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The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment

DOUGLAS G. SMITH*

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I. INTRODUCTION

During the congressional debates over the Fourteenth Amendment, the framers of the Amendment pointed to the terms “privileges” and “immunities” used in Article IV, Section 2 as precursors of the identical terms used in Section 1 of the Fourteenth Amendment. The Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment provided that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” The terms “privileges” and “immunities” were terms of art that had acquired a specific legal meaning through a series of judicial

2. As Senator Bingham, the principal draftsman of Section 1 of the Fourteenth Amendment, stated in a Report of the House Committee on the Judiciary in 1871:
   The clause of the fourteenth amendment, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” does not, in the opinion of the committee, refer to the privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2.
decisions involving the Privileges and Immunities Clause of Article IV, Section 2. Senator Bingham, the principal draftsman of Section 1, and other Republicans believed that the Privileges and Immunities Clause of Article IV, Section 2 may have been designed to guarantee certain privileges and immunities of citizens of the United States that were inherent in the concept of American citizenship uniformly throughout the United States. For example, Senator Bingham stated on January 25, 1866, prior to ratification of the Fourteenth Amendment in 1868, "I believe that the free citizens of each State were guarantied [sic], and intended to be guarantied [sic] by the terms of the Constitution, all—not some, 'all'—the privileges of citizens of the United States in every State." Similarly, Congressman Frederick Woodbridge, a Vermont Radical, stated that the proposed Amendment would give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied [sic] to him under the Constitution of the United States.

Raoul Berger has also argued that the terms "privileges" and "immunities" were "words of art" having a "circumscribed meaning." Raoul Berger, Constitutional Interpretation and Activist Fantasies, 82 KY. L.J. 1, 5 (1993). However, Berger would constrain the terms as used in Article IV, Section 2 to certain privileges of "trade and commerce." This Article contends that although the terms "privileges" and "immunities" did have a well-defined and circumscribed legal meaning, the meaning encompassed a number of capacities of the citizen besides those dealing solely with trade and commerce. See also infra note 17 (collecting cases interpreting the Privileges and Immunities Clause of Article IV, § 2); ROGER HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 9-10 (1918) ("The words 'privileges' and 'immunities,' like the greater part of the legal phraseology of this country, have been carried over from the law of Great Britain, and recur constantly either as such or in equivalent expressions from the time of Magna Charta. For all practical purposes they are synonymous in meaning, and originally signified a peculiar right or private law conceded to particular persons or places whereby a certain individual or class of individuals was exempted from the rigor of the common law."). See also Earl M. Maltz, Fourteenth Amendment Concepts in the Antebellum Era, 32 AM. J. LEGAL HIST. 305, 305 (1988) ("An examination of antebellum thought reveals that equal protection, due process, and privileges and immunities were terms symbolizing a core set of basic rights in which there was substantial agreement in both free state and slave state society.").

5. CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866).
6. Id. at 1088.
However, most Republicans, like Senator Bingham, believed that the Constitution provided no mechanism for congressional enforcement of the Clause. For example, in discussing the proposed Fourteenth Amendment, Congressman Thaddeus Stevens stated:

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies the defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.

Thus, based on such statements, it is likely that Section 1 of the Fourteenth Amendment was thought by members of Congress as well as the populace at large to be analogous to provisions already present in the Constitution. The important innovation contained in the Amendment was Section 5, which conferred upon Congress the power to enforce these provisions.

Although a number of scholars have attempted to determine what was originally meant by the terms “privileges” and “immunities” as used in Section 1 of the Fourteenth Amendment and Article IV, Section 2, no

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7. This was Charles Fairman’s conclusion as well. Fairman stated that “these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.” Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5, 25 (1949). Fairman believed that this “bill of rights” was composed of the Privileges and Immunities Clause of Article IV, Section 2 and the Due Process Clause of the Fifth Amendment. Id. at 33-34.

However, some Republicans thought that there was a congressional power to enforce the guaranteed privileges and immunities of citizens either under the Necessary and Proper Clause or under the Guaranty Clause. For example, Congressman William D. Kelley stated, “I find in [the Constitution] now, 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.” CONG. GLOBE, 39th Cong., 1st Sess. 1062 (1866). Similarly, Congressman William Higby, a Radical Republican from California, stated that the proposed amendment would “only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument.” Id. at 1054; see also Ex parte Bushnell v. Ex parte Langston, 9 Ohio St. 77 (1859) (discussing the lack of congressional enforcement power under the Clause).

8. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).


consensus has been reached. The position adopted in this Article is that during the nineteenth century it was the prevalent view that the "privileges" and "immunities" of citizens were those powers or capacities deemed to be inherent in the concept of citizenship, flowing from the principles of natural law and embodied in the positive common law and constitutions of the state governments.\footnote{11} The conclusion reached is substantially the same as that reached through an analysis of Section 1 in terms of the social compact theories of natural law theorists.

\footnote{11}{Natural rights theory had been influential in American legal thought since the time of the Revolution. \textsc{Charles Grove Haines}, \textsc{The Revival of Natural Law Concepts} (1965); \textsc{Edward S. Corwin}, \textsc{The "Higher Law" Background of American Constitutional Law} (1955); \textsc{Charles F. Mullett}, \textsc{Fundamental Law and the American Revolution} (1933); \textsc{Thomas C. Grey}, \textsc{Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought}, 30 Stan. L. Rev. 843 (1978). Prominent jurists had also espoused natural law concepts. \textit{See, e.g.}, \textsc{Fletcher v. Peck}, 10 U.S. (6 Cranch) 87, 135-36 (1810) (Marshall, C.J.); \textsc{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.); \textsc{United States v. La Jeune Eugenie}, 26 F. Cas. 832, 845-47 (C.C.D. Mass. 1822) (No. 15,551) (Story, Cir. J.); \textsc{Gardner v. Newburgh}, 2 Johns. Ch. 162, 166-67 (N.Y. 1816) (Kent, C.). \textit{See generally} \textsc{Benjamin Fletcher Wright, Jr.}, \textsc{American Interpretations of Natural Law: A Study in the History of Political Thought} 288-98 (Russell & Russell Inc. 1962) (1931) (citing early cases).

Several commentators have noted, in particular, the influence of natural law theories on the framers of the Fourteenth Amendment. \textit{See, e.g.}, \textsc{Curts supra note 10}; \textsc{Daniel A. Farber & Suzanna Sherry}, \textsc{A History of the American Constitution} (1990); \textsc{Howard J. Graham}, \textsc{Everyman's Constitution} (1968); \textsc{Jacobsen Tenbroek}, \textsc{Equal Under Law} (Collier Books 1965) (1951); \textsc{David S. Bogen}, \textsc{The Transformation of the Fourteenth Amendment: Reflections From the Admission of Maryland's First Black Lawyers}, 44 Md. L. Rev. 939 (1985); \textsc{Daniel A. Farber & John E. Muench}, \textsc{The Ideological Origins of the Fourteenth Amendment}, 1 Const. Comm. 235 (1984); \textsc{Robert J. Kaczorowski}, \textsc{Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction}, 61 N.Y.U. L. Rev. 863 (1986); \textsc{Earl Matz}, \textsc{Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment}, 24 Hous. L. Rev. 221, 224 (1987) (stating that "Republicans were committed to the concept of natural rights, which they saw as embodied in the statement of the Declaration of Independence that all men were entitled to "life, liberty and the pursuit of happiness"); \textsc{Olson, supra note 10, at 350 (concluding that "the [Privileges and Immunities] Clause must be placed against the backdrop of the classical natural law tradition embraced by the 39th Congress").}
influential in nineteenth century American legal thought. However, the road traversed in reaching this conclusion is quite different. The analysis focuses on the jurisprudence developed under the Privileges and Immunities Clause of Article IV, Section 2 prior to ratification of the Fourteenth Amendment in 1868. The analysis presented in this Article is a more direct route to an identical conclusion, since members of Congress explicitly referred to Article IV, Section 2 when discussing what they meant by the terms “privileges” and “immunities” as used in Section 1 of the Fourteenth Amendment.

The purpose of this Article is to gain insight into the original meaning of the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment by examining the understanding of the Privileges and Immunities Clause of Article IV, Section 2 in nineteenth century America. Thus, a comprehensive inquiry into the original meaning of the Privileges and Immunities Clause of Article IV, Section 2 at the time of ratification of the Constitution is not undertaken. However, the nineteenth century understanding of the Clause arguably comes relatively close to its original meaning in 1787. Furthermore, many of the sources utilized in this Article pre-date the ratification of the Constitution or were produced during the founding era. Hence, this Article does provide some insight into the original meaning of the Privileges and Immunities Clause of Article IV, Section 2, and derivatively traces the contours of the federal system as originally designed.

Part II of this Article describes the relevance of the Privileges and Immunities Clause of Article IV, Section 2 to a determination of the original meaning of the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. Several members of Congress involved in the debates over the Fourteenth Amendment stated that the privileges

13. See infra notes 15-34 and accompanying text.
14. However, a number of other writers have touched upon the original meaning of the Clause. See, e.g., PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 30-40 (1981) (discussing interstate travel with slaves under Article IV); HOWELL, supra note 4 (describing the relationship between Article IV and the historical treatment of alien merchants in England); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 220-30 (1978); Chester James Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 WM. & MARY L. REV. 1 (1967); David S. Bogen, The Privileges and Immunities Clause of Article IV, 37 CASE W. RES. L. REV. 794, 796 (1987) (arguing that the Privileges and Immunities Clause was “not a reference to natural law, but was solely concerned with creating a national citizenship”); John M. Gonzales, Comment, The Interstate Privileges and Immunities: Fundamental Rights or Federalism?, 15 CAP. U. L. REV. 493 (1986).
and immunities guaranteed under Section 1 of the Fourteenth Amend¬
ment were identical to those guaranteed under the Privileges and
Immunities Clause of Article IV, Section 2.

Part III analyzes the way in which the Privileges and Immunities
Clause went beyond voluntary principles of international comity in order
to establish certain positive obligations among the states. These positive
obligations are textually embodied in the privileges and immunities
language of that Clause. This Part more generally examines the
structure of Article IV as reflecting principles of international comity and
discusses the antebellum controversy over the Fugitive Slave Clause.
The distinction between special and fundamental privileges recognized
in the jurisprudence under the Privileges and Immunities Clause of
Article IV, Section 2 is examined, as well as the state governments’
power of regulation under the Clause. These concepts were fleshed out
in the case law applying the principles of international comity embodied
in the Clause.

Part IV discusses the nature of the protection afforded under the
Clause—whether it guarantees substantive protection of certain
fundamental rights, such as the right to hold property, to contract, to
 testify in court, and to sue, or merely equal civil rights. Again, the
concepts addressed in Part III relating to principles of international
comity provide context for interpretation of the Clause.

Finally, Part V applies the distinction between fundamental and special
privileges in interpreting the Privileges or Immunities Clause of Section
1 of the Fourteenth Amendment. This Part discusses the tension
between the prohibitions of the Privileges or Immunities Clause and the
power retained by the states to regulate the fundamental privileges and
immunities of citizens under the Clause. It also explains the distinction
between political and civil rights made by participants during the
congressional debates over Section 1.

The analysis presented in this Article provides further support for an
interpretation of the Privileges or Immunities Clause as guaranteeing a
closed set of fundamental powers or capacities inherent in the concept
of citizenship. This interpretation recognizes the wide scope of the
states' power to regulate these fundamental powers of the citizenry while
guaranteeing that they will remain free from abridgment or complete
abolition. While the states might regulate the mode or manner in which
they could be exercised, they were powerless to prohibit the exercise of
these capacities. Although the importance of the Privileges and
Immunities Clause as a precursor of Section 1 is widely recognized, it may prove useful to demonstrate the relevance of this analysis to an interpretation of the Amendment by canvassing the links drawn between Article IV, Section 2 and Section 1 of the Fourteenth Amendment by the generation responsible for its ratification.

II. THE COMITY CLAUSE AND SECTION 1 OF THE FOURTEENTH AMENDMENT

It is widely recognized that the Privileges and Immunities Clause of Article IV, Section 2 served as a precursor of the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. Several members of Congress expressed their belief during debates over the Fourteenth Amendment that the privileges and immunities referred to in Section 1 of the Amendment were the same as those guaranteed under

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15. See, e.g., Richard L. Aynes, Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 630 (1994) (discussing the controversy over the proper interpretation of Article IV); Lambert Gingras, Congressional Misunderstandings and the Ratifiers’ Understanding: The Case of the Fourteenth Amendment, 40 AM. J. LEGAL HIST. 41, 47 (1996) (arguing that “Bingham and other Republicans . . . read the comity clause as creating or recognizing a national set of rights, protected from state interference and similar from one state to another”); Earl A. Maltz, The Concept of Equal Protection of the Laws—A Historical Inquiry, 22 SAN DIEGO L. REV. 499, 539 (1985) (concluding that Senator Bingham’s intent in drafting Section 1 was to assure the enforcement of guarantees that were already inherent in the Constitution, “particularly those inherent in the comity clause”); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 999-1000 (1995) (noting that the Slaughter-House decision cannot be correct because it would mean that Section 1 of the Fourteenth Amendment protects a set of rights different from that protected under the Privileges and Immunities Clause of Article IV, Section 2). As Senator Bingham later wrote in 1871:

The clause of the fourteenth amendment [sic], “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those [guaranteed by the comity clause]. The fourteenth amendment [sic], it is believed, did not add to the privileges and immunities before mentioned, but was deemed necessary for their enforcement as an express limitation upon the power of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held as the provision of the second section, fourth article.

THE RECONSTRUCTION AMENDMENTS’ DEBATES, supra note 2, at 466 (citing H. R. REP. NO. 41-22, at 1 (1871)). Therefore, the only innovation that the Privileges and Immunities Clause of Section 1 wrought was to make applicable to the states the guarantee against abridgment of the privileges and immunities referred to in Article IV, Section 2.
Article IV, Section 2. There was already a well-developed body of case law under the Privileges and Immunities Clause to which these members of Congress could point in explicating the meaning of the terms "privileges" and "immunities" as used in Section 1 of the Fourteenth Amendment. The Privileges and Immunities Clause was discussed by members of Congress on several occasions prior to ratification of the Fourteenth Amendment as a potential guarantee for the rights of free blacks. Chief among these episodes are: (1) the controversy over the proposed constitution of Oregon in 1859; (2) the debates over the Civil Rights Bill, another precursor of Section 1; and (3) the debates over the proposed amendment itself. Finally, the Clause was also discussed by the Supreme Court dissenters in the infamous Slaughter-House Cases as being a precursor of the Amendment.

A. Debate Over the Proposed Oregon Constitution

During the congressional debates over the admission of Oregon as a state in 1859, Senator Bingham, the principal draftsman of Section 1 of
the Fourteenth Amendment, made the argument that the Privileges and Immunities Clause of Article IV, Section 2 was intended to protect privileges and immunities of citizens of the United States while in the several states, arguing that there was an ellipsis in the drafting of the Clause. Senator Bingham reasoned:

The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to “all privileges and immunities of citizens in the several States.” Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to “all privileges and immunities” of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is “the privileges and immunities of citizens of the United States in the several States” that it guaranties [sic].

Bingham addressed certain of these rights, which he thought fell under the heading of “privileges and immunities of citizens” and which he thought were violated by the proposed constitution of Oregon. Bingham distinguished between the elective franchise, which he believed states could restrict to “certain classes of citizens of the United States,” and those privileges and immunities of citizens that were guaranteed under Article IV, Section 2. He concluded: “I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the ‘privileges and immunities’ of a citizen of the United States.” Bingham enumerated other rights that were unconstitutionally denied to “colored persons” under the Oregon constitution including the “benefit of the writ of habeas corpus,” “trial by jury,” holding real estate, making contracts, and maintaining suits. These rights enumerated by Bingham were among the most fundamental common-law rights.

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20. Id. According to Bingham, among these unconstitutional provisions were those declaring that large numbers of the citizens of the United States shall not, after the admission of the proposed State of Oregon, come or be within said State; that they shall hold no property there; that they shall not prosecute any suits in any of the courts of that 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.

Id.
21. Id.
22. Id.
23. See Smith, supra note 12 (discussing the fundamental privileges and immunities inherent in citizenship in the United States).
At this point in time, the same year as the Supreme Court’s *Dred Scott* decision, it seems that Senator Bingham adhered to Justice Curtis’ dissenting opinion in the *Dred Scott* case that being born a citizen of a state was sufficient to entitle one to citizenship of the United States and the accompanying privileges and immunities of citizens guaranteed under the Privileges and Immunities Clause of Article IV, Section 2. The Taney majority in *Dred Scott* had argued that it was necessary that free blacks were considered citizens of the United States at the time of ratification of the original Constitution in order for them to enjoy the privileges and immunities of citizens under Article IV, Section 2. The Court examined the historical evidence and determined that free blacks were not considered citizens at the time of ratification. However, Bingham disagreed with this historical conclusion and argued that free blacks were considered citizens at the time that the original Constitution was ratified. Echoing Justice Curtis’s reasoning in his dissenting opinion in *Dred Scott*, Bingham stated:

> Persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law.

Thus, at this time, prior to drafting Section 1 of the Fourteenth Amendment, Bingham maintained that free black citizens of the states were entitled to the privileges and immunities guaranteed under the Privileges and Immunities Clause of Article IV, Section 2. Furthermore, Bingham classified among the privileges and immunities of citizenship,
the "rights of life and liberty and property" and "due protection" thereof, indicating that perhaps the protections afforded under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to "persons" were also understood by Bingham to be conveyed to citizens under the Privileges and Immunities Clause. 29

B. The Civil Rights Bill and the Fourteenth Amendment

Besides the debate over the proposed Oregon constitution, the Privileges and Immunities Clause was also mentioned in the context of the debate over the Civil Rights Bill, 30 a precursor of the Fourteenth Amendment, which was designed to prevent inequalities with respect to certain fundamental rights of citizens occasioned by the Southern Black Codes. 31 For example, it was the conclusion of James Wilson, Chairman of the House Judiciary Committee and floor manager of the Civil Rights Bill, that "[i]f the States would all practice the constitutional declaration [of the Privileges and Immunities Clause] . . . and enforce it . . . we might very well refrain from the enactment of this bill into a law." 32 Therefore, the Privileges and Immunities Clause was identified

29. See Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57, 68-69 (1993) ("It is logical to read the new amendment's protection of life, liberty, and property as representing one privilege and immunity of citizenship—and one worthy of extension equally, not only among citizens but to "all persons in the several States." ").

30. Section 1 of the Civil Rights Bill which was passed over the veto of President Johnson provided:

That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866). As is evident from the above excerpt, many of the rights enumerated in the Bill were fundamental common-law rights. This fact is consistent with an interpretation of the Fourteenth Amendment as guaranteeing a closed set of common-law rights to citizens of the United States. See Smith, supra note 12 (presenting such an interpretation of the Privileges or Immunities Clause).

31. See Flack, supra note 10, at 81 (concluding that "nearly all [members of Congress] said that [the Fourteenth Amendment] was but an incorporation of the Civil Rights Bill"); Fairman, supra note 7, at 44 (noting that "[o]ver and over in this debate [over the Amendment], the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted . . . [: t]he provisions of the one are treated as though they were essentially identical with those of the other").

32. The Reconstruction Amendments' Debates, supra note 2, at 163-64 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866)).
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as addressing the same fundamental, common-law rights as those guaranteed under the Civil Rights Bill.

If free blacks were citizens of the United States, or could be given this status through congressional legislation, and if the national government had the power to address violations of the Privileges and Immunities Clause of Article IV, Section 2 by the state governments through legislation, there would be no question of the constitutionality of the Civil Rights Act of 1866. However, the constitutionality of this Act was called into question by Bingham himself, prompting Congress to draft the Fourteenth Amendment in order to ensure the constitutionality of their actions in passing the Civil Rights Act. As Professor John Harrison has stated, "[a]ny theory of the Fourteenth Amendment must... explain how it validates the Civil Rights Act." By achieving an understanding of the phrase, "Privileges and Immunities of Citizens," as

33. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. The Civil Rights Bill declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed" were "citizens of the United States." Id. § 1.

The Civil Rights Bill was widely recognized by congressional Republicans as a precursor to Section 1 of the Fourteenth Amendment. For example, George Latham stated that the "civil rights bill which is now law... covers exactly the same ground as the amendment." CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866). Martin Thayer stated that the Amendment was "but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law." THE RECONSTRUCTION AMENDMENTS’ DEBATES, supra note 2, at 213 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866)); see also Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 DUKE L.J. 507, 566 (1991) (recognizing that "constitutionalizing the Civil Rights Act was a major purpose of the Fourteenth Amendment").


35. Harrison, supra note 10, at 1390. Harrison points out that Section 1 of the Civil Rights Act stated that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were deemed citizens of the United States. The Act provided that in every state and territory all citizens, without regard to race, color, or previous condition of servitude, should have the same rights as white citizens:

[T]o make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property... and shall be subject to like punishment, pains, and penalties, and to none other.

Id. at 1390 n.14 (quoting Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27).
used in Article IV, Section 2, one can explain the enumeration of rights to be protected under the Civil Rights Act of 1866.

C. The Slaughter-House Cases

Not only had the Privileges and Immunities Clause been cited during the debates in Congress over the Civil Rights Bill and the Fourteenth Amendment itself, but it was also cited by the Supreme Court dissenters in the *Slaughter-House Cases*, who employed the terms “privileges” and “immunities” in the same manner as they were used in Section I. In the *Slaughter-House Cases*, the Supreme Court emasculated the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment by a narrow margin, holding that the privileges and immunities referred to in the Amendment were only certain limited rights of national citizenship. However, several justices wrote vigorous dissenting opinions in the case, arguing that the protections afforded under the Clause were intended to be much broader. According to one dissenting member of the Court, Justice Field, the Privileges and Immunities Clause of Article IV, Section 2 provided that with respect to the privileges and immunities “which of right belong to the citizens of all free governments . . . [n]o discrimination can be made by one State against citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens.”


relationship between the Privileges and Immunities Clause of Article IV, Section 2 and the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment was as follows:

What the clause in question [the Privileges and Immunities Clause of Article IV, Section 2] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the 14th Amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If, under the 4th article of the Constitution, equality of privileges and immunities is secured between citizens of different States, under the 14th Amendment the same equality is secured between citizens of the United States.38

From this passage, it is apparent that Justice Field did not believe that the Privileges and Immunities Clause of Article IV, Section 2 reached state action against resident citizens. This appears to have been the conclusion of Senator Trumbull also, who stated that cases involving the Clause "relate entirely to the rights which a citizen in one State has on going into another State, and not to the rights of the citizen belonging to the State."39 This was one of the "imperfections" in the original Constitution, which the Fourteenth Amendment was designed to correct.40

D. "Imperfections" in the Original Constitution

Not only was the Privileges and Immunities Clause of Article IV, Section 2 silent with respect to the relation between a state government

38. Id. at 100-01.
39. THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 2, at 137 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866)). Senator Garrett Davis also noted that the Civil Rights Bill would apply "where the citizen is domiciled in the State where he was born," unlike the Privileges and Immunities Clause of Article IV, Section 2. CONG. GLOBE, 39th Cong., 1st Sess. 595-96 (1866).
40. Michael Kent Curtis has argued that Senator Bingham and other members of Congress were of the opinion that the Privileges and Immunities Clause of Article IV, Section 2 protected certain rights of national citizenship, including the Bill of Rights. Bingham and others who framed the Fourteenth Amendment relied on a reading of the privileges and immunities clause of Article IV, Section 2 by which it protected a body of national privileges and immunities of citizens of the United States, including those in the Bill of Rights. This reading may have been incorrect. CURTIS, supra note 10, at 114. Raoul Berger has argued, however, that the majority did not share the "unorthodox" view of the Privileges and Immunities Clause. BERGER, supra note 17, at 96-97.
and its own citizens, but, additionally, where it did apply, there were problems with enforcement of the Clause against the states. Prior to ratification of the Fourteenth Amendment, the states did not always comply with the Full Faith and Credit and Privileges and Immunities Clauses of Article IV, Section 2. As Paul Finkelman has noted:

States could and did deny privileges and immunities to citizens of other states. Full faith and credit were not always given to out-of-state judicial decrees. Such denials of comity, by both the North and the South, were partially responsible for the dissolution of the Union. The memory of such problems motivated the adoption of certain sections of the Fourteenth Amendment.\textsuperscript{41}

For example, whether or not the right to property in slaves was one of the privileges and immunities protected under the Clause was a matter of great dispute prior to the Civil War.\textsuperscript{42} As Professor Finkelman has noted, "[t]he United States Supreme Court was never asked to apply this clause, or Washington's interpretation of it [in \textsc{corfield v. coryell}], to transit with slaves. Had this happened in the late antebellum period, Taney's court possibly would have sustained the right of transit with slaves."\textsuperscript{43} The Taney Court did, however, address the issue of whether

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\textsuperscript{41} Finkelman, supra note 14, at 8; see also Aynes, supra note 29, at 75-76 (discussing the problem of enforcement under Article IV); id. at 78 ("Prominent judges, lawyers, and members of Congress shared Bingham's conviction that the Constitution prohibited the states from abridging the privileges and immunities protected by Article IV, Section 2, but that Congress could not enforce the provision.").
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\textsuperscript{42} See infra Section III.C.1.
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\textsuperscript{43} Finkelman, supra note 14, at 10. Finkelman notes that there were a number of cases concerning fugitive slaves in which the notion of comity and interstate transit played a central role. Among them, he cites \textsc{groves v. slaughter}, 40 U.S. (15 Pet.) 449 (1841), \textsc{strader v. graham}, 51 U.S. (10 How.) 82 (1850), \textsc{dred scott v. sandford}, 60 U.S. (19 How.) 393 (1856), and \textsc{lemmon v. people}, 20 N.Y. 562 (1860). Finkelman, supra note 14, at 12. In \textsc{groves}, the Court seems to have come close to affirming the right of property in slaves as being one of the privileges and immunities of citizenship guaranteed under Article IV, Section 2. The Court stated:
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As each state has plenary power to legislate on this subject [what constitutes property], its laws are the test of what is property; if they recognise slaves as the property of those who hold them, they become the subjects of commerce between the states which so recognise them, and the traffic in them may be regulated by Congress, as the traffic in other articles; but no farther. Being property, by the law of any state, the owners are protected from any violations of the rights of property by Congress, under the fifth amendment of the Constitution; these rights do not consist merely in ownership, the right of disposing of property of all kinds, is incident to it, which Congress cannot touch. The mode of disposition is regulated by the state or common law; and but for the first clause in the second section of the fourth article of the Constitution of the United States, a state might authorize its own citizens to deal in slaves, and prohibit it to all others.
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But that clause secures to the citizens of all the states, "all privileges and immunities of citizens" of any other state, whereby any traffic in slaves or other property, which is lawful to the citizens or settlers of Mississippi, with
free blacks were citizens of the United States and therefore entitled to the privileges and immunities of citizens in the several states in *Dred Scott v. Sandford*. The Supreme Court concluded that free blacks

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were not and could not become citizens of the United States absent constitutional amendment. Therefore, the Court assuaged Southern fears that free blacks might claim the constitutional rights of the citizen in Southern states under the Privileges and Immunities Clause of Article IV, Section 2. However, the fear on the part of the North was that application of the Privileges and Immunities Clause to transit with slaves would lead to constitutionally-mandated recognition of slavery outside the Southern States. In fact, in Article IV of the Confederate

45. Id.
46. For example, Francis Lieber, a Republican and professor at the University of South Carolina stated that "[e]ach institution of government was being strangled by an outreaching slave power." FINKELMAN, supra note 14, at 12 (quoting PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 79-80 (Urbana: Univ. of Illinois Press 1975)). Furthermore, Finkelman states that "Lincoln, and other northerners, saw the Dred Scott decision as a first step toward a judicial nationalization of slavery." Id. at 283. Finkelman cites the Lincoln-Douglas debates wherein Lincoln stated:

"[W]hat is necessary for the nationalization of slavery? It is simply the next Dred Scott decision. It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the territorial legislature can do it. . . . [S]lavery is to be made national." Id. at 317 (quoting 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27 (Roy P. Basler ed., New Brunswick, N.J.: Rutgers Univ. Press 1953-55)). Finkelman claims that "[I]n nationalizing slavery the Supreme Court could have relied on doctrine and dictum developed in Groves v. Slaughter, Prigg v. Pennsylvania, Strader v. Graham, and Dred Scott." Id. at 325.

However, not every court recognized a constitutionally-protected right of property in slaves in transit. For example, in Lemmon v. People, 20 N.Y. 562 (1860), the New York Court of Appeals upheld the freedom of slaves brought through New York in transit. It was argued before the court that "the municipal law which makes men the subject of property, is limited with the power to enforce itself, that is by its territorial jurisdiction . . . the strangers stand upon our soil [in New York] in their natural relations as men, their artificial relation being absolutely terminated." Id. at 598. The court adopted this argument that property in slaves was not protected under the Privileges and Immunities Clause because slavery, being contrary to the law of nature, was merely a municipal regulation having no extraterritorial force. However, Judge Clerke in his dissent argued that New York was bound to recognize this form of property under the Privileges and Immunities Clause. Clerke stated:

the relations of the different States of this Union towards each other are of a much closer and more positive nature than those between foreign nations . . . [T]hey are one nation; war between them is legally impossible; and this comity, impliedly recognized by the law of nations, ripens, in the compact cementing these States, into an express conventional obligation, which is not to be enforced by an appeal to arms, but to be recognized and enforced by the judicial tribunals.

Id. at 642. Clerke asked:

"[I]s it consistent with this purpose of perfect union, and perfect and unrestricted intercourse, that property which the citizen of one State brings into another State, for the purpose of passing through it to a State where he intends to take up his residence, shall be confiscated in the State through which he is passing, or shall be declared to be no property, and liberated from his control?"
Constitution, the wording of the Privileges and Immunities Clause was changed so that it was explicitly recognized that property in slaves was to be preserved as one of the privileges and immunities of citizenship. Thus, Northern fears were probably well-founded. The foregoing discussion reveals the confusion in antebellum America concerning the meaning of the Privileges and Immunities Clause, as well as some of the

Id. at 636. Clerke argued that even though property in slaves was not recognized under the law of nations, the positive provisions of the Constitution overrode the law of nations. Clerke argued that the majority was wrong in supposing, because the law of nations refused to recognize slaves as property, the several States of this Union were at liberty to do the same; forgetting that the compact, by which the latter are governed in their relation towards each other, modifies the law of nations in this respect ... [therefore, no state is] permitted in its dealings or intercourse with other States or their inhabitants to ignore the right to property in the labor and service of persons in transitu from those States.

Id. at 642-43. For a more thorough discussion of the Lemmon opinion, see infra notes 113-37 and accompanying text.

The following language was added to the Privileges and Immunities Clause: "[T]he citizens of each State . . . 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." CONSTITUTION OF THE CONFEDERATE STATES art. IV, § 2; CHARLES ROBERT LEE, JR., THE CONFEDERATE CONSTITUTIONS 110 (Chapel Hill: Univ. of North Carolina Press 1963).

The members of the constitutional convention of 1787 from the Southern states may have presumed that because of the enumerated powers of the federal government as well as the Privileges and Immunities Clause of Article IV, Section 2, the right to property in slaves would be maintained under the Constitution. General Charles Cotesworth Pinckney argued before the state’s house of representatives during the debate over ratification in South Carolina:

We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. . . . In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad.

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254-55 (Max Farrand ed., 1937). Furthermore, individuals such as Pinckney might have thought that property in slaves was not merely conventional, but did have a firm foundation in natural law and, therefore, property in slaves would be protected under Article IV, Section 2. During the constitutional convention, Pinckney asserted that "[i]f slavery be wrong, it is justified by the example of all the world. He cited the case of Greece[,] Rome[,] & other antient [sic] States; the sanction given by France[,] England, Holland[,] & other modern States. In all ages one half of mankind have been slaves." 2 Id. at 371.
dissatisfaction with its perceived defects in guaranteeing the rights of citizens of the United States as originally drafted, such as the Clause's inapplicability to controversies between a citizen and his own state government and the lack of congressional power to enforce the Clause.

Having established the relevance of understanding the nineteenth century meaning of the Privileges and Immunities Clause of Article IV, Section 2 to understanding the original meaning of the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment, three interrelated issues arise to be resolved in interpreting the Privileges and Immunities Clause of Article IV, Section 2: (1) did the Clause give substantive protection to a set of well-defined privileges and immunities, perhaps providing for differences in regulation of these rights in different states, or merely provide "antidiscrimination" protection, ensuring that foreign citizens would enjoy the same privileges and immunities as resident citizens, but leaving it open to the states to choose which privileges and immunities their citizens would enjoy; (2) even if the protection was merely antidiscrimination protection, did the framers assume that there would be a set of privileges and immunities conferred to citizens in all of the states, but not constitutionally-mandated under the Clause; and (3) did the Clause merely provide protection for foreign citizens in the other states, or did it also afford protection for citizens against their own state governments?

With respect to the last question, the evidence indicates that Justice Field's interpretation of the Clause in the Slaughter-House Cases as protecting only foreign citizens may have been the most historically accurate. This would not be a surprising result since there is a

48. As Congressman Thaddeus Stevens noted, prior to adoption of the Fourteenth Amendment, "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

49. See supra Part II.

50. This has become the prevailing interpretation of the Clause by modern courts. See Downham v. Alexandria, 77 U.S. (10 Wall.) 173, 175 (1869) (Field, J.) ("It is only equality of privileges and immunities between citizens of different States that the Constitution guarantees."); HOWELL, supra note 4, at 20 ("The view that a citizen of one State carries with him into any other State certain fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the first-mentioned State, has been definitely abandoned.").

51. See supra notes 37-38 discussing Justice Field's Slaughter-House dissent. However, prominent members of Congress may have disagreed with this position including John Bingham, principal draftsman of Section 1 of the Fourteenth Amendment, and James Wilson of Iowa, floor manager of the Civil Rights Bill and Chairman of the House Judiciary Committee. See CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859). Wilson may also have thought that Congress had the implied authority to enforce the Privileges and Immunities Clause against the states, unlike Senator Bingham. See CONG.
perception at least that the Framers of the Constitution were more concerned with federal interference with individual rights and less concerned with state interference with the rights of their own citizens. Resident citizens could be protected from the actions of their own state governments under the state constitutions. At a minimum, it may have been an assumption of the framers of the Fourteenth Amendment that all free governments would recognize a core set of fundamental privileges and immunities of citizens.

The first two questions generated greater controversy. It seems that the prevailing understanding of the Clause was that it only provided antidiscrimination protection, but it may have been assumed that all of the states would provide certain rights possessed by citizens in all free governments. Therefore, the practical effect of the Clause would be to ensure that citizens, no matter where they went in the United States would enjoy certain fundamental rights. For example, certain privileges and immunities of citizenship—the privileges and immunities of citizenship of the United States provided for in the Constitution, applicable to all citizens in the several states—were undoubtedly afforded substantive protection. One such privilege of citizens of the United States, in dispute in *Dred Scott v. Sandford*, was the privilege of suing in the courts of the United States under Article III. However, a wider notion of the privileges and immunities of citizens of the United States, of general citizenship, encompassing certain privileges and immunities of citizens in all free governments which were traditionally under the regulatory control of the state governments, may have been envisioned under the Clause.

52. This is the language that Justice Bushrod Washington used in his opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), in interpreting the Privileges and Immunities Clause of Article IV, Section 2 and the nature of the privileges and immunities guaranteed therein. See infra notes 238-52 and accompanying text, discussing the court's opinion in *Corfield*.

53. 60 U.S. (19 How.) 393 (1856).

54. For example, it was argued by counsel in the case of *Lemmon v. People*, 20 N.Y. 562 (1860), that there was a substantive right to property guaranteed under the Clause as well as certain other "general privileges and immunities." According to counsel, the Privileges and Immunities Clause of Article IV, Section 2 was designed to secure to the citizen, when within a State in which he is not domiciled, the general privileges and immunities which, in the very nature of citizenship, as recognized and established by the Federal Constitution, belonged to that *status* [Citizen of the United States]; so that by no partial and adverse legislation of
Furthermore, even if the weight of the historical evidence leads to the conclusion that the antidiscrimination reading of the Privileges and Immunities Clause of Article IV, Section 2 is the most historically accurate, it does not mean that the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment was also intended to afford only antidiscrimination protection to citizens. The Privileges or Immunities Clause may have been intended to afford substantive protection as well. It may have been the intent of the framers of the Amendment to mandate that the states uniformly respect certain fundamental rights of citizens such that the states could not withdraw these rights equally from every citizen of a state without violating the Section 1 prohibitions. Thus, the protection would be similar to that afforded under other provisions of the Constitution which serve as substantive limitations on all of the states, such as the Contracts Clause and the Bill of Attainder Clause. This may have been the reason that the phrase “privileges or immunities of citizens of the United States” was used in Section 1—to indicate that there were certain fundamental rights inherent in one’s status as a citizen of the United States, which must be recognized by all of the state governments. The state governments would still be free to regulate the form in which these capacities of citizenship existed or the mode in which they could be exercised, but were obligated to recognize these pre-political privileges and immunities of citizens.

The Privileges and Immunities Clause of Article IV, Section 2 did not arise from a blank slate, but rather was preceded by a well-developed body of law concerning the natural relations of sovereign states. The

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a State into which he might go as a stranger or sojourner can he be deprived of them. *Id.* at 580-81. See also infra Part IV.D, discussing potential interpretations of the Privileges and Immunities Clause.

55. See Harrison, supra note 10 (presenting the case for interpreting the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment as protecting against discrimination, but not guaranteeing substantive protection of fundamental rights).

56. Other commentators have argued that the Privileges or Immunities Clause was designed to protect certain substantive rights. For example, Charles Fairman concluded in his exhaustive study of the Amendment’s history that it was “meant to establish some substantial rights” under the heading “privileges and immunities of citizens of the United States.” *Great Justice, supra* note 36, at 77; see also Aynes, supra note 29, at 73 (arguing that the Amendment was designed to enforce existing substantive rights rather than establish new ones); Maltz, supra note 4.


58. *Id.*

59. See Smith, supra note 12 (discussing the relationship between citizenship and the rights guaranteed under the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment).

60. See infra Part V.B, discussing the states’ retained power of regulation under the Privileges or Immunities Clause.
Clause was viewed not only as an “individual rights” provision, but also as a “federalism” provision, maintaining the integrity of the federal system as well as the equality of the states as political entities. However, the Clause went beyond principles of comity in several ways—constituting the citizens of the several states one people and creating positive, conventional obligations in place of “unwritten” principles of reason that served as legal default rules.

III. STATES IN A STATE OF NATURE: THE PRIVILEGES AND IMMUNITIES CLAUSE AND INTERNATIONAL COMITY

The Privileges and Immunities Clause of Article IV, Section 2 was founded upon principles of international comity among states.61 The comity of nations was often described as based on principles derived from an independent “unwritten” law termed the law of nations.62 Such
principles might be employed by judges as background rules of “general” or “universal” law or reason. Positive municipal laws could override these principles as could positive constitutional provisions. As Justice Story stated in his *Commentaries on the Conflict of Laws*, it was the comity of nations and not of courts that could be enforced, and the intent of the legislature expressed in positive law could override these principles of reason.

through principles of comity and identified the law of nations as the source of principles of international comity. According to Webster:

The term “comity” is taken from the civil law. Vattel has no distinct chapter upon that head. But the doctrine is laid down by other authorities with sufficient distinctness, and in effect by him. It is, in general terms, that there are, between nations at peace with one another, rights, both natural and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these, is the right to sue in their Courts respectively; the right to travel in each other’s dominions; the right to pursue one’s vocation in trade; the right to do all things, generally, which belong to the citizens proper of each country, and which they are not precluded from doing by some positive law of the state. Among these rights, one of the clearest is the right of a citizen of one nation to take away his property from the territory of any other friendly nation, without molestation or objection. This is what we call the comity of nations. It is the usage of nations, and has become a positive obligation on all nations.

*Id.* at 556-57. Thus, the principles of international comity were argued to be binding upon the states as positive law since they were embodied in the “usage of nations.” This comity was voluntary where there was no common superior establishing it as law. According to the reporter, Mr. Webster stated that comity “is but a customary or voluntary law; that it is a law existing by the common understanding and consent of nations, and not established for the government of nations by any common superior.” *Id.* at 557. However, in the United States similar principles were made binding with respect to citizens of the several states through the Privileges and Immunities Clause of Article IV, Section 2.

63. An illustration of the belief on the part of the legal community that the law of nations served as a set of legal default rules is to be found in the remarks of Senator Seward concerning rights of slaveowners. According to Seward, “the Constitution does not recognize property in man, but leaves that question, as between the States, to the law of nature and of nations. That law, as expounded by Vattel, is founded in the reason of things.” CONG. GLOBE, 31st Cong., 1st Sess. App. 264 (1850).

64. See Smith, *supra* note 12 (discussing Pufendorf’s views concerning the role of natural law in judicial interpretation).


[A]s has justly been said . . . it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the State, they are bound to assume that its will is to give effect to it. *Id.* at 594 (citation omitted). See also *Phoenix Ins. Co. v. Commonwealth*, 68 Ky. (5 Bush) 68, 77 (1868) (stating that “[i]t is not the comity of the courts, but the comity of nations, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.”).
The origins of a concept of “the law of nations” may be traced to the Roman law. As was stated in Justinian’s Institutes, the law of nations, or jus gentium, comprised that part of the civil law shared in common with most other nations. The concept of comity among the states in the federal system is analogous to the relation of Rome to its client states. The union among the states, however, would appear to be stronger than that between Rome and its client states. The jus gentium represented a separate body of law that was not coextensive with the civil law applicable to citizens of Rome.

Under the federal system in the United States and, more specifically, the Privileges and Immunities Clause of Article IV, Section 2, citizens of foreign states were to be deemed citizens in all of the states and were therefore to be governed under the civil law of the several states. Therefore, the Privileges and Immunities Clause went beyond traditional

66. 4 Digest of Justinian, ch. 15, § 7 (Theodor Mommsen, Paul Krueger, & Alan Watson eds., 1985). Justinian’s Institutes states:

[Al]though free peoples and those bound to us by treaty are foreigners to us . . . they retain their freedom and rights over their own property in our country just as in their own, and the same applies to us in their country . . . . A free people is one which is not subject to the control of any other people; a civitas foederata, one which has neither entered into friendship under an equal treaty or under a treaty [which] includes the provision that this people should with good will preserve the majestas of another people.

Id.

67. See Smith, supra note 12 (discussing the Roman distinction between the law of nations and the civil law).
principles of international comity. First, comity was voluntary. According to Chancellor Kent:

68. This term "comity" was defined by Mr. Ingersoll in argument before the Supreme Court in Bank of Augusta v. Earle and connected to the Privileges and Immunities Clause of Article IV, Section 2:

Comity . . . is international courtesy; never allowed between provinces, districts, counties, cities, or other parts of the same empire. The connexion between these United States is closer and more intimate than that of comity. Their union by federal compact expressly settles the relation of the states to each other, and leaves no room for tacit or constructive comity to operate . . . An article of the Constitution provides for the force and proof of public acts of state, for the privileges and immunities of the citizens of each state in all the rest, for fugitives from justice and fugitives from labour; leaving little or nothing on this important subject to judicial construction.


69. In his dissent in Bank of Augusta, Justice McKinley referred to the work of Emmerich Vattel, an influential natural law theorist, as authority for his discussion of international comity. According to Justice McKinley, the voluntary nature of international comity was said by Vattel to flow from the sovereignty of the individual states and the liberty that each has "derived from nature." Id. at 606. Justice McKinley quoted the following passage from Vattel's Law of Nations:

"Nations being free and independent of each other in the same manner as men are naturally free and independent, the second general law of their society is that each nation ought to be left in the peaceable enjoyment of that liberty it has derived from nature. The natural society of nations cannot subsist, if the rights which each has received from nature are not respected. None would willingly renounce its liberty: it would rather break off all commerce with those that should attempt to violate it. From this liberty and independence it follows that every nation is to judge of what its conscience demands, of what it can or cannot do, of what is proper or improper to be done; and consequently to examine and determine whether it can perform any office for another without being wanting in what it owes to itself. In all cases, then, where a nation has the liberty of judging what its duty requires, another cannot oblige it to act in such or such a manner. For the attempting this would be doing an injury to the liberty of nations."

Id. (quoting EMMERICH VATTEL, LAW OF NATIONS 53, 54). Thus, without some sort of binding agreement, or supreme sovereignty, the principles of comity would remain voluntary.

Similar statements were made in Miller v. Hall, 1 Dall. 229 (Pa. 1788). In that case, the Supreme Court of Pennsylvania discussed the role of the civil law and the law of nations in deciding whether a defendant who was a resident of Maryland could obtain a discharge under the insolvent law in the state of Maryland from a plaintiff who was a resident of Pennsylvania. The plaintiff argued that according to the strict idea of a municipal law, it was limited in its operation to the jurisdiction of the state that made it; . . . and to a free people particularly, it must appear, unreasonable that there should be legislation where there is no representation . . . . There are, however, he [Justinian] acknowledged, cases in which an indirect effect is given to foreign statutes, in order to accomplish the rules of justice; . . . the foreign statutes, as such, have no coercive authority extra territorium, but are received only by consent, so far as they are necessary to justice.

Id. at 239-40.

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Nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another. 70

However, as sovereigns, states could enter into compacts or treaties that were binding among themselves. The states, or the peoples thereof, were parties to the Constitution of the United States, having consented to be bound by it. Therefore, the states could agree to be bound by certain principles that went beyond mere voluntary comity, 71 to protect the privileges and immunities of citizens of foreign states while in their own jurisdictions. Article IV, Section 2 represents such an agreement on the part of the states to recognize citizens of foreign states as citizens of their own states and to respect the privileges and immunities of citizens of foreign states while under their jurisdiction in order to further the peace among the states and to strengthen the Union. 72

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70. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *21 (O.W. Holmes Jr., ed., 12th ed. 1873).
71. This does not mean that the states ceased to recognize voluntary principles of comity. For example, in Bank of Augusta, Justice Taney described the nature of the union among the people of the United States and urged voluntary application of the principles of international comity in cases where courts were not constrained by the Constitution to apply these principles. Justice Taney reasoned as follows:

The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent.

Bank of Augusta, 38 U.S. at 590. Thus, the principles of the law of nations were recognized as legal default rules, which could be trumped by positive law enacted by the legislature.

72. Elsewhere in the Constitution, the states are prohibited from further compacting among themselves without the approval of Congress. U.S. CONST. art. I, § 10. This was probably an attempt to ensure that there were no special privileges accorded between
Thus, the Privileges and Immunities Clause of Article IV, Section 2 made binding through the consent of the states the voluntary principles of international comity found in the well-developed body of law termed the "law of nations."\textsuperscript{73} In addition, the Clause served to preserve the equality of the states by guaranteeing that the citizens of foreign states would enjoy the privileges and immunities of citizens on an equal footing with resident citizens in all of the other states comprising the Union.\textsuperscript{74} In an often-cited passage from The Federalist Papers Number

states within the federal system, but that the privileges and immunities of citizenship would be available to all on an equal footing within the Union.

\textsuperscript{73} In \textit{Dodge v. Woolsey}, 59 U.S. (18 How.) 331 (1855), Justice Wayne presented the opinion of the Court concerning the relation of the Privileges and Immunities Clause to the sovereignty of the states. Citing Vattel, Justice Wayne reasoned:

\begin{quote}
In such a union, the States are bound by all of those principles of justice which bind individuals to their contracts. They are bound by their mutual acquiescence in the powers of the constitution, that neither of them should be the judge, or should be allowed to be the final judge of the powers of the constitution, or of the interpretation of the laws of congress. This is not so, because their sovereignty is impaired; but the exercise of it is diminished in quantity, because they have, in certain respects, put restraints upon that exercise, in virtue of voluntary engagements.
\end{quote}

\textit{Id.} at 351 (citing \textit{EMMERICH VATTEL, LAW OF NATIONS} ch. 1, § 10). One of these "voluntary engagements" was the Privileges and Immunities Clause of Article IV, Section 2, which forced the states to recognize foreign citizens as citizens of their own states, entitled to all of the privileges and immunities attaching to that status.

\textsuperscript{74} The Justices in the \textit{Dred Scott} decision recognized the importance of the Privileges and Immunities Clause of Article IV, Section 2 as not only embodying principles of international comity, but also as guaranteeing the equality of the states in the Union. For example, Justice Nelson in his concurring opinion in \textit{Dred Scott} discussed the principles of international comity in relation to the privileges and immunities of citizens, citing Justice Story as an authority on the subject. \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393, 460 (1856) (Justice Nelson appealed to Justice Story's \textit{Commentaries on the Conflict of Laws} as well as works by Huberus and Kent). Justice Nelson applied the principles of international comity concerning the status of persons in foreign states to determine the status of Dred Scott. \textit{Id.} at 466-67.

Similarly, in his concurring opinion in \textit{Dred Scott v. Sandford}, Justice Catron discussed the privileges and immunities of citizens in relation to the territories controlled by Congress and the Clause's maintenance of the equality among the states. According to Justice Catron:

\begin{quote}
The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State, by virtue of that great fundamental condition of the Union—the equality of the States.
\end{quote}

\textit{Id.} at 527. Therefore, the Privileges and Immunities Clause of Article IV, Section 2 may be seen as not only guaranteeing to citizens the privileges and immunities inherent in the concept of citizenship, but also as ensuring the sovereignty of the states as equals within the federal system. The Privileges and Immunities Clause was therefore designed to be as much a federalism provision governing relations among the states as it was to be an
Eighty, Alexander Hamilton discussed the effect of the Privileges and Immunities Clause of Article IV, Section 2, noting that the Clause formed "the basis of the union" and established an "equality of privileges and immunities to which the citizens of the Union [would] be entitled." The people of the United States were to be recognized as citizens, members of each of the states' political communities, founded upon a social compact. In this respect, the people of the United States could be said to form one people, since each person was automatically made part of the political community of each state. Each citizen would be entitled to be placed upon an equal footing with every other citizen no matter where they might find themselves. One of the most important functions of the new federal judiciary would be to enforce this equality.

However, the privileges and immunities of citizens were not defined in the Constitution and were not comprehensively enumerated by the courts. In fact, the Supreme Court explicitly declined the task of exhaustively enumerating the privileges and immunities of citizens under the Clause. Notwithstanding the Court's reluctance to comprehensive-

individual rights provision, guaranteeing that the citizens of the individual states would be recognized as citizens within foreign jurisdictions. See Bogen, supra note 14, at 844-45; Gonzales, supra note 14, at 499-50.

The Dred Scott Court struck down the Missouri Compromise as a violation of this equality of the states. According to the Court, "the act of 1820, known as the Missouri compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire EQUALITY of rights, privileges, and immunities." Dred Scott, 60 U.S. at 528-29. The Missouri Compromise violated this equality among the states by depriving the rights of property of the citizens of the slaveholding states. The right of these citizens to hold a certain species of property, namely slave property, was not respected within the territory, while the rights of property of citizens in the nonslaveholding states were respected. This was a violation of the sovereignty of the slaveholding states because it was a refusal to respect the rights of property that had been vested under the jurisdiction of these states. The sovereign power of the nonslaveholding states to vest property in the citizenry was respected, while that of the slaveholding states was not.

75. THE FEDERALIST No. 80, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Chester Antieau has argued that this passage indicates that Hamilton understood the Clause as guaranteeing certain fundamental rights of "citizens of the several States." Antieau, supra note 14, at 8.

76. See infra note 83 and accompanying text.

77. Thomas M. Cooley, one of the most prominent nineteenth century constitutional scholars, discussed the ill-defined nature of the privileges and immunities protected under the Clause in his comments on Justice Story's Commentaries on the Constitution of the United States. Citing Conner v. Elliot, 59 U.S. (18 How.) 591 (1856), Cooley
ly define the privileges and immunities of citizens, certain of these privileges and immunities were enumerated in the many cases arising under the Clause prior to ratification of the Fourteenth Amendment. Courts generally made a distinction between special privileges, which were not guaranteed under the Clause, and fundamental privileges, which were the privileges and immunities of citizens guaranteed under Article IV, Section 2. Furthermore, courts frequently acknowledged that the states retained the power to regulate the fundamental privileges and immunities of citizens guaranteed under the Clause.

Besides the question of what types of rights were the "privileges" and "immunities" of citizens under Article IV, Section 2, courts also addressed the question of what kind of protection these privileges and immunities were guaranteed, whether antidiscrimination or substantive

stated, "[t]he Supreme Court will not describe and define these privileges and immunities in a general classification, preferring to deal with each case as it may come up." 2 JOSEPH S. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 560 n.4 (Thomas M. Cooley ed., 4th ed., Little, Brown, & Co. 1873).

78. See infra Part III.D discussing the distinction between special and fundamental privileges under the Clause. As one commentator concluded: [T]here was a widespread belief in certain "fundamental" rights, to be enjoyed by the members of any body politic of necessity, because demanded by the "law of nature." . . . These rights, being conceived of as inherent in the idea of citizenship, were, as a matter of course, those which were commonly regarded as guaranteed by the Comity Clause; but any others, not being inherently possessed by the citizens of every political society, were to be considered as for the individual States to grant to or withhold from whomsoever they pleased.

HOWELL, supra note 4, at 63.

79. See infra Part III.E discussing the states’ power of regulation. See also HOWELL, supra note 4, at 80 ("It has never been questioned to any considerable extent . . . that a State may adopt proper quarantine and other police regulations with a view to the safeguarding of the health and welfare of its own citizens, although such regulations very evidently operate as restrictions upon the enjoyment of the privilege above named.").

80. Thomas M. Cooley accepted the antidiscrimination interpretation of the Clause as granting the same privileges and immunities to nonresident citizens as were available to resident citizens. See 2 STORY, supra note 77, at 559-64 n.4. Distinguishing special privileges from the privileges and immunities of citizens, Cooley made it clear that, in his opinion, the privileges and immunities secured by the Clause were those that were afforded under a given state’s laws and constitutions. According to Cooley:

[T]he privileges and immunities secured to citizens of each State in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter State, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home unless the assent of other States to their enjoyment herein be given.
protection. The Clause may have guaranteed certain fundamental rights uniformly throughout the several states, or it may merely have guaranteed equal civil rights in each state. Finally, there was the question of the Clause's relationship to the regulation of commerce. Although the Clause may have been motivated in part by concerns with interstate commerce, the Clause had a broader purpose, to form a single union of all of the people of the United States. This Part explores that governing purpose by examining the history, text, structural context, and case law arising under the Clause.

A. The Privileges and Immunities Clause of Article IV of the Articles of Confederation

It is widely recognized that the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution was derived from a corresponding clause in the Articles of Confederation. See, e.g., Antieau, supra note 14; Bogen, supra note 14; Gonzales, supra note 14. Charles Pinckney, the probable draftsman of the Privileges and Immunities Clause, stated in a 1787 letter that "[t]he 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 47, at 112. This provision was adopted with almost no debate. See id. at 437.
however, contained an improved mechanism for enforcement of its Privileges and Immunities Clause: a national judiciary that would preside over conflicts among citizens of different states. An understanding of the original meaning of the corresponding clause in the Articles of Confederation conveys some idea of the intention of the Framers in including the similarly-worded clause in the Constitution. The Privileges and Immunities Clause of the Articles reads as follows:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the

The Supreme Court addressed the relation between the Privileges and Immunities Clause of the Articles and that of the Constitution in Bank of Augusta v. Earle, 38 U.S. (18 Pet.) 519 (1839). The argument before the Court was that the constitutional rights of citizens who form corporations might be violated if corporations were not also afforded protection under the Privileges and Immunities Clause. Id. at 547. The question was whether a Georgia corporation could sue in the courts of the United States claiming a violation under the Privileges and Immunities Clause of Article IV, Section 2. Id. at 519. Although it was recognized that the Privileges and Immunities Clause of Article IV, Section 2, like its predecessor in the Articles of Confederation, created a "community of rights" among the citizens in the United States, placing them upon the same footing as resident citizens in each of the several states, the Court did not extend this protection to corporations. In argument before the Court, Mr. Webster discussed the state of the Union under both the Articles of Confederation and the present Constitution.

[Let us see what was the relation between the citizens of the different states by the articles of confederation. The government had become a confederation. But it was something more—much more. It was not merely an alliance between distinct governments for the common defence and general welfare, but it recognised and confirmed a community of interest, of character, and of privileges, between the citizens of the several states. . . . [Article IV of the Articles of Confederation] placed the inhabitants of each state on equal ground as to the rights and privileges which they might exercise in every other state. So things stood at the adoption of the Constitution of the United States. The article of the present Constitution, in fewer words and more general and comprehensive terms, confirms this community of rights and privileges . . . .

Id. at 552.

83. See U.S. CONST. art. III. Alexander Hamilton commented on the provision of a national judiciary in the Constitution and its relation to enforcement of the Privileges and Immunities Clause in The Federalist No. 80, stating:

[I]f it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias insidious to the principles on which it is founded.

The Federalist No. 80, supra note 75, at 537-38.
people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . .

The precursors of the Privileges and Immunities Clause of Article IV of the Articles of Confederation are found in the following proposed Articles VI and VII, drafted largely by John Dickinson of Pennsylvania and reported on July 12, 1776:

Art. VI. The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

Art. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same and to any Part of the World, which the Natives of such Colony enjoy.

Some commentators have argued that the first of these proposed Articles was intended to provide substantive protection for certain uniform fundamental rights, while the second of these Articles was designed to provide antidiscrimination protection and is based on principles of interstate comity. Under this interpretation, Article IV of the Articles of Confederation contains language that reflects the meaning of both of these proposed Articles, but Article IV, Section 2 of the Constitution dropped the interstate comity language, while retaining the language guaranteeing basic, fundamental, natural rights. However, it is not at all clear from the language of the first of these proposed Articles that it was intended to provide substantive protection for fundamental rights that were to be uniform among the states. The proposed Article VII may merely have protected the rights of foreign citizens as measured by those rights accorded to native citizens, and the proposed Article VI may have been abandoned because it would freeze the noncommercial law of the states. Article IV of the Articles of

83. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 547 (1906).
86. See, e.g., Antieau, supra note 14, at 3.
87. See id.
88. See id. at 6.
89. Bogen, supra note 14, at 818 (arguing that “Article VII . . . used the colonial charter technique of measuring intercolonial rights by the rights of natives of the colony”
Confederation may be read as providing antidiscrimination protection for whatever basket of fundamental rights each state chose to adopt. This is the interpretation that Justice Story seems to have adopted in his Commentaries. According to Justice Story, “[t]he intention of this clause was to confer on them, [the citizens of each state,] if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances.” Thus, the clause found in the Articles of Confederation corresponding to the Privileges and Immunities Clause of Article IV, Section 2 provides strong historical support for both the substantive and antidiscrimination readings of the Clause.

B. The Privileges and Immunities Clause: Forming “The Basis of the Union”

As Alexander Hamilton stated in The Federalist Papers Number Eighty, the Privileges and Immunities Clause formed the “basis of the Union.” The Framers of the Constitution expressed time and again the notion that the former colonies were to exist independently of England as a unified body. For example, James Wilson, after reading the Declaration of Independence to the Constitutional Convention, observed “that the United Colonies were declared to be free & independent States; and inferring that they were independent, not Individually, but Unitedly. . . .” The union was, thereby, strengthened, as compared to the states outside the federal system. The new Constitution wrought this fundamental innovation.

Prior to ratification of the Fourteenth Amendment, a number of courts had an opportunity to construe the Privileges and Immunities Clause of Article IV, Section 2 in a variety of contexts. These cases provide a wealth of information concerning the nineteenth century understanding of the terms “privileges” and “immunities” as used in the Clause. A common theme in these cases was that the Privileges and Immunities Clause established a “community of rights” among the citizens of the United States.

and that Article VI “prevented any alteration of noncommercial state law affecting residents of other states, even if nondiscriminatory against nonresidents.”

90. 2 STORY, supra note 77, at 559 (footnotes omitted).
91. THE FEDERALIST NO. 80, supra note 75, at 518-19.
94. See supra note 17 and accompanying text.
For example, in *Campbell v. Morris*, a case later cited by members of Congress during the debates over the Fourteenth Amendment, the Maryland Supreme Court addressed the meaning of the terms “privileges” and “immunities” as used in Article IV, Section 2. The defendant argued that the terms “privileges and immunities” meant the “right of holding property by the citizens of any state, and having the protection of their property and persons in the same manner as the citizens of this state.”

According to defense counsel, the Framers left the word “rights” out of Article IV, Section 2 “in order to prevent the right of voting, and holding offices, by the citizens of one state in another state.” In other words, the term “rights” was left out to avoid a construction that would provide a constitutional guarantee of political, not merely civil, rights under Article IV, Section 2. The defendant argued that unequal regulation of the property of foreign citizens violated the Privileges and Immunities Clause. Defense counsel described the privileges of citizenship the Clause guaranteed as follows:

A citizen of another state may hold real property in any state of the union, subject to the laws and regulations of that state, and his property and his person are entitled to the protection of the laws in the same manner as the citizens of the state. When a citizen of another state comes into this state, he is entitled to all the benefits of our judiciary, and he is also subject to the process of the same in the same manner as the citizens of this state. Another privilege secured

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95. 3 H. & McH. 535 (Md. 1797). See also Howell, supra note 4, at 16 (describing *Campbell* as “[t]he first reported case bearing upon the clause”); Maltz, supra note 4, at 336-37 (discussing *Campbell*).

96. See The Reconstruction Amendments’ Debates, supra note 2, at 121.

97. Campbell, 3 H. & McH. at 537.

98. Id. at 538.

99. It was long recognized that political rights such as the right to vote and to hold public office were not intended to be guaranteed under the Privileges and Immunities Clause. See Howell, supra note 4, at 62 (“From the earliest times in the judicial interpretation of the Comity Clause it has always been affirmed that there are certain kinds of public or political rights which do not come within its operation.”); id. at 63-64 (“In view of the fact that the so-called ‘natural rights’ theory was at the time accepted practically without question, it is not to be wondered at that the judges in the early cases were so positive in their statements as to the exclusion of political privileges from the list of rights to be shared equally by the citizens of all the States . . .”).

100. As defense counsel argued, the act of assembly at issue in the case put “the foreign citizen in a worse situation, and he may be deprived of his property in a different manner from that by which a citizen of this state is deprived of his property.” *Campbell*, 3 H. & McH. at 538.
to the citizen by this clause is, that he may go into a different state without
being under the necessity of taking an oath of allegiance. 101

Thus, the defendant interpreted the Clause to accord substantive
protection in all of the States to certain fundamental rights. However,
defense counsel also recognized that the state’s power of regulation
controlled the exercise of these rights. Although the state had the power
to regulate the rights guaranteed under the Clause, it could not discrimi­
nate against foreign citizens. According to defense counsel, “[i]f the
laws of this state put the citizens of another state in a worse situation
than the citizens of this state, it is a violation of the social compact.” 102
Thus, unequal regulation violated not only the Privileges and Immunities
Clause, but also the “social compact” among citizens of the United
States.

In contrast, plaintiff’s counsel argued that Article IV, Section 2 did not
give “foreign citizens all the advantages of the citizens of any particular
state.” 103 Instead, citizens were merely guaranteed the “right of
citizenship in every state.” 104 The plaintiff contended that the act of
assembly at issue in the case did not violate the “rights of citizenship,”
but merely proscribed a “particular mode of recovering debts, and a
citizen of another state is not in a worse situation than the citizens of our
own state.” 105 Thus, the plaintiff argued that this mode of regulation
did not violate the rights of citizenship under the Clause.

Justice Samuel Chase delivered the opinion of the court. In addressing
the meaning of the Privileges and Immunities Clause, Justice Chase
stated that “[p]rivilege and immunity are synonymous, or nearly so.
Privilege signifies a peculiar advantage, exemption, immunity; immunity
signifies exemption, privilege.” 106 Justice Chase elaborated:

[A] particular and limited operation is to be given to these words, [privileges
and immunities] and not a full and comprehensive one . . . . The court are of
the opinion it means . . . the peculiar advantage of acquiring and holding real
as well as personal property, and that such property shall be protected and

101. Id. at 548.
102. Id.
103. Id. at 542.
104. Id.
105. Id. See also HOWELL, supra note 4, at 57 (“It is the protection of substantive
rights which is guaranteed to the citizens of the several States; and the procedural forms
adopted for enforcing such rights may validly differ in respect to non-residents, provided
only the difference is not such as to defeat their enjoyment of some substantive right
accorded by a State to its own citizens.”).
106. Campbell, 3 H. & McH. at 553.

844
Justice Chase's citation of certain specific privileges and immunities may indicate that, in his view, the Clause guaranteed certain fundamental privileges and immunities of citizens uniformly among all of the states, in addition to ensuring that foreign citizens could exercise these rights in the "same manner" as native citizens. At the same time, he recognized the requirement of equality in regulations concerning the mode in which the privileges and immunities of citizens could be exercised—that the privileges and immunities of citizens had to be protected in the "same manner" for non-resident citizens as they were for resident citizens. However, as previously noted, this was not the only interpretation found in case law dealing with the Privileges and Immunities Clause of Article IV, Section 2.

An interpretation of the Clause as providing only antidiscrimination protection was also prevalent. Justice Story in his Commentaries, as well as Abbot v. Bayley, another case cited by members of Congress during the debates over the Fourteenth Amendment, advanced the notion that the Privileges and Immunities Clause merely placed citizens of one state upon an "equal footing" with citizens of every other state. In Abbot, the Massachusetts court stated:

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

107. Id. at 554. This part of the opinion was cited by Senator Trumbull, who read the remarks of Justice Chase in discussing the Civil Rights Bill. See The Reconstruction Amendments' Debates, supra note 2, at 121.

108. See Howell, supra note 4, at 19 ("The most casual examination of the reasoning in [Campbell] shows that it is based almost entirely upon the prevalent political theory of natural rights.").

109. 2 Story, supra note 77; see also supra note 90 and accompanying text.

110. 23 Mass. (6 Pick.) 89 (1827).

111. See The Reconstruction Amendments' Debates, supra note 2, at 121 (remarks of Senator Trumbull).
such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized.\textsuperscript{112}

However, even in the \textit{Abbot} opinion, there is evidence of a substantive reading of the Privileges and Immunities Clause. The \textit{Abbot} court mentioned a specific privilege or immunity of citizenship, that of taking and holding real estate, indicating that even under its antidiscrimination interpretation, certain privileges and immunities of citizens may have been understood to exist in all of the states even if they were not mandated by the federal Constitution. The relevant question becomes whether the prevailing view held that the Clause mandated such uniformity.

The proper interpretation of the Privileges and Immunities Clause was disputed until the Civil War. A significant case, \textit{Lemmon v. People},\textsuperscript{113} decided in 1860, involved the Privileges and Immunities Clause of Article IV, Section 2 and the slaveholder’s right of property in his slave when traveling in foreign jurisdictions.\textsuperscript{114} The question was whether New York could free a citizen’s slave if that individual came within its jurisdiction accompanied by his slave. More specifically, the issue was whether the right of property in slaves was protected under the Privileges and Immunities Clause.\textsuperscript{115} The slaveowner argued that there were certain general privileges and immunities inherent in the status of citizen of the United States that the Clause guaranteed in all of the states, including the right of property in a slave.

\begin{quote}
[T]he object of this section [Article IV, Section 2] is to secure to the citizen, when within a State in which he is not domiciled, the general privileges and immunities which, in the very nature of citizenship, as recognized and established by the Federal Constitution, belonged to that status; so that by no partial and adverse legislation of a State into which he might go as a stranger or a sojourner can he be deprived of them.\textsuperscript{116}
\end{quote}

Thus, the argument stated that the Clause afforded both substantive as well as antidiscrimination protection for foreign citizens visiting other states. Plaintiff’s counsel also pointed to the principles of international comity that he claimed were “converted by the Constitution into an

\textsuperscript{112} \textit{Abbott}, 23 Mass. (6 Pick.) at 92.
\textsuperscript{113} 20 N.Y. 562 (1860). \textit{See Maltz, supra note 4, at 345-46 (discussing \textit{Lemmon}).}
\textsuperscript{114} The conflict over the right of a slaveowner to maintain a property interest in his slave when traveling in a free state also invoked the Fugitive Slave Clause of Article IV. \textit{See infra Part III.C.1.}
\textsuperscript{115} \textit{Lemmon}, 20 N.Y. at 580.
\textsuperscript{116} \textit{Id.} at 580-81. Plaintiff’s counsel again reiterated his point: “By the section quoted [Article IV, Section 2] the citizen of each State is secured in all the general privileges and immunities of a citizen of the United States whilst temporarily and necessarily within a State other than that of his domicil.” \textit{Id.} at 581.
absolute right of the citizen.”\textsuperscript{117} Citing Article I, Section 10 of the Constitution, plaintiff’s counsel explained that “[c]omity, like municipal law, has its foundation in compact, express or implied. The social or international compact between the States, as such, was fixed by the Federal Constitution.”\textsuperscript{118} The “duty of a State toward the citizens of another State” was a duty that was imposed “not by comity, as a rule of action, but by the Federal Constitution.”\textsuperscript{119}

Counsel for the defendant, the State of New York, argued that the “state of slavery is contrary to natural right,”\textsuperscript{120} citing in particular Justinian’s \textit{Institutes}. As a result, the “peculiar system of laws” arising in states that recognized slavery was “irreconcilable with the jurisprudence of States where it does not exist.”\textsuperscript{121} Citing among other sources the Roman authorities, defendant’s counsel urged that the “law of slavery is local, and does not operate beyond the territory of the State where it is established.”\textsuperscript{122} As a result, New York could free the plaintiff’s slave without violating the plaintiff’s rights under Article IV, Section 2 of the Constitution.\textsuperscript{123} Finally, counsel made a telling argument in stating that if slaves were property, there would be no need

\begin{flushleft}
117. \textit{Id.}
118. \textit{Id.} at 582.
119. \textit{Id.}
120. \textit{Id.} at 584.
121. \textit{Id.} at 585.
122. \textit{Id.} In order to support his contention that slavery was a mere local institution created by positive regulations, having no effect outside the jurisdiction, defendant’s counsel cited the 1820 decision by the Court of Appeals of Kentucky in \textit{Rankin v. Lydia}, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820). In that case, defendant’s counsel noted that the Court of Appeals reasoned as follows:

“[I]n deciding this question, we disclaim the influence of the general principles of liberty which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations, is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law.” \textit{Lemmon}, 20 N.Y. at 587 (quoting \textit{Rankin v. Lydia}, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820)).

123. Citing a variety of authorities, counsel for the defendant reasoned that “[w]hen the slave is carried, or escapes beyond its jurisdiction, he becomes free, and the State to which he resorts is under no obligation to restore him, except by virtue of express stipulation.” \textit{Id.} at 585.
\end{flushleft}
for the Fugitive Slave Clause of Article IV, Section 2. Arguably, slave property would then be afforded the same protection as other forms of property under the Privileges and Immunities Clause of Article IV, Section 2.

Citing Vattel and Montesquieu, defendant’s counsel argued that comity involved the protection of only natural rights. “The laws of nations are, in their origin, only natural rights of men applied to nations.” Slavery was not a “natural relation, but contrary to nature, and at every moment it subsists, it is an ever new and active violation of the law of nature.” Therefore, any protection of slave property in New York could only exist because of the voluntary action of that state. However, the New York statute explicitly freed such individuals. Therefore, the state legislature had not chosen to accord voluntary comity with respect to property in slaves within its jurisdiction.

The court sided with counsel for the State of New York. The court assented to the proposition that a state’s municipal regulations concerning the status of individuals could have no binding extraterritorial effect, but maintained that courts should presume that the legislature desires that they be respected out of principles of voluntary comity. Furthermore, the court agreed with the widely accepted view that slavery was contrary to principles of natural right and, therefore, could have no

124. Id. at 589. For a more thorough discussion of the Fugitive Slave Clause, see infra Part III.C.1.
125. Id. at 592.
126. Id. at 597. Defense counsel William M. Evarts stated: “The law of nations, built upon the law of nature, has adopted this same view of the status of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it.” Id. He further elaborated on this point:

By the law of nations, men are not the subject of property.
By the law of nations, the municipal law which makes men the subject of property, is limited with the power to enforce itself, that is by its territorial jurisdiction.
By the law of nations, then, the strangers stand upon our soil in their natural relations as men, their artificial relation being absolutely terminated.

Id. at 598 (citing The Antelope, 23 U.S. (10 Wheat.) 66, 120, 121 (1825)).

127. Citing, among others, Justice Story and the Dred Scott Court, defense counsel recognized that

[the comity, it is to be observed, under inquiry, is . . . of the State and not of the Court, which latter has no authority to exercise comity in behalf of the State, but only a judicial power of determining whether the main policy and actual legislation of the State exhibit the comity inquired of . . . .

Id. at 596.

128. Id. at 602.
binding extraterritorial effect outside of slaveholding states.\textsuperscript{129} Note, however, that in this case, the State of New York explicitly declared by statute that it did not accord voluntary comity to the status of slavery. Thus, this positive regulation overrode any principles of international comity that might have applied in the case.\textsuperscript{130}

The court also addressed the effect of the Privileges and Immunities Clause of Article IV, Section 2. According to the court, the Privileges and Immunities Clause of Article IV of the Articles of Confederation secured a "community of intercourse" among the states.\textsuperscript{131} Although the Constitution made the states into "a single nation" for "all external purposes and for certain enumerated domestic objects," the court acknowledged that the states remained sovereign under the Constitution with respect to certain other subjects outside the sphere of the enumerat-

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\textsuperscript{129}. \textit{Id.} at 605. The court cited the well known English case, \textit{Somerset v. Stewart}, for the proposition that "a state of slavery could not exist except by force of positive law." \textit{Id.} According to the court, this rule of law in England was transported to America with the colonists.

The laws of England respecting personal rights were in general the laws of the Colonies, and they continued the same system after the Revolution by provisions in their Constitutions, adopting the common law subject to alterations by their own statutes. The literature of the Colonies was that of the mother country.

\textit{Id.} The court also stated, citing Montesquieu, that "slavery is repugnant to natural justice and right, has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government." \textit{Id.} at 617. The court cited Justice Story's opinion in \textit{Prigg v. Pennsylvania} to the same effect. \textit{Id.} at 622-23. For a more thorough discussion of \textit{Prigg}, see \textit{infra} notes 183-208 and accompanying text.

\textsuperscript{130}. \textit{Id.} at 602-03. According to the court:

[I]t follows that where the Legislature of the State, in which a right or privilege is claimed on the ground of comity, has by its laws spoken upon the subject of the alleged right, the tribunals are not at liberty to search for the rule of decision among the doctrines of international comity, but are bound to adopt the directions laid down by the political government of their own State.

\textit{Id.} As a result, the court looked only to the law of New York on the question of whether a slave became free upon setting foot upon the soil of New York. The court also stated:

Comity . . . never can be exercised in violation of our own laws; and in deciding whether comity requires any act, we look to our own laws for authority. There can be no application of the principles of comity, when the State absolutely refuses to recognize or give effect to the foreign law, or the relation it establishes, as being inconsistent with her own laws, and contrary to her policy.

\textit{Id.} at 629.

\textsuperscript{131}. \textit{Id.} at 607.
ed powers delegated to the national government.\textsuperscript{132} The Privileges and Immunities Clause merely guaranteed that foreign citizens would have the same rights as native citizens, except for those rights that depended on the domicil of the individual.\textsuperscript{133} In this case, citizens of New York were also barred from bringing slaves within the state, and therefore, under this interpretation, there was no violation of the prohibitions of the Clause.\textsuperscript{134}

Judge Clerke authored a lengthy dissent in the case. He based his argument on a “principle of the unwritten law of nations” that citizens have a right of passage through foreign territories without having those territories acquire a right over their person or property.\textsuperscript{135} Judge Clerke argued that this principle applied as well to property in slaves under the Constitution of the United States because that document recognized such property.\textsuperscript{136} Because the constitutional compact recognized property in slaves, this principle of the law of nations was even more applicable to the states.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{132} Id. at 608. Among the powers that were retained by the states, according to the court, was the power to regulate “[t]he social \textit{status} of the people, and their personal and relative rights as respects each other, [and] the definition and arrangements of property . . . ." Id.
\item \textsuperscript{133} Id. According to the court, the Clause was “intended to guard against a State discriminating in favor of its own citizens.” Id. at 627.
\item \textsuperscript{134} Id. at 610.
\item \textsuperscript{135} Id. at 636.
\item \textsuperscript{136} Id. at 637. Judge Clerke queried:
\begin{quote}
[C]an any one State insist, under the federal compact, in reference to the rights of the citizens of any other State, that there is no such thing as the right of such citizens, in their own States, to the service and labor of any person. This is property; and whether the person is held to service and labor for a limited period, or for life, it matters not; it is still property—recognized as an existing institution by the people who framed the present Constitution, and binding upon their posterity forever, unless that Constitution should be modified or dissolved by common consent.
\end{quote}
\item Id. Judge Clerke also cited the \textit{Dred Scott} case and the opinion of Chief Justice Taney for the proposition that the Constitution recognized property in slaves. Id. at 640.
\item \textsuperscript{137} Id. at 641. According to Judge Clerke, “the relations of the different States of this Union towards each other are of a much closer and more positive nature than those between foreign nations towards each other.” Id. at 642. Judge Clerke’s summation of his argument is particularly instructive in understanding the way in which principles of the law of nations became binding as conventional obligations under the Constitution:
\begin{quote}
The right to the labor and service of persons held in slavery, is incontestably recognized as property in the Constitution of the United States. The right yielded by what is termed comity under the law of nations, ripens, in necessary accordance with the declared purpose and tenor of the Constitution of the United States, into a conventional obligation, essential to its contemplated and thorough operation as an instrument of federative and national government.
\end{quote}
\item Id. at 643.
\end{itemize}
Thus, both the majority and dissent in *Lemmon* interpreted the Privileges and Immunities Clause of Article IV, Section 2 as protecting certain natural law rights of citizenship throughout the United States. The two sides disputed only whether the right of property in a slave was such a natural law right of the citizen, or whether it was merely a municipal regulation—a special privilege or immunity—having no binding extraterritorial effect.

The court in another important antebellum case dealing with the status of free blacks, *Crandall v. State*, similarly focused its attention on the meaning of the Privileges and Immunities Clause. *Crandall* involved a Connecticut statute that forbid the teaching of “coloured persons not inhabitants” of the state without the approval of the legislature. In rendering its decision, the court evaluated whether this act violated the Privileges and Immunities Clause of Article IV, Section 2. Although the case was reversed on a technicality, the arguments of counsel in the case provide insight concerning the meaning attributed to the Clause in antebellum America.

First, the court determined whether such “coloured persons” were citizens for purposes of the Privileges and Immunities Clause. Citing, among others, Chancellor Kent’s *Commentaries* as authority, the attorney for the State of Connecticut argued that free blacks were not citizens because they were under certain disabilities in various states. Furthermore, admitting that education might be a fundamental privilege guaranteed by Article IV, Section 2, he argued that even if they were citizens under the Clause, the State of Connecticut was still free to regulate the schools for the public good. Thus, counsel urged the

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138. 10 Conn. 339 (1834); see Maltz, *supra* note 4, at 339-40 (discussing *Crandall*).
139. *Crandall*, 10 Conn. at 339.
140. *Id.* at 370-71. The Connecticut act in question prohibited unlicensed schools that taught “coloured persons.” However, the information did not allege that the school in question was unlicensed. *Id.*
141. *Id.* at 339-47, 359. Counsel also noted that the first naturalization act passed by Congress in 1790 reserved naturalization for “free white” persons, indicating that blacks were not citizens. *Id.* at 358.
142. *Id.* at 347. According to counsel: The legislature may regulate schools. I am free to say, that education is a fundamental privilege; but this law does not prohibit schools. It places them under the care of the civil authority and select-men; and why is not this a very suitable regulation? I am not sure but the legislature might make a law like this, extending to the white inhabitants of other states who are unquestionably citizens, placing all schools for them under suitable boards of examination, for
court to find that the state of Connecticut passed the act within the proper scope of its regulatory power with respect to the fundamental privilege of education.

On the other side, plaintiff's counsel argued first that free blacks were citizens and that the common law made no distinction in status based upon color alone. Furthermore, counsel contended that education was a fundamental privilege and, consequently, that free blacks had the right to come into the State of Connecticut and be educated (although not necessarily at taxpayer expense). Plaintiff's counsel then urged that the Connecticut act was not a permissible regulation of the privilege of educating oneself because the power exercised by the legislature was one of "exclusion on the ground of alienage." In other words, the Connecticut act was not a "general and equal law," according to counsel. Thus, in Crandall, the court dealt with the familiar question of the nature of the protection afforded under the Privileges and Immunities Clause—substantive or antidiscrimination protection.

the public good; and I can see no objection to the board created by this act.

143. Crandall, 10 Conn. at 348. Counsel argued:

Here, the free man of colour may take his position, and upon the immutable principles of justice and truth demand his political rights from that government which he is bound to aid and to defend: he is not a citizen to obey, and an alien to demand protection. Nor is he of an intermediate class. His relations to society are the same as others; his absolute and relative rights, his rights of person and to things, his acquisitions of property by contract and by inheritance,—and even the soil, which no alien inherits—are the same. So every requisition of the law, in its civil and criminal provisions, reaches him. His legal capabilities and his legal obligations are the same. Every favour or right conferred on the citizens, by general legislation, reaches him; every requisition demands his obedience.

144. Crandall, 10 Conn. at 350-51.

145. Id. at 352.

146. Id. at 353.

852
Furthermore, the court also addressed the question of the proper scope of state regulation under the Clause.

The Supreme Court interpreted the Clause several times prior to ratification of the Fourteenth Amendment. For example, the arguments before the Supreme Court in *Gibbons v. Ogden* noted the relation between the Privileges and Immunities Clause of Article IV, Section 2 and commerce.147 In that case, involving the congressional power to regulate commerce, it was argued that the Privileges and Immunities Clause as well as the Commerce Clause reflected the notion of comity among the states.148 In discussing the commercial barriers among the states under the Articles of Confederation, it was argued that the Constitution remedied problems arising among the states under the Articles. The Constitution remedied these evils . . . [by] express prohibitions on the states, in those particulars in which the evils had been most sensibly felt, preventing them from levying any impost or duty of tonnage without the consent of Congress . . . [and by]

| vesting Congress with a general power to regulate commerce with foreign nations and among the states.149 |

Furthermore, it was argued that the “law of nations” provided the source of at least the right of intercourse with a state, as explicitly mentioned in the Privileges and Immunities Clause of the Articles of Confederation:

The constitution does not profess to give, in terms, the right of ingress and egress for commercial and any other purposes, or the right of transporting articles for trade from one state to another. It only protects the personal rights of the citizens of one state, when within the jurisdiction of another, by securing to them “all the privileges and immunities of a citizen” of that other, which they hold subject to the laws of the state as its own citizens; and it protects their property against any duty to be imposed on its introduction. The right, then, of intercourse with a state, by the subjects of a foreign power, or by the citizens of another state, still rests on the original right, as derived from the law of nations.150

Therefore, because the Privileges and Immunities Clause of Article IV, Section 2 embodied principles originally expressed in the law of nations, the right of engaging in commerce was seen as flowing not only from

148. *Id.* at 68–69.
149. *Id.* at 69.
150. *Id.*
the principles of the law of nations, but also from the Privileges and Immunities Clause. This indicated that the purpose of the Clause was to effect greater commercial union among the citizens of all of the states, besides protecting the rights of citizens in foreign states and the equality of the states. Furthermore, by referring to the "personal rights of citizens," it seems that counsel had in mind a certain set of rights, encompassing personal rights other than commercial privileges, which all of the states would be obligated to recognize. Thus, the Clause afforded protection broader in scope than merely a guarantee of commercial privileges and immunities.

In Thurlow v. Commonwealth of Massachusetts, the Court again addressed the relationship between commerce and the privileges and

151. This Clause was designed to carry out, among other things, the "commercial purposes" of the Union. As Mr. Ogden argued before the Supreme Court in Bank of Augusta v. Earle:

The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every State could alone be promoted and secured by establishing these on principles of reciprocity; and on the security and protection of the citizens of each State, in all the States united by the government.


152. Other provisions of the Constitution dealing with commercial issues were also thought to be designed to ensure greater unity among the states. For example, the prohibition against emitting bills of credit was a further attempt to unify the United States commercially. In Briscoe v. Bank of the Commonwealth of Kentucky, it was argued before the Court that

[...the separation of all these powers of coining, issuing bills, making legal tenders, fixing standards, and the bestowal of them on the Union, to the total exclusion of the States, was indispensably necessary to accomplish the great ends for which the Constitution was formed. Its leading object was to make the people one people, for many purposes, and especially as to the currency. One, as far as the high immunities and privileges of free citizens are concerned. One, in the rights of holding, purchasing, and transferring property. One, in the privilege of changing domicil and residence at pleasure. One, in the modes and means of transacting business and commerce.

36 U.S. (11 Pet.) 257, 289-90 (1837). In fact, a uniform currency was argued to be essential to assuring that the citizens of each state were accorded all privileges and immunities of citizens in the several states:

Such a currency was altogether proper and indispensable under a system which, for the first time in the history of free governments, established it as a fundamental principle that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It was impossible to carry out this principle without it.

Id. at 291. The understanding of the Union formed under the Constitution given in this argument may entail certain rights of citizens that were relatively uniform among the states and which were guaranteed to all citizens under Article IV, Section 2. Through construction of a single political community, or body politic, from the people of the several states, certain privileges and immunities of these individuals as members of this political community were guaranteed.

153. 46 U.S. (5 How.) 504 (1847).
immunities of citizens. The case involved a tax upon items entering a state, which was not applied to those items already in the state. It was urged before the Court that “the subjection of the productions of one State, when introduced for the purpose of sale and consumption within the territories of another to the internal laws and regulations of the latter State, finds an analogy in the case of the citizens of one State going into the jurisdiction of another.” 154 Therefore, the provisions of Article IV, Section 2 with respect to the privileges and immunities of citizens could be applied to invalidate the discriminatory tax. 155 Chief Justice Taney delivered the opinion of the Court and in dicta argued as he subsequently would in Dred Scott v. Sandford that the states could not exercise a power that would have extraterritorial force and “compel other States to acknowledge as citizens those whom it might not be willing to receive.” 156

The Taney majority in Dred Scott accepted this view in arguing that freed blacks could not have been considered citizens at the time of ratification of the Constitution because they would have been entitled to the privileges and immunities of citizenship under Article IV, Section 2. Such a result, Chief Justice Taney argued, neither reflected the reality in the United States before the Civil War nor the intent of the Framers of the Constitution. In Dred Scott, Chief Justice Taney reasoned:

154. Id. at 570.

155. Id. at 570-71. Mr. Burke argued for the state that:

The constitution provides, that “the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.” Citizens of one State, going into the jurisdiction of another State, can claim no exemption from its laws under this clause . . . . If they remain in the State, they become subject to the taxing power, and all the burdens and restraints which its laws impose upon its own citizens.

Id.

156. Id. at 585. Chief Justice Taney based his argument on the fact that Congress had been given the exclusive power of naturalization. He analogized this power of naturalization to the commerce power, reasoning that the states could not be allowed to exercise any power having extraterritorial effect through the Privileges and Immunities Clause where there was a corresponding congressional power over the subject matter. Taney concluded:

[I]t would seem to be hardly consistent with this provision to allow any one State, after the adoption of the Constitution, to exercise a power, which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive.

Id.
It cannot be supposed that they [State sovereignties] intended to secure to them [blacks] rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word “citizens,” or would have consented to a constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. 157

Thus, Chief Justice Taney enumerated certain rights under the Privileges and Immunities Clause to which free blacks would be entitled were they considered citizens of the United States. His analysis indicates that it may have been the general understanding that certain rights would be respected by all free governments and, therefore, that certain rights would be civil rights of the citizen in any state in which he might find himself: 158

The nature of the rights enumerated by Chief Justice Taney is also noteworthy. Taney stated that free blacks would possess not only the right to enter any state and remain without molestation, but also the right to “full liberty of speech in public and in private,” the right to “hold public meetings,” and the right to “keep and carry arms” wherever they went. Therefore, Chief Justice Taney did not limit the privileges and immunities protected under the Clause to certain rights of “trade and commerce,” such as those at issue in Gibbons v. Ogden and Thurlow v. Commonwealth of Massachusetts, but enumerated certain other personal rights that would be protected under the Clause, some of which were analogous to provisions in the Bill of Rights. 159

158. For an argument supporting this interpretation of the Clause, see infra Part IV.D.
159. See U.S. CONST. amends. I (guaranteeing “freedom of speech” and “the right of the people peaceably to assemble”) and II (guaranteeing “the right of the people to keep and bear Arms”).

856
The foregoing discussion of antebellum case law demonstrates that courts examining the Privileges and Immunities Clause clearly noted that it formed the "basis of the union" and made the United States "one nation" by both entitling citizens to certain national rights in every state, as well as placing them upon an equal footing with resident citizens in the state in which they found themselves with respect to rights traditionally within the regulatory control of the state governments. The rights conferred under the Clause were limited to civil rights and did not include political rights. 160

However, the Clause clearly encompassed a broader set of rights than those relating only to trade and commerce. Further, the Taney opinion in *Dred Scott* indicates that there may have been certain rights thought to be afforded citizens in *all free governments*, which would therefore be the privileges and immunities of citizens in all of the states. The question remained, though, concerning the nature of the protection the Clause extended—whether it guaranteed substantive protection, or merely antidiscrimination protection, and whether the privileges and immunities of citizens were intended to be guaranteed uniformly among the states under the Clause. 161

160. Mr. Webster argued before the Supreme Court in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), that the Clause did not extend political rights to citizens of each state in the several states and that the Clause acted "independently" of any voluntary comity—in other words, the fact that this Clause was placed in the Constitution made the protection mandatory rather than voluntary among the states. *Id.* at 552. Webster explained:

> [T]his article in the Constitution does not confer on the citizens of each State political rights in every other State, is admitted. A citizen of Pennsylvania cannot go into Virginia and vote at an election in that State; though, when he has acquired a residence in Virginia, and is otherwise qualified as required by her constitution, he becomes, without formal adoption as a citizen of Virginia, a citizen of that State politically. But for the purposes of trade, commerce, buying and selling, it is evidently not in the power of any State to impose any hinderance or embarrassment, or lay any excise, toll, duty, or exclusion, upon citizens of other States, to place them, coming there, upon a different footing from her own citizens.

*Id.* Furthermore, Webster noted: "This is American, constitutional law, independent of all comity whatever." *Id.* at 553.

161. See infra Part IV, which addresses this interpretational problem in greater detail.
C. A Structural Analysis of Article IV: The Fugitive Slave Clause and Full Faith and Credit Clause

Other provisions of Article IV, in addition to the Privileges and Immunities Clause, were intended to extend principles of international comity among the states. Principles of comity formed the basis of both the Fugitive Slave Clause and the Full Faith and Credit Clause as well. The Full Faith and Credit Clause ensured that the judgments of state courts would be respected in foreign states. The Fugitive Slave Clause ensured the recognition of the property of citizens in slaves outside slaveholding states.

1. Cases Arising Under the Fugitive Slave Clause

Neither reason nor natural law provided the foundation for property in slaves. Rather, property in slaves was considered merely conventional. Thus, if it weren’t for the presence of the Fugitive Slave Clause

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162. U.S. Const. art. IV, § 2, cl. 3 (“No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

163. U.S. Const. art IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

164. For example, Justice McClean, dissenting in the Dred Scott decision, compiled an extensive list of authorities stating that slavery was contrary to the principles of natural law and as such could only be a local institution founded upon mere municipal regulations.

As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulations.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 534 (1856) (citations omitted). Justice McClean concluded:

The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law.

Id. at 535 (citation omitted). Justice McClean concluded not only that slavery was contrary to principles of natural law, but also that it had no foundation in the common law. Justice McClean noted, quoting Rankin v. Lydia:

“Slavery is sanctioned by the laws of [the] State, and the right to hold slaves under our municipal [sic] regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law.”

Id. at 536 (quoting Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 470 (1820)). See also JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW § 667 (1864) (“Slavery, in
in the Constitution, the slaveholders' rights of property in their slaves might not be respected when they ventured outside their home states into states that did not recognize property in human beings.\textsuperscript{165} Indeed, this was the case before ratification of the Constitution.\textsuperscript{166} An analogy might be drawn between the Privileges and Immunities Clause of Article IV, Section 2 and the Fugitive Slave Clause in that, under at least one interpretation of the Privileges and Immunities Clause, both clauses protect the rights of citizens to hold property in foreign states.\textsuperscript{167} The compact among the states embodied in Article IV required that the rights of property that had vested in a citizen's home state be respected in all of the foreign states.

In general, protection of property in slaves in the free states was not consistent with principles of the law of nations.\textsuperscript{168} However, laws

\begin{flushright}
\textsuperscript{165}. As was argued before the Court in \textit{The Amistad}: \\
[I]t was deemed necessary in the Constitution to insert an express stipulation in regard to fugitives from service. The law of comity would have obliged each State to protect and restore property belonging to a citizen of another, without such stipulation; but it would not have required the restoration of fugitive slaves from a sister State, unless they had been expressly mentioned. 40 U.S. (15 Pet.) 518, 559 (1841).

\textsuperscript{166}. This dilemma was pointed out by defendant's counsel before the Supreme Court in the case of \textit{Prigg v. Commonwealth of Pennsylvania}: During the confederation, the southern States had sustained great inconveniences and loss by the change that had been effected by the abolition laws of the northern States. The conventional or customary law, was no longer observed. There was no provision upon the subject in the articles of confederation. In many of the northern States no aid whatsoever would be allowed to the owners of fugitives slaves, and sometimes, indeed, they met with open resistance. 41 U.S. (16 Pet.) 539, 564 (1842). Similarly, Justice Wayne discussed this problem in his opinion in \textit{Prigg}: Experience had shown that under the confederacy the reclamation of fugitive slaves was embarrassed and uncertain, and that they were yielded to by the States only from comity. It was intended that it should be no longer so . . . . It was foreseen, that unless the delivery of fugitive slaves was made a part of the Constitution, and the right of the States to discharge them from service was taken away, that some of the States would become the refuge of runaways.

\textit{Id.} at 645. For a more thorough discussion of the Court's decision in \textit{Prigg}, see infra notes 183-208 and accompanying text.

\textsuperscript{167}. \textit{See supra} notes 113-37 discussing Lemmon.

\textsuperscript{168}. For example, in \textit{People v. Lemmon}, 20 N.Y. 562 (1860), Judge Paine reasoned that besides there being no constitutional right to transit with slaves, there also was no right based upon the principles of the law of nations. According to Judge Paine:
regulating one’s status in ways other than slave versus free were to be respected in foreign jurisdictions. Justice Story stated in his Commentaries on the Conflict of Laws:

All laws, which have for their principal object the regulation of the capacity, state, and condition of persons, have been treated by foreign jurists generally as personal laws . . . . [T]hey are for the most part held by foreign jurists to be of absolute obligation everywhere, when they have once attached upon the person by the law of his domicile. 169

Therefore, normally one’s status would remain the same outside the jurisdiction of the state in which the status attached, even when “the law of the domicile and that of the situation (situs) are in conflict with each other.” 170 However, slavery was different, according to Justice Story:

There is a uniformity of opinion among foreign jurists and foreign tribunals in giving no effect to the state of slavery of a party, whatever it might have been in the country of his birth or of that in which he had been previously domiciled, unless it is also recognized by the laws of the country of his actual domicile, and where he is found, and it is sought to be enforced. 171

Therefore, the Fugitive Slave Clause was designed to trump the common law of the free states to ensure that slaveholders retained property in their slaves outside their state of domicile. The consensus

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Writers of the highest authority on the law of nations agree that strangers have a right to pass with their property through the territories of a nation . . . . And this right, which exists by nature between States wholly foreign to each other, undoubtedly exists, at least as a natural right, between the States which compose our Union. But we are to look further than this, and to see what the law of nations is when the property which a stranger wishes to take with him is a slave.

Id. at 133 n.3 (citations omitted). Judge Paine argued that there could be no property in slaves, and therefore that under the law of nations, there could be no right to take slaves through foreign states and retain property in those slaves.

[T]hey [writers on the law of nations] all agree that by the law of nature alone no one can have a property in slaves. And they also hold that, even where slavery is established by the local law, a man cannot have that full and absolute property in a person which he may have in an inanimate thing . . . . It can scarcely, therefore, be said, that when writers on the law of nations maintain that strangers have a right to pass through a country with their merchandise or property, they thereby maintain their right to pass with their slaves.

STORY, supra note 61, at 134 n.3 (citation omitted). For a more comprehensive discussion of Lemmon, see supra notes 113-37 and accompanying text.

169. STORY, supra note 61, at 49. However, there were writers who took exception to this general rule. “John Voet . . . is one of the few jurists who insist that personal statutes of all sorts respecting capacity or incapacity, majority or minority, legitimacy or illegitimacy, have no extra-territorial operation, either directly or consequentially.” Id. at 56-57.

170. Id. at 54-55.

171. Id. at 118-19.
was that slavery's status as a creature of mere municipal regulation warranted no extraterritorial effect.\textsuperscript{172} The protection of slave property in the free states necessitated some form of positive law, overriding the principles of private international law. According to Justice Story:

Independent of the provisions of the Constitution of the United States, for the protection of the rights of masters in regard to domestic fugitive slaves, there is no doubt that the same principle pervades the common law of the non-slaveholding States in America; that is to say, foreign slaves would no longer be deemed such after their removal thither.\textsuperscript{173}

The rights of masters over their slave property in free states was a matter of great dispute prior to the Civil War. This controversy concerning the meaning of the Fugitive Slave Clause sheds light on the antebellum understanding of the Privileges and Immunities Clause.

Cases arising under the Fugitive Slave Clause in the courts of the United States between ratification of the Constitution and ratification of the Fourteenth Amendment exhibit a reliance upon the philosophy of international comity underlying Article IV.\textsuperscript{174} A number of cases dealt

\textsuperscript{172} According to Justice Story, this conclusion was dictated by three principles of the law of nations laid down by Huberus and adopted by Story in his \textit{Commentaries on the Conflict of Laws}. \textit{Id.} at 27. Similarly, Justice Marshall concluded:

That . . . [slavery] is contrary to the law of nature, will scarcely be denied. That every man has a natural right to the fruits of his own labor, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.


Members of Congress also noted the local nature of slavery. \textit{See, e.g.}, \textbf{CONG. GLOBE}, 35th Cong., 1st Sess. App. 332, 335 (1858) (Rep. Walton); \textit{id.} at App. 79 (Sens. Fessenden and Mason); \textit{id.} at 87-90 (Sen. Clark); \textbf{CONG. GLOBE}, 34th Cong., 1st Sess. App. 938-39 (1856) (Rep. Brenton); \textit{id.} at 201 (Sen. Trumbull); \textit{id.} at 1164 (Rep. Cragin).

\textsuperscript{173} \textit{STORY}, \textit{supra} note 61, at 119.

\textsuperscript{174} The connection between the notion of comity and the Fugitive Slave Clause is evident in \textit{Miller v. McQuerry}, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9,583) wherein the Ohio circuit court stated:

The surrender of fugitive slaves was a matter deeply interesting to the slave states. Under the confederation there was no provision for their surrender. On the principles of comity amongst the states the fugitives were delivered up; at other times they were protected and defended. This state of things produced uneasiness and discontent in the slave states. A remedy of this evil, as it was called, was provided in the constitution.

\textit{Id.} at 337. This remedy in the Constitution, to which the court refers, was the Fugitive Slave Clause, which was needed to ensure that the rights of property in slaves would be protected in non-slaveholding states. The Privileges and Immunities Clause of the
with the problem of property in slaves outside of slave states under the Constitution. For example, in Johnson v. Tompkins, the court upheld the right of a master to property in a slave's custody and services and recognized the security given to the right to reclaim fugitive slaves under the Constitution. The court observed that although this right of property was contrary to principles of natural law, it was embodied in the fundamental law of the United States and, thus, was legally binding. According to the court, "the law of the land recognises the right of one man to hold another in bondage, and that right must be protected from violation, although its existence is abhorrent to all our

Articles of Confederation might not have afforded this protection because there was some dispute concerning whether slaves remained property upon entering a free state. Property in slaves was generally recognized as being contrary to the law of nature, and it had been argued that, as a result, once slaves left the jurisdiction having positive laws that were contrary to the laws of nature, the property in slaves need not be protected as a privilege or immunity of citizens. Id. at 338. The court in Miller v. McQuerry recognized the analogy between the Privileges and Immunities Clause and the Full Faith and Credit Clause of Article IV, Section 2 and went so far as to declare that Congress possessed the power to enforce the provisions of the Privileges and Immunities Clause through appropriate legislation. According to the court:

The constitution provides, "that full faith shall be given to public acts, records, and judicial proceedings," of one state in every other. If an individual claims this provision as a right, and a state court shall deny it, on a writ of error to the supreme court of the Union, such judgment would be reversed. And the provision is that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Congress unquestionably may provide in what manner a right claimed under this clause, and denied by a state, may be enforced. And if a case can be raised under it, without any further statutory provisions, so as to present the point to the supreme court, the decision of a state court, denying the right, would be reversed.

Id. 175. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841); Lemmon v. People, 20 N.Y. 562 (1860); Miller v. McQuerry, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9,583); Johnson v. Tompkins, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7,416); Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467 (1820). Paul Finkelman has noted the importance of these cases in the development of the contemporary understanding concerning principles of international comity as applied to the states prior to ratification of the Fourteenth Amendment. According to Finkelman:

The question of comity for slavery helped define the issues and problems that ultimately led to the Civil War. These issues also helped define the goals of the war and shaped its consequences. Much of the wording of the Fourteenth Amendment appears to be a direct response to the issues raised by the cases involving comity and interstate relations before the war. Perhaps the most important legacy of Aves, Dred Scott, Lemmon, and the other antebellum comity cases is this amendment.

FINKELMAN, supra note 14, at 342.


177. Id. at 840. The court reasoned that "[t]he ownership of . . . [the slave] being thus clearly made out, he must be deemed to be the property of Mr. Johnson, over which he has the same control as over his land or his goods." Id. at 843.
ideas of natural right and justice." Many of the antebellum cases addressing this issue reiterated this principle. In *Rankin v. Lydia*, the Kentucky Court of Appeals addressed the conflict over the status of slaves brought into the Northwest Territory after the Ordinance of 1787 outlawed slavery. Judge Mills recognized that the right to property in slaves was "a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law." Citing Vattel, Judge Mills distinguished between property of an individual in transit and that of an individual domiciled in a state and, therefore, a resident of the state. Mills argued that the property of an individual in transit was not subject to municipal regulation, as opposed to the property of a resident. Therefore, the law of the domicile, which did not recognize slavery, governed, and freed the slave.

Although a number of state cases addressed the right to property in slaves under the Fugitive Slave Clause, the Supreme Court did not conclusively deal with the meaning of the Clause until 1842. The Supreme Court finally addressed the proper interpretation of the Fugitive Slave Clause in order to guarantee a substantive right of property in slaves against state abridgement.

178. *Id.* The court stressed the inviolability of property as protected under the Constitution and the dangers of disregarding the protection afforded property by the Constitution: "If this spirit pervades the country; if public opinion is suffered to prostrate the laws which protect one species of property, those who lead the crusade against slavery may, at no distant day, find a new one directed against their lands, their stores and their debts . . . ." *Id.* at 844. Thus, the court recognized a substantive right to property, which it enforced against abridgement by the state governments. What provision of the Constitution the court appealed to in rendering its decision is unclear. However, it would seem that the court was reaching beyond the Fugitive Slave Clause in order to guarantee a substantive right of property in slaves against state abridgement.

179. 9 Ky. (2 A.K. Marsh.) 467 (1820).

180. *Id.* at 470.

181. A similar argument was subsequently made by Justice Baldwin in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841). Justice Baldwin appealed to the congressional power to regulate interstate commerce to argue that regulation of slave property was outside the power of the state governments. According to Justice Baldwin, "transit of property, whether of slaves or bales of goods, is lawful commerce among the several states, which none can prohibit or regulate, which the constitution protects, and Congress may, and ought to preserve from violation." *Id.* at 516.

182. This analysis was rejected in *Julia v. McKinney*, 3 Mo. 193 (1833) wherein a Missouri court appealed to the Privileges and Immunities Clause of Article IV, Section 2 as guaranteeing a substantive right to transit with one's property in the several states. According to the court, under the Privileges and Immunities Clause, it was "the undoubted right of every citizen of the United States to pass freely through every other State with his property of every description, including negro slaves, without being in any way subject to forfeit his property." *Id.* at 194.
Slave Clause in *Prigg v. Commonwealth of Pennsylvania*. An examination of the arguments made on both sides in *Prigg*, as well as the decision of the Court, is useful in grasping the prevalent antebellum understanding of the Fugitive Slave Clause and its relation to the Privileges and Immunities Clause. In *Prigg*, a citizen of the state of Maryland was indicted for kidnapping a black woman under a Pennsylvania law that made it a crime to forcibly "carry away or seduce, any negro or mulatto" present in the state of Pennsylvania with the intention of making them a slave. In argument before the Court, counsel for the State of Pennsylvania made an analogy between the Fugitive Slave Clause and the Privileges and Immunities Clause of Article IV, Section 2. Counsel for the defendant argued that one of the defendant’s privileges and immunities as a citizen was to exercise the rights of property in his slaves in all of the states. The state’s counsel admitted that

> [a]mong the people of this free country, there is nothing which should be guarded with more watchful jealousy, than the charter of their liberties; which being the fundamental law of the land, in its judicial construction, every one is immediately interested, from the highest dignitary to the meanest subject of the commonwealth. Any irreverential touch given to this ark of public safety should be rebuked, and every violence chastised; its sanctity should be no less than that of the domestic altar; its guardians should be Argus-eyed; and as the price of its purchase was blood, its privileges and immunities should be maintained, even if this price must be paid again.

In this excerpt, counsel expressed to the Court the idea of the state as founded upon a charter or compact conferring certain "fundamental" privileges and immunities of citizenship.

However, the state’s counsel argued that the Fugitive Slave Clause did not remove the states’ general power to regulate the subject of fugitive slaves nor vest an exclusive power of regulation in the national

183. 41 U.S. (16 Pet.) 539 (1842); see Maltz, *supra* note 11, at 253-54 (noting the similarity between Justice Taney’s approach to the Fugitive Slave Clause in *Prigg* and congressional Republicans’ interpretation of the Privileges and Immunities Clause of Article IV, Section 2 prior to ratification of the Fourteenth Amendment); Maltz, *supra* note 4, at 312-13 (discussing the *Prigg* decision).

184. *Prigg* is particularly relevant since Republicans such as James R. Wilson, Chairman of the House Judiciary Committee, relied on the case for the proposition that Congress possessed the power to enforce all of the provisions of Article IV, including the Privileges and Immunities Clause as well as the Fugitive Slave Clause. See Aynes, *supra* note 15, at 650-51 (noting Wilson’s citation of *Prigg* and the importance of the Fugitive Slave Act of 1850 as a precursor of the Civil Rights Act of 1866).


186. Id. at 571-72.

187. For a discussion of the relation between social compact theory and the privileges and immunities of citizenship, see Smith, *supra* note 12.
government. According to counsel, the Clause merely obligated the state to offer up fugitive slaves. As such, it only infringed upon the state’s power to regulate the subject of fugitive slaves in one particular.\textsuperscript{188} Therefore, it was argued that under the Fugitive Slave Clause, if not under the Privileges and Immunities Clause of Article IV, Section 2, the states retained the power to regulate the slave trade. Furthermore, the state’s counsel argued that Congress had no power under the Clause to pass legislation compelling state action. This was consistent with the prevailing view of the Privileges and Immunities Clause— that Congress had no power to compel the states through federal legislation to obey their obligations under the Clause.

Justice Story delivered the opinion of the Court, acknowledging that the purpose of the Fugitive Slave Clause was to protect the rights of property of slaveholders in their slaves throughout the Union.\textsuperscript{189} Such explicit recognition was necessary because property in human beings was widely considered to be merely conventional and not founded in natural

\textsuperscript{188} Prigg, 41 U.S. (16 Pet.) at 592-93. According to counsel, the Fugitive Slave Clause certainly gives no authority to the general government, in terms; none, even by implication. It simply enjoins a duty on the states, and prohibits them from passing laws or regulations liberating fugitive slaves. It recognises the general right to legislate on this subject, for it restricts its exercise in a particular manner.

\textit{Id.} This argument is extremely interesting, for it presages Section 5 of the Fourteenth Amendment, which gave to Congress the power to compel the state governments through legislation to refrain from abridging the privileges and immunities of citizens of the United States. Like some members of Congress during the debates over the Fourteenth Amendment, counsel argued that such a congressional power to compel the states to do or refrain from doing something would annihilate the sovereignty of the states. See \textit{id.}

\textsuperscript{189} Id. at 611. According to Justice Story: Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

\textit{Id.}
law. This view was expressed by Chancellor Kent, who stated in his *Commentaries on American Law* that,

Sir William Blackstone... examines... [the] causes of slavery by the civil law, and shows them all to rest on unsound foundations; and he insists that a state of slavery is repugnant to reason and the principles of natural law. The civil law... admitted it to be contrary to natural right, though it was conformable to the usage of nations.\(^{191}\)

Therefore, under the law of nations, founded upon principles of natural law,\(^{192}\) states were not obligated to recognize aliens' property in slaves. According to Kent, as soon as a slave set foot within the jurisdiction where the municipal laws did not recognize property in slaves, that slave became free.\(^{193}\)

Justice Story recognized this argument in his opinion. However, he concluded that the Fugitive Slave Clause trumped the principles of the law of nations, being a positive law by which all the states were bound. Justice Story reasoned:

By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favour of the subjects of other nations where slavery is recognised. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in Somerset's Case, ... which was decided before the American revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slave-holding

\(^{190}\) See supra notes 168-73 and accompanying text. As Justice Curtis later stated in his dissent in *Dred Scott v. Sandford*:

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court [referring to *Prigg v. Pennsylvania*]. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law. 60 U.S. (19 How.) 393, 624 (1856).  

\(^{191}\) 2 KENT, *supra* note 70, at *248* (footnotes omitted).  

\(^{192}\) See Smith, *supra* note 12 (discussing the relationship between natural law and the law of nations in nineteenth century legal thought).  

\(^{193}\) 2 KENT, *supra* note 70, at *248*-49. According to Kent:  

The instant the slave touches the soil, he becomes free, so as to be entitled to be protected in the enjoyment of his person and property, though he may still continue bound to service as a servant. ... [B]y the common law, it was said, one man could not have a property in another, for men were not the subject of property. In the case of Somerset, in 1772, who was a negro slave, carried by his master from America to England, and there confined, in order to be sent to the West Indies, he was discharged by the K. B. upon *habeas corpus*, after a very elaborate discussion, and upon the ground that slavery did not and could not exist in England, under the English law.  

*Id.* (footnote omitted).
state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different states.\footnote{Prigg, 41 U.S. (16 Pet.) at 611-12 (citation omitted).}

Hence, slavery in America was viewed as being in conflict with principles of natural law and founded solely upon positive law. Were it not for the Fugitive Slave Clause, the institution of slavery would have been analogous to the charters of incorporation considered in cases such as 

Bank of Augusta v. Earle,\footnote{38 U.S. (13 Pet.) 519 (1839); See infra notes Part III.D.1 and accompanying text, discussing corporations and special privileges under the Privileges and Immunities Clause of Article IV, Section 2.} which had no extraterritorial effect except by the voluntary recognition of foreign states.

The Fugitive Slave Clause put the subject of property in slaves beyond the reach of the state governments. The right to property in slaves is therefore analogous to the fundamental privileges and immunities of citizens of the United States.\footnote{See infra Part III.D.2 and accompanying text, discussing the nature of the fundamental privileges and immunities of citizens guaranteed under Article IV, Section 2.} Although the states were free to regulate the exercise of the right, they could not withhold or “control the incidents” of the right. Justice Story saw the distinction between regulation and abridgement not as a degree along a continuum, but as a bright line discernible by the courts.\footnote{Prigg, 41 U.S. at 612-13. According to Justice Story: The [fugitive slave] clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labour, in consequence of any state law or regulation. Now, certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labour, operates, pro tanto, a discharge of the slave therefrom. The question can never be, how much the slave is discharged from; but whether he is discharged from any, by the natural or necessary operation of state laws or state regulations. The question is not one of quantity or degree, but of withholding, or controlling the incidents of a positive and absolute right. Id.}

Elsewhere, Justice Story reiterated his opinion that the Constitution made recognition of property in slaves obligatory upon the state.
governments, which had consented to be bound by Article IV. The Constitution in this respect went beyond mere voluntary principles of comity:

Before the adoption of the Constitution, no state had any power whatsoever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other states. Whenever the right was acknowledged or the duty enforced in any state, it was as a matter of comity and favour, and not as a matter of strict moral, political or international obligation or duty. Under the Constitution it is recognised as an absolute, positive, right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by state sovereignty or state legislation. It is, therefore, in a just sense a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy.198

From this, Story reasoned that the regulation of fugitive slaves should be subject to national legislation.199 This new positive right was not created by the courts, but arguably could only exist through the act of consent of all the people in ratifying the Constitution.

Furthermore, Justice Story maintained that this right of property in slaves was a positive right not founded upon principles of natural law. Such a right is therefore, perhaps, distinguishable from the privileges and immunities of citizenship guaranteed under Article IV, Section 2. Justice Story’s argument regarding the Fugitive Slave Clause allows by analogy an argument that the national government was to have power to enforce the Privileges and Immunities Clause of Article IV, Section 2 against the states to protect a uniform set of privileges and immunities inherent in citizens of the United States.200 However, it remained within the power and sovereign capacity of a state to regulate the fundamental privileges and immunities of the citizens within the state’s jurisdiction. The fundamental privileges and immunities were the rights of citizens under the civil law and encompassed the citizens’ rights in their persons and property. The Constitution left jurisdiction over the persons and

198. Id. at 623.
199. Id. Accordingly, Story concluded:
   It would be a strange anomaly, and forced construction, to suppose, that the national government meant to rely for the due fulfillment of its own proper duties and the rights, which it intended to secure, upon state legislation, and not upon that of the Union. A fortiori, it would be more objectionable to suppose that a power, which was to be the same throughout the Union, should be confided to state sovereignty, which could not rightfully act beyond its own territorial limits.
   Id.; see also Maltz, supra note 4, at 331 (noting Justice Story’s conclusion that the federal government had the exclusive power to regulate the recapture of fugitive slaves).
200. This was a question that produced controversy among congressional republicans responsible for drafting the Fourteenth Amendment. See supra Part II.D.
property of citizens to the individual states to regulate in that the Constitution conferred powers upon the general government that were national in character, while the states retained their powers of "police" over the persons and property within their jurisdictions.

Chief Justice Taney's concurring opinion similarly illustrates the strong analogy between the Fugitive Slave Clause and the Privileges and Immunities Clause of Article IV, Section 2. In affirming the states' retained right to regulate citizens' rights of property within their respective jurisdictions, Chief Justice Taney stated:

Again. The Constitution of the United States declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. And although these privileges and immunities, for greater safety, are placed under the guardianship of the general government; still the states may by their laws and in their tribunals protect and enforce them. They have not only the power, but it is a duty enjoined upon them by this provision in the Constitution.

The individual right now in question [the right to reclaim fugitive slaves], stands on the same grounds, and is given by similar words, and ought to be governed by the same principles. The obligation to protect rights of this description is imposed upon the several states as a duty which they are bound to perform; and the prohibition extends to those laws only which violate the right intended to be secured.

I cannot understand the rule of construction by which a positive and express stipulation for the security of certain individual rights of property in the several states, is held to imply a prohibition to the states to pass any laws to guard and protect them.

Justice Taney's argument thus makes a strong analogy between the nationalized right of property in slaves and the privileges and immunities of citizenship. States may still pass regulatory laws governing the exercise of these rights, but they may not pass laws intended to destroy these rights. The general government was charged under the Privileges and Immunities Clause and the Fugitive Slave Clause, in Taney's opinion, to protect the rights guaranteed against state action. The right of property in slaves is an absolute right guaranteed under the United States Constitution by the federal government similar to the privileges and immunities of citizens of the United States.

Justice Thompson clarified the distinction between guaranteeing a right and the regulation of the right in his concurring opinion. According to Justice Thompson, regulation of the "mode and manner in which" a right

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202. *Id.* at 629.
is to be "asserted and carried into execution" is probably better left to the Congress, in the case of the Fugitive Slave Clause, in order to assure uniformity. However, Justice Thompson saw nothing in the Clause that would preclude state regulation. He argued for a concurrent power of Congress and the states to regulate the manner in which fugitive slaves were to be delivered back into the custody of their masters.

Chief Justice Wayne's concurring opinion reiterated the themes of the other Justices' opinions. According to Chief Justice Wayne, the power of regulating the manner in which fugitive slaves were delivered up should lie with Congress, since only some of the states recognized property in slaves, and it would be to the prejudice of the slaveholding states to allow the states to individually regulate in this area. Justice

203. Id. at 634.
204. Id. Justice Thompson distinguished between a guarantee of a right and the mode of regulating a right in interpreting the Fugitive Slave Clause. According to Justice Thompson:

This provision naturally divides itself into two distinct considerations. First, the right affirmed; and secondly, the mode and manner in which that right is to be asserted and carried into execution.

The right is secured by the Constitution, and requires no law to fortify or strengthen it. It affirms, in the most unequivocal manner, the right of the master to the service of his slave, according to the laws of the state under which he is so held. And it prohibits the states from discharging the slave from such service by any law or regulation therein.

The second branch of the provision, in my judgment, requires legislative regulations pointing out the mode and manner in which the right is to be asserted. It contemplates the delivery of the person of the slave to the owner; and does not leave the owner to his ordinary remedy at law, to recover damages on a refusal to deliver up the property of the owner.

Id. A similar division may be made under the Privileges and Immunities Clause of Article IV, Section 2. The first inquiry concerns the nature of the privileges and immunities of citizens guaranteed under the Clause. The second concerns the mode or manner in which these rights could be asserted. It is likely that the Privileges and Immunities Clause guaranteed a uniform result among the states with respect to the first inquiry, but allowed for a diversity of approaches under the second. See infra Part IV.D.

205. Justice Daniel, in his concurrence, also argued that the power was concurrent and not exclusive in the federal government. According to Justice Daniel:

[T]he majority of my brethren proceeding beyond these positions, assume the ground that the clause of the Constitution above quoted, as an affirmative power granted by the Constitution, is essentially an exclusive power in the federal government; and consequently that any and every exercise of authority by the states at any time, though undeniably in aid of the guarantee thereby given, is absolutely null and void. I am prepared to affirm, that even in instances wherein Congress may have legislated, legislation by a state which is strictly ancillary, would not be unconstitutional or improper.


206. Id. at 641 ("To permit some of the states to say to the others, how the property included in the provision was to be secured by legislation, without the assent of the latter, would certainly be, to destroy the equality and force of the guarantee, and the
Wayne's opinion illustrates the concept of a community of rights embodied under Article IV of the Constitution. These rights include the privilege of holding property. Thus, protecting property in slaves merely upholds one such privilege of citizenship in express terms. However, as previously noted, because property in slaves was seen as contrary to natural right and as merely based on conventional or positive law—a mere municipal regulation—non-slaveholding states would be free to make their own regulations on the subject and free slaves without abridging the privileges and immunities of citizens.

According to Justice Wayne, the Fugitive Slave Clause was designed to protect the equality of states that chose to maintain the system of slavery as an institution, in addition to protecting individual rights.207 This argument is analogous to that made by the Dred Scott majority with

equality of the states by which it was made.

207. Id. at 644-45 (emphasis added). In Justice Wayne's opinion:

[T]he provision was not intended only to secure the property of individuals, but that through their rights, that the institutions of the states should be preserved, so long as any one of the states chose to continue slavery as a part of its policy.

The subject has usually been argued as if the rights of individuals only were intended to be secured, and as if the legislation by the states would only act upon such rights.

The framers of the Constitution did not act upon such narrow grounds. They were engaged in forming a government for all of the states; by concessions of sovereign rights from all, without impairing the actual sovereignty of any one, except within the sphere of what was conceded. One great object was, that all kinds of property, as well that which was common in all of the states, as that which was peculiar to any of them, should be protected in all of the states, as well from any interference with it by the United States, as by the states . . . . The . . . [free states] were bound, when forming a general government with the other states, under which there was to be a community of rights and privileges for all citizens in the several states, to protect that property of their citizens which was essential to the preservation of their state constitutions. If this had not been done, all of the property of the citizens would have been protected in every state, except that which was the most valuable in a number of them. In such a case, the states would have become members of the Union upon unequal terms. Besides, the property of an individual is not the less his, because it is in another state than that in which he lives. It continues to be his, and forms a part of the wealth of his state. The provision, then, in respect to fugitive slaves, only comprehended within the general rule a species of property not within it before.

Id. (emphasis added). This excerpt also indicates the analogy to be made between the Privileges and Immunities Clause and the Fugitive Slave Clause. Both clauses were intended to protect fundamental property rights of citizens in all the states.
respect to the Privileges and Immunities Clause.\textsuperscript{208} The design of the Fugitive Slave Clause mandated that the ability to hold property in slaves came within the heading of "privileges and immunities of citizens." Therefore, the Privileges and Immunities Clause may be seen not only as creating a community of rights among the people of the United States, but also, in certain instances, as contributing to the establishment of the federal structure and protecting the equality of the several states, by extraterritorially enforcing the rights of property vested by the states individually.

2. \textit{The Full Faith and Credit Clause}

Like the Fugitive Slave Clause and the Privileges and Immunities Clause, notions of international comity formed the basis of the Full Faith and Credit Clause of Article IV, Section 1. Justice Story discussed the Clause in his \textit{Commentaries} as going beyond the "general comity of nations."\textsuperscript{209} According to Justice Story, "[t]he framers of both instruments must be presumed to have known, that by the general comity of nations, and the long-established rules of the common law, both in England and America, foreign judgments were \textit{prima facie} evidence of their own correctness."\textsuperscript{210} However, Story concluded that

[a] motive of a higher kind must naturally have directed them to the provision. It must have been, "to form a more perfect union," and to give to each State a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all.\textsuperscript{211}

Therefore, the Full Faith and Credit Clause, as well as the other clauses in Article IV, were designed to move beyond principles of international comity in order to construct "a more perfect Union" and to make what once were voluntary principles founded upon natural reason binding upon the states as sovereign entities.

\textsuperscript{208} See supra note 74 and accompanying text.

\textsuperscript{209} 2 STORY, supra note 77, at 183-84. Story also mentioned the Clause in his \textit{Commentaries on the Conflict of Laws}, stressing the equality-based nature of the protection afforded under the Clause. Story states therein:

By the Constitution of the United States it is declared that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And Congress, in pursuance of the power given them by the Constitution in a succeeding clause, have declared that the judgments of State courts shall have the same faith and credit in other States as they have in the State where they are rendered . . . . They are therefore put upon the same footing as domestic judgments.

\textit{STORY, supra} note 61, at 754.

\textsuperscript{210} 2 STORY, supra note 77, at 183.

\textsuperscript{211} Id. at 184.
D. The Distinction Between Fundamental and Special Privileges

An important distinction arose in the jurisprudence under the Privileges and Immunities Clause of Article IV, Section 2 prior to ratification of the Fourteenth Amendment—the distinction between fundamental privileges and immunities, which were guaranteed under the Clause to all citizens, and special privileges and immunities, which were not. By the time the Supreme Court rendered its decision in the Slaughter-House Cases, it was well-established that “citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States. . . .”212 Elsewhere,213 I have argued, based on an analysis of social compact theories influential in nineteenth century American legal thought, that the fundamental privileges and immunities protected under Article IV, Section 2 were those powers of citizens existing anterior to the establishment of government and that special privileges and immunities could exist only after formation of the government. This Part traces this distinction between fundamental and special privileges in the context of the case law arising under the Privileges and Immunities Clause of Article IV, Section 2 prior to ratification of the Fourteenth Amendment. The distinction is an important one in terms of delineating the rights guaranteed under the Amendment as well as the scope of permissible state regulation under Section 1.

First examined is the nature of the “special privileges” not guaranteed under the Clause. These privileges were local or municipal regulations that could have no extraterritorial force. In particular, the privileges and immunities granted to corporations were among the special privileges and immunities not guaranteed under the Clause.214 Corporations were

212. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 100 (1873).
213. See Smith, supra note 12.
214. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586 (1839); Ducat v. City of Chicago, 48 Ill. 172, 174 (1868), aff’d, 77 U.S. (10 Wall.) 410 (1871) (stating that “corporations are not citizens within the meaning of section 2 of article 4, of the Constitution of the United States”). People v. Imlay held:

An incorporated company is not a citizen, within the meaning . . . [of the Privileges and Immunities Clause]. Such a company is a creation of the state which incorporates it, which has no power to legislate for other states, or to give to the artificial bodies which it creates powers to act in other states. Such companies act in other states than those which incorporate them, only by the
tion under Article III. Thus, much like the right to property in slaves, the privileges and immunities granted under corporate charters were viewed as merely special privileges and immunities—municipal regulations that had no binding extraterritorial effect.

This Part also addresses the nature of the fundamental privileges and immunities of citizens guaranteed under the Clause. These were the privileges and immunities of citizens thought to be inherent in the concept of citizenship in all free governments. In particular, Justice Washington’s opinion in Corfield v. Coryell, cited by Senator Trumbull during the debates over the proposed Fourteenth Amendment, partially enumerated some of these fundamental privileges and immunities guaranteed under Article IV, Section 2.

Id. at 342. Justice Daniel therefore analogized the status of corporations as artificial persons to that of aliens. Any privileges and immunities that were enjoyed by aliens were enjoyed at the discretion of the government, since aliens were not parties to the social compact and could claim no legal right to the privileges and immunities of citizenship. Similarly, corporations, because they could exist only after the creation of the government, were not considered parties to the social compact and therefore had no legal right to enjoyment of the privileges and immunities of citizenship. Id. at 343. Justice Campbell, also dissenting, reasoned as follows:

A corporation is not a citizen. It may be an artificial person, a moral person, a juridical person, a legal entity, a faculty, an intangible, invisible being; but Chief Justice Marshall employed no metaphysical refinement, nor subtlety, nor sophism, but spoke the common sense, “the universal understanding,” as he calls it, of the people, when he declared the unanimous judgment of this court, “that it certainly is not a citizen.”

Nor were corporations within the contemplation of the framers of the Constitution when they delegated a jurisdiction over controversies between the citizens of different States... [T]o administer the rights and privileges of citizens of the different States, held under a constitutional guaranty, when brought into collision or controversy—rights and immunities derived from the constitutional compact, and forming one of its fundamental conditions, was the object of this jurisdiction [under Article III].

Id. at 351.

217. See supra Part III.C.1.
219. See THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 2, at 122 (remarks of Senator Trumbull).
1. Corporations and Special Privileges

The Supreme Court in *Bank of Augusta v. Earle* stated that corporations did not qualify as "citizens" under the Privileges and Immunities Clause of Article IV, Section 2. Justice Story in his *Commentaries* also stated that a corporation could not possess the status of "citizen" for purposes of the Privileges and Immunities Clause of Article IV, Section 2. However, for purposes of diversity jurisdiction under Article III, a corporation was considered to be analogous to a citizen. In *Bank of the United States vs. Deveaux*, the Supreme Court reached this re-

220. 38 U.S. 519, 586 (1839). Chief Justice Taney gave the opinion of the Court, stating the arguments on both sides. He reaffirmed the Court's previous decision concerning jurisdiction under Article III. The identity of individuals composing a corporation could be used in determining jurisdiction, but not for purposes of conferring privileges and immunities under Article IV, Section 2.

It is true, that . . . this Court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the Courts of the United States. But in that case the Court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. We fully assent to the propriety of that decision . . . .

*Id.* The Court further reasoned that although the privileges and immunities of corporations need not be recognized by the states under Article IV, Section 2, the states could voluntarily recognize these privileges and immunities, consistent with principles of voluntary international comity.

The comity . . . extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong; that Courts of justice have continually acted upon it, as a part of the voluntary law of nations.

*Id.* at 589. Therefore, if the principles of comity are voluntary the courts are constrained and must look to the legislature for guidance as to which foreign rights or laws are to be respected in the courts. However, under Article IV, Section 2, the states must recognize as residents citizens of the several states. With respect to corporations, which do not possess the status of citizens, the principles of comity are merely voluntary.

221. After *Bank of Augusta v. Earle*, a number of state courts had also come to the same conclusion. *See, e.g.*, Phoenix Ins. Co. v. Commonwealth, 68 Ky. (5 Bush) 68 (1868) (states may tax out-of-state corporations); Tatem v. Wright, 23 N.J.L. 429, 446 (Sup. Ct. 1852); People v. Imlay, 20 Barb. 68, 79 (S.C.N.Y. 1855) (act did not prevent corporations from doing business in the state); Fire Dep't v. Noble, 3 E.D. Smith 440, 452 (N.Y.C.C.P. 1854); Slaughter v. Commonwealth, 54 Va. (13 Gratt.) 767, 773 (1856) (states may require licensing of out-of-state corporations); but see Magill v. Brown, 16 F. Cas. 408 (C.C.E.D. Pa. 1833) (No. 8,952) (stating that the Privileges and Immunities Clause guaranteed out-of-state corporations the same right to hold property as in-state corporations).
sult.222 According to Justice Story, the Court held that "[a] corporation, as such, is not a citizen of a State in the sense of the Constitution. But if all the members of the corporation are citizens, their character will confer jurisdiction, for then it is substantially a suit by citizens suing in their corporate name."223 Thus, both courts and commentators agreed that corporate charters were special privileges, not guaranteed under the Privileges and Immunities Clause.

During the debates in Congress over the Fourteenth Amendment, one case in particular, Paul v. Virginia,224 indicated the nature of the privileges and immunities to be guaranteed under Section 1 of the Fourteenth Amendment. In this case, the Supreme Court decided that a law compelling insurance companies not incorporated within a state to be licensed did not violate the Privileges and Immunities Clause of Article IV, Section 2. The Court held that the privileges and immunities secured to citizens under the Constitution were those privileges and immunities common to citizens of the several states and did not include special privileges enjoyed by citizens in their own states. Thus, both the special privileges and immunities accorded to corporations, which were creatures of state law, as well as other special privileges and immunities of citizens, had no extraterritorial effect under the Privileges and Immunities Clause. Under the Clause, foreign citizens were merely placed upon the same footing as resident citizens with respect to the privileges and immunities of citizens. In Paul, counsel argued:

A corporation created by the laws of one of the States, and composed of citizens of that State, is a citizen of that State within the meaning of the Constitution. Legislation imposing special and discriminating restrictions upon the carrying on of lawful business in one State by citizens of other States was expressly forbidden by an article of the Confederation . . . .225

However, consistent with prior case law, on the other side counsel contended that a corporation was not a "citizen" within the meaning of the term as used in the Constitution:

[N]o one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a State in the sense in which that word

222. 9 U.S. (5 Cranch) 61 (1809).
223. 2 STORY, supra note 77, at 479 (footnotes omitted).
224. 75 U.S. (8 Wall.) 168 (1868). For a discussion of Paul, see HOWELL, supra note 4, at 9-10, 98-100.
is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible. . . . This court has several times decided that a corporation is not a citizen within the meaning of the Constitution.226

Refusing to stray from well-established legal principles, the Court adopted the latter argument that corporations were not afforded the rights otherwise guaranteed under the Clause because, existing only after the institution of society and establishment of government, corporations could not be parties to the social compact from which the privileges and immunities of citizenship were derived.227 Distinguishing on these grounds between the Privileges and Immunities Clause of Article IV, Section 2 and diversity jurisdiction under Article III, Justice Field delivered the opinion of the Court declaring that “[t]he term citizens as there used [in the Privileges and Immunities Clause] applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.”228 Justice

226. Id. at 175. Furthermore, counsel made the analogy of special privileges and immunities to political rights, which also were not conferred under the Clause. These rights of participation in government might also be said to be rights that could exist only after the institution of the government, similar to the special privileges and immunities afforded to both corporations and citizens. They are not the “common rights” that are inherent in individuals or which are naturally deduced from the social compact.

If the assumption that a corporation was a citizen in the contemplation of the Constitution of the United States were correct, yet it would not follow, that a citizen of a State residing in one State, would be entitled to the privileges and immunities of citizens of each of the other States. Politically, it is very certain he would not, and it is not seen very clearly how he could in all other things. There is no question, that a citizen of any particular State, who removes into any other State of the Union and resides there long enough to become a citizen, is entitled to all the privileges and immunities of the latter State, without being required to be naturalized. He would become a citizen by the mere operation of the Constitution of the United States. By such removal he might lose some of his privileges, whilst he gained others; after he became a citizen of a State he could not sue a citizen of the same State in the courts of the United States. To illustrate,—a citizen of New York may sue a citizen of Virginia in the United States courts.

Id. at 176.

227. Smith, supra note 12 (discussing the relation between social compact theories and special privileges and immunities).

228. Paul, 75 U.S. at 177. Justice Field continued, citing Bank of Augusta v. Earle for the proposition that corporations could not be considered citizens for purposes of the Privileges and Immunities Clause of Article IV, Section 2. He concluded that in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.
Field continued his opinion by discussing the effect of the Clause as placing “the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”

However, Justice Field also mentioned certain substantive rights that the Clause guaranteed including “the acquisition and enjoyment of property,” “pursuit of happiness,” and “equal protection” of the laws. Citing *Lemmon*, Field concluded:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution tended so strongly to constitute the citizens of the United States one people as this.

The Privileges and Immunities Clause served to confer those privileges and immunities of citizenship guaranteed in the state in which an individual found himself, and not any special privileges and immunities that were conferred in his home state. Such a provision was necessary to remove the disabilities of alienage—otherwise, “the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.” Field explained that the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not

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*Id.* at 178. Field observed that the decision of the Court that corporations were citizens for purposes of Article III “was confined in express terms to a question of jurisdiction [and] that the principle had never been carried further, and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation . . . .” *Id.* at 179.

229. *Id.* at 180.
230. *20 N.Y. 562 (1860).* For a more comprehensive discussion of *Lemmon* and the court's interpretation of the Privileges and Immunities Clause in that case, see *supra* notes 113-37 and accompanying text.
231. *Paul,* 75 U.S. at 180.
232. *Id.*
intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.\textsuperscript{233}

If the Clause were interpreted to protect special privileges and immunities, such as the grant of a corporate charter, the states would possess the power to extend the effect of their laws extraterritorially to the other states in the Union. According to Justice Field, this would be "destructive of the independence and the harmony of the States."\textsuperscript{234} As a result, "[t]he principal business of every State would, in fact, be controlled by corporations created by other States."\textsuperscript{235} Thus, Justice Field adhered to the principle of the law of nations that a state's laws could have no extraterritorial effect, at least with respect to special privileges and immunities granted to citizens.\textsuperscript{236}

However, notice that Justice Field only mentioned "special" privileges in declaring that they were not available to citizens outside their home states. This leaves open the possibility that fundamental privileges could be guaranteed extraterritorially under the Privileges and Immunities Clause. Another possibility is that all of the fundamental privileges and immunities of citizenship were recognized in every state, and, therefore, the issue of whether they were guaranteed substantive protection under the Clause would never arise.\textsuperscript{237}

Thus, the Court in \textit{Paul v. Virginia} noted the distinction between special privileges, which were mere local laws or positive regulations not binding outside the jurisdiction of the state, and fundamental privileges and immunities of citizenship, which were the privileges and immunities

\textsuperscript{233.} \textit{Id.} at 180-81. Among the special privileges conferred by the states, Justice Field included the "grant of corporate existence," reasoning that a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . [As a result, the] recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. \textit{Id.} at 181.

\textsuperscript{234.} \textit{Id.}

\textsuperscript{235.} \textit{Id.} at 182.

\textsuperscript{236.} See Smith, supra note 12 (discussing the principles of the law of nations underlying Article IV).

\textsuperscript{237.} See infra Part IV.D for a more thorough discussion of this interpretation of the Privileges and Immunities Clause.
to which Article IV, Section 2 referred—privileges and immunities of citizens. One such special privilege, granted by a mere positive law having no extraterritorial effect under the Privileges and Immunities Clause of Article IV, Section 2, was the privilege conferred by a corporate charter to carry on business using the corporate form. Because the charter was a mere positive local regulation, it had no binding effect outside the jurisdiction of the state granting the charter, and, therefore, might only be respected voluntarily by foreign states following principles of comity. The rights guaranteed under charters of incorporation were, thus, analogous to the property right a master had in his slave—a right not founded in natural law and, therefore, not binding extraterritorially absent some expression in positive law to the contrary.

2. Fundamental Privileges

The antebellum cases addressing the Privileges and Immunities Clause made it abundantly clear that the rights guaranteed under the Clause did not include special privileges. A long line of cases, the most frequently-cited of which was *Carfield v. Coryell*, 238 held that the Clause guaranteed only those privileges and immunities of citizenship that were fundamental. However, even prior to this decision, courts in the United States recognized that the Clause protected certain fundamental rights of citizenship. 239 *Carfield* is an appropriate starting point for determining

238. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Among these fundamental rights of citizens were the right to contract, to hold property, to sue, to testify in court, and perhaps several rights guaranteed under the Bill of Rights such as the right to bear arms and the right to free speech. For example, a number of courts acknowledged that the right to sue was one of the fundamental privileges and immunities guaranteed under the Privileges and Immunities Clause. See, e.g., *id.*; *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

239. For example, the Supreme Court stated that the privileges and immunities of citizens were “natural, inherent and unalienable rights of man.” *VanHorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795). Judge Chase stated that the Privileges and Immunities Clause “secures and protects personal rights,” *Campbell v. Morris*, 3 H. & McH. 535, 554 (1797), and entitles “the citizens of each State . . . to all the privileges and immunities of citizens of the several states,” *id.* at 553 (emphasis added), including the right “to acquire and hold real property in any of the states.” *id.* at 554. Judge Cabell of the Virginia Supreme Court of Appeals stated that under the Clause, “although a citizen of one state may hold land in another, yet he cannot interfere in those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state. Such are the rights of election and of representation . . . .” *Murray v. M'Carty*, 2 Munf. 393, 398 (1811). Chancellor Ridgely of the Delaware Chancery Court
what rights the Privileges and Immunities Clause was understood to
guarantee considering that Justice Washington’s interpretation of the
Clause was widely recognized as being definitive, and given that
Republicans in Congress,240 as well as both the majority and dissenters
in the Slaughter-House Cases,241 cited Corfield as authority in inter­
preting the terms “privileges” and “immunities” as used in the Constitu­
tion.

Corfield v. Coryell involved a forfeiture of property under a New
Jersey act that prohibited “any person who is not at the time an actual
inhabitant and resident in this state . . . [from gathering] clams, oysters,
or shells, in any of the rivers, bays, or waters in this state . . . .”242
The plaintiff in the case whose property was seized argued that the right
of fishing in the bed of public waters of a state is common to all the
citizens of the state and, alternatively, that the oyster beds were common
property between Delaware and New Jersey and that New Jersey could
not assert an exclusive right to them.243

In contrast, the defendants argued that New Jersey as a sovereign state
was entitled to the rights and prerogatives of a sovereign, and that the
common property of citizens of a state may be regulated and controlled
for the “common benefit.”244 The defense made the distinction
between “privileges and immunities,” which were private proprietary
rights and capacities, and rights to the common property of the state,
contending that “[a]s to the second section of the fourth article of the

stated that “the words ‘privileges and immunities’ comprehend all rights, and all the
methods of protecting those rights, which belong to a person in a state of civil society
. . . and the general good require.” Douglass v. Stephens, 1 Del. Ch. 465, 469 (1821).
In the same case, Chief Justice Johns stated that “[t]he privileges and immunities to be
secured to all citizens of the United States . . . which includes the whole United States,
and must be understood to mean, such privileges as should be common, or the same in
every State . . . .” Id. at 476-77. This statement of Justice Johns reflects the notion of
a jus gentium as distinguished from the jus civile of each state. The jus gentium
represents that part of the civil law that is common among nations, or the law of nations.
See Smith, supra note 12. If these privileges and immunities were found in each state,
even if the Clause were intended to afford antidiscrimination protection, it would be the
case that citizens would be able to exercise these rights within all of the states on an
equal footing with resident citizens.

240. See THE RECONSTRUCTION AMENDMENTS’ DEBATES, supra note 2, at 122
(remarks of Senator Trumbull).
241. Justice Miller termed Corfield “[t]he first and the leading case” on the meaning
of the Privileges and Immunities Clause of Article IV, Section 2. Slaughter-House
Cases, 83 U.S. (16 Wall.) at 75-76. Similarly, Justices Field, id. at 97, and Bradley, id.
at 116-17 (noting that Corfield’s “often-quoted” language was “very instructive”), cited
Corfield as being authoritative in their dissents.
242. Corfield, 6 F. Cas. at 546.
243. Id. at 548.
244. Id. at 549.
constitution, it applies only to the privileges and immunities of citizenship, not to rights in the common property of the state.\textsuperscript{245}

In deciding whether the New Jersey act was constitutional, the court made a detailed examination of the Privileges and Immunities Clause of Article IV, Section 2. In an often-cited passage, Justice Bushrod Washington described the nature of the privileges and immunities of citizens referenced in Article IV, Section 2 as being \textit{fundamental}:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. 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 fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."\textsuperscript{246}

The court’s enumeration of "particular privileges" encompassed instances of capacities with respect to property recognized by the majority of the

\textsuperscript{245} Id.
\textsuperscript{246} Id. at 551-52. Senator Trumbull later quoted Justice Washington in order to indicate the nature of the privileges and immunities guaranteed in the Civil Rights Bill, a precursor of Section 1 of the Fourteenth Amendment. \textit{The Reconstruction Amendments’ Debates, supra} note 2, at 122. However, Trumbull argued that the Civil Rights Bill did not cover the elective franchise. \textit{Id.}
state governments.\textsuperscript{247} Property, here, must be understood in the
Lockean sense of the term. One may have property in one’s life, labor,
or goods. Thus, the court listed the privilege of the writ of habeas
 corpus and the freedom to travel in foreign states as among those
privileges and immunities deemed fundamental. These fundamental
privileges and immunities belong to “citizens of all free governments.”
This is an expression of the concept of the \textit{jus gentium} applied to the
Privileges and Immunities Clause of Article IV, Section 2. Those
privileges and immunities that are fundamental are civil capacities that
have been recognized as flowing from principles of natural reason by a
majority of the governments characterized as “free.”\textsuperscript{248}

However, not every right that citizens might be able to exercise under
the government of a particular state necessarily falls within the phrase
“privileges and immunities of citizens.” Only those privileges and
immunities deemed \textit{fundamental}, or inherent in citizenship as such, are
encompassed in the guarantee of Article IV, Section 2.\textsuperscript{249} The power
of regulation remains with the state governments. Through the consent
of the governed, the state governments have been given a power of
regulation over the property of citizens, which they must exercise only
for the “common benefit.” Exercise of this power is therefore not
inconsistent with the inviolability of the privileges and immunities of
citizens because this power has been given through the consent of the
citizens via the compact (or law) establishing the government.\textsuperscript{250} In
the case of the regulation of common property of the state in which the
citizens have been vested as tenants in common, the state governments
owe no duties whatsoever to citizens of foreign states. Citizens of
foreign states have no more right to participate in the common property

\textsuperscript{247} \textit{See} Howell, \textit{supra} note 4, at 33 (“In both Corfield v. Coryell and Ward v.
Maryland there are dicta to the effect that the right to acquire and possess property of
every description is one secured to the citizens of the several States by virtue of the
Comity Clause.”) (citations omitted).

\textsuperscript{248} \textit{See} Smith, \textit{supra} note 12 (discussing the deductive and inductive methods for
determining the principles of the law of nature).

\textsuperscript{249} According to the court:

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

\textit{Corfield}, 6 F. Cas. at 552.

\textsuperscript{250} \textit{See} Smith, \textit{supra} note 12 (discussing social compact theory and the background
of the Fourteenth Amendment).
of the state than they do to participate in any citizen's private property in the state.

In particular, the court found that the right to fish the river bed at issue in the case was the property of the citizens of New Jersey as tenants in common, subject to the regulation of the state government for the common good, and not a privilege or immunity of citizenship. Because the citizens of the state of New Jersey held the river beds as private property and as tenants in common, others had no right to use and enjoy this property. Just as a foreign citizen from another state of the Union would have no right under the Privileges and Immunities Clause of Article IV, Section 2 to the property of John Smith living in New Jersey, so this individual had no right to the property the citizens of New Jersey held as tenants in common. However, this individual would have a right to exercise the capacities with respect to property, privileges and immunities, that are recognized by all free governments and to hold, for example, his own property without its removal either by the state of New Jersey or by individuals within the jurisdiction and sovereign power of the state.

E. Regulation of the Privileges and Immunities of Citizens Under Article IV, Section 2

Although the states were obligated to confer all of the privileges and immunities of citizenship enjoyed by resident citizens to non-resident citizens, they retained the power to regulate these rights of citizenship as long as they did so in a nondiscriminatory manner. As Justice Washington stated in his opinion in Corfield, the privileges and immunities of citizens were "subject nevertheless to such restraints as the

251. Corfield, 6 F. Cas. at 552. According to the court:
A several fishery . . . is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use. Id. See also McCready v. Virginia, 94 U.S. 391, 396 (1876) (noting that the right to fish in waters that were the common property of Virginia was "not a privilege or immunity of general but of special citizenship"); HOWELL, supra note 4, at 69 ("Besides what have been termed by the courts political privileges, it has been settled that the citizens of the several States are not entitled by virtue of the Comity Clause to enjoy upon equal terms with the citizens of any State the use of property in which that State is vested with a proprietary interest and which it holds for the general benefit of its own citizens.").
government may justly prescribe for the general good of the whole." 252

The privileges and immunities of the citizens of the several states, retained by the citizens, may have been more or less uniform throughout the United States. 253 However, the manner in which these rights were regulated by the state governments certainly was not. The state governments could pass positive regulations or municipal laws prescribing the mode or manner in which one could exercise the rights of citizenship. 254 These regulations were merely local laws with no

252. Corfield, 6 F. Cas. at 552.
253. This may have been the motivation behind the Clause—to ensure that certain important rights of the citizen would be uniform among the several states. As the court stated in Ducat v. Chicago:
[The individual citizen] has rights which are so important, as to make it desirable that they should be uniform throughout this broad and expanded Union, which, in order to promote mutual friendship and free social, or business intercourse among the people of the several States, were placed, by this clause of article 4, under the protection of the federal government.
48 Ill. 172, 180 (1868). Similarly, in Commonwealth v. Towles the court stated that the privileges and immunities of a naturalized citizen of the United States and a citizen of any of the states were identical, implying that there was a uniform set of privileges and immunities of citizens as such, which was to be guaranteed under the Clause.

It is obvious, that the privileges and immunities of the naturalized citizen and of the citizen of each state, are exactly the same, under the constitution of the U. S. art. 4, § 2, and the naturalized citizen, and the native citizen of North Carolina, would be both equally entitled to them, whatever they are, in the state of Virginia.
32 Va. (5 Leigh) 743, 749 (1835).
254. The case of Costin v. Washington, 6 F. Cas. 612 (C.C.D.C. 1821) (No. 3,266) illustrates the potentially limited nature of the rights of free men, citizens, and the role of the government in regulating these rights. The case involved an act that regulated the terms and conditions “upon which free negroes and mulattoes may reside in the city of Washington, and for other purposes.” Id. at 612. Free blacks were required to appear before the mayor and subscribe a statement of their trades, or means of subsistence, and of their family . . . to produce a satisfactory certificate from three respectable white inhabitants . . . as to his living peaceably, his means of subsistence, and his character[.] . . . “to enter into bond with one good respectable white citizen, assurety in the penalty of twenty dollars, conditioned for the good, sober, and orderly conduct of such person or persons of color, and his or her family . . .”

Id. In Costin, counsel argued:
It is said that the constitution gives equal rights to all the citizens of the United States, in the several states. But that clause of the constitution does not prohibit any state from denying to some of its citizens some of the political rights enjoyed by others. In all the states certain qualifications are necessary to the right of suffrage; the right to serve on juries, and the right to hold certain offices; and in most of the states the absence of the African color is among those qualifications. Every state has the right to pass laws to preserve the peace and the morals of society . . . .

Id. at 613. Counsel therefore urged that the state could still regulate the life, liberty, and property of citizens for the public welfare.
extraterritorial effect that need not be respected outside the jurisdiction of the state, but which could be voluntarily respected by foreign states based purely upon voluntary principles of international comity.

Case law prior to ratification of the Fourteenth Amendment made it abundantly clear that state governments were to retain their power of regulation under the Privileges and Immunities Clause as long as they exercised it for the "common benefit." In *Dred Scott v. Sandford*, Chief Justice Taney argued that if free blacks were considered citizens for purposes of the Privileges and Immunities Clause, they would be entitled to certain fundamental rights of citizenship and would be exempt from all police regulations except those that applied to all citizens alike. Therefore, it would seem that under the Privileges and Immunities Clause, discriminatory regulation was prohibited. Justice Field's assessment of the operation of the Clause may have been the most accurate, however. Justice Field asserted in the *Slaughter-House Cases* that the Clause prohibited discriminatory regulation against foreign citizens when venturing into states in which they were not resident citizens. He argued that the Privileges or Immunities Clause of the Fourteenth Amendment was designed, in part, to apply this principle to all citizens and to prevent discriminatory regulation within every state with respect to resident citizens as well.

Courts during the antebellum period recognized that although state governments were not free to *abridge* the privileges and immunities of citizens guaranteed under Article IV, Section 2, they could *regulate* the

Judge Cranch agreed with this argument, acknowledging that although citizens were entitled to the privileges and immunities of citizens of the several states under Article IV, Section 2, the states still maintained the power to make regulations for the public good. According to Judge Cranch:

A citizen of one state, coming into another state, can claim only those privileges and immunities which belong to citizens of the latter state, in like circumstances. But the present case is like that of a state legislating in regard to its own citizens, and I can see no reason why it may not require security for good behavior from free persons of color, as well as from vagrants, and persons of ill-fame.

*Id.* at 613-14. Therefore, Judge Cranch seemed to indicate that the state governments were free to regulate the privileges and immunities of citizenship, even in a discriminatory manner, as long as they did so pursuant to the public welfare.

255. 60 U.S. (19 How.) 393 (1856); see infra notes 277-79 and accompanying text.

256. See supra notes 37-38 and accompanying text.
manner in which they were exercised. Attorneys arguing before the Supreme Court also recognized this power of regulation that remained with the state governments. Under Article IV, Section 2, these principles of comity were no longer voluntary among the several states but were made binding by compact. The state governments, however, maintained the power to regulate the manner in which these privileges and immunities of citizenship were exercised. For example, in Conner v. Elliott, the Supreme Court held that the states had a right to regulate marriage contracts and that a right to community of acquits or gains between married persons, where the marriage was contracted within the state, was not one of the personal rights of citizens under Article IV, Section 2. The Court decided to determine if certain rights were "privileges and immunities" of citizens on a case by case basis.

257. For example, in Hutchinson v. Thompson, the court held that the clause in the ordinance of 1787 for the government of the Northwestern Territory that declared that the navigable rivers in the territory should be "common highways . . . without any tax, impost, or duty . . . ." and the Privileges and Immunities Clause of Article IV, Section 2 did not prohibit the states formed in the territory from legislating concerning the rivers, but that any regulations must apply equally to their own citizens and citizens of other states. 9 Ohio 52, 62 (1839). The states were thereby prohibited from imposing discriminating restrictions, duties, and imposts upon citizens of other states. The court reasoned that such interference on the part of the federal government would invade the jurisdiction of state governments, which were free to regulate such affairs with respect to their own citizens. Id. at 63-64. According to the court:

It was the intention of the ordinance, first, to restrain a state from obstructing the navigation of a river to the injury of the inhabitants of another state, into or from which it passed; and in the second place, to prohibit all discriminating duties on citizens of other states, on any river, whether it run through several states, or was contained in the limits of the single state which attempted to impose such duties. This was effecting precisely what was effected by the constitution of the United states, which was in agitation at that very time, and was adopted two years afterwards. That gives to the citizens of each state, all the privileges and immunities of citizens of the several states, and in addition, clothes Congress with the power of regulating the commerce among the states. The principles of the new constitution, (as it was uncertain whether it would be adopted,) were carried into the ordinance. But to suppose that it was intended to restrain the state from passing laws affecting the navigation of rivers, which lay exclusively within its own limits, by authorizing the building of bridges, dams, or aqueducts, can not be admitted, because it would, to say the least, be a palpable departure from those principles. Id. at 65.

258. For example, in Bank of Augusta v. Earle Mr. Webster argued before the Court that:

The right of a foreigner to sue in the Courts of any country may be regulated by particular laws or ordinances of that country . . . . But if, under pretence of such regulation, any nation shall impose unreasonable restrictions or penalties on the citizens of any other nation, the power of judging that matter for itself lies with that other nation. 38 U.S. (13 Pet.) 519, 557 (1839).

259. 59 U.S. (18 How.) 591 (1855).
rather than setting out a general classification.\textsuperscript{260} However, the Court stated that the Clause conferred privileges that "belong to citizenship."\textsuperscript{261} The Court recognized a fundamental distinction between rights that were essential to the concept of citizenship and the incidents of these essential rights. The incidents of the rights, or the regulations governing the exercise of these rights, could be prescribed by the state governments according to the Court. However, the state governments were obligated to respect the essential rights of citizens—the rights inherent in the concept of citizenship.\textsuperscript{262} Thus, regulations prescribing

\textsuperscript{260} Id. at 593. The Supreme Court stated that it would be "safer, and more in accordance with the duty of a judicial tribunal" to examine which rights were guaranteed under the Clause on a case by case basis and that this was "especially" true when the Court was dealing with so broad a provision.

\textsuperscript{261} The Court reasoned:

\[\text{[A]ccording to the express words and clear meaning of this clause, no privileges are secured by it, except those which belong to citizenship. Rights, attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed "privileges of a citizen," within the meaning of the constitution . . . . They are incidents, ingrafted by the law of the State on the contract of marriage.}\]

\textsuperscript{262} This distinction between the fundamental rights of the citizen and the regulation of those rights arose in the case of \textit{Crandall v. State}, \textit{10 Conn.} 339, 349-53 (1834). In that case, William Ellsworth made the following argument before the court:

The law under consideration forbids a citizen of another state from coming here, to pursue education, as all others may do, \textit{because} he has not a legal settlement in the state . . . . This power of regulating because of alienage is virtually a power of exclusion, and in this case is, in effect, and was designed so to be . . . the legislature may superintend and regulate private schools . . . . [as it might superintend and regulate] all the pursuits of its citizens, but . . . . this must be done by a general and equal law. Mere birth in another state cannot be seized upon, as a ground of distinction, discrimination and deprivation . . . . The law must be alike and general, or there is an end of equal privileges and immunities.

If 4th art. sec. 2, means anything, [it secures] to a citizen of New York, a right to come here, and \textit{remain} here, if he offends against no general law; he cannot be whipped out, nor carried out of the state because he has no legal settlement: he may present the shield of the constitution, and as Paul claimed the immunity of a Roman citizen, he may claim the immunity of an American citizen . . . . Neither present nor future poverty can strike out of the constitution the word "citizen," and a "citizen" has a universal right, title, and immunity, to a \textit{residence}, and other fundamental rights.

\textsuperscript{261} \textit{REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT, BEFORE THE SUPREME COURT OF ERRORS, AT THEIR SESSION AT BROOKLYNN, JULY TERM, 1834, at 14 (1834), reprinted in GRAHAM,}
the mode or manner in which fundamental privileges and immunities of citizens could be exercised had no binding extraterritorial effect, much like the rights granted under charters of incorporation or the slaveholder's right of property in his slave, discussed previously. Regulations were analogous to special privileges and immunities of citizens, which were not guaranteed under the Clause.

IV. ANTIDISCRIMINATION OR SUBSTANTIVE PROTECTION?

From the foregoing discussion, it is evident that there are at least two possible interpretations of the Privileges and Immunities Clause of Article IV, Section 2. The first is that the Clause guarantees that nonresident citizens will have merely the same privileges and immunities that are guaranteed to resident citizens. The privileges and immunities of citizenship are the fundamental rights of person and property that exist anterior to the formation of the government and that, perhaps, are embodied in the positive law of the states' constitutions. However, under this reading of the Clause, the privileges and immunities guaranteed in every state might be different. As the Supreme Court in United States v. Cruikshank noted in construing Section 1 of the Fourteenth Amendment, "the rights of citizenship under one of these governments will be different from those that he will have under the other."

Under this interpretation, the Privileges and Immunities Clause merely ensures that citizens changing their residence or traveling to foreign states will have the same rights of person and property as resident citizens.

The second view concerning the meaning of the Privileges and Immunities Clause is that it guarantees a uniform set of substantive privileges and immunities to citizens of the United States no matter what rights a particular state constitution might contain. Chester James Antieau advanced this view, arguing that the purpose of the Privileges and Immunities Clause was to secure a uniform set of fundamental rights

supra note 11. For a more thorough discussion of Crandall, see supra notes 138-46 and accompanying text.

263. 92 U.S. 542, 549 (1875) (citation omitted).

264. Senator Poland of Vermont seems to have made this argument, equating the Privileges or Immunities Clause of the Fourteenth Amendment with the Privileges and Immunities Clause of Article IV, Section 2. According to Poland:

The clause of the first proposed amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).
to citizens of the United States.\textsuperscript{265} In addition, Michael Kent Curtis has argued that this was the view of the Republicans in Congress responsible for framing the Fourteenth Amendment.\textsuperscript{266} This view is, perhaps, more consistent with the protection of slaves as property in states where slavery was outlawed. Although property in human beings seemed to be recognized under the Fugitive Slave Clause, appeal was also made to the Privileges and Immunities Clause as guaranteeing a substantive right to property of all kinds.\textsuperscript{267} Some of the state constitutions expressly prohibited slavery, and yet the courts upheld slaveholders' rights of property in their slaves when traveling to foreign states. Further, under this interpretation of the Clause, \textit{equality} in regulation of these rights might also have been one of the substantive rights afforded protection as a common right of citizens. Therefore, this interpretation might afford substantive protection for certain fundamental rights, as well as antidiscrimination protection in the regulation of those fundamental rights.

Case law arising under the Privileges and Immunities Clause of Article IV, Section 2 as well as in other areas, the opinions of legal commentators, and statements by members of Congress during the Reconstruction debates, all offer clues concerning the nature of the protection thought to be afforded under the Clause. Both interpretations may be historically accurate to a certain extent and may be accommodated by keeping in

\textsuperscript{265} Antieau, \textit{supra} note 14, at 5. Antieau asserts that Article IV was intended to be enforceable by Congress when read together with the Necessary and Proper Clause. \textit{Id.} at 1-2. However, the Necessary and Proper Clause states that "Congress shall have the Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8. The Privileges and Immunities Clause makes no mention of any congressional enforcement power. Therefore, it would seem that the Necessary and Proper Clause cannot authorize Congress to enforce the Privileges and Immunities Clause. However, the United States is given the power to "guarantee to every State in this Union a Republican Form of Government . . . ." \textit{Id.} art. IV, § 4. Therefore, it may be the case that Congress was intended to possess a power to enforce the guarantee of certain fundamental rights under the Guarantee Clause. Michael Conant has similarly asserted that the Privileges and Immunities Clause was originally intended to secure certain privileges and immunities of Englishmen, inherited by the colonists. \textit{See} Conant, \textit{supra} note 36.

\textsuperscript{266} \textit{See} CURTIS, \textit{supra} note 10, at 114. \textit{See also} KETTNER, \textit{supra} note 14, at 258 (supporting the substantive reading of the Clause); Kaczorowski, \textit{supra} note 11 (same).

\textsuperscript{267} \textit{See supra} Part III.C.1, discussing the nineteenth century interpretation of the Fugitive Slave Clause.
mind the conceptual framework developed during the nineteenth century addressing the rights guaranteed under the Clause.

A. Case Law

It is particularly noteworthy that antebellum cases discussing the "privileges and immunities" of citizens outside the context of Article IV, Section 2 seem to indicate that there was a well-defined understanding of what constituted the set of privileges and immunities to which citizens of all free governments were entitled.\(^{268}\) For example, in *Sheridan v. Furber*,\(^ {269}\) a case involving an alleged assault and battery of a master of a ship and the first mate against the carpenter of the ship, the court

\(^{268}\) As previously noted, cases addressing the Privileges and Immunities Clause itself also give clues to its meaning. The case of *The Cynosure*, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3,529), addressed the rights of free men of color under the Privileges and Immunities Clause of Article IV, Section 2. Under a statute of Louisiana, "colored seamen" belonging to vessels of the United States were prohibited from being brought into the ports of Louisiana. *Id.* at 1102. Although the statute was held to be inconsistent with federal regulations of commerce under the Commerce Clause, the case is interesting for the court's discussion in dicta of the Privileges and Immunities Clause of Article IV, Section 2. The court stated that had the free man been a citizen of the states, the statute would have been unconstitutional in its application, abridging the citizen's right to privileges and immunities under the United States Constitution.

Another case that arose under the Louisiana statute was *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836). See CASE OF THE SLAVE-CHILD MED: A REPORT OF THE ARGUMENTS OF COUNSEL AND OF THE OPINION OF THE COURT IN THE CASE OF COMMONWEALTH VS. AVES 5 (Boston: Isaac Knapp ed., 1836). It was argued before the court in this case by Ellis Gray Loring that under the statute "colored citizens of the North, seamen or others, are forbidden by law from entering many of the Southern ports in this Union, on peril of being 'confined in jail'" and that the statute was "in direct violation" of the Privileges and Immunities Clause of the Constitution. *Id.* at 14-15. Loring argued that slavery was not founded upon principles of natural law, but rather was merely conventional. He reasoned that slavery "is contrary to good morals;—a violation of the law of nature, and of the revealed will of God. It therefore falls within the first exception to the exercise of national comity." *Id.* at 20; see also FINKELMAN, supra note 14, at 109 n.28 (discussing other ways in which the privileges and immunities of free black citizens were denied by Southern states); Earl M. Maltz, The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery, 17 CARDOZO L. REV. 1995, 2007 (1996) (discussing the Negro Seamen's Acts in the Southern states); *id.* at 1998-2000 (discussing Justice Curtis's opinion in *Aves*); Maltz, supra note 4, at 340-41 (discussing the Negro Seamen's Acts). The court in *Aves* found this reasoning persuasive, and Justice Shaw, delivering the opinion of the court, declared that slavery was "contrary to natural right, to the principles of justice, humanity and sound policy." *Aves*, 18 Pick. at 215. Shaw reasoned that if the right to personal property in slaves were based upon the natural law then "if slavery exists anywhere, and if by the laws of any place a property can be acquired in slaves," then "the law of slavery must extend to every place where such slaves may be carried." *Id.* at 216. Shaw rejected this argument with respect to slavery, stating that comity could "apply only to those commodities which are everywhere, and by all nations, treated and deemed subject of property." *Id.*

\(^{269}\) 21 F. Cas. 1266 (S.D.N.Y. 1834) (No. 12,761).
expressed a notion of the "privileges and immunities" of citizens that involved certain fundamental rights that were guaranteed under all free governments. Even though the alleged assault occurred on a ship outside the territory of the United States, the court used the phrase "privileges and immunities of citizens" to describe the rights that citizens possessed even though they might relinquish some of them in the disciplined environment of a ship at sea.

With regard to a ship-master, the persons over whom his authority is to be exerted are entitled to the privileges and immunities of citizens in all respects other than in their qualified subjection to the discipline on ship-board; and every provision of law which sanctions the deprivation of their rights as freemen, evinces, at the same time, a jealous solicitude in their behalf, by imposing on the master a heavy responsibility in the employment of his power. 270

Similarly, Polydore v. Prince 271 involved an alleged assault and battery on the high seas. The question in this case was whether a foreign slave who suffered the alleged assault could sue in the courts of the United States or whether "this personal incapacity upon the received principles of the jus gentium, or at least on the principles of national comity, follows him into whatever country he may voluntarily go or be carried by his master." 272 The defendants in the case argued that, although slavery was contrary to "natural right," it was "an institution admitted and acknowledged by the law of nations" and therefore the incapacity of slavery followed the slave "as the shadow follows the body" while traveling abroad in the United States. As a result, defense counsel argued that the slave could not sue in the courts of the United States for the alleged assault. 273 The defendants pointed to the "Code Napoleonian" as authority for the proposition that one's status followed one outside the jurisdiction under which it attached. The defendants also described the caste systems erected in Europe and the distinctions in the "privileges and immunities" separating the different levels.

Among these personal statutes, for which this ubiquity is claimed, are those which formerly over the whole of Europe, and still over a large part of it, divide the people into different castes, as nobles and plebeians, clergy and laity.

270. Id. at 1268.
271. 19 F. Cas. 950 (D. Maine 1837) (No. 11,257).
272. Id. at 951.
273. Id.
The favored classes were entitled to many personal privileges and immunities particularly beneficial and honorable to themselves.274

However, the court did not adopt the defendants' arguments, stating that "the peculiar personal status, as to his capacities or incapacities, which an individual derives from the law of his domicil, and which are imparted only by that law, is suspended when he gets beyond the sphere in which that law is in force."275 The status of slave could only be conferred through positive municipal regulation, and it did not flow from principles of natural right. Thus, this status need not be recognized outside the jurisdiction in which it was conferred. As a result, the slave in this case was automatically entitled to certain "rights and capacities of a free man" upon entering the jurisdiction of the United States.276

The substantive rights of citizens were also discussed by certain members of the Supreme Court deciding the *Dred Scott* case.277 For example, in arguing that the Framers of the Constitution did not understand the term "citizen" to include free blacks, Chief Justice Taney made the following pragmatic argument:

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274. *Id.* at 951-52.
275. *Id.* at 953. The court distinguished between natural relations of foreigners and those established through "mere positive institution":

Natural relations of foreigners, and such as are established by our own domestic institutions, we recognize in foreigners who are temporarily resident among us; but the rights and obligations which flow from them must, as a general rule at least, be determined by our own law, and be enforced by such means only as the local law allows. But those merely artificial distinctions, those capacities and disqualifications of mere positive institution, established by different communities among their members, which are not founded in nature but which relate to their own domestic economy, their municipal institutions, and their peculiar social organization, cannot be admitted to follow them into other nations in whose laws such distinctions are unknown, without disturbing the whole order of society, and introducing into communities privileged castes of persons, each governed to a considerable extent by different laws and affected by personal privileges peculiar to themselves, and totally at variance with the habits, social order, and the laws of the community among whom they reside.

*Id.* 19 F. Cas. 950 (D. Maine 1837) (No. 11,257). According to the court:

The law which declares a slave free on his introduction into this country, by necessary consequences, if it be not an identical proposition, declares him to be possessed of the civil qualities of a freeman, and confers on him the faculty of vindicating his rights, and claiming redress for wrongs in the ordinary course of justice . . . .

*Id.* For a more detailed discussion of the "civil qualities of a freeman," see Smith, *supra* note 12.

277. See Smith, *supra* note 12 (discussing the *Dred Scott* case and the understanding of both the majority and dissenting members of the Court concerning the rights of citizens).
If persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the States could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and the laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizens when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question . . . . And these rights are of a character that would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States. 278

This passage might be read as stating that the citizens of one state were merely placed on the same footing with the citizens of every state insofar as they were entitled to the fundamental privileges and immunities of any state in which they found themselves. Each state might have a different set of fundamental privileges and immunities based, perhaps, on provisions in the state constitutions. However, Chief Justice Taney explicitly enumerated certain of the privileges and immunities free blacks would be entitled to enjoy were they citizens. 279 This would seem to indicate that there was a uniform set of core fundamental privileges and immunities to which citizens were entitled in every state.

Furthermore, Justice Curtis also discussed the privileges and immunities of what he called “general citizenship” under Article IV, Section 2. Curtis’s statements indicate that there might have been a uniform set of privileges and immunities that he thought were guaranteed under the Privileges and Immunities Clause:

Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of

279. See supra notes 157-59 and accompanying text.
general citizenship, derived and guarantied [sic] by the Constitution, are to be
enjoyed by them. 280

Based on antebellum case law, the Privileges and Immunities Clause
probably guaranteed substantive protection for certain "national" rights
of citizenship, such as the privilege of suing in the courts of the United
States. The question is whether it also guaranteed substantive protection
for privileges and immunities traditionally within the regulatory control
of the state governments, such as the right to contract and the right to
testify. The tentative answer to this question based on an examination
of antebellum case law is that the Clause did provide a substantive
guarantee of such rights.

B. Commentators

The view that the Privileges and Immunities Clause guaranteed
substantive protection to a core set of fundamental rights was held by
certain commentators prior to ratification of the Fourteenth Amendment.
For example, William Rawle, in The Constitution of the United States
of America, stated that "[t]here [were] certain incidents to the character
of a citizen of the United States, with which the separate states cannot
interfere." 281 Similarly, Chancellor Kent in his Commentaries, stated
that in Corfield v. Coryell it was declared that "the privileges and
immunities conceded by the Constitution of the United States to citizens
of the several States were to be confined to those which were, in their
nature, fundamental, and belonged of right to the citizens of all free
Governments." 282 Therefore, nineteenth century commentators tended
to follow the results reached by courts, indicating that the privileges and
immunities of citizens were intended to be uniform among the states and
to be afforded substantive protection under the Clause. In particular,
Justice Washington's interpretation of the Privileges and Immunities
Clause as guaranteeing certain fundamental rights, which he attempted
to enumerate, was often cited as authoritative. These rights were those
common-law rights of citizens, many of which were traditionally under
the regulatory control of the state governments such as the right to
contract and to sue. 283

280. Dred Scott, 60 U.S. at 580.
281. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF
AMERICA 81 (1st ed. 1825).
282. 2 KENT, supra note 70, at *71-72.
283. See supra note 246 and accompanying text, quoting Justice Washington's
enumeration of rights guaranteed under the Privileges and Immunities Clause; see also
HOWELL, supra note 4, at 48 ("That the citizens of every State are entitled by virtue of the
Comity Clause to institute and maintain actions of any kind in the courts of the

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C. Congressional Republicans

This view of the Clause as having substantive content was also held by many of the Republicans in Congress who were responsible for framing the Fourteenth Amendment. For example, James Wilson of Iowa, co-author of the Thirteenth Amendment, manager of the Civil Rights Bill in the House and Chairman of the Judiciary Committee of the House, stated that slavery "denies to the citizens of each State the privileges and immunities of citizens in the several States" and that freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together.

several States has been declared from the very beginning by the decisions discussing the general scope and operation of the clause.

284. This conclusion was reached by Michael Kent Curtis in his historical study of the Fourteenth Amendment. CURTIS, supra note 10, at 114 ("The debates show ... that Bingham and others who framed the Fourteenth Amendment relied on a reading of the privileges and immunities clause of article IV, section 2 by which it protected a body of national privileges and immunities of citizens of the United States, including those in the Bill of Rights.").


286. Id. Representative John A. Kasson stated:

You cannot go into a State of the North in which you do not find refugees from southern States who have been driven from the States in the south where they had a right to live as citizens, because of the tyranny which this institution exercised over public feeling ... and even over the laws of those States.

CONG. GLOBE, 38th Cong., 2d Sess. 193 (1864). According to Kasson, slavery "denies the constitutional rights of our citizens in the South, suppresses freedom of speech and of the press, throws types into the rivers when they do not print its will, and violates more clauses of the Constitution than were violated even by the rebels when they commenced this war ... ").

Id. Senator John Sherman of Ohio stated:

There never was any doubt about the construction of this clause [the privileges and immunities clause] of the Constitution—that is, that a man who was recognized as a citizen of one state had a right to go anywhere within the United States, at and exercise the immunities of a citizen of the United States.

TENBROEK, supra note 11, at 185 n.14. Representative John Broomall of Pennsylvania stated that the rights guaranteed under the Privileges and Immunities Clause of Article IV included "[t]he right of speech, the right of transit, the right of domicil, the right to sue, the writ of habeas corpus, and the right of petition."

CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866). Representative Martin Thayer of Pennsylvania stated that the Civil Rights Bill was necessary to guarantee "these fundamental rights and immunities which are common to the humblest citizen of every free State ... ."

Id. at 1151.
Wilson reasoned that "[b]efore our Constitution was formed, the great fundamental rights . . . belonged to every person who became a member of our great national family. No one surrendered a jot or tittle of these rights by consenting to the formation of the Government." 287

Senator Lyman Trumbull of Illinois, the principal draftsman of the Thirteenth Amendment and Civil Rights Act and the Chairman of the Judiciary Committee of the Senate, stated that individuals going into other states were "entitled to the great fundamental rights of life, liberty and the pursuit of happiness, and the right to travel, to go where [they please]." 288 After President Johnson’s veto of the Civil Rights Bill, Trumbull stated:

To be a citizen of the United States carries with it some rights . . . . They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something. 289

Similarly, Representative William Lawrence of Ohio stated that there were "some inherent and inalienable rights, pertaining to every citizen which cannot be abolished or abridged by state constitutions or laws." According to Lawrence:

Every citizen . . . has the absolute right to live, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property. 290

Therefore, although members of Congress thought it necessary to clarify the effect of the Constitution in guaranteeing the privileges and immunities of citizenship by passing the Fourteenth Amendment, it seems they may have thought the correct interpretation of the Privileges and Immunities Clause of Article IV, Section 2 encompassed substantive protection for the privileges and immunities of citizens.

D. Resolution

The difference between these competing views of the Privileges and Immunities Clause might practically be minimal. All of the state

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288. Id. at 475.
289. Id. at 1757. Trumbull referred to these rights of citizenship as “natural rights.”
290. Id. at 1833.
governments guaranteed the fundamental rights of property and person in their state constitutions. Furthermore, these privileges and immunities were embodied in the English common law and adopted by the colonists in America. The Framers of the Constitution and the framers of the Fourteenth Amendment thought that these rights flowed from the principles of natural law and that therefore they would be embodied in the fundamental law of all “free governments.” All free governments would respect these rights of citizens. Furthermore, these fundamental rights, embodied in the positive law of the states as well as documents such as the Declaration of Rights of 1774, which had been consented to by all of the people, may have received substantive protection through the guarantee of a “Republican Form of Government” in Article IV, Section 4. The Privileges and Immunities Clause may have been designed to forbid discrimination in whatever rights were granted, and the rights that happened to be granted were practically identical in the several states because of the common heritage of the states.

The most accurate interpretation of the Clause encompasses both of these views to a certain extent. Citizens of the United States were guaranteed certain fundamental rights corresponding to the natural law rights of person and property that were recognized as belonging of right to citizens in all free governments. Although elsewhere I have tried to construct a model to accurately characterize the nature of these powers or capacities, the “privileges” and “immunities” of citizens, the courts of the day declined this task and stated that they would determine whether a given right was a privilege or immunity of citizenship on a

291. One contemporary commentator argued that because of this fact, Section 1 of the Fourteenth Amendment did not present any great innovation: All else in this section [Section 1] has already been guaranteed in the second and fourth section of the fourth article; and in the thirteen amendments. The new feature declared is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States. Most of the States, in general terms, had adopted the same bill of rights in their own state constitutions.

GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES 290 (1876). See also JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 151 (1868) (noting that the Amendment would not “interfere with any of the rights, privileges, and functions which properly belong to the individual states”).

292. See Smith, supra note 12 (discussing the role the Guarantee Clause may have played in protecting a uniform set of substantive rights throughout the several states).

293. Id.
case by case basis. By looking to that body of law that all nations that could be called "free" had adopted as their own municipal law, judges could endeavor to determine what were the privileges and immunities of citizenship that were founded upon principles of natural law. By relying on the wisdom of the nations of the world as well as past generations, judges could discover moral principles founded in reason and determine what rights were to be classified as privileges and immunities of citizenship.

The privileges and immunities of citizenship were the fundamental rights of citizenship that flowed from the social compact existing anterior to the establishment of the government, and, therefore, no government possessed the power to abridge these rights. They were founded upon principles of natural law, but were expressed in the positive law of custom, the common law inherited from England and expressly adopted under state constitutions and the Declaration of Rights of 1774, the organic law of the United States, and most importantly, the state constitutions. As Justice Field stated in his Slaughter-House dissent, the privileges and immunities of citizens of the United States
do not derive their existence from its [a State's] legislation, and cannot be destroyed by its power. The [fourteenth] amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.

Thus, it is likely that the rights guaranteed under the Privileges and Immunities Clause were intended to be accorded substantive protection. The terms "privileges" and "immunities" were terms of art encompassing certain powers or capacities that were founded upon the social compact theories of the natural law theorists.

Although the antidiscrimination aspect of the Privileges and Immunities Clause is commonly accepted, and, although the guarantee under the Privileges and Immunities Clause may not have extended to the

295. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95-96 (1873). Justice Field also stated that the Fourteenth Amendment "was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." Id. at 105.
296. See supra note 4 and accompanying text.
297. This reading of the Privileges and Immunities Clause was prevalent by the beginning of the twentieth century. See HOWELL, supra note 4, at 105 ("[T]here exists only one privilege or immunity of which it can be said that it may be demanded as of right by the citizens of every State in the Union. That one is equality of treatment, freedom from discriminating legislation."); but see id. (stating that this interpretation of the Clause was "far from being clearly recognized or stated by the courts").
rights of a citizen against his own government, the weight of the
evidence indicates that the privileges and immunities to be guaranteed
were substantive rights out of reach of the state governments as well as
the federal government. The only way in which these rights could be
altered was through the consent of the people. However, this consent
would not be forthcoming as long as the people acted rationally because
these rights were founded upon principles of natural reason—no one
would enter into the social compact without some assurance that these
rights would be guaranteed. Under the original Constitution and Article
IV as well as under the Fourteenth Amendment, states retained their
sovereignty and, therefore, their power to regulate the rights of person
and property of individuals within their jurisdiction. Thus, they could
govern the exercise of the privileges and immunities of citizenship as
long as they did not impair the value of these privileges and immunities
to the citizens, unless they did so pursuant to their regulatory power,
exercised for the common good. Consequently, through differences in
regulation, there might be differences from state to state in the mode or
manner by which citizens exercised their privileges and immunities, but
in all states citizens would have a constitutional guarantee of certain
fundamental privileges and immunities. The state governments could not
abridge these rights through improper regulations.

The view presented in this Article is that both the Privileges and
Immunities Clause of Article IV, Section 2 and the Privileges or
Immunities Clause of Section 1 of the Fourteenth Amendment were
designed to afford substantive protection to a well-defined closed set of
capacities of citizens and that antidiscrimination protection was merely
derivative in nature. Each citizen is entitled to the privileges and
immunities of citizenship; therefore, no inequality may result. Just as all
persons are entitled to freedom of speech under the First Amendment
and there can be no inequalities in free speech rights because each
individual shares in the same substantive guarantee, so individuals
guaranteed substantive protection of privileges and immunities also
receive antidiscrimination protection. One of the privileges and
immunities of citizenship was the immunity from unequal regulation of
the fundamental privileges and immunities of citizens unless such
regulations were passed pursuant to the common good. Not only was each individual entitled to bring suits, for example, but each individual must be subject to the same statute of limitations unless the public good necessitated otherwise. As we have seen, there may have been a mandate of “limited absolute equality” with respect to a citizen’s entitlement to the fundamental privileges and immunities of citizenship, but inequalities in regulation were permissible as long as these inequalities constituted a legitimate exercise of the state government’s police power. With respect to special privileges and immunities, there was no substantive or antidiscrimination guarantee, since these were not privileges and immunities of citizens guaranteed under Article IV, Section 2.

V. THE PRIVILEGES AND IMMUNITIES CLAUSE AND THE FOURTEENTH AMENDMENT

An analysis of the Privileges and Immunities Clause leads to an explanation of the distinction made between civil and political rights by congressional Republicans debating Section 1 of the Fourteenth Amendment, as well as the belief on the part of congressional Republicans that the states would remain free to regulate the privileges and immunities of citizens guaranteed under the Amendment. The fact that special privileges—local or municipal regulations—were not guaranteed under the Privileges and Immunities Clause in foreign states explains many of the beliefs on the part of Republicans concerning the meaning of the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. First, it was understood that political rights would not

298. This was the interpretation of the Clause given by Justice Bradley in his dissent in the Slaughter-House Cases. Bradley argued that equality was “one of the privileges and immunities of every citizen” under Article IV of the Constitution. The Slaughter-House Cases, 83 U.S. at 118 (Bradley, J., dissenting).

299. Earl Maltz has been the foremost proponent of this theory. See, e.g., EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869, at 68 (1990); Maltz, supra note 11.

300. The notion that the Privileges and Immunities Clause of Section 1 of the Fourteenth Amendment only guaranteed certain “fundamental” privileges and immunities of citizenship is not a new idea and is widely supported by statements made by members of Congress during the debates over the Amendment. For example, during the debates over the Civil Rights Act Senator Trumbull stated:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). However, this Article has attempted to offer an explanation of what the term “fundamental” meant in the context of the jurisprudence of Article IV, Section 2. By developing a definition of this term and
be guaranteed under the Privileges or Immunities Clause of the Fourteenth Amendment.\textsuperscript{301} These were rights of participation in the government such as voting and serving on juries. Such rights could not be \textit{fundamental} privileges and immunities of citizens because they could exist only after establishment of the government.\textsuperscript{302} The same is true in general of all such special privileges. Second, it was thought that the states remained free to regulate the fundamental privileges and immunities of citizens even after the Fourteenth Amendment was ratified, for example, by passing laws regulating criminal and civil conduct, without investing in Congress the power to prescribe uniform criminal or civil codes for all of the states.\textsuperscript{303} The sovereignty of the states was to

\textsuperscript{301}. See Timothy S. Bishop, Comment, \textit{The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent}, 79 Nw. U. L. Rev. 142, 145 (1984); see also CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (According to Michigan Senator Jacob Howard, “[t]he right of suffrage is not, in law, one of the privileges or immunities . . . secured by the Constitution.”).

\textsuperscript{302}. Several members of Congress equated fundamental privileges and immunities protected under Article IV, Section 2 with the rights of citizenship. For example, Representative Martin Thayer of Pennsylvania, in discussing the Civil Rights Bill, stated: “The sole purpose of the bill is to secure to [blacks] the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law . . . .” CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866). Similarly, Lyman Trumbull stated with respect to the Bill that it [provides that blacks are to be considered citizens and that] they will be entitled to the rights of citizens. And what are they? The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman. \textit{Id.} at 475.

\textsuperscript{303}. For example, Senator Bingham objected to the original version of the Civil Rights Bill because of its guarantee of equal “civil rights,” protesting that “‘[C]ivil [R]ights’ . . . embrace every right that pertains to the citizen . . . [it would] strike down . . . every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen . . . .” THE RECONSTRUCTION AMENDMENTS’ DEBATES, \textit{supra} note 2, at 186 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866)). The distinction between the phrases “civil rights” and “privileges and immunities” is therefore evident. As Raoul Berger has noted, these phrases were not synonymous or used interchangeably. Raoul Berger, \textit{Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well}, 62 U. Cin. L. Rev. 1, 27 (1993). An explanation for the distinction may be found in the theory presented in this Article. The phrase “civil
remain intact under the Amendment. This belief can be explained by noting that the fundamental privileges and immunities of citizens differ from special privileges or municipal regulations. The latter were not guaranteed under either the Privileges and Immunities Clause of Article IV, Section 2 or under the Privileges or Immunities Clause of the Fourteenth Amendment. Finally, antidiscrimination protection under the Privileges or Immunities Clause of the Fourteenth Amendment may have been at the level of regulation of the privileges and immunities of citizens. The Clause may have guaranteed substantive as well as antidiscrimination protection in terms of the fundamental privileges and immunities that citizens were entitled to enjoy in all of the states, as well as the privilege or immunity of being subject only to equal regulation of these fundamental privileges and immunities of citizens. Thus, one of the privileges and immunities of citizens was enjoyment of equal civil rights could be construed as referring to the positive regulations or modes in which the privileges and immunities of citizenship were exercised. Mandating an equality of civil rights would indeed reform the civil and criminal codes of the states and call for a uniformity in legislation among the states. However, the phrase “privileges and immunities” could be construed as referring only to those capacities of citizenship existing anterior to the establishment of the government that are regulated through municipal regulations passed by legislatures. Thus, the theory presented in this Article accounts for the distinction in terminology made by members of Congress.

304. Several statements by members of Congress indicate their concern that the sovereignty of the state governments not be impaired by the new Amendment. For example, Roscoe Conkling, a member of the Joint Committee on Reconstruction, stated “the proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty.” THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 2, at 111 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866)). Similarly, Columbus Delano stated, “there are certain rights of citizenship that are exclusively within the control of the States . . . .” Id. at 178 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866)). Senator Trumbull remarked that the Civil Rights Bill “in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.” Id. at 200 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866)). Finally, Robert Hale declared that “all powers having reference to the relation of the individual to the municipal government, the powers of local jurisdiction and legislation, are in general reserved to the states . . . .” Id. at 153 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866)). See also FLACK, supra note 10, at 68 (concluding that, “Radical leaders were as aware as any one of the attachment of the great majority of the people to the doctrine of States Rights . . . the right of the states to regulate their own internal affairs . . . .”); Alfred H. Kelly, Comments on Harold M. Hyman's Paper, in NEW FRONTIERS OF AMERICAN RECONSTRUCTION 55 (Harold Hyman ed., 1966) (concluding that the “commitment to traditional state-federal relations meant that the radical Negro reform program could be only a very limited one”). Later, Justice Bradley, one of the Slaughter-House dissenters, emphasized in the Civil Rights Cases, 109 U.S. 3, 11 (1883), that Section 5 of the Fourteenth Amendment “does not authorize Congress to create a code of municipal law for the regulation of private rights.”
rights. This interpretation of Section 1 as protecting only fundamental privileges and immunities of citizens is not only consistent with the original meaning of Section 1, but also was the interpretation adopted by the Supreme Court dissenters in the *Slaughter-House Cases*, who were defeated by a narrow margin.

**A. The Distinction Between Civil and Political Rights**

It is well established that Republicans intended to guarantee basic civic rights, but not political rights, under Section 1 of the Fourteenth Amendment. The text itself guarantees privileges and immunities

305. The *Slaughter-House* dissenters referred to the Lockeian triumvirate of life, liberty, and property as embodied in the Declaration of Independence as referring to the fundamental rights of citizens "of every free government." For example, Justice Bradley stated in his dissent in referring to the Declaration:

> Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty ... and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be ... modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

The *Slaughter-House* Cases, 83 U.S. (16 Wall.) 36, 116 (1872). Thus, Justice Bradley reiterated Justice Washington’s belief that the fundamental privileges and immunities of citizens were those to which citizens of all free governments were entitled and that these were the privileges and immunities referred to in Section 1 of the Fourteenth Amendment. Justice Field made similar remarks. According to Justice Field, "[t]he privileges and immunities designated [in Section 1 of the Fourteenth Amendment] are those which of right belong to the citizens of all free governments." Id. at 97. Thus, the "privileges or immunities of citizens" referred to in Section 1 of the Fourteenth Amendment as well as those derived from Article IV, Section 2 were those privileges and immunities that were fundamental—that existed anterior to the formation of government, whether belonging equally to all men or flowing from the social compact among the members of society, its citizens.

This was the conclusion of the first court to hear a case arising under the Privileges or Immunities Clause of the Fourteenth Amendment. In *United States v. Hall*, the federal court queried, "[w]hat are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens ... of the several states which compose this union from the time of their becoming free, independent and sovereign." 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282).

306. See CURTIS, supra note 10, at 29. The distinction between political and civil rights was well established in nineteenth century legal thought. For example, Chief Justice Taney made such a distinction in his opinion in *Dred Scott v. Sandford*, where he stated that "[u]ndoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices." 60 U.S. (19 How.) 393,
of citizens and not political rights, such as the right to vote or hold office. Many Republicans had stated during the debates over the proposed Civil Rights Bill, a precursor of Section 1 of the Fourteenth Amendment, that political rights would not be guaranteed under the Bill. After reading the passage from *Corfield v. Coryell*, which

422 (1856). Justice Curtis made the same distinction in his dissent. *Id.* at 581. However, complicating the analysis concerning rights addressed under Section 1 of the Fourteenth Amendment was the fact that the phrase “political rights” was sometimes used as a synonym for “civil rights.” The original version of Section 1 of the Fourteenth Amendment secured “to all citizens . . . the same political rights and privileges.” See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 51-52 (1988) (suggesting that the “political rights” language was dropped because it might be construed as guaranteeing to free blacks political rights such as the right to vote and hold office, the right to serve on juries, and the right to serve in the militia); Earl M. Maltz, The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction, 45 OHIO ST. L.J. 933, 965 (1984).

307. U.S. CONST. amend. XIV, § 1. In *United States v. Hall*, the court stressed this point:

What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign.

26 F. Cas. at 81.

308. For example, Representative Martin Thayer of Pennsylvania stated that “no lawyer who is acquainted with the use of terms and the rules which regulate the construction of laws” could interpret the Bill to extend the suffrage laws. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866). Representative Thayer analyzed the language of the Bill:

In the first place, the words themselves are “civil rights and immunities,” not political privileges; and nobody can successfully contend that a bill guarantying [sic] simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.

Then, again, the matter is put beyond all doubt by the subsequent particular definition of the general language which has been just used; and when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated.

*Id.* Similarly, Representative James Wilson cited the definition of civil rights in Bouvier’s *Law Dictionary* as “those [rights] which have no relation to the establishment, support or management of government.” *Id.* at 1117. See also *id.* at 1117, 1367 (Wilson), 1263 (Broomall), 1757 (Trumbull). However, there was some confusion in terminology. Some members of Congress thought that the phrase “civil rights” might encompass political rights as well. For example, Willard Saulsbury of Delaware was disturbed that the phrase “civil rights and immunities” in the Bill was a “generic term which in its most comprehensive signification includes every species of right that man can enjoy other than” natural rights and that “the right of voting . . . [i]s . . . a civil right . . . .” *Id.* at 477. See also *id.* at 1157 (Rep. Thornton); *id.* at 1291 (Rep. Bingham); *id.* at 476 (exchange between Sen. Trumbull and Sen. McDougall).
enumerated the fundamental privileges and immunities of citizens under Article IV, Section 2, Senator Trumbull stated that the Civil Rights Bill did not provide for the elective franchise.309 As Congressman Russell Thayer noted, the words in the Civil Rights Bill were "'civil rights and immunities', not political privileges."310 The fact that the Fifteenth Amendment was ratified to extend the vote to free black citizens is confirmation of this interpretation.311

Furthermore, during the debates over the proposed Fourteenth Amendment, several members of Congress indicated that it was not their intention to confer political rights under Section 1. For example, many Republicans noted that the Fourteenth Amendment did not confer the right to vote upon free blacks.312 Representative Wilson stated that

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309. THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 2, at 122. Several members of Congress lamented the fact that the Fourteenth Amendment and Civil Rights Act did not confer the elective franchise. For example, Senator Samuel Pomeroy stated that without suffrage, free blacks would have "no security," CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866), and Senator Sumner stated that if the Amendment "is inadequate to protect persons in . . . the right to vote, it is inadequate to protect them in anything." CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869).

310. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866).

311. During the debate over the Fifteenth Amendment, it was noted that the Fourteenth Amendment did not confer the right to vote. Senator Aaron H. Cragin recounted:

I remember the struggle that we had here in the passage of the fourteenth amendment; . . . I remember that it was announced upon this floor by more than one gentleman, that that amendment did not confer the right of voting upon anybody . . . . There is no doubt upon the question. It was the understanding of Congress and of the people of this country that that amendment did not confer and did not seek to confer any right to vote upon any citizen of the United States . . . . [T]hat it conferred the right to vote was distinctly disclaimed on this floor in the caucus which has been alluded to here to-night; and, for one, I am not willing to have it go out from this Senate that we passed that amendment understanding that it conferred any right to vote. CONG. GLOBE, 40th Cong., 3d Sess. 1003-04 (1869).

312. CONG. GLOBE, 39th Cong., 1st Sess. 2539-40 (1866) (Farnsworth); id. at 2462 (Garfield); id. at 405 (Rep. Shellabarger); id. at 406-07 (Rep. Eliot). As Senator Trumbull stated, "the granting of civil rights does not . . . carry with it . . . political privileges. A man may be a citizen in this country without a right to vote . . . . The right to vote . . . depends upon the legislation of the various States . . . ." THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 2, at 197. Senator Howard stated:

[T]he first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges and immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of
suffrage was "a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government."\textsuperscript{313} Senator Bingham, upon introducing the Fourteenth Amendment on the floor of the House, stated that "the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the states."\textsuperscript{314} Bingham also stated that "[i]t is a guarantied [sic] right of every State in this Union to regulate for itself the elective franchise within its limits, subject to no condition whatever except that it shall not . . . transform the State government from one republican in form . . . ."\textsuperscript{315} Finally, Senator Howard stated that Section 1 of the Amendment did "not give to either of these classes [whites or blacks] the right of voting."\textsuperscript{316}

Members of Congress noted that it was well established under the case law of the Privileges and Immunities Clause of Article IV, Section 2 that the phrase "Privileges and Immunities of Citizens" did not refer to political rights, but rather merely extended civil rights to foreign citizens. For example, William Lawrence stated during the debates that the privileges referred to under Article IV were "such as are fundamental civil rights, not political rights, nor those dependent on local law . . .

\begin{quote}
positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.
\end{quote}

\textit{CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).} \textit{See also Maltz, supra note 306, at 942.}

313. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).
314. \textit{Id.} at 2542. This was not the only time that Senator Bingham made a distinction between political and civil rights. In the debate over admission of Oregon as a state, Bingham distinguished political rights, which he indicated were conventional, from natural or inherent rights. According to Bingham, the "\textit{distinctive}" political rights of citizens of the United States included:

\begin{quote}
The great right to choose (under the laws of the States) severally, as I remarked before, either directly by ballot or indirectly through their duly-constituted agents, all the officers of the Federal Government, legislative, executive, and judicial, and through these to make all constitutional laws for their own government, and to interpret and enforce them; the right, also, to hold and exercise, upon election thereto, the several offices of honor, of power, and of trust, under the Constitution and Government of the United States.
\end{quote}

\textit{CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859).} Bingham continued, stating that "[t]his Government rests upon the absolute equality of natural rights amongst men. There is not, and cannot be, any equality in the enjoyment of political or conventional rights, because that is impossible."\textit{ Id.} at 985. Bingham also stated that "[p]olitical rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of qualified electors of any State and by the minority only nominally."\textit{ Id.}

315. CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867).
316. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).
Lawrence’s classification of political rights with rights “dependent upon local law” is instructive. Political rights, like municipal regulations, may exist only after the establishment of government. One can only participate in government by voting or holding office after a government is formed. Fundamental civil rights, privileges and immunities of citizenship, on the other hand, were thought to exist anterior to the establishment of government, being comprised of inherent and inalienable rights of persons as well as those rights flowing from the social compact among the members of society, its citizens. Therefore, political rights are wholly analogous to municipal regulations governing the exercise of the fundamental privileges and immunities of the citizenry. Neither were afforded protection under Article IV, Section 2, and neither were intended to be afforded protection under Section 1 of the Fourteenth Amendment. Thus, the distinctions between fundamental and special privileges and, concomitantly, between political and civil rights, under the Privileges and Immunities Clause of Article IV, Section 2, were carried over to the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment.

In summary, there are two important aspects of the Privileges and Immunities Clause of Article IV, Section 2 reflected in statements made by members of Congress. The first is that the private proprietary rights of citizens in their person and property must be respected when those citizens venture into the jurisdiction of another state. In this way, the fundamental rights of citizens to be secure in their person and property are ensured. The second aspect of the Clause is that the citizens of one state are entitled to the privileges and immunities of citizens residing in the jurisdiction in which they find themselves. The rights of person and property are qualified, as always, by the government’s power, which it has received from the consent of the citizens, to pass regulatory laws for the public good. These regulations, however, must be designed to secure the public welfare.

317. *Id.* at 1836.
318. See Smith, *supra* note 12 (discussing application of social compact theory in interpreting Section 1 of the Fourteenth Amendment).
B. Regulation of the Privileges and Immunities of Citizens

The notion that the states retained the power to regulate the privileges and immunities of citizens—those privileges and immunities that were in their nature fundamental—was expressed time and again during debates over the Fourteenth Amendment. Republicans were concerned that the states retain their power of regulation and that the Fourteenth Amendment not mandate a uniform civil or criminal code for the states. As Senator Bingham, the principal draftsman of Section

319. Several commentators have noted the importance of maintenance of the federal system and state sovereignty in the eyes of the 39th Congress, which passed the Fourteenth Amendment. See, e.g., BERGER, supra note 17, at 50. For example, Raoul Berger quotes Horace Flack’s The Adoption of the Fourteenth Amendment to support his interpretation of the Amendment under which the states would retain significant power to regulate the fundamental rights of citizens: “The ‘radical leaders,’ Horace Flack wrote, ‘were as aware as any one of the attachment of a great majority of the people to the doctrine of States Rights . . . the right of the States to regulate their own internal affairs.’” Id. (quoting FLACK, supra note 10, at 68). In Berger’s opinion, “[M]ichael Kent] Curtis’ major flaws is his refusal to face up to Bingham’s repeated recognition that control of internal matters was left to the States.” Id. at 131. See also Maltz, supra note 11, at 230 (stating that “[t]he concept of federalism played a critical role in limiting Republican efforts on behalf of the freedmen”).

320. See CURTIS, supra note 10, at 68-69. Curtis notes in particular the objections of Congressman Robert S. Hale of New York, id. at 69 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864)), and Congressman Giles W. Hotchkiss, id. at 71 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866)). Senator Garrett Davis of Kentucky contended that the Civil Rights Act might “authorize Congress to pass a civil and criminal code for every State in the Union.” CONG. GLOBE, 39th Cong., 1st Sess. 1414 (1866). Willard Saulsbury argued that the act placed limitations on the “police power” of the states. Id. at 478. Andrew J. Rogers indicated that Section 1 of the Fourteenth Amendment would “interfere with the internal police and regulations of the States . . . .” Id. at app. 134. Senator Edgar Cowan, playing devil’s advocate, had argued that the mandate for equality in regulation under the Civil Rights Act would confer upon married women, upon minors, upon idiots, upon lunatics, and upon everybody native born in all the States, the right to make and enforce contracts, because there is no qualification in the bill, and the very object of the bill is to override the qualifications that are upon those rights in the States

Id. at 1782. Congressman Wilson stated during the debate over the Civil Rights Bill that “[w]e are not making a general criminal code for the States.” Id. at 1120. Wilson also stated that the rights of individuals “possesse[d] as a citizen of the United States” could “only be secured to him by laws which operate within the State in which he resides,” Id. at 2513. Thomas Davies of New York, in debates over the Civil Rights Act, stated “[t]his government is one of delegated powers, and . . . every law . . . is circumscribed by the limitation of the Constitution. The States have reserved all sovereignty and power which has not been expressly or impliedly granted to the Federal Government.” Id. at 1265-66. Representative Samuel Shellabarger stated that the Civil Rights Bill’s “whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinction based on race or former condition of
1 of the Fourteenth Amendment, stated, "[t]he Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States . . . but leaves it as the reserved power of the States, to be by them exercised." Bingham also stated:

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

slavery." Id. at 1293. Finally, Columbus Delano, a Republican Representative from Ohio, worried that under the Civil Rights Bill, “Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers . . . .” Id. at app. 158. See also HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 438-40 (1973); NELSON, supra note 306, at 114-15; Maltz, supra note 306, at 936 (stating that “the concept of federalism was one overarching concern”); Maltz, supra note 11, at 230-36.

Bingham also stated that “the citizens must rely upon the State for their protection. I admit that such is the rule . . . as it now stands.” Id. at 159. Bingham cited The Federalist No. 45 (James Madison): “The powers reserved to the Federal States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” Id. at 159. Furthermore, Bingham seemed to distinguish between fundamental rights and their instantiation in municipal law. Bingham stated that “[t]he rights of life and liberty are theirs whatever States may enact,” but also stated: [W]ho ever heard it intimated that any-body could have property protected in any State until he owned or acquired property there according to its local law . . . . I undertake to say no one.

As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States . . . . But suppose any person has acquired property not contrary to the laws of the State, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection?

CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). Democratic Congressman Andrew J. Rogers of New Jersey made a similar distinction between natural rights, a “right which God gives us,” and civil rights, which are “derived from the Government and municipal law, as laid down in the organism of a State, and to extend to such persons as it may see fit.” Id. at 1122.

322. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).
Bingham did not believe that the Fourteenth Amendment in any way infringed upon the powers of the states because it merely forbid that which the states did not possess the power to do—abridge the privileges and immunities of the citizen.\textsuperscript{323}

Senator Bingham was not alone in his understanding of Section 1 of the Fourteenth Amendment as prohibiting the states from abridging the privileges and immunities of citizens, while leaving the states free to regulate these fundamental capacities of citizenship in different manners. For example, Representative Shellabarger also indicated that the state governments could exercise the right to regulate the fundamental privileges and immunities of citizens without abridging them. Shellabarger stated:

\begin{quote}
Now, the inquiry I wish to make is this: suppose that at the time of taking a statutory apprentice, or at the time of the birth of a child, the age of majority for the child and the expiration of the apprenticeship is fixed by the law of this District, or of any of the States, at the age of twenty-one years; and suppose the State, or the Legislature of the District, in the exercise of municipal legislation, should change the law so as to terminate the minority and the apprenticeship at eighteen instead of at twenty-one years, and thus should take from the parent and from the master three years of service, would that be a depriving the citizen
\end{quote}

\textsuperscript{323} As Bingham stated during the debates:
I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to . . . take away from any State any right that belongs to it. . . . The proposition pending before the House is simply a proposition to arm Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today. It "hath that extent—no more."

\textldots\textbf{.} . . .

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?

\textit{Id.} at 1088-89; see also \textit{id.} at 1090 (statement of John Bingham) (noting that "the adoption of the proposed amendment will take from the States no rights that belong to the States"); \textit{id.} at 2542 (statement of John Bingham) (concluding that "this amendment takes from no State any right that ever pertained to it"); Fairman, \textit{supra} note 7, at 33; Gingras, \textit{supra} note 15, at 44-45 (discussing Bingham’s views).
of property without due process of law within the meaning of Magna Charta or of the Constitution of the United States? Is not the property in these personal relations within the full control of the municipal legislation of every supreme legislature?\(^{324}\)

Similarly, Senator Richard Yates of Illinois distinguished between regulating the rights of citizens and destroying them. According to Yates:

> To define the length of residence necessary to enable a man to vote, to say what his age shall be, is one thing; and to say that he shall not vote at all because he is black or white, is an entirely different thing. In the latter case, color is made the disqualification, just as race would be if Germans were excluded from the ballot-box. The State may preserve a right; it may fix the qualifications; it may impose certain restrictions so as to have that right preserved in the best form to the people; but it is not legitimately in the power of the State, . . . it is not in any earthly power to destroy a man's equal rights to his property, to his franchise, to his suffrage, or to the right to aspire to office—I mean according to the true theory of republican government. That is the one thing, that in this country, the Government cannot do.\(^{325}\)

Although in this passage Yates discussed political rights such as the right to vote and to hold office, which were not considered to be privileges and immunities of citizenship, his distinction between the destruction of a right and its regulation is instructive.

Finally, Senator George F. Edmunds also distinguished between the regulation of a right and its destruction or abridgment. Edmunds commented:

> Every lawyer, knows . . . that it is one thing to have a right which is absolute and inalienable, and it is another thing for the body of the community to regulate . . . the exercise of that right.

> . . . I may be daily deprived of my liberty under the regulations of the State, which apply to us all alike. If I am deprived of it, rightfully or wrongfully, I

\(^{324}\) CONG. GLOBE, 37th Cong., 2d Sess. 1636 (1862).

\(^{325}\) CONG. GLOBE, 40th Cong., 2d Sess. app. 350 (1868). In his annual message to the Illinois legislature in January, 1865, Richard Yates, acting as Governor of Illinois, also stated:

> I am for unlimited state sovereignty in the true sense, in the sense that the State is to control all its municipal and local legislation and I would be the first to resist all attempts upon the part of the Federal Government to interpose tyrannical usurpation of power in controlling the legislation. The States are sovereign in every sense in which it is desirable they should have sovereignty . . . .

Maltz, \textit{supra} note 11, at 233-34 (quoting 1 REPORTS TO THE GENERAL ASSEMBLY OF ILLINOIS, 24th Sess. 28 (1865)).
can only get restored to it by the process of the law under the regulations that legislation shall provide. My friend admits that one of the privileges of a citizen of the United States is to hold property. Where is he to hold it? He must hold it in some State or Territory, must he not? Now, then, is he to acquire it in spite of the State law by an instrument unwitnessed, unsealed, unsigned? By no means. He must conform to the regulation of the local law which declares that his deed must be witnessed by two witnesses, must be sealed, must be acknowledged, must be delivered. And yet no man here thought of supposing that a privilege of a citizen was denied, although it is confessedly by my friend agreed to be a privilege, from the fact that the States regulate the exercise of it . . . [E]verybody knows that a right may be perfectly secure and yet be subject to regulation. 326

Thus, congressional Republicans made a distinction between the legitimate regulation of a fundamental right and its abridgement or destruction. In the nineteenth century mind, there was a well-defined conception of the legitimate sphere of government action in regulating the fundamental rights of the citizenry. 327 The line between legitimate

326. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).
327. The Supreme Court subsequently acknowledged this right of regulation in the states preserved under the Fourteenth Amendment in *Munn v. Illinois*, 94 U.S. 113 (1876). The Court stated that individuals, upon entering society, conferred upon the government the power to regulate "the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." *Id.* at 125. Justice Field, one of the *Slaughter-House* dissenters, recognized this broad police power, acknowledging that the states possessed the power to "control the use and possession of . . . property, so far as may be necessary for the protection of the rights of others, and to secure them the equal use and enjoyment of their property." *Id.* at 145. Field continued, stating:

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope . . . . Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property . . .

*Id.* at 145-46. Justice Field later expounded upon these views in *Barbier v. Connolly*, 113 U.S. 27 (1884), in which he stated that the first section of the Fourteenth Amendment undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.
regulation of fundamental rights and their abridgement was not as fuzzy as it might appear to be to modern legal scholars.\textsuperscript{328}

Although the states remained free to regulate the mode or manner in which the privileges and immunities of the citizen might be exercised, they were not free to abridge or destroy these rights—they were inherent or inalienable rights of the citizen. According to Congressman William Lawrence of Ohio, matters involving contracting, suing, and property rights were left to the states “subject only to the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws.”\textsuperscript{329} However, there were other constraints placed upon the state’s power of

\textit{Id.} at 31. The difference between an arbitrary deprivation of fundamental rights and a proper exercise of the state’s police power is the difference between an abridgement of the privileges and immunities of citizens of the United States and a proper regulation of the exercise of these rights. Justice Field continued, stating:

\[\text{[T]he amendment—broad and comprehensive as it is . . . was [not] designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.}\]

\textit{Id.} at 31-32.

\textsuperscript{328.} See, \textit{e.g.}, State v. Medbury, 3 R.I. 138, 141 (1855) (counsel for defendant stated that “the difference between the regulation and the destruction of a right is too obvious for argument”).

\textsuperscript{329.} \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1832 (1866). Lawrence also stated in response to concerns of invading the powers of the state governments, “I answer [that] it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded.” \textit{Id.} at 1837.
regulation. Regulation of the fundamental rights of the citizen had to be "equal." As Senator Lot M. Morill of Maine stated,

The peculiar character, the genius of republicanism is equality, impartiality of rights and remedies among all citizens, not that the citizen shall not be abridged in any of his natural rights. The man yields that right to the nation when he becomes a citizen. The republican guarantee is that all laws shall bear upon all alike in what they enjoin and forbid, grant and enforce. This principle of equality before the law is as old as civilization, but it does not prevent the State from qualifying the rights of the citizen according to the public necessities. 330

This equality may have flowed from a fundamental immunity—to be free from unequal regulation. As Senator Wilson stated concerning the term "immunities" in the Civil Rights Act, it "merely secure[d] to citizens of the United States equality in the exemptions of the law." 331 In particular, it was the function of the Civil Rights Act to enforce the privilege or immunity of citizenship of being subject to equal regulation of the fundamental privileges and immunities of citizenship. The language of the Act guaranteed "the same" rights of citizenship. For example, Congressman Shellabarger said of the Civil Rights Bill:

[Except so far as it confers citizenship it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State law shall be for and upon all citizens alike without distinction based on race or former condition of slavery. 332

Shellabarger also said of Section 1 of the Bill:

[If this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would . . . be an assumption of the reserved rights of the States and the people. But, sir, except so far as it confers citizenship, it neither confers nor defines nor regulates any rights whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinction based on race or former condition of slavery. 333

In addition, Senator Trumbull stated regarding the Civil Rights Bill that it "will have no operation . . . where all persons have the same civil rights without regard to color or race." 334 Thus, the power to regulate

330. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866).
331. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Senator Trumbull stated that the Act "in no manner interfere[d] with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union." Id. at 1761.
332. THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 2, at 188.
333. Id.
334. Id. at 122.
the rights of citizens was left in the hands of the state governments under both the Civil Rights Act and the Fourteenth Amendment. As Senator Bingham stated, Section 1 of the Fourteenth Amendment took "from no State any right that ever pertained to it."\textsuperscript{335}

Both the Miller majority and the dissenters in the \textit{Slaughter-House Cases} recognized this principle. Justice Bradley stated in his dissent that "[c]itizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as the legislature may rightfully prescribe."\textsuperscript{336} According to Justice Miller, "[t]he power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details."\textsuperscript{337} Justice Miller, quoting Chancellor Kent,\textsuperscript{338} gave the test for whether a regulation by a state pursuant to its police power violated the Fourteenth Amendment's prohibition on abridging the privileges and immunities of citizens:

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must

\begin{itemize}
  \item \textsuperscript{335} CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).
  \item \textsuperscript{336} The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 113 (1872).
  \item \textsuperscript{337} \textit{Id.} at 62.
  \item \textsuperscript{338} Chancellor Kent discussed the general power of the government to regulate property rights in order to protect the rights of all the citizens when they come into conflict in his \textit{Commentaries}:
  
  But though property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.

2 \textit{KENT, supra} note 70, at 340 (citations omitted).
be made subservient to the general interests of the community." This is called
the police power; and it is declared by Chief Justice Shaw that it is much easier
to perceive and realize the existence and sources of it than to mark its
boundaries, or prescribe limits to its exercise. Justice Miller indicated that the regulation in question in the *Slaughter-
House Cases* would be permissible since not all such exclusive privileges
were forbidden traditionally. However, Justice Miller did not let his
opinion rest on this argument, because he restricted the privileges and
immunities protected under the Clause to a limited set of "national"
privileges and immunities, which did not include the right to be free
from monopolies.

In contrast to Justice Miller, Justice Field, in his dissent, found that the
state of Louisiana had exceeded the limits of its police power in passing
the regulation because it had "infringed" upon a fundamental right of the
people. According to Justice Field:

All sorts of restrictions and burdens are imposed under it [the police power],
and when these are not in conflict with any constitutional prohibitions, or
fundamental principles, they cannot be successfully assailed in a judicial
tribunal. With this power of the State and its legitimate exercise I shall not
differ from the majority of the court. But under the pretence of prescribing a
police regulation the State cannot be permitted to encroach upon any of the just
rights of the citizen, which the Constitution intended to secure against
abridgment.

Justice Bradley also acknowledged that "[t]he right of a State to regulate
the conduct of its citizens is undoubtedly a very broad and extensive
one, and not to be lightly restricted." However, he also stated that
"there are certain fundamental rights which this right of regulation
cannot infringe." Justice Bradley later commented on this power of
regulation in *Missouri v. Lewis* where he stated that the Amendment
"does not profess to secure to all persons in the United States the benefit
of the same laws and the same remedies. Great diversities in these
respects may exist in two States separated by an imaginary line . . . .
Each State prescribes its own modes of judicial proceeding."

Thus, the distinction between a permissible regulation of a fundamen-
tal privilege or immunity and an impermissible abridgement was carried

340. Justice Miller argued: "Nor can it be truthfully denied, that some of the most
useful and beneficial enterprises set on foot for the general good, have been made
successful by means of these exclusive rights, and could only have been conducted to
success in that way." *Id.* at 66.
341. *Id.* at 87.
342. *Id.* at 114.
343. *Id.*
over to the congressional understanding of the Privileges or Immunities Clause of Section 1 as well as the interpretation of the Clause by the Slaughter-House dissenters. Just as the fundamental privileges and immunities of citizens could be regulated in different ways through positive local laws under the Privileges and Immunities Clause of Article IV, Section 2, so too could the privileges and immunities of citizens of the United States be regulated without abridgment under the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. These regulations prescribing the mode or manner in which the fundamental rights of citizens could be exercised were municipal regulations, analogous to special privileges, prohibited by neither the Privileges and Immunities Clause of Article IV, Section 2, nor the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment.

VI. CONCLUSION

This Article has attempted to illuminate the nineteenth century understanding of the Privileges and Immunities Clause of Article IV, Section 2. Such an inquiry is useful in gaining an accurate understanding of the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. The "privileges" and "immunities" guaranteed under Article IV, Section 2 were the same as those later guaranteed under Section 1 of the Fourteenth Amendment. These were those capacities of the citizen that existed anterior to the establishment of government, but which could be regulated pursuant to the common good by the government that was subsequently established.

Although several commentators have argued that the privileges and immunities of citizenship guaranteed under Section 1 that were traditionally within the regulatory control of the state governments, such as the right to contract and to hold property, are afforded merely antidiscrimination protection under Section 1, it is likely that they

345. See, e.g., Harrison, supra note 10. William E. Nelson has contended that "[b]y understanding section one as an equality guarantee, the puzzle of how Congress could simultaneously have power to enforce the Bill of Rights and not have power to impose a specific provision of the Bill on a state is resolved." NELSON, supra note 306, at 119. Nelson notes that many of the states ratifying the Fourteenth Amendment did not provide for all of the same Bill of Rights protections in their state constitutions and yet did not oppose ratification or change their constitutions to reflect the federal Bill of Rights after ratification. Id. at 118.
were originally intended to be provided substantive protection as well. There was a widespread belief in nineteenth century America that the privileges and immunities of citizenship were guaranteed substantive protection under Article IV, Section 2, or at least there was a presumption that certain privileges and immunities of citizens would exist in all free governments. The states remained free to regulate the exercise of these fundamental capacities of citizenship in different ways through municipal regulation. However, they did not remain free to abridge them. The difference may appear to be a subtle one from the modern viewpoint. However, a studious inquiry into the nature of the police power as understood in nineteenth century America would further illuminate the distinction.

It is particularly noteworthy that although these commentators agree that the right to contract and other such privileges and immunities of "state" citizenship receive merely antidiscrimination protection under the Fourteenth Amendment, they seem to argue that the provisions of the Bill of Rights receive substantive protection as well. For example, they would agree that the Fourteenth Amendment forbids a state government from passing a generally applicable law outlawing all political speech. Such a law would apply equally to all and yet would be prohibited by the Fourteenth Amendment's guarantee of substantive protection for the privileges and immunities of citizenship.