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18. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

19. 332 U.S. 46 (1947) (holding that the Bill of Rights is not incorporated against the states).

20. Fairman, *supra* note 18, at 9–11.

21. *Id.* at 9.

22. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

23. *Id.* at 552 (listing 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").

24. Fairman, *supra* note 18, at 11.

general range of really essential rights such as one found established throughout America? If this was the thought, then the enumeration gives an idea of which among the rights locally accorded are “fundamental” in maintaining the “mutual friendship” among the people of the different states . . . .<sup>25</sup>

Fairman describes the recitation of rights as “unguarded,” as though Justice Washington were over-eager in his demonstration of his affection for the Constitution.<sup>26</sup> Moreover, he suggests that the Justice could not have meant to imply that all American citizens have the same privileges as citizens in the other states.

[An out of state] visitor was entitled to engage in “professional pursuits.” But think of the profession with which Justice Washington was best acquainted: certainly the attorney could not come in and practice without admission to the local bar—and did the Justice really mean that the state might not make state citizenship a requisite to admission? The list even included “the elective franchise, as regulated and established” by the local law. But surely, participation in Maryland’s elections was even more intimately an affair for only Marylanders . . . .<sup>27</sup>

All of this “confusing”<sup>28</sup> analysis vanishes away under the weight of Justice Story’s *Commentaries on the Constitution*.<sup>29</sup> Fairman introduces the venerable work as though it would part the clouds of historiographical darkness: “There was no ambiguity in Story’s *Commentaries*.”<sup>30</sup> Story’s work all but resolves the matter: the Comity Clause was an antidiscrimination measure designed to ensure the most basic of liberties.<sup>31</sup>

The problem with this analysis is Fairman’s creation of a false dichotomy between extensive privileges and immunities and the

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25. *Id.*

26. *Id.* And, indeed, perhaps he was. Politicians in the latter part of the nineteenth century were unabashedly effusive in their love for the Constitution and its seemingly divine origins. *See, e.g., infra* note 79 (explaining Thad Stevens’ somewhat messianic view of the document).

27. Fairman, *supra* note 18, at 11.

28. When Fairman encountered statements that contradicted his thesis he often asserted that the speaker was confused: there were eight separate times he referred to persons as being confused. *Id.* at 11, 12, 31, 35, 45, 54, 106, 137.

29. 2 STORY, COMMENTARIES § 1806 (4th ed. 1873), *quoted in* Fairman, *supra* note 18, at 12.

30. Fairman, *supra* note 18, at 12.

31. *Id.*

police power—a false dichotomy that will reappear throughout the discussions of the Privileges Clause.<sup>32</sup> As his discussion of *Corfield* makes clear, Fairman thinks it implausible that the Constitution would mandate that all states permit non-citizens to vote. Yet there is no need to read the Comity Clause as vesting *all* rights of state citizenship in non-citizens. The language of the Clause itself does not so require; it simply mandates that states provide the same treatment to all persons. A reasonable reading of Article IV is that the Guarantee Clause imposes limits on the form of state government (an internal limit), and the Comity Clause limits the manner in which that government may treat outsiders (an external limit designed to avoid interstate strife). In any event, the Clause certainly does not eliminate the police power, which would have included the right to set qualifications for office or voting. Fairman’s view requires one to ignore the fact that states did not permit every citizen to vote or practice medicine. That is, even if states had to give outsiders all the same privileges as citizens, those privileges were not unrestrained to the point of anarchy.

Yet having carefully built and dressed his straw man, Fairman proceeds to demolish him. His analysis of the Fourteenth Amendment depends almost wholly on the Comity Clause, and he opens Part III of his article with Senator Lyman Trumbull’s views on privileges and immunities, which he thought would permeate the Civil Rights Act.<sup>33</sup> He sets out these arguments<sup>34</sup> and then cites three Democrats who opposed the Act on the grounds that it was “one of the most dangerous that was ever introduced into the Senate of the

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32. It certainly reappears throughout his work. *See generally id.*

33. *Id.* at 15–18.

34. Again, he does so with a somewhat breathtaking lack of equanimity. His parentheticals (complete with exclamation points) and his somewhat fawning treatment of opponents of the consensus or Radical views of the Fourteenth Amendment hinder his argument. *See id.* at 18 (noting that “Senator Reverdy Johnson of Maryland, Democrat, made a number of lawyer’s points against the bill—a task for which he was outstandingly qualified”). John Bingham—one of the most respected lawyers in the United States at the time—is never credited with making “lawyer’s points.” Later, during the debates, John Bingham stated that the Fourteenth Amendment would counter those state constitutions having in them provisions “in direct violation of every principle of our Constitution.” *Id.* at 29–32; *see also* CURTIS, *supra* note 3, at 95. Fairman (rather churlishly) remarks that, “[o]f course a state law could hardly violate *every* principle of the Constitution.” Fairman, *supra* note 18, at 32. This is both obviously correct and obviously beside the point.

United States.”<sup>35</sup> He sets out the story of the ratification, but with their imperfect understanding of the Comity Clause, Fairman believes that the ratifiers simply got it wrong.<sup>36</sup> His piece has been thoroughly critiqued elsewhere and need not occupy us further. It is simply worthwhile to note that the “traditional story” is Fairman’s, and his work deserves the same exacting eye—if not tone—that he directed towards the 39th Congress.<sup>37</sup>

If Fairman’s partisan tract is the Legal Process School foundation of the modern approach to Privileges or Immunities, Raoul Berger’s *Government by Judiciary* is the logical—if delayed—response of the more cynical and skeptical 1970s.<sup>38</sup> Fairman and Berger did not accept that the Fourteenth Amendment’s Privileges Clause conveyed significant political rights—such as the right to vote, the right to participate in juries, or the right to run for office—or that it made the Bill of Rights enforceable against the states.<sup>39</sup> Again, they are not necessarily wrong, but a refusal even to examine the opposing

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35. Fairman, *supra* note 18, at 18 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 476 (1865–66)).

36. As Fairman put it, “It is not our responsibility here to find answers to the questions that needed to be answered in 1866. It is enough that we, with the wisdom of eighty years’ hindsight, have made our own analysis and have discovered the underlying issues. As we pursue the debates in Congress it will often be apparent that a speaker had a very imperfect awareness of the essential difficulty. We shall in each case be watching on two levels—to understand his conceptions, and then to refer those conceptions to the inescapable logic of the problem.” *Id.* at 24.

37. The grave error Fairman commits is one common to legal historians—hindsight bias. Fairman believed that the Fourteenth Amendment did not incorporate the Bill of Rights, and so he impugned any contemporary who thought that it might. Fairman later went out of his way to argue against the incorporation of the Bill of Rights against the states, but then suggests that selective incorporation was, in fact, the appropriate outcome. *See id.* at 134–39; *see also* CURTIS, *supra* note 3, at 117–18.

38. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

39. This is a point to which Berger repeatedly returned during his career, albeit with the same restricted, one-sided historical examination. *See, e.g.*, Raoul Berger, *Ronald Dworkin’s The Moral Reading of the Constitution: A Critique*, 72 IND. L.J. 1099, 1103–11 (1997) (reviewing RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996)) (criticizing Dworkin for failing to abide by the premise that “history is crucial” in Dworkin’s analysis of the Fourteenth Amendment, but proceeding to ignore contradictory sources himself); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well*, 62 U. CIN. L. REV. 1, 14–28 (1993) (discussing the “limited scope” of the Fourteenth Amendment in general and of the Privileges Clause in particular); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response*, 44 OHIO ST. L.J. 1, 7–16 (1983) (asserting that the Fourteenth Amendment did not incorporate the Bill of Rights).

documents casts doubt on their arguments.<sup>40</sup> For example, Berger takes as a given that Section 1 does not permit blacks to vote, and he relies on the words of Senators and Representatives to support his position.<sup>41</sup> Yet dozens of other speeches, letters, and declarations provide support for precisely that notion, and the contemporary documents support it.<sup>42</sup> A simple examination of those sources, even in an effort to undermine them, would dramatically strengthen Berger's argument; without discussing them, Berger transforms from historian into polemicist. Moreover, he engages in the same sort of sniping at the drafters and ratifiers as Fairman, undoing any claim to neutrality.<sup>43</sup> And while Berger properly explained that noted historians praised his works, he continuously mistakes prestige for authority and assumes that approbation is the same as confirmation.<sup>44</sup> Berger asks his readers to rely on his incomplete historical inquiry, which is little better than an *ipse dixit*.

Moreover—though this anticipates Part III—if the Radical Republicans were wrong, and the Fourteenth Amendment did not allow Congress to protect privileges and immunities, the Civil Rights Act of 1875 would have probably been facially unconstitutional. The

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40. Some are far more critical of Berger's work. Bruce Ackerman wrote that he was "troubled by Berger's use of italics to suggest that Washington is emphasizing the limited character of his construction of 'privileges and immunities'—when in the excised portion of the text he explicitly endorses a more expansive interpretation. This kind of shoddy work on a source as crucial as *Corfield* is inexcusable." BRUCE ACKERMAN, *WE THE PEOPLE* 335 n.21 (1991). This, for Ackerman, was bad historical research and writing. "By 'bad,' [Ackerman] mean[s] really bad." *Id.* at 334. Berger was unflinching in his response and his criticism of Ackerman's book, but his attempt to rehabilitate his historiography still falls somewhat flat; his focus is still on exclusively elite sources, and his argument is essentially one about original intent. See Raoul Berger, *Bruce Ackerman on Interpretation: A Critique*, 1992 BYU L. REV. 1035, 1043–50 (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: THE FOUNDATIONS* (1991)) (citing judges, Senators, Representatives, and legal scholars to support his proposed view of the original understanding of the Fourteenth Amendment).

41. See Berger, *supra* note 40, at 1046–50; see also BERGER, *supra* note 38, at 54–68.

42. See *infra* Part III.

43. As Curtis discusses, the language related to John Bingham in Berger's *Government by Judiciary* is somewhat less than flattering. Bingham was "muddled" and "inept." CURTIS, *supra* note 3, at 120 (quoting BERGER, *supra* note 38, at 145, 219). Curtis suggests that Berger's point was to "subject[] [Bingham] to personal attacks . . . [and] prove that Bingham was a legal moron." *Id.*

44. Berger, as always, was blunt: "My *Government by Judiciary* won praise from Willard Hurst, Philip Kurland, Forrest McDonald, and C. Vann Woodward, scholars of higher stature than Curtis and Nelson. What sort of scholarship is it that prefers the testimony of a tyro like Curtis to that of renowned scholars?" Berger, *supra* note 40, at 1050 (internal citations omitted).

Act, replete with provisions related to public accommodations and certainly based on the consensus or even Radical view of Section 1,<sup>45</sup> passed a Congress where the Radicals were no longer the majority. Neither Berger nor Fairman explain this apparent anomaly. Their understanding is shaped by a misperception of Article IV, Section 2, so they cannot provide an adequate explanation for contemporary legislation that contradicts their argument.

Even if one accepts the Fairman view of the Comity Clause, it is entirely inaccurate to say that the same legal theories animated the Fourteenth Amendment. Although textually similar, the Clauses serve different purposes in different times; and to conflate them is to understate or ignore the political dynamism of the Reconstruction era.<sup>46</sup> It makes even less sense to assume that the Privileges Clause was intended or understood to convey those rights “implicit in the concept of ordered liberty,” as Fairman suggested.<sup>47</sup> Such an approach raises the question “what privileges or immunities *are* implicit in ordered liberty?”<sup>48</sup> while consigning the Privileges Clause to a dead letter.<sup>49</sup> For Fairman, that approach permitted him to assert that “selective incorporation” was the only proper interpretation of the Fourteenth Amendment—a premise he slips into his article’s last paragraphs, and it is an obvious nod to his collaborator and friend, Justice Frankfurter.<sup>50</sup>

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45. See Civil Rights Act of March 1, 1875, ch. 114, 18 Stat. 335, 336 (“[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.”).

46. See generally Raoul Berger, *Government by Judiciary: Some Counter criticism*, 56 TEX. L. REV. 1125 (1978) (tying the Privileges Clause to Article IV’s Privileges and Immunities Clause without differentiating the political circumstances at the time of their relative enactments). Berger simply assumes that a “privilege” meant the same thing in 1787 as it did in 1867, which is a faulty proposition when it is unaccompanied by primary sources to substantiate it. *Id.*

47. Fairman, *supra* note 18, at 139 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784) (internal quotation marks omitted).

48. I suggest that the sources below indicate that the Bill of Rights lists precisely those privileges or immunities that would have been considered “fundamental.” See *infra* Part III.

49. See Fairman, *supra* note 18, at 139 (“Since [the *Slaughter-House Cases*] [the Privileges Clause] has merely lingered on, performing virtually no duty as an operative part of the Constitution.”).

50. *Id.* For a discussion of Fairman’s relationship with Frankfurter, see Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT. L. REV. 1197, 1215–29 (1995) (outlining the decades long collaboration between the two men,

The other important element missing from the traditional analysis of the Privileges Clause is that the ideal the Amendment sought to create was equal citizenship rights between citizens in the states.<sup>51</sup> This missing piece helps explain some of the shortcomings in the traditional view, and suggests that a better approach to the historiography would provide a better understanding of the Fourteenth Amendment.<sup>52</sup>

### *B. The Revisionist Story*

Perhaps chafing against the limitations imposed on the Fourteenth Amendment by the traditional story, some scholars have reached a different conclusion on its meaning. Notably, these revisionists believe that the Fourteenth Amendment incorporated (at least) the Bill of Rights against the states, and that the Privileges and Immunities and Due Process Clauses were the vehicles by which this was accomplished.<sup>53</sup>

Randy Barnett is a prominent member of the revisionist school. In a characteristically trenchant piece, he suggests that our “Misconceived Assumption about Constitutional Assumptions”<sup>54</sup> has led us to presume that parts of the Constitution mean things that they need not and do not.<sup>55</sup> From the outset he makes clear that the traditional account is too stingy when it comes to the rights

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including their contemporaneous work on the Fourteenth Amendment around the time the Court decided *Adamson*).

51. *See infra* Part III.

52. Another criticism we can level at Fairman and Berger is that they display little humility towards their sources and the contemporary actors who created them. That is, both scholars seemingly fail to accept that disparagement or flippancy towards historical figures does not strengthen an argument. While Bingham and others may not have had a modern scholar’s understanding of the Bill of Rights or the nature of the Constitution, this is no reason to ignore what they understood the provisions of their Amendment to be. First, they lacked the same access to historical materials that we have today. Second, the exercise of examining a historical record is not the same as grading a law-school exam. In other words, it is irrelevant if the entire nation misunderstood the Privileges and Immunities Clause when it ratified the Privileges Clause. All that matters is what *they* thought they were doing.

53. *See generally* CURTIS, *supra* note 3.

54. Randy Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615 (2009).

55. In fact, Barnett’s piece continues his criticism of the contractarian approach to the Constitution. *See id.* at 616–22 (“In this Article, I challenge this misconceived assumption about the constitutional status of basic assumptions, which derives from a mistaken conflation of constitutions and contracts.”).

protected by the Fourteenth Amendment.<sup>56</sup> For Barnett, “privileges or immunities of citizens’ was a reference to natural rights in addition to other particular positive rights contained in the Bill of Rights.”<sup>57</sup> Barnett has devoted a significant portion of his work to discovering what rights are truly retained by the people, and his libertarian lens focuses his views of the Fourteenth Amendment.<sup>58</sup>

Rather than delve into the Barnett canon, it is worthwhile to consider his resolution of Fairman’s rights/police power false dichotomy.<sup>59</sup> Barnett notes that Thomas Cooley’s work *A Treatise on the Constitutional Limits Which Rest upon the Legislative Power of the States of the American Union*<sup>60</sup> construed the state police power contemporaneously with the passage of the Fourteenth Amendment.<sup>61</sup> For Cooley, the police power was a tool for the “preserv[ation of] the public order and . . . establish[ment] for the intercourse of citizens with citizens . . . rules of good manners and good neighborhood.”<sup>62</sup> Barnett interprets this to mean that the police power exists for reasonable regulation, but suggests that modern readers should not assume that it was as broad as they do.<sup>63</sup> In any case, he does not doubt the authority of the states to regulate pursuant to their police power—he merely (but rightly) notes that

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56. *Id.* at 635 (introducing his discussion of the Privileges Clause by noting that “the original meaning of some allegedly vague terms may convey considerably more information than is commonly thought”).

57. *Id.* at 635–36 (quoting U.S. CONST. amend. XIV, § 1).

58. *See, e.g.*, Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 289–91 (2008) (outlining his approach to privileges or immunities through a natural rights and libertarian approach); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 456–75 (2004) (outlining his approach once again).

59. *See supra* notes 32–52 and accompanying text.

60. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868).

61. Barnett, *supra* note 54, at 654–55.

62. COOLEY, *supra* note 60, at 829.

63. Barnett, *supra* note 54, at 654–58. He is particularly concerned about morality legislation. *See id.* at 656 (“The historical claim that the police power of states was assumed also to include a power to regulated morality is both far more problematic and much more complex.”). Again, Professor Barnett’s libertarianism is apparent, but his argument is somewhat less compelling on this point. While Barnett is correct to note that Cooley devotes little time to the subject, his claim that morality legislation was not an essential part of the police power is somewhat surprising given the extensive scope of sexual and social legislation that existed even at the Founding. There can be little doubt that longstanding laws against prostitution, bigamy, sodomy, and pornography were, at least in part, morality measures.

the Fourteenth Amendment limited these powers. The most important point he makes along these lines is thus:

That the scope of the police power includes the protection of individual rights seems consistent with, if not implicated by, the text of the Constitution. First and foremost, it is consistent with the original meaning of the Ninth Amendment's implication that there are natural individual liberty rights that shall not be denied or disparaged.<sup>64</sup>

In other words, the Fourteenth Amendment's Privileges and Immunities Clause is a means by which the federal government will ensure state protection of natural rights, like those found in the Ninth Amendment. It is hard to imagine an interpretation more different than Fairman's.

Before addressing this interpretation, it is worthwhile to put Barnett's view into relief with another revisionist piece. Michael Kent Curtis's *No State Shall Abridge* is less ambitious in its claim—namely, that the Fourteenth Amendment incorporated the Bill of Rights against the states.<sup>65</sup> Curtis's use of primary sources is more nuanced and balanced than that of Fairman or Berger.<sup>66</sup> Rather than making a bolder assertion, Curtis simply lays out the congressional evidence from 1865 to 1868 and then analyzes the response of the courts and the public at large.<sup>67</sup> It is therefore difficult to establish the precise contours of his argument. Nevertheless, Curtis's presentation of the debates over the Amendment point toward an original understanding that the Fourteenth Amendment incorporated the Bill of Rights.<sup>68</sup>

The problem with this revisionist approach—though it is much closer to being correct than Fairman's—is that it merely is a continuation of the same debate in *Adamson*. If Fairman parrots the selective incorporation approach of his old teacher and colleague, Felix Frankfurter,<sup>69</sup> Barnett and Curtis are latter-day Blacks and

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64. *Id.*

65. CURTIS, *supra* note 3, at 212–20 (suggesting that the Fourteenth Amendment incorporated the Bill of Rights).

66. Indeed, though Fairman was published almost forty years earlier, legal scholars have cited Curtis's work roughly the same number of times as Fairman's Stanford Law Review piece.

67. *See generally* CURTIS, *supra* note 3.

68. The public understanding of the Amendment was a dynamic thing, as will be demonstrated below. *See infra* Part III.

69. *See supra* note 50 and accompanying text.

Douglases.<sup>70</sup> Barnett suggests that all manner of natural rights are incorporated against the states through the first section of the Fourteenth Amendment.<sup>71</sup> He makes this claim somewhat uncritically—though he may address it in more depth elsewhere<sup>72</sup>—and somewhat inaccurately. Postwar Republicans were nationalizers, certainly, but they were not unconscious of states as having some authority—the structure of the Fourteenth Amendment presupposes that states would be doing most of the regulating, with the federal government as a check when the states got out of hand.<sup>73</sup> As Curtis pointed out, Republicans viewed federalism as analogous to the solar system: “States must be kept within their proper orbit, an orbit that would keep them from colliding with the rights of the individual.”<sup>74</sup>

This ought not surprise us. Midcentury Republican leaders—almost to a man—were lawyers, men who were rather concerned with the constitutional consequences of their actions.<sup>75</sup> By framing the argument in *Adamson*’s terms, revisionists fail to take account of what was actually going on between 1866 and 1868. While it is true that Radical Republicans and their more moderate allies were concerned with establishing federal supremacy, they were not interested in undoing the entire edifice of federalism. In this way, arguments that depend on radical reorganization of the state (or some proto-progressive statism) miss the mark.

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70. See *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting) (suggesting that the Fourteenth Amendment incorporates the first eight Amendments in their entirety), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964). Justice Douglas joined Justice Black’s dissent. *Id.* at 92.

71. Barnett, *supra* note 54, at 635–36.

72. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 253–69 (2004).

73. See CURTIS, *supra* note 3, at 41 (“Although Republicans rejected the notion that states could invade the fundamental rights of citizens, they still wanted to preserve the states.”).

74. *Id.* (footnote omitted) (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 1088 (1866) (statement of Rep. Woodbridge)).

75. Compare CURTIS, *supra* note 3, at 61–62 (detailing John Bingham’s legal concerns over Congress’s rights-enforcement powers and his belief in the need for a Constitutional amendment to that end), with Edward Whelan, Editorial, *Look Who’s Politicizing Justice Now*, WASH. POST., Apr. 5, 2009, at B5 (quoting Nonvoting Delegate Eleanor Holmes Norton who spoke on electing a voting Representative for the District of Columbia: “I don’t think [Congresspersons] are in the least bit affected in their votes on the question of its constitutionality . . . . People vote their politics in the House and in the Senate” (internal quotation marks omitted)).

The most important misstep in the revisionist story is the characterization of the debate as one surrounding natural rights. The Privileges Clause does not embody those rights—by the mid-nineteenth century, few people were talking about natural rights, and even fewer mentioned them during the ratification arguments about the Fourteenth Amendment.<sup>76</sup> Moreover, the revisionist view of the Privileges Clause does not contextualize the debate over the Fourteenth Amendment as being uniquely shaped by the political realities (and political theories) of the post-Civil War era.

An explanation for all of this is a combination of two serious historiographical errors—anachronism and presentism.<sup>77</sup> Believing mid-century Republicans to have espoused the natural rights view is anachronistic because they simply did not think of rights in that way. Where early (Democratic-)Republicans like Madison and Jefferson were concerned with man's relationship to "Nature and Nature's God,"<sup>78</sup> latter day Republicans were notably less religious in their language than the Deist third President. Instead, their language is almost exclusively about the relationship of citizen to state and other citizen.<sup>79</sup> This revisionist focus is also presentist as it ascribes to the Republicans an interest in natural rights simply because we are interested in them today. To conflate natural rights with fundamental citizenship rights may be something we do in the twenty-first century, but it was not done in the nineteenth.<sup>80</sup>

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76. See discussion *infra* Parts III.A.2 and III.A.3.

77. See *generally* GORDON S. WOOD, *THE PURPOSE OF THE PAST* (2008) (explaining the types of errors made in history-writing and the dangers of placing concepts out of their historical place—anachronism—or imputing modern theories or beliefs onto historical actors—presentism).

78. See *THE DECLARATION OF INDEPENDENCE* para. 1 (U.S. 1776).

79. See *generally infra* Part III (explaining that the Republicans sought to enforce equality of citizenship rights). There are, of course, exceptions to this general rule. Thaddeus Stevens, in a speech entitled "Universal Suffrage," explained that the "grand idea of [the Founders] was that there were certain rights, privileges and immunities which belonged to every being who had an immortal soul, none of which should be taken from him, nor could he surrender them in any arrangement with society." See Thaddeus Stevens, *Universal Suffrage*, *CIN. DAILY GAZETTE*, Nov. 1, 1867, at 3, *available at* America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

80. See Stevens, *supra* note 79, at 3.

*C. The Contemporary Context*

Bearing all of this background in mind, it is best to let the framers of the Amendment speak for themselves. Bingham, in his remarks in the House, explained “[t]here was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. . . . [T]o protect by national law the privileges and immunities of all the citizens of the Republic . . . .”<sup>81</sup> This historical lacuna began at the first drafting of the Fourteenth Amendment, which Bingham wrote to protect “privileges and immunities and equal protection in the rights of life, liberty, and property.”<sup>82</sup> In essence, the draft empowered Congress to create remedies for violations of Article IV, § 2 and incorporated the Fifth Amendment. Bingham—the respected attorney and abolitionist—viewed his Amendment as organic law that would undo the “flagrant[] violat[i]ons of] the absolute guarantees of the Constitution of the United States to all its citizens,” which for Bingham meant the protections of the Privileges and Immunities Clause.<sup>83</sup>

Bingham believed that some rights appertained to American citizenship, regardless of one’s state of residence. Consider his views on the controversy surrounding the statehood admission process for Oregon in 1859.<sup>84</sup> Oregon’s proposed state constitution barred African-Americans from entry and refused access to the court for blacks already in the state.<sup>85</sup> Bingham’s opposition to Oregon’s admission to the Union turned on the failure of the proposed Oregonian constitution to protect the rights held by the *national*

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81. CURTIS, *supra* note 3, at 87 (internal citation omitted).

82. *Id.* at 84.

83. *Id.* at 59 (quoting CONG. GLOBE, 35TH CONG., 2D SESS. 984 (1859)).

84. *Id.* at 59–60.

85. As John Bingham explained in his speech opposing Oregon’s entry into the Union, the proposed state constitution contained a provision “which declares that [a] large number[] of the citizens of the United States [that is, free blacks] shall not, after the admission of . . . Oregon, come or be within said State; that they shall hold no property there; and that they shall not prosecute any suits in any of the courts of the State; and that the Legislature shall, by statute, make it a penal offense for any person to harbor any of the excluded class of their fellow-citizens who may thereafter come or be within the State.” CONG. GLOBE, 35TH CONG., 2D SESS. 984 (1859). Bingham concluded thus: “I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, . . . or from the enjoyment therein of the ‘privileges and immunities’ of a citizen of the United States.” *Id.*

citizenry, which included those expressed in the Bill of Rights.<sup>86</sup> Bingham and many others of his time did not accept the Supreme Court's ruling in *Barron v. Baltimore*,<sup>87</sup> which rather conclusively declared that the Bill of Rights did not apply against the states.<sup>88</sup> *Barron* notwithstanding, Bingham and his cohort believed in federal Constitutional supremacy<sup>89</sup>—a mistaken reading of the Supremacy Clause, perhaps, but nevertheless a historically significant one.

In a similar vein, many Republicans believed that the Comity Clause *already* protected privileges and immunities of national citizenship. Congressman William D. Kelley of Pennsylvania thought that the Constitution had powers “by which the General Government may defend the rights, liberties, privileges, and immunities of the humblest citizen, wherever he may be upon our country's soil.”<sup>90</sup> The sources reveal similar thoughts from Congressmen William Higby and Frederick Woodbridge.<sup>91</sup> Even archconservatives like Robert Hale (R-N.Y.) were not concerned with the notion that “the states should be required to obey the Bill of Rights . . . . He believed they already were required to do so.”<sup>92</sup>

In this context, Republican views on the Privileges Clause begin to come into some relief. They understood the Amendment as granting Congress authority to legislate “that hereafter no state shall make it a crime for a man, whether he be black or white, a citizen of the Republic, to learn the alphabet of his native tongue and his rights and duties.”<sup>93</sup>

Views on the Constitution's history were mixed, and for every retrained view of the document there were those who considered it a compact with the devil, or a Divine covenant lapsed by the Framers's

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86. *Id.* Bingham's argument also applied the standard interpretation of the Privileges and Immunities Clause in Article IV, which requires states to permit travel.

87. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089–93 (1866).

88. *Barron v. Mayor of Baltimore*, 32 U.S. 243, 250–51; *see also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3079 (2010) (Thomas, J., dissenting) (“Like the Framers, many 19th-century Americans understood the Bill of Rights to declare inalienable rights that pre-existed all government. Thus, even though the Bill of Rights technically applied only to the Federal Government, many believed that it declared rights that no legitimate government could abridge.” (citation omitted)).

89. *See* CURTIS, *supra* note 3, at 61.

90. *Id.* at 68 (quoting CONG. GLOBE, 35TH CONG., 1ST SESS. 1062–63 (1866)).

91. *Id.* at 68–69.

92. *Id.* at 69.

93. *Id.* at 62 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 432 (1866)).

complicity in slavery.<sup>94</sup> What they all agree upon, quite clearly, is that the Amendment aimed at protecting and promoting equal citizenship throughout the states. In the next Part, I propose to show that this view is the likeliest given public understanding and comment.

### III. ORIGINAL PUBLIC UNDERSTANDING

Before beginning the exposition of the public understanding of the Fourteenth Amendment, I think it is important to set forth some historical parameters and attempt to justify them. Legal history fills law reviews and court opinions more today than ever before.<sup>95</sup> In itself, this is not troubling and indeed may be a good thing, particularly for originalists. Unfortunately, much of this history is so poorly done that it would earn a first-year history graduate student a stern lecture from her advisors.<sup>96</sup> Poor or selective source selection is rampant, as are hindsight bias and shoddy research.<sup>97</sup> Originalism, because it is so reliant on history, is thus more susceptible to sophistry's gentle drift away from fact.<sup>98</sup>

A good originalist, then, is exceptionally demanding when it comes to the history she uses. But it can be difficult to figure out the appropriate scope of an originalist inquiry—Whose opinion counts? Who has to be excluded? Answers to these questions can, and do, fill volumes. The following is illustrative: Bingham, Hale, Kelley, and all the Republicans seemed to think that the Privileges Clause conveyed at least political and civil rights, and perhaps human and social rights to all Americans.<sup>99</sup> In other words, the Clause vested Americans with the rights of a national citizenry, the rights traditionally held by Anglo-American citizens through history. Redeemers, Southerners,

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94. See, e.g., Gordon A. Christenson, *A Tale of Two Lawyers in Antebellum Cincinnati: Timothy Walker's Last Conversation with Salmon P. Chase*, 71 U. CIN. L. REV. 457, 472 (2003) (noting that William Lloyd Garrison "dismissed the United States Constitution as a pact with the devil").

95. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (relying heavily on primary source document history to support the opinion of the Court and the opinions of the other Justices); *Heller v. District of Columbia*, 554 U.S. 570 (2008) (same); *Boumediene v. Bush*, 553 U.S. 723 (2008) (same).

96. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995).

97. See *id.*

98. See *id.* at 524.

99. See discussion *supra* Part II.C.

and the unreconstructed publically espoused a far more restrictive view—states' rights blocked the federal government from vesting the franchise in freed slaves, or from enforcing various political rights that had not inured in disfavored classes before the war.<sup>100</sup> The difficult choice for judges and scholars is deciding whose ideas should prevail.

It is simple to argue that the aperture of the originalist lens should be opened to capture the whole society, giving every viewpoint an equal measure of credence. Democratic and simple as that approach may be, it makes it all but impossible to reach a conclusion—if everyone's viewpoint is valid, how can a jurist or scholar ever decide which should prevail? That would be an absurd result, though. Surely former rebels didn't believe that freed blacks were possessed of the same rights as white citizens, but that should be less relevant to this inquiry. Not only did former rebels lack sufficient political power to represent the widest or strongest view of what the Fourteenth Amendment or the Privileges Clause meant, they had recently lost a Civil War related to similar questions. The proper question is about what the most likely public understanding of the Amendment was, and that question is unanswerable without making pragmatic and (at times) normative judgments about whose opinion should carry more weight. The most important element of this analysis is honesty: a straightforward explanation of one's historiographical choices and, to the extent possible, an attempt to avoid bias.

As in all history, it comes to making a choice. The first choice is about the scope of study, because no inquiry can ever encompass an entire era, let alone the entire history of a part of the Constitution. For my purposes, I suggest that the years 1866–1873 are the best indicators of original public understanding. The range is not so narrow as to make sources difficult to locate or too remote in time to bear upon the inquiry. Likewise, the timeframe is not so broad as to encompass, later, more anachronistic views colored by time and experience. On another level, the years from the Civil Rights Act through the *Slaughter-House Cases* are compelling because they frame the opening and closing of the conversation about privileges or immunities.

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100. See discussion *infra* Part III.A.1.

*A. The Three Views*

Having thus fully disclosed my historical approach, I lay out a part of the historical arguments made at the time of the Amendment. One point beyond question is that the phrase “privileges and/or immunities” was on many lips during this time period.<sup>101</sup> It is the meaning behind these words that complicates the search for public meaning. As mentioned above, the public comments on the Privileges Clause fall into three categories, easily described by those who most commonly made them. The first, or “narrow view” of the Clause came—unsurprisingly—from Southerners, former Confederates, and the Supreme Court.<sup>102</sup> Under this interpretation, the antebellum understanding of the Comity Clause still obtained, and privileges or immunities were quite restricted.<sup>103</sup> The second or “consensus view,” held by “moderates,” was that the Amendment ensured a range of political and citizenship rights—including those set forth in the Bill of Rights.<sup>104</sup> Finally, the third or “Radical view” was espoused, at least, by ardent abolitionists and Radical Republicans who believed that the Clause conveyed the entire range of civil and human rights, including protections against segregation or discriminatory state practices.<sup>105</sup> Whether one applies a statistical

101. See, e.g., *Civil Government in North Carolina*, MACON WKLY. TELEGRAPH, Dec. 24, 1866 (page 1) (noting that the readmission convention proposes to undertake the readmission of “the district formerly comprising the State of North Carolina” into the Union and quoting the proposed bill, whose goal is the “re-establishment of the said States and the re-vesting [*sic*] its loyal citizens with all the rights, privileges and immunities appertaining to the citizens of the other States of the Union.”); *Georgia Legislature*, DAILY COLUMBUS ENQUIRER (Ga.), July 31, 1868 (page 3) (“The following bills were introduced and severally read the first time, to wit: By Mr. Bradley—A bill to protect citizens in their privileges and immunities.”); *Mr. Etheridge Accepts the Nomination*, MEM. DAILY AVALANCHE, Apr. 23, 1867 (page 2) (quoting Conservative party gubernatorial nominee Emerson Etheridge as inviting all persons “deserving the name and privilege of citizens” to help renew the state); *Radical Ferocity*, WKLY. ARK. GAZETTE (El Paso), Apr. 28, 1868 (page 1) (“The oath referred to the proposed act, requires every elector to swear to support the rights, privileges and immunities of all men, without regard to race [or] color.”); *Reconstruction*, ALB. J., Jan. 7, 1867 (page 1) (Speech of Rep. James Gibson) (mentioning privileges and immunities); *The Conservative Convention*, DAILY COLUMBUS ENQUIRER (Ga.), Apr. 21, 1867 (page 1) (noting the convention’s concern with “rights, privileges and immunities” of citizens and the notion of restoring the same to the “disenfranchised” of the state). All of the sources in this footnote are available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

102. See discussion *infra* Part III.A.1.

103. See discussion *infra* Part III.A.1.

104. See discussion *infra* Part III.A.2.

105. See discussion *infra* Part III.A.3.

probability method or a common sense reading of the sources, a picture begins to emerge that identifies the moderate approach as the common public understanding.<sup>106</sup>

1. *The narrow view*

A century and a half has blunted our ability to believe that anyone could have opposed the Union and Abraham Lincoln, but to think this was always the case is a serious error.<sup>107</sup> The war was an unhealed wound in 1866, and Andrew Johnson was not equipped to ensure that there was “malice towards none” in the course of the Reconstruction.<sup>108</sup> As Southern states imposed limits on freedmen rights—the infamous Black Codes<sup>109</sup>—Republicans in Congress moved to assert control over the situation. The Thirteenth Amendment was already organic law, and the Fourteenth Amendment became a necessary condition for readmission to the Union and, consequently, the seating of Southern representatives on Capitol Hill.<sup>110</sup> Unsurprisingly, the Amendment became a topic of enormous importance and near-constant debate in the media and in state legislatures around the Union.

Southerners knew there was no avoiding ratification, just as there was no avoiding reentry into a Union whose armed troops maintained the new order. The loss of the war made compliance with

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106. Readers should be aware that newspapers had palpable biases in this era. A look at their names gives the gist: one can hardly expect the *Daily Austin Republican* to provide “fair and balanced” coverage of the affairs of the day. Yet the *manner* in which the biases make themselves evident is important. Rather than skewing coverage, the papers tended to reproduce exactly what opponents said or did (good journalism) and then editorialized throughout by peppering their coverage with incredulous statements (bad journalism). In other cases, the papers would just criticize the speaker in the closing paragraphs of the article itself, rather than write a separate opinion column. The papers are thus simultaneously more blatant in their bias and more reliable in their coverage. As a result, they are useful as a source of public understanding. See also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3072–73 & n.12 (2010) (Thomas, J., concurring) (explaining the noted biases of newspapers in the mid-nineteenth century, including the *New York Times*).

107. John Harlan, the lone dissenter in *Plessy v. Ferguson*, was a longtime defender of slavery and opposed Lincoln’s re-election campaign in 1864, even while he led a regiment of Unionist Kentucky volunteers. See generally LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992) (detailing Harlan’s development from pro-slavery Democrat to champion of an anti-discriminatory reading of the Constitution).

108. For a fine account of Johnson’s woes while in office, and his inability to control Reconstruction, see HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY (1997).

109. *Id.* at 230.

110. See NORMAN K. RISJORD, THE CIVIL WAR GENERATION 226 (2002).

Republican demands a matter of grumbling, but not of debate. But if ratification of the Fourteenth Amendment was indisputable for Southerners,<sup>111</sup> the interpretation of its first Section was not. Ironically, the broadest reading of the Privileges Clause came from Southern and Democratic opponents. Like Jeffersonians of old railing against the Necessary and Proper Clause,<sup>112</sup> these speakers claimed that a privilege was “everything it is desirable to have,”<sup>113</sup> and that it would force states to grant suffrage to freed slaves.<sup>114</sup> Some called the Amendment “more Radical than anything that has heretofore come from” the Congress.<sup>115</sup> At the beginning of the ratification debates, then, its opponents cast the Fourteenth Amendment as conveying an enormous range of rights.

Upon ratification that tune changed quickly. Once effective, the formerly mammoth Privileges Clause shrunk to boundaries coterminous with the traditional reading of the Privileges Clause.<sup>116</sup> Thus, rather than conveying “everything that is desirable,” the Clause merely ensured the right to hold property and move freely and no other political rights.<sup>117</sup> Under this approach, the antebellum

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111. Other states could, and did, dispute it. Some, like New Jersey, went so far as to rescind ratification, while others simply refused to ratify in the first place. *See generally* Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555 (2002) (noting that New Jersey, Ohio, and Oregon rescinded their ratification of the Amendment, while Kentucky, Delaware, Maryland, and California never ratified the Amendment at all). The Radical Republicans—in control of Reconstruction, Congress, and the army—did not find these arguments persuasive, and the Amendment became a *fait accompli*.

112. *Resolutions Adopted by the Kentucky General Assembly* (Nov. 10, 1798), in 30 JEFFERSON PAPERS 552–53 (Barbara Oberg ed., 2004).

113. *See* CURTIS, *supra* note 3, at 149 (quoting PA. LEG. REC. APP. XIII (1867)).

114. *See Speech of Hon. Charlton Burnett*, HARRISBURG WKLY. PATRIOT AND UNION, Jan. 31, 1867 (page 1), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required). Indeed, fear of enfranchising blacks is a recurring theme throughout the ratification debates and later.

115. *The Radical Reconstruction Plan*, DAILY COLUMBUS ENQUIRER (Ga.), Apr. 28, 1866 (page 1), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

116. U.S. CONST. art. IV, § 2.

117. *See, e.g.*, CURTIS, *supra* note 3, at 81; *The Radical Programme, Strong Letter of Gov. Perry of South Carolina Against the Constitutional Amendment*, DAILY PICAYUNE (New Orleans), Nov. 11, 1866 (page 2) (arguing that the Fourteenth Amendment could not require states to grant political rights to freedmen, as doing so was a purely local matter), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

understanding of federalism would remain intact, permitting each state to set qualifications for office and the scope of political and civil rights. “Privileges or immunities” were simply those rights of movement, work, and access to the government.<sup>118</sup> There was no irreducible quantum of fundamental rights that reposed in the people beyond these, and the federal government could not force the states to comply with a congressionally mandated set of privileges or immunities.<sup>119</sup>

Given the historical circumstances, this approach is difficult to accept at face value. These views are almost identical to prewar notions of privileges and immunities and federal-state relations, restrictive notions embodied even in the Confederate Constitution.<sup>120</sup> As the *Daily Austin Republican*—a Unionist Texan newspaper—put it in 1868:

[For Southerners] [t]o assert that the XIV article is susceptible of a construction which would confer the unrestricted regulation of suffrage upon the States, is to charge the Republican party with having deliberately incorporated into the constitution of the country the secession theory of State Rights, and of having surrendered every principle of nationality involved in the terrible civil war . . . .<sup>121</sup>

It is clear that Southerners did not see the matter this way when they made their arguments; it is also clear that some of these arguments were disingenuous. When the subject matter was black suffrage or eligibility for office, Southern whites were rather stingy with the privileges or immunities guaranteed under the Constitution. Yet when whites had their own prerogatives threatened, Section 1 transformed into a wellspring of political and civil rights. Consider

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118. See, e.g., *Reconstruction*, ALB. J., Jan. 7, 1867, at 1 (speech of Rep. James Gibson) (setting out what could be included in “privileges and immunities”), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

119. *Contra infra* note 157 and accompanying text.

120. CONFED. CONST. art. IV, § 2 (“The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.”).

121. *The XIV Amendment*, DAILY AUSTIN REPUBLICAN, Dec. 16, 1868 (page 1), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

the case of one T. T. Fauntleroy, Jr., who in a letter to the head of his military district complains that his receipt of a pardon made him “a new man; fully rehabilitated with all the functions, rights, *privileges and immunities* of a citizen of the United States . . . accordingly [ ] allowed to vote.”<sup>122</sup> Compare these sentiments with the article “Is a Negro Eligible to Office in Georgia,” from the April 2, 1869 *Macon Weekly Telegraph*. Judge Schley (of the Chatham Superior Court) says that blacks are certainly not entitled to run for office and cites *Dred Scott* and *Corfield v. Coryell* as his authority.<sup>123</sup> To put it another way, proponents of the narrow view were advocating a theory of constitutional interpretation that not only relied on antebellum federalism, it relied on the very case that the Fourteenth Amendment set out to overrule.<sup>124</sup>

The *Georgia Weekly Telegraph* illustrates the scope of the enmity Southerners had towards the consensus and Radical view readings of the Amendment on November 12, 1869, reproducing an editorial in the *Montgomery Advertiser*, by explaining how it is all but impossible to keep freed blacks from voting. The segment concludes: “This is our opinion after full examination and reflection on the subject. It will be in the power of the States, (perhaps,) to exclude negroes from holding office, but not from voting.”<sup>125</sup> Quite obviously, the Southern states were looking to interpret away the rights inherent in the Privileges and Immunities Clause.

Narrow view adherents were not beyond sophistry and evasion. Consider the case of G.T. Ruby, a free black from Maine living in Texas under General Sheridan’s control, as explained in *Flake’s Daily Bulletin*, of Galveston, Texas.<sup>126</sup> Ruby sued for recognition of the

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122. See *Executive Pardon and Political Disabilities*, DAILY PICAYUNE (New Orleans), June 17, 1869 (page 8) (emphasis added), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required). The fact that his demand for the franchise was denied was a matter of interpretation of the extent of Johnson’s pardon, rather than the Fourteenth Amendment.

123. *Is a Negro Eligible to Office in Georgia*, MACON WKLY. TELEGRAPH, Apr. 2, 1869 (page 8), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

124. *Sanez v. Roe*, 526 U.S. 489, 502 n.15 (1999) (noting that the Fourteenth Amendment was intended to overrule the *Dred Scott* decision).

125. *The Fourteenth and Fifteenth Amendments*, GEORGIA WKLY. TELEGRAPH, Nov. 12, 1869 (page 6), available at <http://telegraph.galileo.usg.edu/telegraph/view?docId=news/mwt1869/mwt1869-0337.xml>.

126. *The Ruby Suit*, FLAKE’S DAILY BULLETIN (Galveston, Tex.), May 5, 1868, at 4, available at America’s Database of Historical Newspapers

rights of blacks on steamboats. He also organized one of the first black labor unions, making Galveston's port open to large numbers of black stevedores and other workers. The article, which (to put it delicately) is contentious, suggests that the Comity Clause cannot mean that each state's internal regulations can have control in other jurisdictions: "The section does not embrace any privilege conferred by the local laws of a State."<sup>127</sup> By framing the argument as one related to Article IV, and not the Fourteenth Amendment, *Flake* reveals the flimsiness of its arguments. The author lists the usual Article IV rights—travel, disposing property, petitioning the government, etc.<sup>128</sup>—and acts as though this disposes of the matter. Like Fairman's argument, the article proposes a straw man Comity Clause and dismisses non-textual rights or federal enforcement.<sup>129</sup>

Some who held the narrow view were more straightforward in their reasoning,<sup>130</sup> others were unabashedly hypocritical.<sup>131</sup> In any event, that unreconstructed rebels, former Copperheads, and States' Rightists would hold these views should be some indication of how little merit they deserve. The problem is not that Southerners did

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[http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

127. *Id.*

128. *Id.*

129. For good measure, the author of the article then suggests that any reading of the Constitution other than his would allow "Mr. Brigham Young [to] move his harem and forty wives to Galveston Island." *Id.*

130. Some simply feared the vastly expanded power of Congress. Unseated Mississippi Senator William Sharkey was concerned that "we may find Congress conferring 'privileges and immunities' on one class to the exclusion of another class." *Letter from Hon. W.L. Sharkey, of Mississippi*, DAILY MEM. AVALANCHE, October 2, 1866 (page 2) ("[The Fourteenth Amendment] proceeds to prohibit the States from making or enforcing any law 'which shall abridge the privileges or immunities of citizens.' It does not say what are privileges and immunities; that is left for the next Congress to provide in virtue of the last section, which declares that Congress shall 'have power to enforce, by appropriate legislation, the provisions of this article.'"), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

131. See, e.g., *Meeting of the Citizens of Fulton and DeKalb Counties*, GEORGIA WKLY. (Macon, Ga.), June 14, 1867 (page 5) (noting that the Sherman Act would require Georgians to mark the graves of her war dead with "Traitor" or "Rebel," and that Georgia demanded that the Act not apply. Georgia's resolves included the following: "Resolved, That Georgia only asks, as it is her right to expect, and her duty to demand under the guarantees of the Constitution of which she was a co-architect and builder, the same privileges and immunities as those enjoyed by any other State composing the American Union. She asks nothing more, will never accept any less."), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

not have a valid claim: the problem is that their claim was only valid until 1865 and their loss of the War. Modern readers may disagree with the narrow view and limit its value in an originalist inquiry, but they ignore it with some peril. Nevertheless, the political realities of the late 1860s ought to give pause to anyone who thinks this view should prevail.<sup>132</sup>

*a. The strange case of the Slaughter House.* Despite the weight of the evidence and the patent unreasonableness of the narrow view, the Supreme Court adopted it just four years after passage of the Fourteenth Amendment. The (much and rightly) maligned *Slaughter-House Cases*<sup>133</sup> represent an abdication of judicial duty on par with *Dred Scott v. Sanford*. Put briefly, the Court held that the right to conduct personal business without interference by state monopolies was not a privilege or immunity of citizenship.<sup>134</sup> Yet, rather than end the decision there—which would be a limited, but wholly defensible reading of the Fourteenth Amendment—Justice Miller proceeds to dismantle the Privileges Clause by adopting the narrow view. Like Chief Justice Taney before him in *Dred Scott*, Miller undertakes an unnecessary but highly consequential examination of the Privileges Clause and effectively reads it out of the Constitution.<sup>135</sup>

The opinion defines privileges or immunities as though they inhered in the undifferentiated mass of the people, rather than in individuals. Thus, the controversy is whether Crescent City's monopoly came "at the expense of the great body of the community of New Orleans."<sup>136</sup> working a "gross injustice to the public, and invasion of private right."<sup>137</sup> Only the last clause of the last sentence should bear on an inquiry of breach of the Privileges Clause: Has the state invaded a private right? Instead, Miller depicts the controversy as one between the general rights of the people to be protected and

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132. Try to imagine a debate about the 26th Amendment where the Democrat-controlled Congress and President Johnson argue one interpretation and Barry Goldwater and the John Birch Society argue the other. Now imagine that Goldwater had lost the Civil War and not just the election of 1964.

133. 83 U.S. 36 (1872).

134. *Id.* at 72–83.

135. *Id.* at 77.

136. *Id.* at 60.

137. *Id.* at 61.

the state's exercise of its police power.<sup>138</sup> While the Fourteenth Amendment certainly preserved the police power,<sup>139</sup> Miller renders the Privileges Clause nugatory by establishing the supremacy of state law over it—precisely the opposite result of what its framers and ratifiers envisioned.<sup>140</sup>

The proper inquiry in this case was whether Louisiana, through the City of New Orleans, had violated individual butchers' privileges or immunities. In this way, Miller's citations to *New York v. Miln*<sup>141</sup> and the *License Tax Cases*<sup>142</sup> are inapposite. No one disputed that the states are entitled to reasonable regulations of matters taking place within their boundaries. Nevertheless, Miller "reduce[s matters] to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?"<sup>143</sup> This was no "reduction": framing the question so broadly permitted Miller to take the opinion in the direction he wanted, rather than one necessarily implicated by the case.

To that end, he ponders whether the State had violated the Civil War Amendments.<sup>144</sup> He proceeds to prove too much and too little. Miller explains that all natural born persons are citizens of the United States and thus subject to the protection of the national government.<sup>145</sup> The Amendment states "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the *United States*."<sup>146</sup> Miller apparently considers the fact that the Clause mentions United States citizenship as so pregnant with meaning as to dispose of the whole matter.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but

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138. *Id.* at 61–65.

139. *See supra* notes 59–64 and accompanying text.

140. *See infra* Part III.A.2.

141. 32 U.S. 102 (1837) (embracing the notion that the police power enables states to legislate for the health, welfare, and morals of the people while avoiding the resolution of a claim under the Commerce Clause).

142. 72 U.S. 462 (1866) (explaining that "the power and right of the States to tax, control, or regulate any business carried on within its limits" is beyond question under the Constitution).

143. *Slaughter-House*, 83 U.S. at 65.

144. *Id.* at 66.

145. *Id.* at 72–74.

146. *Id.* at 74 (quoting U.S. CONST. amend. XIV, § 1).

we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.<sup>147</sup>

All of this seems to ignore his immediately foregoing analysis of the Citizenship Clause, which is a federal creation of state citizenship. In dissent, Justice Field rightly recognizes this incongruity when he ties the majority's reasoning on citizenship to John C. Calhoun "and the class represented by him" during the Nullification Crisis of the 1830s.<sup>148</sup>

Adding insult to injury, Miller determines that the Comity and Privileges Clauses are synonymous. Apparently, the drafting and ratification history of the Amendment were mistaken: the two Clauses are coterminous. To accept this view, one must also accept that the Radical Republicans who had just waged a Civil War and forced three constitutional Amendments upon the legislatures of the vanquished South decided that enforcement of equal rights *within* a state would be no priority at all.

And Miller must have so believed, for he wrote that the Privileges Clause "threw around [Privileges or Immunities] in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens."<sup>149</sup> In other words, the Amendment was a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."<sup>150</sup>

As the jurist who dispatched the Privileges Clause, Justice Miller is the successor to the adherents of the narrow view, and the progenitor of the traditional story later told by Fairman. A jurisprudential Janus, he marries the prewar conceptualizations of federalism and police power with postwar Southern views on the

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147. *Id.*

148. *Id.* at 94 (Field, J., dissenting).

149. *Id.* at 77 (majority opinion); see also *Negro Suffrage to be "Snaked" upon the People Through the Rump Amendment, and Enforced by the Supreme Court*, HARRISBURG WKLY. PATRIOT AND UNION, Sept. 13, 1866, at 4 (" [Section 1] simply gave to every man equal civil rights. It was false that it implied negro suffrage. It gave the right to sue and be sued, hold property, etc."), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/ind\\_ex.shtml#tab\\_news](http://www.library.nd.edu/find_articles/ind_ex.shtml#tab_news) (username and password required).

150. *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

limited scope of federal rights enforcement. It is difficult to imagine a less textually faithful or more politically damaging reading of the Amendment, yet it has prevailed with no serious challenge for more than a century and a quarter.

2. *The consensus view*

The decision in the *Slaughter-House Cases* marked the end of the public debate over privileges or immunities, but a robust discussion had taken place over the preceding four years. Indeed, there is a rich repository of public comment and debate in the newspapers, the Congressional Record, and private correspondence that reveals the depth of interest in the second clause of Section 1.

Though the Southern view on the Amendment prevailed, the view of its drafters and ratifiers sheds important and contradictory light on the meaning of its provisions. Public meaning, of course, is about more than the “intent of the framers,” but that does not render their input and influence irrelevant. The arguments made in support of the Amendment and public comments give insight into the mind of the authors of the Privileges Clause. Moreover, popular response and the debate in the public forum put the original intent into relief and begin to reveal the outline of what can be referred to as the consensus view—namely that the Clause protected citizenship rights among the citizenry of the state against discriminatory or arbitrary abridgement.

John Bingham, of course, plays a central role in this analysis. The Pennsylvania-born Ohio lawyer had a lifelong animosity towards slavery that permeated his approach to the law.<sup>151</sup> Curtis points out that his abolitionism manifested itself in a deep affinity for the Bill of Rights and the Privileges and Immunities Clause.<sup>152</sup> As noted above, Bingham believed that the Bill of Rights applied against the states—*Barron v. Baltimore* notwithstanding—and the Privileges Clause supplied a substantive body of rights to all citizens of the Union.<sup>153</sup> And, as Curtis explains, many of Bingham’s fellow Republicans believed that the Bill of Rights had always applied against the states,

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151. See Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Meaning of the Fourteenth Amendment*, 36 AKRON L. REV. 589, 591–98 (2003) (describing Bingham’s upbringing and education in an integrated college in Ohio).

152. See CURTIS, *supra* note 3, at 59.

153. *Id.*

and that all the federal government lacked was an enforcement capacity.<sup>154</sup> This view created a relationship between the Bill of Rights and Article IV, Section 2,<sup>155</sup> so it should not be surprising that Republicans sought to protect anti-slavery and pro-Union speakers throughout the South from laws or prosecution—they wanted to ensure the freedom of speech and assembly.<sup>156</sup>

Some insight into the rights-oriented nature of the Privileges Clause comes upon examination of Republican constitutional theory. Republicans did not hide their belief that the substantive provisions of the Constitution—the Bill of Rights and Privileges Clause in particular—conveyed an irreducible quantum of liberty upon every American citizen.<sup>157</sup> Republicans feared the denial of speech and assembly rights in the South both before and after the War,<sup>158</sup> and more generally espoused the belief that the Bill of Rights applied against the states.<sup>159</sup> It is highly unlikely that Republicans would have drafted or promoted an Amendment so limited as described by the narrow view, or that their supporters in the state legislatures would have ratified it.<sup>160</sup>

Another important element of the Republican rhetoric was the infusion of the language of equality. It becomes quite apparent throughout their debates that the Republicans were concerned with ensuring blacks and Unionists equal citizenship and protection under

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154. *See id.* at 61–64 (outlining Republican views on the Bill of Rights).

155. Such is Curtis’s basic premise, viz. the Privileges Clause incorporated the Bill of Rights in accord with Republican constitutional theory. *See generally id.* (adopting this position throughout the course of his work).

156. *Id.* at 59 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 157–58 (1866)).

157. *See id.* at 49; CONG. GLOBE, 39TH CONG., 1ST SESS. (quoting John Bingham espousing a broad, substantive interpretation of Article IV, § 2).

158. CURTIS, *supra* note 3, at 38–40 (describing Republican views on speech suppression in the antebellum South); *The New Element in Kentucky Politics*, CIN. DAILY GAZETTE, Aug. 31, 1867 (page 1) (quoting prominent antebellum abolitionist and Union General James Brisbin as saying, “I had read in the Constitution of the United States that there should be no abridging of freedom of speech, or freedom of the press, or the right of the people peaceably to assemble”), *available at* America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

159. *See* CURTIS, *supra* note 3, at 51–56 (citing speeches by Republicans and showing the commonness of the theory of incorporation).

160. This Article does not address the claims that the Fourteenth Amendment was never really ratified, and does so relying on Professor Amar’s refutations of that theory in AMERICA’S CONSTITUTION, *supra* note 16, at 364–66.

the law.<sup>161</sup> Curtis chronicles the equality-reinforcing nature of the Amendment in greater detail and depth than I intend to do here.<sup>162</sup> Suffice it to say that the majority of Republicans thought they were creating an equal citizenship provision in and through the Privileges Clause.<sup>163</sup> Once again, context is crucial. The “states formerly in rebellion” were enacting draconian ordinances that restricted black property holding, participation in government, and even rights of locomotion.<sup>164</sup> Given that the Republicans wrote the Civil Rights Act of 1866 to undo the Black Codes, and then wrote the Fourteenth Amendment to—at a minimum—constitutionalize the Civil Rights Act, one can hardly accept a reading of the Amendment that does not mandate intrastate citizenship equality.

They also thought, most reasonably, that they were not undoing the power of states to establish rights, privileges, or immunities. As their statements make clear, they presumed the states would have the authority to set the basic contours of privileges or immunities for their citizens—they were simply forbidden from denying some citizens the same treatment as others.

The views taken in the late 1860s by members of Congress or what we would now call “Washington insiders” has been studied, argued, and reargued ad nauseum in the academy.<sup>165</sup> The more important inquiry for originalists is what the people outside Washington said on the matter. At the very least, Southerners recognized that the Amendment conveyed the rights of citizens to freed blacks. The Speaker of the Texas House of Representatives in late 1866 admitted as much in legislative deliberation of whether to ratify the Fourteenth Amendment when he declared that Texas must vote against ratification, if only because the Amendment conveyed “the priceless rights of American citizenship” to the freed slaves.<sup>166</sup>

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161. See CONG. GLOBE, 39TH CONG., 1ST SESS. 1065 (1866) (arguing that the Amendment guaranteed equal rights under law for blacks and whites). This citation is the source of Fairman’s eye-rolling: “of course, a state law could hardly violate every provision of the Constitution.” See *supra* note 34.

162. See generally CURTIS, *supra* note 3.

163. *Id.* at 49–50.

164. See *supra* note 109.

165. See, e.g., *supra* Part II.A–II.B. (describing “insider” source histories by Fairman and Berger); *infra* Part IV.A.1. (describing Justice Thomas’s use of elite sources in his concurrence in *McDonald v. City of Chicago*).

166. *Texas on the Constitutional Amendment*, MACON DAILY TELEGRAPH, Nov. 1, 1866 (page 2) (Speech of Hon. N.M. Burford), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and

The Republicans themselves made quite clear what they thought they had done. The Republican Congressional Committee declared that “the negroes of the South, by the measures of the Republican party as expressed [in the Reconstruction Acts] are elevated to the full and equal rights of citizens of the States to which they belong, and of the country, which hereafter will recognize no distinctions on account of race or color.”<sup>167</sup> Note that freedmen are full and equal citizens “of the States to which they belong,” meaning that the pre-ratification Reconstruction Acts sought the equalization of citizenship within the states.<sup>168</sup>

Many Republicans thought that the Amendment conferred political rights on freedmen, and relied on *Corfield v. Coryell*.<sup>169</sup> In fact, some leaders considered the deprivation of political rights in the South a violation of the Guaranty Clause.<sup>170</sup> The language describing the South being an “oligarchy” or “slave-ocracy” is not a modern

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password required). In fact, Burford tries to convince Texans to “refuse willingly to transfer our [illegible] from the great master race of the races constituting the Caucasian family of nations to ‘Africans and the descendants of Africans.’” *Id.* Nathan Bedford Forrest himself would have had no argument with that line of reasoning.

167. *Republican Congressional Committee*, THE FARMER’S CABINET (Amherst, N.H.), May 30, 1867 (page 2), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

168. Curtis and others make clear that the Fourteenth Amendment constitutionalized more than the Civil Rights Act of 1866, and there is no reason to assume that the language of the Privileges Clause did not aim at the same equality provisions.

169. *See, e.g.*, CURTIS, *supra* note 3, at 114 (outlining Lyman Trumbull’s reliance on, and interpretation of *Corfield* to set out what were the fundamental rights of citizens).

170. *See, e.g.*, *The XIV Amendment*, *supra* note 121, (page 1) (asserting that the federal government had *always* been empowered to enforce political and fundamental rights against the states), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required). This argument, so like the typical Republican view of the Bill of Rights—namely, that *Barron v. Baltimore* was irrelevant—bears examining in full. The author suggests that the speech-suppressing, disenfranchising governments in the prewar and postwar South

could in no sense be called republican, the essence of which is the consent of the governed, and in such a case it would have been the imperative duty of the government of the United States, under article four, to step in and guarantee to such State a republican government. Until the emancipation of the slaves, they were, under the constitution, not citizens but merely persons, and therefore not entitled to demand the exercise of these high prerogatives of the government in their behalf, but their status was changed by the results of the war, and the benefits of the fundamental inured to them as well as to other native citizens of the country.

*Id.* In other words, freedom of expression and voting rights were sine qua non of a republican form of government, and thus inured to newly free black citizens.

invention.<sup>171</sup> For example, in “A Colored Man’s Speech,” the speaker noted, “the poor white man, debased as much by slavery as the colored man, cringed the supple knee to the dark image of the slave oligarchy . . . . [He was] as subservient a tool to the rich white” as slaves.<sup>172</sup> This almost Marxist critique of the political superstructure of the South found voice in Charles Sumner, the old foe of slavery and Boston Brahmin.<sup>173</sup> Railing against disenfranchisement in the South, Sumner noted that

[a] Republic is a pyramid standing on the broad mass of the people as a base; but here is a pyramid balanced on its point. To call such a government “republican” is a mockery of sense and decency. . . . It is not difficult to classify these States. They are aristocracies or oligarchies.<sup>174</sup>

In one sense, this Guaranty Clause argument moves voting rights beyond the realm of privileges or immunities and into the category of fundamental rights of (male) citizens.<sup>175</sup> There were certainly others who considered the Guaranty Clause the font of freedmen suffrage, adding a second dimension to the considerations of their political rights under the Fourteenth Amendment.<sup>176</sup> Others still

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171. Though it is prominent in modern literature. *See, e.g.*, AMAR, *supra* note 16, at 371 (“A long history of slavocratic contempt for core republican freedoms formed yet another factor inclining Sumner, Bingham, and company to a strongly nationalistic and democratic understanding of Article IV.”).

172. *A Colored Man’s Speech*, CIN. DAILY GAZETTE, July 2, 1867 (page 1), *available at* America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

173. Sumner’s status among abolitionists and freed blacks was legendary, as was his popularity in Massachusetts. When Congressman Preston Brooks brutally beat Sumner with a cane on the floor of the Senate for his anti-slavery comments, Massachusetts refused to replace him and left his seat vacant. South Carolinians, on the other hand, responded by gratefully sending Brooks dozens of canes to replace the one he had cracked in half on Sumner’s head. *See* SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE: FORT SUMTER TO PERRYVILLE* 15 (1986).

174. AMAR, *supra* note 16, at 375 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 674–87 (1866)).

175. Apparently, few people thought women were competent to vote, though feminists forcefully tried to make the argument. *See infra* note 222 and accompanying text (outlining Susan B. Anthony’s arguments in favor of female suffrage).

176. *See, e.g.*, *A Republican Form of Government*, OREGONIAN (Portland), Jan. 8, 1866 (page 2) (reproducing comments of Judge Redfield of Vermont, who claimed that the franchise was an ineluctable element of the freedman’s new rights), *available at* America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

invoked federal intervention in Kentucky to protect Unionists, lest the State violate the Guaranty Clause. Among the anti-Republican features of the Constitution was its “disfranch[isement of] some forty or fifty thousand of its free male citizens of the constitutional voting age.”<sup>177</sup>

Nevertheless, the primary debate at the time was how best to interpret the political ramifications of the Privileges Clause.<sup>178</sup> Public debate on the matter was unsurprisingly vigorous, given the stakes. For example, Congressman Charlton Burnett lays out the *Corfield* argument for inclusion of the franchise in “privileges or immunities” as early as 1866.<sup>179</sup> Southern Unionists argued for immediate restoration of “rights, privileges and immunities” of the “disenfranchised” citizens of Georgia,<sup>180</sup> while the Baltimore *Sun* opined that “Privileges and Immunities do not include the right to hold office, but rather the right to vote.”<sup>181</sup>

The non-Washington Republicans can speak for themselves. In Pennsylvania, the Republicans believed that

[w]e can have no guarantees against future treason more valuable than to render permanent by organic laws the principles triumphant in the war. These . . . [are] the vote by ballot; equality of civil and political rights, privileges and immunities; the nationality of citizenship, the unitary integrity of the republic . . .<sup>182</sup>

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177. *Kentucky Reconstruction*, CIN. DAILY GAZETTE, Aug. 13, 1867 (page 3), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

178. Of course, the political-rights element of the Privileges Clause makes sense by reading the Amendment as a whole. Section 1 embraces rights, including the franchise, Section 2 punishes states that deny citizens suffrage, and Section 5 permits Congress to enforce these provisions. Moreover, Section 2 reinforces the notion that voting was included in the Privileges Clause given that representation depended on the “whole number of persons in each State.” U.S. CONST. amend XIV, § 2. If blacks were not permitted to vote or hold office but were counted for representation, the Amendment was a gift to Southern Democrats in addition to being, of course, taxation without representation.

179. See *Speech of Hon. Charlton Burnett*, *supra* note 114.

180. *The Conservative Convention*, DAILY COLUMBUS ENQUIRER (Ga.), Apr. 21, 1867 (page 1), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

181. *Opinion: Privileges and Immunities*, THE SUN (Balt.), Sept. 12, 1868 (page 1), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

182. *Platform of the Pennsylvania Republican Party*, THE N. AM. (Phila.), June 28, 1867 (page 2), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

In New Jersey, the Grand Old Party called on “Congress to take measures to induce [all States to enact] a just and uniform rule of suffrage, excluding all distinctions of class, race or color, so that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”<sup>183</sup> Back in Ohio, Senator James Sherman declared that “[t]he logical consequences of the great events through which we have passed is [*sic*] to broaden the elective franchise.”<sup>184</sup> In Texas, Republicans resolved that “no individual or class of society shall ever hereafter be debarred from the rights, privileges and immunities common to all citizens, and especially those of suffrage and holding office . . . .”<sup>185</sup> Their inconsistent views apparent again, Southerners complained about the loyalty oath<sup>186</sup> that purported to require fealty to the universal applicability of “rights, privileges and immunities” of all citizens while simultaneously disenfranchising former rebel leaders.<sup>187</sup>

In short, a widely held understanding of the Privileges Clause was that it required states to grant the franchise to citizens in their jurisdiction and perhaps African Americans as well.<sup>188</sup> This is the view that obtained in the public, *even though John Bingham disagreed*.<sup>189</sup>

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183. *Political: The Republicans in New Jersey*, BOS. DAILY J., July 25, 1867 (page 4), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

184. *Speech by Senator Sherman*, CIN. DAILY GAZETTE, Aug. 21, 1867 (page 2), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

185. *Legislative Acts*, DAILY AUSTIN REPUBLICAN, June 26, 1868 (pages 2–3), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

186. WKLY. ARK. GAZETTE, Sept. 22, 1868 (page 2), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

187. *Id.*

188. The existence of the Fifteenth Amendment cuts either way regarding this contention. Narrow view adherents might argue that, had political rights been a part of privileges or immunities, then the Section 5 power was all that was necessary, not an amendment. Consensus and Radical view supporters (and postwar Republicans) could counter that the South had proven all too adept at avoiding federal legislation regarding voting. In any event, and the Fifteenth Amendment notwithstanding, Southern states disenfranchised African Americans for generations.

189. This is, perhaps, the best case against original intent originalism and in favor of public meaning originalism. The fact that the public (and Radical) understanding of the Amendment likely included voting or political rights despite the Framers’ intent is why it is a “consensus view.” On Bingham’s disagreement, see CURTIS, *supra* note 3, at 87.

The consensus view, therefore, encompassed a floor of fundamental rights: those found in the Bill of Rights and the exercise of some political power in the state, along with certain antidiscrimination principles. What this amounts to is a succinct definition of Republican views of citizenship rights. A citizen must be able to speak, assemble, be secure in their person, and keep liberty and property, and so the Bill of Rights is finally applied to the states.<sup>190</sup> A citizen must be on the same footing as other citizens, subject to the nondiscriminatory and reasonable police power, and so internal equality is reinforced by the Privileges or Immunities, Equal Protection, and Due Process Clauses.<sup>191</sup> A citizen cannot meaningfully discharge his or her privileges or immunities or direct the affairs of the state without political power, and protection of voting rights is the surest way to guarantee a republican form of government.<sup>192</sup> This was the legacy Republicans sought to leave through the Fourteenth Amendment.

Four people who accepted this legacy and fought against its frustration wrote the *Slaughter-House Cases* dissents. Justice Field in particular provided the legal, as opposed to political, argument in favor of the Republican consensus theory of the Privileges Clause. He began by setting forth the proper scope of the state's police power, and his view dovetailed the Republican approach to state regulatory authority. Namely, he reasoned that while states are entitled to regulate for the "health, good order, morals, peace, and safety of society,"<sup>193</sup> the simple fact that a state exercises its authority does not make it a valid police power.<sup>194</sup> Field recognized that the case was to be decided at the intersection of the state's authority and the Fourteenth Amendment, and that the Court's duty was to determine which was to prevail.<sup>195</sup> The Amendment recognized the "fundamental rights, privileges, and immunities which belong to him

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190. *Id.* at 87–88.

191. Professor Barnett makes a strong case that these three Clauses are mutually reinforcing and all related to equality. *See* Barnett, *supra* note 54, at 23–24.

192. It is also, of course, a good way to ensure a Republican form of government. Protecting the franchise of freedmen and loyal southerners may have been part of Republican constitutional theory, but national political viability for the GOP was certainly a pleasant incidental benefit.

193. *The Slaughter-House Cases*, 83 U.S. 36, 87 (1872) (Field, J., dissenting).

194. *Id.* at 87–90 (detailing why the monopoly granted in this case was not an appropriate exercise of Louisiana's police power).

195. *Id.* at 94.

as a free man and a free citizen . . . as a citizen of the United States,” though these were subject to state regulation.<sup>196</sup> Field then delineated what he believed “privileges or immunities” to mean,<sup>197</sup> and in so doing offered a précis of the consensus view:

What the [Privileges and Immunities Clause] 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.<sup>198</sup>

Field notes that the Fourteenth Amendment places a baseline of fundamental rights “under the guardianship of the National authority,”<sup>199</sup> and ensures federal judicial vindication.<sup>200</sup> Field, like Bingham and the consensus view Republicans, identifies an irreducible minimum body of fundamental rights, which he believes is partially set out in *Corfield*, but which certainly includes freedom from monopolies. He further ties himself to the consensus view and Republican constitutional theory by predicating his arguments on a civic equality basis.<sup>201</sup>

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196. *Id.* at 95–96. By positing that privileges or immunities in a state were relative to the “the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations,” Field was not undoing his argument. Rather, he was suggesting that all rights are relative and subject to regulation or modification, as with registering voters or the exigent circumstances doctrine. Field clarified his views on the police power (and reconciled any potential doubt that he espoused the consensus view) in *Bartemeyer v. Iowa*, 85 U.S. 129, 137–41 (Field, J., concurring), where he explained that states may regulate rights as they see fit, provided they do not “encroach upon any of the just rights of the citizen, which the Constitution intended to guard against abridgment.” *Id.* at 138.

197. *Slaughter-House*, 83 U.S. at 96–106.

198. *Id.* at 100–01.

199. *Id.* at 101.

200. Notably, Justice Field moves on to explain why monopolies were such a baleful entity at common law, and how every citizen was entitled to protection against them. *Id.* at 102–04. In a sense, he has performed the very first *Palko v. Connecticut* inquiry, by testing the constitutional adequacy of a state act against the traditions and principles inherent in Anglo-American concepts of government. Citing *Corfield*, he looks at whether pursuit of a trade was of the sort that “belong[s] of right to citizens of all free governments.” *Id.* at 97.

201. *Id.* at 88–89 (explaining that an arbitrary privilege for one group of persons for one period of time could be extended to one person in perpetuity, and consequently the remaining citizenry would be deprived of its rights); *see also id.* at 109–110 (“In all [his cited] cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void. This equality of right, with exemption from all

### *3. The radical view*

By its very name, the consensus view implies that it occupies a middle position among three choices, as indeed it does. Not every Republican was a moderate, and not every newspaper called for restrained application of the Amendment. Radicals dominated the rhetorical landscape in this era, such that one might predict that Radical views would have been very relevant to historical queries, but they were not.<sup>202</sup> When modern revisionist scholars think of privileges or immunities, it is likely that they are imagining the Radical view, a view that understood the Amendments as conveying a plenitude of political, social, and human rights.

One must note from the outset that this view by no means predominated; it rather bounded discussions on one side the way the narrow view bounded them on the other. To that end, the Radical view is less common than the narrow, and certainly less common than the consensus view. Yet it is no less relevant for its minority status, in that it was a key element in debates over the Amendment, and it offered a glimpse into what the nation's intellectual and philosophical leadership aimed at during this period.

Thaddeus Stevens, longtime Radical firebrand and Republican leader, argued in favor of the Amendment as the best Congress could do at the time. Notably, his language is more in keeping with the Barnett-revisionist understanding of the Privileges Clause. Consider his statement that he could “hardly believe that any person can be found who will not admit that [the Amendment] is just. [Its provisions] are all asserted, in some form or other, in our DECLARATION or organic law.”<sup>203</sup> The idea that the Declaration should be given effect through the Constitution reappears in Stevens' statements during the ratification debates. He argued with some force that the franchise was included in privileges or immunities of citizens, challenging his listeners to “show me the man who is so impudent as to deny that suffrage by the ballot is due to every being within this realm to whom God has given

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disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States.”).

202. As seen above, Fairman and Berger marginalized them, while Justice Miller ignores their view in his ruling.

203. CONG. GLOBE, 39TH CONG., 1ST SESS. 2459 (1866).

immortality.”<sup>204</sup> He later posited that the Constitution of 1789 failed in its attempt to “carry out the principles of government which were intended by the fathers, when in 1776 they laid the foundation of the government on which this nation was to be built.”<sup>205</sup> At the time of the Founding, Stevens says, the Framers had to postpone the fulfillment of these rights, but now, “thank God that necessity no longer exists.”<sup>206</sup>

Moreover, though a theory does not become valid by having luminous devotees, prominent support does place the contemporary debate in relief. To that end, Frederick Douglass believed that voting and civil rights were part and parcel of the new freedom of blacks and all citizens in general. In his “Appeal to Congress for Impartial Suffrage” of 1867, he claims that voting rights are natural rights that emanate from the manhood of the freed slaves.<sup>207</sup> He made a powerful claim against second-class citizenship as contrary to the national honor and dignity, and notes that America could not “afford to endure the moral blight which the existence of a degraded and hated class must necessarily inflict upon any people among whom such a class may exist. . . . [I]n a word, you stamp them as a degraded *caste* . . . .”<sup>208</sup> He is most prescient when he notes that a “disfranchisement in a republican government based upon the idea of human equality and universal suffrage . . . [has a] bitter and stinging element of invidiousness.”<sup>209</sup> Douglass saw the Southern objections to the franchise and broader acceptance of civil rights

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204. *From Our Second Evening Edition of Yesterday*, BOS. DAILY J., Nov. 1, 1867 (page 2), available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required). He explicitly ties this right to the Privileges Clause. He suggested that “every citizen of any State is entitled to all the inalienable rights, privileges and immunities of this Government, and . . . one of those inalienable rights is the right to cast his ballot for every man who is to take part in the Government.” *Id.*

205. Stevens, *supra* note 79.

206. *Id.*

207. Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, 19 ATLANTIC MONTHLY, Jan. 1867, at 112, available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

208. *Id.* at 114.

209. *Id.* at 115.

under the Fourteenth Amendment for what they likely were: an attempt to maintain the prewar social order.<sup>210</sup>

Reconstruction governments in the states also took a wide view of privileges or immunities. A curious episode in Georgia's Reconstruction provides a good glimpse into the nature of the rights Radicals thought were at stake. In 1868, the Georgia Assembly complained of Radicals and carpetbaggers, and sought to reassert control over the government.<sup>211</sup> While asserting that it firmly believed in the protection of all individual rights,<sup>212</sup> the Legislature inexplicably proceeded to expel all its black members.<sup>213</sup> The *Springfield Daily Republican*, another Massachusetts Republican organ, was archetypical when it incredulously reproduced the Georgian Legislature's pledge of support for equality when it "ha[d] just passed, or [was] going to pass, a law declaring the negroes ineligible to office in Georgia!"<sup>214</sup> Governor-General Bullock of Georgia, in response to the Act expelling blacks from the legislature, wrote the Federal Congress to say that Reconstruction was not accomplished in Georgia.<sup>215</sup> His annual message to the Legislature says that only Congress can interpret the tone and meaning of the Reconstruction Acts, and that "Congress will not pause in the great work of regeneration until we fully acquiesce in the great fact that

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210. *Id.* at 116. He continues, "[The South] will swallow all the unconstitutional test oaths, repeal all the ordinances of Secession, repudiate the Rebel debt, promise to pay the debt incurred in conquering its people, pass all the constitutional amendments, if only it can have the negro left under its political control. The proposition is as modest as that made on the mountain: All these things will I give unto thee if thou wilt fall down and worship me." *Id.* (internal quotation marks omitted).

211. *Times' Special Dispatches: Georgia*, NEW ORLEANS TIMES, Sept. 27, 1868 (page 1), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

212. *See id.* ("We assert that it is the purpose of the white people of this State to faithfully protect the negro race in the enjoyment of all the rights, privileges and immunities guaranteed him by the Constitution and laws of the United States, and the constitution and laws of this State.").

213. *Republican State Convention*, BOS. DAILY J., Sept. 9, 1868 (page 2), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

214. *Review of the Week*, SPRINGFIELD DAILY REPUBLICAN (Mass), Oct. 3, 1868 (page 1), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

215. *Affairs in the South*, THE SUN (Balt.), Jan. 16, 1869 (page 1), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

our late slaves are men, entitled to all the rights, privileges and immunities of other men before the law.”<sup>216</sup>

Yet more was involved than political rights in these struggles. The *Daily Republican*'s article also approvingly described Louisiana Governor-General Warmoth's veto of a “bill punishing discriminations on account of color in hotels, on cars, &c. and the veto [was] sustained by the Legislature.”<sup>217</sup> Apparently, the “veto [was] based on several reasons, one all sufficient one being that the constitution clearly secures equal rights and privileges to the blacks, which they are at liberty to enforce in the courts.”<sup>218</sup> In other words, Radicals believed the Constitution protected a fundamentally equal society, both in the private and public sphere. One hears echoes of this belief in both Justice Bradley's and Justice Swayne's dissents in *The Slaughter-House Cases*.<sup>219</sup>

Other radicals promoted individual liberties as at the core of the Privileges Clause, liberties that formed the basis of equal citizenship. Republican, historian, and diplomat John Lothrop Motley declared that the Constitution was a “pompous falsehood” until and unless “the citizens of New England, or New York, or Pennsylvania, white, black or yellow, are entitled to the privileges and immunities of citizens in Alabama, or Texas, or any other State.”<sup>220</sup> Senator James Wilson told a crowd of African-Americans that “[b]efore the law you are my equals and my peers, you have the same rights, privileges and immunities that I possess. . . . [Y]ou are as free as I am, and are entitled to vote.”<sup>221</sup> One can only assume that Wilson believed he had more social or human rights than the franchise. Feminists like

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216. *Id.*

217. *Review of the Week*, *supra* note 214.

218. *Id.*

219. See *The Slaughter-House Cases*, 83 U.S. 36, 111–24 (1872) (Bradley, J., dissenting); *id.* at 124–30 (Swayne, J., dissenting). These dissents deserve a fuller treatment than they will receive in this paper, but it is enough to note that their view of privileges or immunities extends beyond Justice Field's consensus approach.

220. *Four Questions for the People at the Presidential Election*, BOS. DAILY J., Oct. 21, 1868 (page 5), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

221. *Senator Wilson to the Colored Men*, N.H. SENTINEL, April 18, 1867 (page 2); see also *The New Element in Kentucky Politics*, *supra* note 158 (“[B]ut to-day we are—stupendous change—an American citizen, entitled to all the privileges and immunities of the white man.”). These sources are available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

Elizabeth Cady Stanton demanded full civic and social equality for women, and complained that “while every type and shade of manhood is rejoicing to-day in all the rights, privileges, and immunities of citizens in the District [of Columbia], its noblest matrons are still living under the statute law of a dark and barbarous age.”<sup>222</sup>

Republican papers promoted the Radical view in their pages. The *Harrisburg Weekly Patriot and Union* forcefully argued that the Privileges Clause included “the privileges of voting, of holding office, of being a jurymen, &c.; immunity from exclusion from schools, hotels, public offices, conventions, &c. The corollary is to meet the case of the slaves just emancipated.”<sup>223</sup> Former Attorney General George Hoar embraced the Radical view to a degree that would not become mainstream until the late twentieth century.<sup>224</sup> The (ever Radical) *Cincinnati Daily Gazette* quotes Hoar as believing “privileges and immunities” to include the pursuit of

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222. *Woman Suffrage—Mrs. Stanton Before the Senate Committee*, THE SUN (Balt.), Jan. 30, 1869 (page 1). Indeed, suffragettes and other feminists had lobbied both parties for political and social rights. On one occasion, Susan B. Anthony had petitioned the Democratic National Convention to agree to women’s suffrage and other rights, and noted that recent moves by Republicans had “roused us to more earnest and persistent efforts to secure these rights, privileges and immunities that belong to every citizen under the Government.” *The National Democratic Convention Second Day*, BOS. DAILY J., July 7, 1868 (page 1). She also pointed out that blacks had been elevated to citizenship (which prompted hisses from Democrats) and described the nature of their rights: suffrage, taxation with representation, juries of peers, government by consent, possession of the “honor and dignity” of citizens. *Id.* In what would presage a later coalition of progressives, labor unions joined the chorus for greater rights (though not for women), professing in 1869 their belief that all freedmen were “equal in political right, and entitled to the largest liberty consistent with good government; no persons or classes are entitled to exclusive privileges and immunities.” See *The Labor Congress*, CIN. DAILY GAZETTE, Aug. 21, 1869 (page 3). All sources quoted in this footnote are available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

223. *Negro Suffrage to be “Snaked” upon the People Through the Rump Amendment, and Enforced by the Supreme Court*, *supra* note 149, at 4, available at America’s Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

224. Hoar, when in the House in 1871, believed that privileges or immunities meant “all the privileges and immunities declared to belong to the citizen by the Constitution itself together with ‘those privileges and immunities which all Republican writers of authority agree in declaring fundamental and essential to citizenship.’” CURTIS, *supra* note 3, at 162 (quoting CONG. GLOBE, 42D CONG., 1ST SESS. 334 (1871)). In other words, the Radical view accepts all Republican equality notions in the consensus view and adds to them social rights.

happiness.<sup>225</sup> To that end, the paper editorializes that marriage between races *must* be included in the Privileges or Immunities Clause, because marriage is a pursuit of happiness, which is a privilege of citizenship.<sup>226</sup>

The Radical view, then, accepted privileges or immunities as embodying the litany of fundamental rights of Englishmen and Americans, the Bill of Rights, social and civic equality, and a robust application of the principles of the Declaration of Independence. It should be no surprise that revisionists find much to commend in this view; nor should it be a surprise that libertarians like Randy Barnett approve of the Radical view, as it imposes on states the sort of limits that they believe the Ninth Amendment enforces against the federal government.<sup>227</sup> As appealing as this view may be, it simply was not widely held enough to constitute a viable reading of the public understanding of the Privileges Clause between 1866 and 1872. If nothing else, the Radical view shows what Radical Republicans offered in response to the narrow view, and what the moderates of the consensus view had to recognize as the belief and desire of a powerful political minority. In this, it clarifies the political environment of those six years, and helps develop a more accurate appreciation of the public understanding of the Fourteenth Amendment; or rather, what that understanding was until the Supreme Court imposed the narrow view upon the nation in *The Slaughter-House Cases*.

#### IV. NEW OPPORTUNITIES

After *The Slaughter-House Cases*, the Privileges Clause became a nearly dead letter. The Court eviscerated any remaining usefulness for the Clause just three years later in *United States v. Cruikshank*.<sup>228</sup> When a group of African-Americans assembled around the Colfax, Louisiana courthouse to prevent Democrats from seizing control, a mob of armed whites attacked, killing many dozens.<sup>229</sup> Cruikshank,

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225. *Marriage Between Whites and Blacks*, CIN. DAILY GAZETTE, May 19, 1870 (page 2), available at America's Database of Historical Newspapers [http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

226. *Id.*

227. Barnett, *supra* note 54, at 9.

228. 92 U.S. 542 (1875).

229. *Anarchy Again in Louisiana: A War of Races in Grant Parish*, HARTFORD COURANT, Apr. 16, 1873 (page 3), available at America's Database of Historical Newspapers

one of the leaders of the white mob, and his cohort were charged with violating the Enforcement Act, which forbade “band[ing] or conspi[ring] together . . . to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.”<sup>230</sup> The charge presupposed that the murdered freedmen were attempting to exercise their rights to assembly and the right to bear arms—the freedmen had their weapons seized, rendering them helpless.

Although initially convicted, the Supreme Court reversed, determining that none of the charges under the Enforcement Act were valid.<sup>231</sup> The Fourteenth Amendment, the Court reasoned, protected persons against invidious discrimination and unconstitutional action by state government.<sup>232</sup> Had the Court disposed of the case in this way, it may have worked little constitutional harm: after all, the Fourteenth Amendment does not proscribe non-state conduct in the same way that the Thirteenth Amendment does. But Chief Justice Waite went much farther than a simple textual analysis, and completed the work begun in *The Slaughter-House Cases*. Waite explained that even if there had been state action in *Cruikshank*, the convictions still could not have stood because the mob had not deprived anyone of a “right or privilege granted or secured . . . by the constitution or laws of the United States.”<sup>233</sup>

This jurisprudential feat required a hypertechnical reading of the facts and some linguistic contortion. For example, Waite wrote that the First Amendment protects “the right of the people to assemble and to petition the government for a redress of grievances.”<sup>234</sup> Waite omits a crucial comma; the text of the Amendment actually protects “the right of the people peaceably to assemble, and to petition the

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[http://www.library.nd.edu/find\\_articles/index.shtml#tab\\_news](http://www.library.nd.edu/find_articles/index.shtml#tab_news) (username and password required).

230. *Cruikshank*, 92 U.S. at 548 (citing Enforcement Act of May 31, 1870, ch. 114, § 6, 16 Stat. 141).

231. *Id.* at 559.

232. *Id.* at 554 (“The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.”).

233. *Id.* at 551–56.

234. *Id.* at 552 (quoting U.S. CONST. amend. I).

Government for a redress of grievances.”<sup>235</sup> By omitting the split between the assembly clause and the petition clause, Waite makes it seem that the First Amendment only protects lawful assemblies for the purpose of petitioning the government:

The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.<sup>236</sup>

The Court ignored the possibility that peaceable assembly for any purpose was probably within the ambit of the First Amendment’s protections. The Second Amendment receives similarly short shrift. Bearing arms, the Court reasoned, was a right that predated the Constitution and was therefore not created by the Second Amendment, nor was possession of weapons for a “lawful purpose” a right first established by the Amendment.<sup>237</sup> The amendments are merely limits on Congress’s authority to legislate: the Fourteenth Amendment did not work any change to *Barron v. Baltimore* or the notion that the states chose the scope of rights within their jurisdiction.<sup>238</sup>

The *Cruikshank* Court, which rejected even the modest idea that the Bill of Rights applied to the states after the Fourteenth Amendment, issued the final word on privileges or immunities for generations. As Chief Justice Rehnquist noted in his dissent in *Saenz v. Roe*, the Privileges Clause was applied once with approval between

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235. U.S. CONST. amend. I.

236. *Cruikshank*, 92 U.S. at 552–53.

237. *Id.* at 553.

238. *Id.* at 553–54 (“The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these ‘unalienable rights with which they were endowed by their Creator.’ Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.”).

its passage and 1999.<sup>239</sup> Given the limitations imposed by *The Slaughter-House Cases* and *Cruikshank*, this dormancy is unsurprising. Only in the recent debate on the Second Amendment did the Clause appear to have a chance at revitalization. After the Supreme Court concluded that the Second Amendment protected private firearm ownership against federal intrusion,<sup>240</sup> the logical next question was whether states were similarly barred from banning handguns. The heavy restrictions placed on handgun ownership in Chicago offered the chance to resolve the issue of whether the Privileges Clause could have new use.

#### A. McDonald and Revisionism

When *McDonald v. City of Chicago*<sup>241</sup> came before the Supreme Court, commentators and jurists—whose thoughts were leavened by the revisionist school and works like Curtis’s *No State Shall Abridge*—debated the Privileges Clause as a source of constitutional rights.<sup>242</sup> Chicago’s Municipal Code all but forbade citizens from owning or possessing handguns within the city limits.<sup>243</sup> Although *Heller* couched the right to personal firearm ownership in the language of substantive due process,<sup>244</sup> the principal and major amicus briefs in *McDonald* devoted dozens of pages to an analysis of the Privileges Clause and skirted the Due Process Clause.<sup>245</sup> In the months leading up to oral arguments, speculation ran that the Court was poised to make a profound statement about privileges or immunities.<sup>246</sup>

239. *Saenz v. Roe*, 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting) (citing *Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled by* *Madden v. Kentucky*, 309 U.S. 83 (1940)).

240. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (concluding that private firearm ownership was constitutionally protected under the Second Amendment).

241. 130 S. Ct. 3020 (2010).

242. *Id.*

243. *See id.* at 3026 (“A City ordinance provides that ‘[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.’ . . . The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City.”) (citations omitted).

244. *Id.* at 3042 (plurality opinion) (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

245. *See, e.g., supra* note 11.

246. Timothy Sandefur, *Revive Privileges or Immunities: 14<sup>th</sup> Amendment Clause Ought to Protect Against State Red Tape Limiting Economic Freedom*, NAT’L L.J. (March 01, 2010),

The Court did indeed make such a profound statement. As Alan Gura, lead counsel for the petitioners in *McDonald* began his argument, Chief Justice Roberts stated that any argument based on the Privileges Clause was “contrary to the Slaughter-House cases, which have been the law for 140 years” and that it would be a “heavy burden for [Petitioner] to carry to suggest that [the Court] ought to overrule that decision.”<sup>247</sup> Justice Scalia, after securing from Gura an admission that it would be “easier” to resolve the case per the Due Process Clause, explained that while a revitalized Privileges Clause is the “darling of the professoriate, for sure, . . . it’s also contrary to 140 years of our jurisprudence.”<sup>248</sup> Scalia went on to ask why the petitioners wanted “to undertake that burden instead of just arguing substantive due process, which as much as I think it’s wrong, I have—even I have acquiesced in it?”<sup>249</sup>

Despite this unpromising opening, the Justices did discuss privileges or immunities. Throughout the argument, the influence of the revisionist school was apparent. That is, the questions for counsel were littered with references to “natural rights” and unenumerated rights in the mode of Professor Barnett.<sup>250</sup> Justice Ginsburg explored the definitional problem that goes along with any concept of privileges or immunities that went beyond the first eight amendments. If the Privileges Clause secured rights that are implicit in the concept of ordered liberty, then those rights are coterminous with rights that are protected by substantive due process. If the Clause protects natural rights, as revisionists argue, then it is almost impossible to adjudicate cases without adopting a dramatically libertarian view of the Constitution. If the Clause protects something else, what is it?<sup>251</sup>

These interpretive problems should be familiar: they are the same issues that have arisen since the drafting of the Privileges Clause. Accordingly, the Court skirted the issue, with Justice Alito

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[http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202444559409&Revive\\_privileges\\_or\\_immunities&slreturn=1&hblogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202444559409&Revive_privileges_or_immunities&slreturn=1&hblogin=1).

247. Transcript of Oral Argument at \*2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

248. *Id.* at \*5.

249. *Id.*

250. *See, e.g., id.* at \*3-4, \*7 (“Justice Ginsburg: What unenumerated rights would we be declaring privileges and immunities under your conception of it?”).

251. *See id.* at \*9-10.

dismissing outright the possibility of a revived Privileges Clause.<sup>252</sup> Justice Thomas offered a new interpretation—or rather, an old interpretation that seems new.

*1. Justice Thomas's concurring opinion*

Although the Privileges Clause did not feature prominently in the majority or the dissents in *McDonald*,<sup>253</sup> Justice Thomas broke with the other eight Justices to thoroughly examine the Clause. In fact, he based his concurrence upon it, something all but unknown in the Court since *The Slaughter-House Cases*. Thomas opened by stating his belief that “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”<sup>254</sup> Much ink will no doubt be spilled discussing the legal conclusions and interpretive consequences of Justice Thomas’s concurrence. My intent is not to dissect his argument, because I agree substantially with Justice Thomas’s position. My conclusion, however, is driven by different considerations, supported by different sources, and compels a slightly different result.

Justice Thomas conducts a standard originalist inquiry as the basis for his opinion. He begins by placing the Fourteenth Amendment in political and social context. Describing the splintering of the nation over slavery and the bloodshed of the Civil War, he argued that the postwar amendments “were adopted to repair the nation from the damage slavery had caused.”<sup>255</sup> Then, laying out a critique of substantive due process,<sup>256</sup> Justice Thomas

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252. *McDonald*, 130 S. Ct. at 3048.

253. *Id.* at 3089 (Stevens, J., dissenting) (describing petitioners’ argument on the Privileges Clause and agreeing “with the plurality’s refusal to accept petitioners’ primary submission”); *id.* at 3132 (Breyer, J., dissenting) (“[T]he Court today properly declines to revisit our interpretation of the Privileges or Immunities Clause.”).

254. *Id.* at 3059 (Thomas, J., concurring).

255. *Id.* at 3060.

256. *Id.* at 3061–63. Originalists often level criticism at the idea of “substantive due process,” contending that it is a doctrine without an origin in constitutional text. And, in fact, reduced to their simplest form, substantive due process cases are exercises in judicial incredulity—they turn on whether a court’s reaction to a legislative choice is, essentially, a statement that “no reasonable legislature could possibly have reached X or Y conclusion.” Laws that violate substantive due process are overruled because they offend a “deeply rooted tradition or principle of ordered liberty.” But because there is no objective way to decide what rights are fundamental, judicial review is little more than a litmus test on whether a law “seems right.” For this reason, critics of all stripes are unhappy with substantive due process’s

posits that the *McDonald* was an opportunity for the Court “to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.”<sup>257</sup>

This restoration takes the form of an etymological study of “privileges or immunities” and then an examination of contemporary documents, primarily what can be called “elite” sources: members of Congress and legal scholars. The concurrence describes Justice Washington’s list of rights in *Corfield*<sup>258</sup> and the thoughts of prominent legal thinkers like Kent and Cooley.<sup>259</sup> Turning to the records from the 39th Congress, Thomas outlines the thoughts of congressional leaders like Bingham<sup>260</sup> and Sen. Jacob Howard,<sup>261</sup> and the forceful objections of Representative Hale of New York.<sup>262</sup> “As a whole,” Justice Thomas asserts, “these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task.”

Thomas continues this survey of sources by recounting more speeches in Congress, describing legislation passed by the Radical Republicans, citing decisions by Circuit judges, and outlining the considered opinions of more leading legal thinkers.<sup>263</sup> With one exception,<sup>264</sup> Justice Thomas relies on these elite sources as the basis for his conclusion that the “evidence plainly shows that the ratifying

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scattershot and unpredictable results. The frustration the dissents voice in *McDonald* at the incorporation of the Second Amendment via substantive due process resembles the frustration of other Justices in other substantive due process cases.

257. *Id.* at 3063.

258. *Id.* at 3067 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3230)).

259. *Id.* at 3067–68 (quoting COOLEY, *supra* note 60, at 15, 16 & n.3 (reprint 1972) (1868); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 35 (11th ed. 1867)).

260. *Id.* at 3072.

261. *Id.* at 3073–74 (quoting Howard’s remarks that the Constitution recognized “‘a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution . . . some by the first eight amendments of the Constitution,’ and that ‘there is no power given in the Constitution to enforce and to carry out any of these guarantees’ against the States”).

262. *Id.* at 3073; *see also supra* note 92 and accompanying text.

263. *McDonald*, 130 S. Ct. at 3075–77 (Thomas, J., concurring).

264. Thomas cites one article that collects certain newspaper articles, some of which reflect public comments from a non-elite perspective. *See* David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695 (2009).

public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms.”<sup>265</sup>

While the decision to use these sources does not undermine Justice Thomas’s argument, it deprives his contentions of some force. To begin, elite-source historiography comes close to “original intent” originalism, a theory most jurists and scholars reject as an interpretive methodology.<sup>266</sup> Privileging elite sources over a wider array of contemporary documents leaves judges with a limited body of evidence with which to make a decision: an ill-advised decision when originalists already suffer from a lack of reliable sources to begin with.<sup>267</sup> A better course, although a more time-consuming one,<sup>268</sup> is to use the widest array of sources.

Contextualizing Justice Thomas’s arguments amid the spectrum of public comment around 1868 places his concurrence somewhere near the consensus view. But his methodology is tied to the revisionist school, and, in a more fulsome way, to the Framers’ views on natural rights. One important aspect of his discussion is the emphasis on historical and contemporary practice: firearms were an important part of life for millions—and because they were so common, ownership must have been understood to be a fundamental right, and vice versa.

But as the evidence in Part III suggests, natural rights and unenumerated privileges were apparently far from the minds of the drafters and ratifiers of the Fourteenth Amendment. Little public comment touched upon the natural right to firearms, or the fact that the Bill of Rights merely codified a preexisting set of rights. In fact, the Supreme Court’s opinions in *Cruikshank* and *The Slaughter-House Cases*—with their discussion of natural rights—were rare exceptions to the rule that citizenship rights were the primary

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265. *McDonald*, 130 S. Ct. at 3077 (Thomas, J., concurring).

266. See, e.g., Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325, 327 nn.5–6 (2009) (“Most academic originalists insist that . . . the original public meaning of the Constitution[] is the relevant object of interpretation because the Constitution became legally binding through the actions of its ratifiers, not its framers.”).

267. Opponents of the use of legislative history should also be hesitant to rely only on elite sources like the Congressional Record.

268. This consideration is not insignificant, given the time-consuming nature of historical research and the incredibly crowded federal docket.

concern of the day.<sup>269</sup> Discussions about the substantive guarantees of the Bill of Rights and about political citizenship were far more important to the national conversation on the Amendment.<sup>270</sup>

The originalist inquiry in Justice Thomas's concurrence, then, mirrors the simultaneously too broad/too narrow nature of the revisionist school. While he rightly notes that the original understanding of the Privileges Clause applied the Bill of Rights against the states, his emphasis on the nature of the right to firearm ownership as an inalienable right that predates the Constitution is somewhat outside the scope of public understanding at the time. In other words, Justice Thomas's concurrence is a fair reading of the original meaning, but a somewhat incomplete one. The broader public's understanding of the Privileges Clause should inform the discussion more fully, and should frame originalists' discourse in the future.

#### V. WHOSE CONSTITUTION IS IT, ANYWAY?

The debates over the Fourteenth Amendment are not likely to abate, even in the face of overwhelming evidence one way or the other. The stakes are too high, given the extensive nature of the Due Process Clause's "liberty" rights and the political sensitivity that attends those rights. But due process was just about the last thing on anyone's mind in 1866—all the public and the politicians could discuss were privileges or immunities.

In that sense, an originalist who focuses on due process has missed the point of the Amendment almost in its entirety. The sources show such a powerful devotion to the three views among their adherents that the only fair answer to what Section 1 means must begin there, in the midst of the kind of spirited public debate we lament not having today. The great irony of this episode in American history is that Southerners and the Supreme Court did more to preserve antebellum states' rights and federalism in the four

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269. Perhaps because unenumerated rights are undefined and malleable, it was easier for the Court to use them as the basis for a wholesale rejection of a more defined set of rights.

270. One of the dangers of originalist opinion-writing, as with any historical exercise, is answering the wrong question. Describing the public's understanding of firearm ownership is a helpful tool when conducting a *Palko*-style "deeply rooted tradition" test. But the stronger inquiry (and, incidentally, the inquiry with far more source materials) in *McDonald* was whether the public understood the Privileges Clause to apply the Bill of Rights to the states, and not whether firearm ownership was a privilege of American citizenship.

years between ratification of the Fourteenth Amendment and the decision in *The Slaughter-House Cases* than the armies of the Confederacy did in the four years of the Civil War. The triumph of the narrow view and its ossification in legal scholarship deprived the citizens of the several states of a body of privileges or immunities to which they were entitled.

But what were those rights? The available sources bear out the assertion that, at the very least, the consensus view was the original public understanding of the Privileges Clause. One may accept the Radical view and the revisionist story, but only at some peril. While modern scholars may like the notion of a vast, unenumerated body of rights embedded in the Fourteenth Amendment, it does not appear as though the drafters and ratifiers of that provision believed it existed.

Bearing that in mind, it is important to note also that revitalizing the consensus view would not be without consequences, a fact that applies a fortiori for revivifying the Radical view. Citizenship rights are emphatically *not* liberty rights as we understand them.<sup>271</sup> The consensus view of the Privileges Clause would not necessarily protect privacy rights, but it would have voided generations of discriminatory state political practices. More relevant to modern readers, the consensus view of the Clause might not require states to recognize gay marriages, but it would have forbidden them from creating second class legal status for minorities—that is, *Perry v. Schwarzenegger*<sup>272</sup> might not be the correct reading of the Fourteenth Amendment, but neither is *Plessy v. Ferguson*.<sup>273</sup> Modern jurisprudence would be different, and would likely lean towards greater state autonomy, which would be consistent with republican intent and contemporary understanding.

Accepting the original public understanding as laid out above does not necessarily require courts to undo the last forty (or even one hundred and forty) years' precedents. Originalists—including “progressive originalists”<sup>274</sup>—may well find the radical view the most

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271. In effect, liberty interests would probably be pared down to what we now call “procedural due process.”

272. 704 F. Supp. 2d 921 (N.D. Cal. 2010) (invalidating California ballot measure and concluding that the Fourteenth Amendment compels states to recognize same-sex marriage).

273. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

274. See Bravin, *supra* note 8, at A12 (“So-called progressive originalism departs from the conservative strain by shifting focus from the 18th-century constitutional text to the three Reconstruction amendments ratified after the Civil War. . . . By applying methods blessed by

compelling understanding of the Privileges Clause. A robust antidiscrimination power coupled with a textual guarantee for facial challenges would certainly provide means to broadly define personal rights, despite relatively weaker protection under the Due Process and Equal Protection Clauses.<sup>275</sup> Other critics might posit that substantive due process has developed into an important source of individual rights in the United States, and that *stare decisis* might compel its preservation even in the face of overwhelming evidence that the Fourteenth Amendment did not understand “process” to encompass “substance.”<sup>276</sup> And, of course, one might reject originalism as a legal tool altogether, or at least one might reject giving historical evidence dispositive weight in assessing a case.

On the other hand, accepting the consensus view does require the rejection of many decisions, including, of course, *The Slaughter-House Cases*. It also probably necessitates scrapping the selective incorporation doctrine and the application of Supreme Court case law on the amendments against the states—although not completely. *Duncan v. Louisiana* requires the states to apply Supreme Court decisions on the provisions of the Bill of Rights incorporated by the Due Process Clause.<sup>277</sup> But if the first eight Amendments were incorporated whole-cloth, as Justice Black’s dissent in *Adamson* argued and as the contemporary public discussion suggests,<sup>278</sup> then the states may be entitled to interpret

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conservatives to the neglected texts and forgotten framers of the Reconstruction amendments, liberals hope to deploy powerful new arguments to cement precedents under threat from the right and undergird the recognition of new rights.”).

275. Admittedly, these personal rights are only guaranteed to *all* citizens if a state guarantees them to *some* of its citizens. Thus, a state could foreseeably restrict some rights even under the Radical view’s antidiscrimination principle, so long as the restriction applied to all citizens. For example, consider *Palmer v. Thompson*, 403 U.S. 217 (1971). In *Palmer*, the city of Jackson, Mississippi decided to close, rather than integrate, a public swimming pool. The Court held that this decision did not violate the Equal Protection Clause: all citizens of all races were deprived of the benefit of the pool. Just as the decision to close the pool did not violate the Equal Protection Clause, the closure would probably not violate the Privileges Clause (unless public swimming pools are a privilege of national citizenship), because there is no discrimination among the citizenry. In the end, such cases would be resolved by resort to the political process and selecting new legislators.

276. As demonstrated in the *McDonald* oral arguments, even vociferous critics of substantive due process like Justice Scalia recognize the doctrine’s importance and likely staying power in our jurisprudence. See *supra* notes 248–249 and accompanying text.

277. 391 U.S. 145 (1968).

278. *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., Dissenting), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

them as they see fit, though with federal court supervision of the lower boundary of those rights. The contours of the rights in the first eight Amendments would thus be left to the states to ascertain, but Congress and the courts would ensure federal protection of a baseline of personal rights. Such a system would neatly match Bingham's understanding of the Fourteenth Amendment as an enforcement mechanism for the Bill of Rights and with the public's understanding of the balance between police power and federal authority. That each state might have different protections for speech, religious exercise, or privacy would not have been surprising to Americans in 1868: each state *did* have different rights, privileges, and immunities already. The Fourteenth Amendment, as understood at the time, did not abolish all of these differences. Instead, it forbade states from denying its citizens some rights that inhered to all Americans

Regardless of changes to the law today, there is a final reason to apply the Privileges Clause as it was understood: legitimacy. The drafters of the Amendment fought actual, as well as political, battles to achieve its passage and application. The citizens who ratified it thought they were altering the organic law of the Republic, and modern courts ought not to deprive them of their historical agency simply because society has grown accustomed to our precedents—which are unwieldy and too malleable as it is. The solution to the Gordian complexity of our private rights jurisprudence may lie in the restoration of the elegant and original understanding of the Privileges Clause.

