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PRIVILEGES OR IMMUNITIES

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INTRODUCTION

What was meant by the Fourteenth Amendment's Privileges or Immunities Clause?[1] Did it incorporate the U.S. Bill of Rights against the states or did it do something else? In retrospect, the Clause has seemed to have the poignancy of a path not taken—a trail abandoned in the *Slaughter-House Cases* and later lamented by academics, litigants, and even some judges.[2] Although wistful thoughts about the Privileges or Immunities Clause may seem to lend legitimacy to incorporation, the Clause actually led in another direction. Long-forgotten evidence clearly shows that the Clause was an attempt to resolve a national dispute about the Comity

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[1] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

[2] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 66, 74 (1873) (upholding law restricting slaughtering to a city corporation and rejecting argument that the Privileges or Immunities Clause protected individuals from their own states). Among the judges who look back regretfully at the path not taken is Justice Thomas, whose concurrence in *McDonald v. City of Chicago* argues that the Privileges or Immunities Clause incorporated the Bill of Rights. 130 S. Ct. 3020, 3059–60 (2010) (Thomas, J., concurring in part and concurring in judgment) (holding that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment against the states). For the incorporation of incorporationist fallacies in Justice Thomas's opinion, see *infra* note 305 and accompanying text.

Clause rights of free blacks.[3] In this context, the phrase "the privileges or immunities of citizens of the United States" was a label for Comity Clause rights, and the Fourteenth Amendment used this phrase to make clear that free blacks were entitled to such rights.

The incorporation thesis runs into problems already on the face of the Privileges or Immunities Clause. The Bill of Rights guarantees rights generally, without distinguishing citizens from other persons. In contrast, the Fourteenth Amendment sharply juxtaposes the privileges or immunities of "citizens" with the due process and equal protection rights owed to "any person." It therefore is not easy to understand how the Amendment's guarantee of the privileges or immunities of citizens can be understood to refer to the rights of persons protected by the Bill of Rights.[4]

What then was the Privileges or Immunities Clause doing when it guaranteed that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"? The answer lies in the nineteenth-century dispute about whether free blacks had the benefit of the Comity Clause. This clause assured that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in

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[3] According to the Comity Clause, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[4] *See* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 342 (2005) ("No satisfactory interpretation of the Fourteenth Amendment . . . can elide the distinction between citizens and persons . . . ."); Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 78 n.16 (1963) ("[T]he provisions of the Bill of Rights are not rights of citizens only but are enjoyed by non-citizens as well.").

Recognizing that the focus on citizens seems incompatible with incorporation, Professor Akhil Amar defends incorporation by proposing that noncitizens were not necessarily protected by the Bill of Rights: "Surely the fact that Americans may often extend many benefits of our Bill [of Rights] to, say, resident aliens—for reasons of prudence, principle, or both—does not alter the basic fact that these rights are paradigmatically rights of and for Americans citizens." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 170 (1998). A scholar attentive to the text, however, might recognize that the Constitution in 1789 and 1791, and the Fourteenth Amendment in 1868, carefully distinguished between citizens and persons. As Representative Bingham himself observed, "[t]he alien is not a citizen," and this was why "[y]our Constitution says 'no person,' not 'no citizen,' 'shall be deprived of life, liberty, or property,' without due process of law." CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866). Rather than focus on citizens, the Bill of Rights generally protects all persons enjoying the protection of the law, including all citizens, all lawfully visiting aliens in amity, most unlawfully present aliens in amity, and even some enemy aliens. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1977–78 (2009). It therefore is troubling to read that "Americans may often extend many benefits of our Bill [of Rights] to . . . resident aliens"—as if the application of the Bill of Rights beyond citizens were merely discretionary. In order to incorporate the Bill of Rights, Amar's analysis profoundly curtails its application.

Incidentally, the textual obstacle to incorporation cannot be explained away as an accident of drafting, for the men who proposed the Amendment clearly were attentive to the distinction between the rights of persons and the privileges and immunities of citizens. For details, see *infra* text accompanying notes 238–43, 252, 259–60.

the several States."[5] Many states, however, especially in the South, denied Comity Clause rights to free blacks—the justification being that only citizens of the United States were entitled to the benefit of the Comity Clause and that free blacks were not U.S. citizens. Opponents of slavery responded in kind, arguing that free blacks were U.S. citizens and so were entitled to the privileges and immunities secured by the Comity Clause. Thus, each side interpreted this clause to exclude or include free blacks on the basis of whether or not they were federal citizens. In these circumstances, opponents of slavery defended the Comity Clause rights of free blacks in terms of "the privileges and immunities of citizens of the United States." After the Civil War, the Fourteenth Amendment echoed this antislavery interpretation of the Comity Clause and secured it in the Constitution.[6]

The phrase employed by the Fourteenth Amendment's Privileges or Immunities Clause thus has a history—indeed, a genealogy—that clearly reveals its historical meaning. It will be seen that allusions to privileges and immunities could occur in different contexts with different meanings.[7] But only one combination of context, text, and meaning led directly to the Fourteenth Amendment, thereby revealing a historical genealogy that leaves the meaning of the Privileges or Immunities Clause unmistakable. Although this history has been largely forgotten, it was once a central element in the struggle against slavery and a foundation of the Fourteenth Amendment. And it had nothing to do with incorporation.

1. The Missing Evidence.—The incorporation thesis has seemed plausible because scholars have tended to focus either on too narrow a slice of evidence (which excludes what is essential) or on too broad a range of evidence (which conflates different contexts). In fact, although the relevant evidence comes from a wide array of sources, it arose in a specific context, in which "the privileges and immunities of citizens of the United States" had a very specific meaning.

Many scholars concentrate on too narrow a slice of evidence: the text of the Amendment and the debates about it in 1866 and 1868. Hoping for enlightenment from the drafting and ratification debates, these scholars sift through the speeches of congressmen and others, searching for passages

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[5] U.S. CONST. art. IV, § 2, cl. 1.

[6] This Article uses the term "antislavery" more for its convenience than its clarity. The privileges and immunities debate explored here concerned the rights of free blacks rather than of slaves, and this question often split Northerners, even those who shared a distaste for slavery. *See, e.g.*, Crandall v. State, 10 Conn. 339, 348 (1834), discussed in the text *infra* accompanying notes 104–07. But increasingly, opposition to interstate discrimination against free blacks became a core question for antislavery Americans. Slavery became an all-or-nothing battle, and in this context, although there remained some opponents of slavery who did not favor privileges and immunities for free blacks, the privileges and immunities of free blacks became prominent as a central point of dispute in the broader quarrel.

[7] *See infra* Part IV.A.

that might, perhaps, have alluded to incorporation.[8] Even most of the scholars who have questioned incorporation (such as Charles Fairman) have worked from the same evidence, picking through the debates for hints of what the drafters or ratifiers might have thought.[9] When those earlier Americans, however, discussed the Privileges or Immunities Clause, they

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[8] William Nelson observes: "Nearly all the scholarship dealing with the adoption of the amendment which is addressed to lawyers is based on a single set of source materials: the debates of Congress . . . ." WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 5 (1988) (footnote omitted). Nonetheless, he believes that "[i]t is even more important to ask new questions than to examine more sources." *Id.* at 6.

There is much learned scholarship finding incorporation in the debates, including MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 92–130 (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE]; JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 258 (1978); AMAR, *supra* note 4, at 163–80; Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1218–33 (1992); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295 (2009); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 58–63 (1993); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000) [hereinafter Curtis, *Historical Linguistics*]; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 3 (1996) [hereinafter Curtis, *Resurrecting*]; Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1406 (2009) [hereinafter Curtis, *The Klan*]; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 910–17 (1986); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1109 (1994).

[9] *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) [hereinafter Fairman, *Fourteenth Amendment*]. Even Fairman, however, conceded some partial incorporation. Charles Fairman, *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870–1892*, 30 B.U. L. REV. 49, 77 (1950) ("Congress, no doubt, . . . meant to establish some substantial rights even though the State might not itself have established them for its own citizens.").

Some scholars are mildly skeptical. *See, e.g.*, EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 117 (1990) [hereinafter MALTZ, CIVIL RIGHTS] (observing that incorporation has not been "proven beyond a reasonable doubt"); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 337 (1988); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1657 (2007) (concluding that the Clause is a riddle).

Others are more forcefully critical of incorporation. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 134–56 (1977); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 342–51 (1985); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1564, 1571–92 (1996); Stephen B. Presser, *Some Alarming Aspects of the Legacies of Judicial Review and of John Marshall*, 43 WM. & MARY L. REV. 1495, 1497 (2002).

In addition, there are scholars who argue that the Privileges or Immunities Clause was understood to establish equality, even among a state's own citizens. *See* NELSON, *supra* note 8, at 115–18; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992).

felt little need to explain a phrase that was widely understood. As a result, the scholars who narrowly rely on the debates from the 1860s have rarely found much clarity, let alone much agreement. They reach conflicting conclusions about incorporation, and many simply view the Privileges or Immunities Clause as a puzzle or mystery.[10]

Other scholars look to a wider range of evidence and, on this basis, confidently conclude that the Privileges or Immunities Clause incorporated the Bill of Rights, but their confidence rests on their assumption that privileges and immunities were understood in the same way in different contexts. For example, Michael Kent Curtis quotes abolitionists who argued in terms of "privileges and immunities" to defend their freedom of speech and the press in Southern states.[11] It will be seen, however, that these arguments for the rights of abolitionists, however, typically did not go beyond ordinary Comity Clause claims, and to the extent the arguments touched on something like incorporation, they were made in a different context and thus had a different meaning from the arguments that led to the Fourteenth Amendment's Privileges or Immunities Clause. Similarly, Akhil Amar quotes the abolitionist Joel Tiffany, who argued against slavery on the ground that all Americans enjoyed the privileges and immunities of U.S. citizens against both the federal and the state governments.[12] Again, however, it will become apparent that such arguments for privileges and immunities had a different context and meaning from the claims that led to the Privileges or Immunities Clause. Another incorporationist scholar, Kurt Lash, recognizes that "privileges and immunities" could be discussed in different contexts, but he then cuts across contexts by assuming that the phrase "privileges and immunities of citizens of the United States" was a "legal

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[10] Many commentators have thought the Clause puzzling. According to the Beards, the entire first article of the Amendment was "mysterious" and "cabalistic." 2 CHARLES & MARY BEARD, THE RISE OF AMERICAN CIVILIZATION 111–14 (Macmillan 1930) (1927). Seizing upon such assumptions to impute meaning where none was clearly discernable, Justice Jackson argued that "the difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case." Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring); *see also* NELSON, *supra* note 8, at 3–5 (noting "conflicting interpretations" and arguing that the uncertain meaning leaves judges free to develop incorporation). Gerald Gunther writes: "In no part of the congressional debates on the Amendment is there greater evidence of vagueness and inconsistencies than in the discussions of 'privileges and immunities.'" GERALD GUNTHER, CONSTITUTIONAL LAW 417 (11th ed. 1985). Perhaps most famously, Robert Bork analogized the Clause to an inkblot or Rorschach test. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990).

[11] MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY, 266–68 (2000) [hereinafter CURTIS, DARLING PRIVILEGE]; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 8, at 26–56; Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 20–25 (2009).

[12] AMAR, *supra* note 4, at 262–63. Incidentally, the nineteenth-century Americans who made claims for slaves and abolitionists in terms of privileges and immunities did not always distinguish between the privileges and immunities of state citizens and those of citizens of the United States.

term of art."[13] To be precise, he notes that, in treaties ceding territories to the United States, the federal government generally guaranteed federal rights to the inhabitants of these territories, assuring them that they would enjoy "the privileges, rights and immunities of citizens of the United States."[14] On this basis, Lash assumes that the Fourteenth Amendment's words "privileges or immunities of citizens of the United States" also generally referred to federal rights—apparently not recognizing that the Amendment actually differed from the cession treaties, using a different phrase to deal with a different problem in a different context.[15]

In contrast to the existing scholarship, the approach taken in this Article is neither so narrow nor so broad. On the one hand, the Article examines a much wider range of evidence than the debates from the late 1860s, and it thereby recognizes that those debates discussed an idea that was already widely familiar. On the other hand, rather than assume that all pre-1868 discussions of privileges and immunities matter for understanding the Fourteenth Amendment's Privileges or Immunities Clause, it focuses on the line of discussion that led directly to the adoption of this clause. The privileges and immunities of citizens of the United States were discussed in different contexts, in different ways, and with different meanings, and it is therefore essential to focus on the genealogy and meaning of the specific ideas that actually led to the Privileges or Immunities Clause.[16]

The privileges and immunities controversy that matters for understanding the Fourteenth Amendment can be observed in a line of evidence that has hitherto been largely ignored. Fortunately, Paul Finkelman has elegantly explored some of the pre-Civil War history of privileges and immunities, and this Article relies on his work.[17] But no scholar has traced the central genealogy of ideas that matter here—an evolution of ideas, from at least 1821 to 1866, that concerned the mobility of free blacks and that often was framed in terms of the privileges and immunities of citizens of the United States.[18]

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[13] Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1244, 1287 (2010). For further details, see *infra* text accompanying notes 154–56.

[14] Lash, *supra* note 13, at 1285.

[15] *Id.* at 1285–87. Similarly, Amar observes that the "rights, and privileges and immunities" of citizens of the United States could mean the rights held under federal law. AMAR, *supra* note 4, at 170.

[16] For some of the different contexts, phrases, and meanings, see *infra* Part IV.A.

[17] Paul Finkelman shows how mobility threatened slavery and how the resulting tensions soon overwhelmed the fragile structure of the Comity Clause. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 9 (1981). Also relevant, for the shift toward federal citizenship, is the work of Robert Kaczorowski, although his work assumes that this shift and the Fourteenth Amendment entailed incorporation. Kaczorowski, *supra* note 8, at 910, 913.

[18] The conclusion that the Privileges or Immunities Clause echoed the Comity Clause is not unfamiliar, but it rests mostly on the relatively thin foundation of the 1866 congressional debates. For example, Fairman alludes to the possibility of a Comity Clause reading, but apparently hesitates to

Indeed, the scholarship on the Fourteenth Amendment scarcely even recognizes the events and statements that provoked, popularized, and gave legal expression to the ideas that ended up in the Privileges or Immunities Clause. Although the first Missouri Compromise, in 1820, appears in much scholarship on the Fourteenth Amendment, the second Missouri Compromise, in 1821, is scarcely mentioned. Although *Corfield v. Coryell* gets discussed in anodyne and even celebratory fashion, its context in the second Missouri Compromise, and its racist implications for excluding blacks from privileges and immunities, are simply ignored.[19] Although *Dred Scott v. Sandford* in 1857 is recognized as important, the scholarship tends to dwell on the implications of the case for the first Missouri Compromise, thus distracting attention from what Justice Curtis, in his dissent, said about the second.[20] Furthermore, although the vague words of white legislators are parsed as if they were the Rosetta Stone of constitutional law, the public

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embrace it. Fairman, *Fourteenth Amendment*, *supra* note 9, at 56. The current scholarly attitude toward this position is almost one of incredulity:

> Scholars do not generally seem to have thought much about this issue, perhaps because it is so unlikely that a state would think of discriminatorily denying any Bill of Rights guarantees to out-of-state visitors. Think about it. Could it really be imagined that a state, under Article IV, could properly deny such travelers freedom of speech, or trial by jury, while maintaining such rights for its own citizens?

Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 195 (2009).

In contrast, Michael Kent Curtis takes the Comity Clause interpretation of the Privileges or Immunities Clause seriously, and his response to it is therefore particularly detailed and interesting. *See* Curtis, *Resurrecting*, *supra* note 8, at 44–67. His arguments against the Comity Clause interpretation, however, are misplaced.

The first argument is that "Republicans were deeply concerned about denials of free speech" and that under "the equality argument," a state "could deny basic rights if it denied them to all residents of the state also." *Id.* at 46–47. It is true that abolitionists and then Republicans were concerned about freedom of speech in Southern states, and it is true that Southern states could for some purposes wiggle out of guarantees of equality. But just because Republicans worried about free speech does not mean that they generally doubted the efficacy of equality guarantees or that they addressed this danger in the Privileges or Immunities Clause or, indeed, in any other constitutional guarantee. Although the free speech rights of abolitionists mattered, the rights of free blacks seemed far more central, and what free blacks needed was equality—equal protection within their own states and cross-jurisdictional equality when they went to other states.

Curtis's second argument is that the word "abridge" in the Privileges or Immunities Clause alluded to any diminishment of the relevant rights, not merely to discrimination. *Id.* at 47. In the abstract, this sounds significant, but it is, in fact, irrelevant to the argument here. The Comity Clause addressed interstate discrimination, and this Article argues that the Privileges or Immunities Clause barred states from diminishing or "abridging" Comity Clause rights.

Third, Curtis denies that the Privileges or Immunities Clause merely gave effect to a narrow reading of the 1866 Civil Rights Act. *Id.* at 50. This, however, is another irrelevant point, for this Article does not place the Privileges or Immunities Clause on the Civil Rights Act, but instead argues that the Privileges or Immunities Clause echoed another 1866 statute: Representative Shellabarger's Privileges and Immunities Bill. *See infra* Parts V.B–C, VI.A.

[19] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

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

statements of blacks about the privileges and immunities of citizens of the United States have been omitted from the scholarship, thus treating the blacks like invisible men. Even more astonishing is the neglect of the Privileges and Immunities Bill of 1866. Although the Bill recited the key phrasing that would appear three weeks later in the Fourteenth Amendment's Privileges or Immunities Clause, the Bill's significance has gone entirely unrecognized.[21] Indeed, it would appear that scholars of the Amendment have never even read the Bill. Finally, although two national movements in the 1870s proposed constitutional amendments incorporating the First Amendment, the implications for the Fourteenth Amendment are ignored. Overall, the scholarship thus offers a strange contrast: it scours debates, casual comments, and even private letters from 1866 and later to show the intent of the framers and ratifiers of the Privileges or Immunities Clause, but it fails to explore the most important public records relating to the Clause.[22]

This largely public evidence removes the uncertainty about "the privileges or immunities of citizens of the United States" and challenges the confident claims about incorporation. The phrase used in the Fourteenth Amendment was the label for a position that opponents of slavery had developed over the course of the prior half century—a position that concerned not incorporation, but the privileges and immunities to which citizens of the states were entitled under the Comity Clause. The Privileges or Immunities Clause was thus an almost literal restatement of a familiar antislavery position, and once this is understood, the mystery of the Clause comes to an end.

2. The Underlying Legal and Sociological Problems.—The historical meaning of the Fourteenth Amendment's Privileges or Immunities Clause may initially seem strangely redundant and poorly expressed. Why would the Fourteenth Amendment reassert the privileges and immunities already assured to state citizens by the Comity Clause? And why would it do so in terms of the privileges or immunities of citizens of the United States?

This sense of redundancy and misexpression is reinforced by the view that the *Slaughter-House Cases* rendered the Privileges or Immunities Clause meaningless. These cases, according to Justice Field's dissent, reduced the Clause to "a vain and idle enactment, which accomplished noth-

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[21] A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States, H.R. 437, 39th Cong. (1866). *See infra* Part V.B.

[22] A recent article summarizes the frustrations of seeking the framers' personal intent: "Unfortunately for historians attempting to learn more concerning the drafters' intent, no record of the Committee's debates exists, and 'extensive investigation of private correspondence by a legion of historians has unearthed only the most fragmentary evidence on the issue.'" Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1136 (2002) (quoting MALTZ, CIVIL RIGHTS, *supra* note 9, at 81).

For the contrast between the intent of framers and the intent, sense, or meaning of their legislative act, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 49–52, 57, 295–96 (2008).

ing."[23] Even Charles Fairman writes that, as a result, the Clause has "perform[ed] virtually no duty as an operative part of the Constitution."[24] This assumption has become ever more widespread, leading some scholars to pronounce that "everyone agrees the Court incorrectly interpreted the Privileges or Immunities Clause."[25] From this point of view, there is a "scholarly consensus" in favor of incorporation and against the *Slaughter-House Cases*.[26]

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[23] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).

[24] Fairman, *Fourteenth Amendment*, *supra* note 9, at 139.

[25] Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 627 (1994) (internal quotation marks omitted). *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, 195 (2004) (arguing that the Supreme Court "set aside" the "original meaning" of the Clause).

[26] *See, e.g.*, RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 292 (2008); Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. L. ISSUES 77, 151 (2009) (quoting Barnett).

Rather than criticize *Slaughter-House*, a recent article concludes that "[a] careful examination reveals nothing in *Slaughter-House* that is inconsistent with incorporation." Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102, 105 (2009). See, however, *infra* note 304, for the words of Justice Miller.

In support of its conclusion about *Slaughter-House*, that article argues that "[t]he anti-incorporation reading did not emerge until . . . three decades after *Slaughter-House*." Magliocca, *supra*, at 105. This argument, however, relies on very narrow evidence: the opinions of judges in the federal courts. Outside the courts, those who sought incorporation of First Amendment rights assumed that they needed an additional amendment. *See infra* Part VII. Moreover, newspaper and periodical literature shows that contemporaries understood *Slaughter-House* to have rejected incorporation. For example, a newspaper article noted that the opinion of the Court "was substantially a definition of State and National citizenship, with a separation of the rights which distinctively belong to each." *Another View of State Rights*, N.Y. DAILY TRIB., May 5, 1873, at 4. Incidentally, when incorporation was more widely demanded, such observations about *Slaughter-House* became widespread. For example, when speaking of the Fourteenth Amendment, a professor at the University of Virginia said that the Supreme Court in *Slaughter-House*, "instead of intimating for a moment that the rights and privileges secured under this amendment were those specified in the first eight amendments, specif[ied] others which, according to circumstances, may be regarded as the immunities and privileges intended." JAMES H. GILMORE, ARTICLES OF CONFEDERATION AND CONSTITUTION OF THE UNITED STATES, AND NOTES OF A COURSE OF LECTURES ON THE CONSTITUTION OF THE UNITED STATES 313 (1891). Similarly, Andrew McLaughlin noted that *Slaughter-House* rejected the proposition that the "'privileges and immunities of citizens of the United States' . . . include the restrictions in the first eight amendments." Andrew McLaughlin, *Mississippi and the Negro Question*, ATLANTIC MONTHLY, Dec. 1892, at 828, 835. For this point, at much greater length, with a citation to *Slaughter-House*, see J.I. CLARK HARE, AMERICAN CONSTITUTIONAL LAW 539 (1889).

One criticism of Justice Miller's opinion in *Slaughter-House* is that whenever he quoted the Comity Clause, he rewrote it to allude to "citizens of the several states" rather than, as in the Constitution, "citizens in the several states." LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 194–95 (1975); Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Incorporation*, 39 AKRON L. REV. 289, 299 (2006). Rather than deceptive misquotation, however, this probably was an attempt to clarify the meaning of the Clause after so many decades of reinterpretation and rewriting. For the rewriting, see *infra* text accompanying notes 181–83.

Yet the oddity of a redundant or meaningless amendment is largely a product of modern sensibilities. It arises, at the very least, from the assumption that the central question is incorporation and that anything else is lesser fare. It arises even more emphatically from a failure of imagination—a failure to recognize that, in 1866, the purpose of the Privileges or Immunities Clause was not to give blacks new rights, but to secure them in rights that, in theory, they already possessed. Comity Clause rights were already guaranteed, but this is not to say they were already enjoyed. Only by understanding this can one begin to recognize the nineteenth-century legal problem.

Put another way, the legal problem was not centrally about *what* was protected but about *who* was protected. When scholars assume that the Privileges or Immunities Clause incorporated the Bill of Rights, they are apt to think that the essential question is to determine what rights were considered privileges or immunities. And certainly among whites the question of what was protected had great salience. When free blacks, however, increasingly were excluded from Southern states, and thus were denied the privileges and immunities of local citizens, the question shifted. Both for blacks and for those who despised them, the primary issue now was not what was protected, but who was protected, and once one recognizes this, the seriousness of the Comity Clause question becomes inescapable.

As if the legal difficulty were not enough, it ultimately arose from a sociological problem. When the question was merely one of white mobility, the Comity Clause solved it by guaranteeing visiting citizens the privileges and immunities of local citizens. But when free blacks in the nineteenth century increasingly crossed state lines, the Comity Clause's solution collapsed under the weight of local prejudice. The Clause would further implode when slaveholders who traveled north with their slaves were told by Northern courts that they could not keep their property.[27] The point here, however, is that the interstate movement of free blacks had already begun to fracture the Comity Clause and that, in defense of this mobility, antislavery Americans came to interpret the Clause in terms of the privileges and immunities of citizens of the United States.[28] Under the Comity Clause, free blacks traveling south could claim the local rights enjoyed by whites, and

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[27] *See* FINKELMAN, *supra* note 17, at 9–13 (showing how comity broke down when, beginning in the 1830s, Southern slaveholders in Northern states were denied their right of property in their slaves). Although Finkelman focuses mostly on the claims of slaveowners and their slaves rather than those of free blacks, his argument generally supports the point here about the claims of free blacks. Incidentally, Finkelman notes that courts had difficulty maintaining the distinctions among transients, visitors, sojourners, and residents. *Id.* at 9. In this spirit, this Article casually speaks of travelers, visitors, and other mobile Americans without drawing distinctions among such persons.

[28] The attention to the Comity Clause claims by slaveowners has unfortunately distracted attention from the significance of such claims by, or on behalf of, free blacks. *See, e.g.*, *id.* at 280–81 (focusing on claims by slaveowners and only briefly discussing claims by free blacks); Lash, *supra* note 8, at 1146–49 (regarding claims by slaveowners).

this was intolerable to Southerners.[29] Put sociologically, the mobility and freedom of a modernizing society collided with a peculiarly stationary and restrictive local institution. When faced with this sort of contradiction, the Comity Clause, a mere paper solution, could not be very effective.[30] Modernization, in other words, had stimulated a struggle between local prejudice and federal rights of mobility, and the depth of this problem suggests why the Fourteenth Amendment's Privileges or Immunities Clause had to reassert what the Comity Clause had already guaranteed.

It thus makes sense that the Privileges or Immunities Clause concerned Comity Clause rights rather than incorporation. Blacks had little need for assurances of any particular substantive federal rights, let alone incorporation. But they had a great need for federal guarantees of voting, due process, and especially equality—both local equality and cross-jurisdictional equality. It therefore should be no surprise that advocates for blacks, including advocates for the Fourteenth Amendment, focused on these questions rather than on incorporation.

Nor should it be a surprise that, although the Comity Clause guaranteed the privileges and immunities of state citizens, the Fourteenth Amendment restored this guarantee in terms of the privileges and immunities of citizens of the United States. Southerners had avoided the Comity Clause's guarantee of interstate mobility and equality by denying that blacks could be citizens of the United States. In response, Northerners defended Comity Clause rights as the privileges and immunities of citizens of the United States. In effect, Southerners had turned the phrases "privileges and immunities" and "citizens of the United States" into terms of evasion. These were therefore the terms on which Northerners self-consciously took their constitutional stand.

3. A Pair of Conceptual Distinctions.—Conceptually, the evidence examined here points to distinctions that are incompatible with an incorporationist reading of the Privileges or Immunities Clause. The incorporation theory rests on the sweeping assumption that the privileges and immunities of citizens of the United States were the rights enumerated in the Bill of Rights—or perhaps, even more broadly, all rights guaranteed by the Constitution. The evidence, however, leads to more refined distinctions.

First, like the preexisting Constitution, the Fourteenth Amendment carefully distinguished between the rights of persons and the privileges and immunities of citizens. The leading advocates of the Amendment, moreover, emphasized this distinction.[31] Of course, from the perspective of in-

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[29] Slaveowners who took their property north did not ordinarily have to worry about citizenship issues when making Comity Clause claims, and their slaves did not usually rest their claims on the Comity Clause. Free blacks, however, depended on the Clause to protect them from states that sought to exclude or enslave them.

[30] For hints of this point, see FINKELMAN, *supra* note 17, at 9–13.

[31] *See id*.

corporation, the distinction seems incongruous, and it therefore usually gets left by the wayside. It is, however, essential, for it reveals how the Fourteenth Amendment, in guaranteeing the privileges or immunities of citizens of the United States, referred not to all rights that the Constitution secured to persons, but only to the privileges and immunities it assured to citizens.

Second, rather than grant rights abstractly, the U.S. Constitution protected rights by limiting government, and in so doing, it distinguished between limits on the federal government and limits on the states. Thus, whereas only the states could abridge the limits in Article I, Section 10, and Article IV, Section 2, only the federal government could abridge the limits in Article I, Section 9, and in the first eight amendments. As a result, although a state could abridge a right that consisted of a limitation on the states, it was difficult to conclude that it could abridge a right that consisted of a limit on the federal government. The Supreme Court addressed this question—one "of great importance, but not of much difficulty"—in *Barron v. Baltimore*, holding that "the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."[32] The incorporation theory supposes that the Privileges or Immunities Clause overrode this distinction. By contrast, this Article shows that when the Fourteenth Amendment prohibited states from abridging the privileges or immunities of citizens of the United States, it alluded to the privileges and immunities of citizens that the Constitution *secured against the states*, not those guaranteed against the federal government. In the abstract, the privileges and immunities of citizens of the United States included all rights secured to citizens, including not only Comity Clause rights but also the right to hold federal legislative and presidential office.[33] But of these rights, only the Comity Clause rights were limits on the states, and therefore only these were the sort of privileges and immunities of U.S. citizens that a state could abridge. The drafter of the Privileges or Immunities Clause, Representative John Bingham, nicely summarized this point. After quoting *Barron* and similar sources, he asked: "Why . . . should not the 'injunctions and prohibitions,' addressed by the people in the Constitution to the States and the Legislatures of States, be enforced by the people through the proposed amendment?"[34]

The evidence thus draws attention to some revealing conceptual points. The incorporation theory assumes that the Privileges or Immunities Clause concerned the Bill of Rights or, more generally, the rights guaranteed by the Constitution. The Clause and its history, however, suggest further distinctions, which require one to focus on the privileges and immunities of *citi-*

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[32] 32 U.S. (7 Pet.) 243, 247 (1833).

[33] For the restriction of legislative and presidential office to citizens of the United States, see U.S. CONST. art. I, §§ 2–3; art. II, § 1.

[34] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. John Bingham on Feb. 28, 1866).

zens and, in particular, on those that limited the states and so could be *abridged* by the states. These distinctions are important, for they show how the Privileges or Immunities Clause was written, and still can be read, without reference to incorporation.

4. Overview of the Argument.—This Article lays out the argument chronologically, in seven stages. Part I examines the privileges and immunities problem in an era in which it was mostly a question about whites—showing how the Comity Clause solved the problem of mobility in a federal system by guaranteeing to the citizens of each state the privileges and immunities of the citizens of the other states. Part II shows how this solution collapsed under the stresses of slavery, especially when Missouri attempted to evade the Comity Clause by excluding free blacks. It further shows how the congressional solution in the second Missouri Compromise refocused the debate in a way that led antislavery Americans to argue that free blacks enjoyed Comity Clause rights as citizens of the United States. Part III observes that Justice Curtis, in his 1857 dissenting opinion in *Dred Scott v. Sandford*, gave great prominence to the antislavery position. Part IV explains that already before the Civil War, Americans not only defended the Comity Clause rights of free blacks on the ground that they were citizens of the United States but also began to describe Comity Clause rights as "the privileges and immunities of citizens of the United States." Tellingly, the American who did this most prominently was Representative John Bingham, who would later draft the Fourteenth Amendment. Part V shows that Congress, in early 1866, considered a bill that would have protected Comity Clause rights on the ground that they were "the privileges and immunities of citizens of the United States." Part VI shows that, after the bill failed to pass because of constitutional objections, Congress instead adopted the bill's language in the Fourteenth Amendment. The Article thus traces the long-forgotten genealogy of the Privileges or Immunities Clause, and it thereby shows that this clause was designed to settle the dispute over the Comity Clause rights of free blacks.

Last but not least, the Article adds an epilogue, Part VII, on two national movements that demanded a sort of incorporation. In the years immediately following the adoption of the Fourteenth Amendment, these movements sought a separation of church and state, and because they assumed that the Constitution had not yet incorporated the Bill of Rights, they campaigned for amendments to apply the First Amendment to the states. Evidently, Americans were perfectly capable of an open and vigorous debate about incorporation. Yet rather than do this in 1866 and 1868, in response to racial problems, they did it in the next decade, in response to concerns about religion.

In sum, the Fourteenth Amendment's Privileges or Immunities Clause did not concern the rights of persons in general under the Constitution. Instead, it guaranteed the privileges and immunities of citizens of the United

States, which were understood to be the privileges and immunities that belonged to such citizens under the Comity Clause.

I. PRIVILEGES AND IMMUNITIES UNDER THE COMITY CLAUSE

The traditional privileges and immunities problem in international law was how to assure travelers from one jurisdiction of local rights when in another jurisdiction. Already in Europe, the solution lay in guarantees of "privileges and immunities." In America, the Comity Clause offered an unusually generous version of this protection, for the Clause generally secured each state citizen in the privileges and immunities of citizens of the other states. This protected at least white Americans in cross-jurisdictional rights. Among whites, therefore, the most salient Comity Clause question concerned not who was protected, but exactly what was protected.

A. The Privileges and Immunities Problem

The underlying problem arose from mobility. A citizen of one state who traveled in or through another state had reason to fear that the other state might deny him rights there. Although this was already a standard problem in Europe, it became especially significant in America, where individuals were relatively mobile, and where they traveled among states that were united in a federal system. In these circumstances, it was particularly important to assure citizens from any one state of local rights in other states. The Comity Clause of the U.S. Constitution therefore adopted a very comprehensive guarantee of privileges and immunities.

The phrase "privileges and immunities" could be used for many purposes. Seeking to understand this locution, scholars have explored the meaning of the separate words "privileges" and "immunities" and the combined words "privileges and immunities."[35] But of particular interest here, the phrase "privileges and immunities" was the conventional phrase with which European treaties assured that the subjects or citizens of one nation would enjoy local rights in another.[36]

In guaranteeing privileges and immunities, European treaties specified two variables: first, *who* had a right to the guaranteed privileges and immu-

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[35] These studies of the meaning of the words tend to argue that the words "privileges" and "immunities" were understood to include freedom of speech and the press and the other sorts of rights that are enumerated in the U.S. Bill of Rights. *See, e.g.*, Curtis, *Historical Linguistics*, *supra* note 8, at 1146–48; Curtis, *Resurrecting*, *supra* note 8, at 20; Curtis, *The Klan*, *supra* note 8, at 1406; Lash, *supra* note 8, at 1146–49. The studies also show that the words "rights," "liberties," "privileges," and "immunities" were often used "interchangeably." CURTIS, NO STATE SHALL ABRIDGE, *supra* note 8, at 64–65. Although such evidence is interesting, it is of doubtful relevance. What matters here is not the generic meaning of the words, but the meaning of a particular phrase in a particular context and how the phrase came to be adopted in a particular amendment.

[36] The treaties could also employ variants of the phrase, such as "privileges, rights and immunities." *See, e.g.*, *infra* note 154.

nities, and, second, *what* privileges and immunities were guaranteed. There was no predetermined answer to either question, for both depended on negotiations and ultimately on the wording of the treaty or other document in which the privileges and immunities were secured. With regard to who was protected, treaty clauses could focus on a nation's merchants, its natural subjects, or its subjects when in another nation. As for what privileges and immunities were protected, one solution was to enumerate them. A more practicable approach was to tie them to the same privileges and immunities granted to the peoples of other nations—this being a most-favored-nation provision.[37] Going even further, some nations reciprocally guaranteed each other's subjects the privileges and immunities of local subjects.[38]

This was the approach taken by American constitutional documents. The Articles of Confederation formed a sort of contract or treaty among confederated states. Under such an arrangement, which was more national than international, there was particularly good reason to assure visiting citizens of local rights and, moreover, to measure such rights by whatever the local state gave its own citizens:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.[39]

Conceptually, this was an elegant solution to the questions of who enjoyed local rights and what rights were included. The phrasing, however, was cumbersome.

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[37] For example, a treaty provided: "[T]he English merchants and other subjects of the King of Great Britain shall enjoy the same, and as great privileges and immunities, as to their being imprisoned, arrested, or any other way molested in their persons, houses, books of accounts, merchandizes and goods, within the extent of the states of the most renowned King of Portugal, as have been, or shall be for the future granted to any Prince or people in alliance with the King of Portugal." Articles of Peace and Commerce, Gr. Brit.-Port., art. XV, Jan. 29, 1642, *in* 2 A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS 257–58, 265 (George Chalmers ed., 1790).

[38] In their August 25, 1761 treaty, France and Spain reportedly guaranteed that "their natural born subjects are to enjoy all rights, privileges and immunities, &c. in both kingdoms." JOHN ALMON, AN IMPARTIAL HISTORY OF THE LATE WAR 332 (1763).

[39] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

Desiring simplicity, the framers of the Constitution retained only the basic concept employed by the Articles of Confederation.[40] They merely stated in their Comity Clause that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[41]

The rest of what had appeared in the equivalent clause of the Articles of Confederation probably seemed redundant. It will be seen that if a state denied some rights to paupers, vagabonds, and fugitives from justice, such rights were probably not among the privileges and immunities of citizens of the state, for they were not among the privileges and immunities enjoyed by citizens as such. The framers of the Constitution, therefore, did not need to exclude "paupers, vagabonds and fugitives" from access to the "Privileges and Immunities of Citizens in the several States."[42] Similarly, it was unnecessary to specify that the promised privileges and immunities were those of "free" citizens in the several states, for citizens were understood to be free, and therefore what a state did not give its slave population was irrelevant to what it owed the citizens of other states. As for rights of ingress and regress, commercial privileges, and freedom from unequal restrictions, these were apt to be considered among the privileges and immunities of the citizens of a state. Eventually, during the contest over slavery, some states would deny the right of ingress to black citizens of other states, thus nearly bringing the entire constitutional edifice to the ground. But at least among whites, such details about what was guaranteed, although occasionally a source of difference, were not a source of danger.

B. Three Conceptions of What Was Protected

When Comity Clause disputes arose from the claims of white Americans, the most salient question was *what* was protected. The conflicting visions of what was protected are not the main focus of this inquiry, for in the nineteenth century, amid the struggle over slavery, the more central question would become *who* was protected. This would therefore be the focus of the Fourteenth Amendment's Privileges or Immunities Clause. Nonetheless, the question of *what* became central in the debates about *who*, and it is therefore important to understand that there were at least three different conceptions of what was protected.[43]

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[40] In a central drafting document from the 1787 Convention, the Committee of Detail explained that it was desirable "[t]o use simple and precise language, and general propositions, according to the example of the constitutions of the several states." Edmund Randolph, *Draft Sketch of Constitution*, *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (James H. Hutson ed., 1987).

[41] U.S. CONST. art. IV, § 2, cl. 1.

[42] *Id.*

[43] Of course, even among whites, there were some doubts as to who could claim the privileges and immunities of the citizens of a state. Such questions arose, for example, when Massachusetts in 1785 contemplated a statute denying the privileges and immunities of its citizens to Tories who had fled to join the British but later returned to other states and then, after the war, came back to Massachusetts.

These different approaches had to reconcile an underlying tension between national and local interests. On the one hand, from the national perspective, a visitor needed and deserved a broad range of local rights. On the other hand, from the state point of view, he could not justifiably expect every sort of local right enjoyed by every sort of local citizen. For example, imagine that a New Yorker spent a week in Ohio, including the day when that state held its elections; moreover, imagine that he happened to spend all his money before the end of the week. This improvident New Yorker surely did not have a right to poor relief from Ohio, let alone a right of suffrage in Ohio's elections, for this would jeopardize the interests of the state and its citizens. It was thus apparent that although a visitor enjoyed the rights of local citizens, he could not be understood to have all of their rights.[44]

This tension gave rise to the three basic conceptions of what rights were protected by the Comity Clause. Each conception had its drawbacks—and the first two posed particularly significant difficulties—but all three approaches to *what* was protected need to be understood in preparation for understanding the question of *who* was protected.

1. Delaying Access.—One solution was to delay access to some rights. From this perspective, the privileges and immunities of citizens could be defined very broadly—even so broadly as to include any right that

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Many legislators doubted the constitutionality of this measure under the Articles of Confederation, and when the question was put to the justices of the Massachusetts Supreme Judicial Court, they gave an advisory opinion:

> [T]hat all Persons, who *are* or *shall be* naturalized, by any State in the Union, from any Class or denomination of Aliens, *are* by the Confederation, *Considered* as Intitled to all the priviledges, and immunities of *free Cityzens* in the several States; and of Course in this Commonwealth whenever they shall come to reside within the same.

Opinion of Justices of the Supreme Judicial Court on an Article of the Confederation (June 22, 1785) (docketed Oct. 19, 1785), MSA, Senate Documents, Rejected Bills, 1785, No. 344, Box 11. For further details, see HAMBURGER, *supra* note 22, at 597–600.

In another eighteenth-century decision, *Bayard v. Singleton*, the North Carolina judges seem to have come close to assuming that the Comity Clause not merely gave visitors the rights of citizens, but required that they be deemed citizens for some purposes. A North Carolina statute (which protected purchasers of confiscated Tory lands) barred the plaintiffs from enjoying a jury trial, and the judges held that the enactment violated the North Carolina Constitution. The plaintiffs, however, were from New York, and the judges therefore had to consider the privileges and immunities question. According to a newspaper, they held that "[t]hese plaintiffs being citizens of one of the United States, are citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly." Bayard v. Singleton (N.C. Super. Ct. 1787), *as reported in* Correspondence (Newbern, June 7), VA. INDEP. CHRON. (July 4, 1787). Although this may have been only a compressed account of what the judges said, the judges themselves may have used the reported phrasing. Certainly, the Massachusetts Supreme Court said in 1827: "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 . . . ." Abbot v. Bayley, 23 Mass. (6 Pick.) 89, 91 (1827).

[44] Kurt Lash has noted that the Comity Clause could not have protected a visitor in all local rights, although on the assumption that there was rough agreement on the solution of limiting rights. *See* Lash, *supra* note 13. In fact, this was but one of at least three different solutions.

a state conferred on any of its citizens in any circumstances. So expansive a definition was plausible, however, because it was combined with a restriction on when a visitor could enjoy such rights. As explained by Senator John Burrill of Rhode Island, "Citizens of one State were entitled to the rights of citizens of all the States; yet the different States exercised the power of prescribing certain probationary rules to those coming from another State, to entitle them to all the privileges."[45] Or, as put by the justices of the Massachusetts Supreme Court, the Comity Clause "is necessarily limited and qualified, for it cannot be pretended that a citizen of Rhode Island coming into this State to live, is *ipso facto* entitled to the full privileges of a citizen, if any term of residence is prescribed as preliminary to the exercise of political or municipal rights."[46]

This sort of waiting period for access seemed particularly important for the right of suffrage. Senator Burrill broadly understood the privileges and immunities of citizens to include suffrage, and he made this practicable by suggesting that a state could require visitors to have stayed for a probationary period before being allowed to vote:

> If a citizen of Massachusetts removes to another State, he cannot vote as soon as he enters it—a certain residence is required of him—and the people of Missouri were competent by law to impose a residence of one or more years on a citizen going there, to entitle him to all the privileges of citizens of the State.[47]

Such an approach avoided the difficulty of deciding what rights were not guaranteed by shifting the question to the probationary rules delaying access to them.

Yet there were problems in opening up the definition of the protected privileges and immunities and then cutting back on access—risks that are well illustrated by the assumption of Senator Burrill and others that suffrage was among the guaranteed privileges and immunities. Many American men in the 1820s—notably, in Virginia—were demanding that they be allowed equal suffrage, regardless of property qualifications. Not surprisingly, therefore, suffrage could seem to be among the privileges and immunities of citizenship. But so broad a definition of the privileges and immunities of

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[45] 37 ANNALS OF CONG. 47 (1820) (statement of Sen. Burrill).

[46] *Abbot*, 23 Mass. at 91–93. Immediately prior to the statement quoted above in the text, the justices said:

> 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 such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized.

Id. at 91–92.

[47] 37 ANNALS OF CONG. 47 (1820).

citizenship was poorly thought out. It suggested that visiting citizens of other states acquired voting rights in a state not because they eventually became its citizens, but rather because they were visitors who satisfied the probationary rules. It thereby also implied that a mere visitor who lingered in a state long enough to satisfy the probationary period, but without intent to become a resident or citizen, could acquire the right to vote. Yet it was improbable that the Comity Clause could be understood to require states to give suffrage to visitors who had no intent to become citizens or permanent residents. Another approach might therefore seem necessary.

2. Limiting the Definition to Fundamental Rights.—A second solution was not to delay access to the protected privileges and immunities, but to limit their definition. Whereas the first approach could assume that the protected privileges and immunities included any of the rights that might be available in any circumstances to any of a state's citizens, the second approach confined the guaranteed privileges and immunities to such rights as were "fundamental." For example, in *Corfield v. Coryell*, Justice Bushrod Washington asked, "what are the privileges and immunities of citizens in the several states?"[48] He answered that he felt "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."[49]

Justice Washington, however, soon found himself in trouble, for even while restricting the definition of the protected privileges and immunities, he took too broad a view of them. When he listed "these fundamental principles" that belong of right to the citizens of all free governments, he began with an array of rights that usually were open to all citizens, and because it made sense that these would be shared with visitors, he initially encountered no difficulty.[50] He ended, however, with "the elective franchise."[51] This seemed to him fundamental, but it was odd to say that a state had to share this right with all visitors. Perhaps, therefore, Justice Washington should have paused before famously commenting that the enumeration was "more tedious than difficult."[52] In reality, suffrage in a state was not ordinarily enjoyed by the women, minors, and blacks who were its citizens, let

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[48] 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

[49] *Id.*

[50] *Id.* at 551–52.

[51] *Id.* at 552.

[52] *Id.* at 551. According to a 1797 case on the Comity Clause, "It seems agreed . . . by the counsel on both sides, that . . . it does not mean the right of election, the right of holding offices, the right of being elected." Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797). By the early nineteenth century, however, equal suffrage had come to seem so important that judges such as Bushrod Washington came to assume it was too fundamental to be omitted. Incidentally, the court in *Campbell* also noted that "[i]t seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one." *Id.*

alone by mere visitors who were not citizens. Accordingly, like Senator Burrill, Justice Washington found himself stumbling over suffrage. He therefore hastened to explain that he meant "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised."[53]

Evidently, although Bushrod Washington began by narrowing the definition of the protected privileges and immunities to those that were "fundamental," this was sufficiently broad that he still ended up with an awkwardly expansive a view of privileges and immunities. Therefore, despite his best intentions, he ultimately found himself in the same position as Senator Burrill, who had to delay access. At least, however, Washington started on a different conceptual path—one that narrowed the definition of the protected rights.

The difficulty with both approaches was the Comity Clause itself, which bluntly stated that "[t]he Citizens of each State" were "entitled to all Privileges and Immunities of Citizens in the several States"—thus leaving little room for restriction, either by delayed access or by limited definition.[54] At least one of the two approaches seemed necessary to make the Comity Clause practicable. Yet each, from its own angle, cut into what the Comity Clause apparently guaranteed.

On the one hand, the delayed access was problematic because the Comity Clause secured visitors from the very moment they entered a state. It was therefore unclear how the protected privileges and immunities could be truncated by "probationary rules" or other barriers to access. Nor was it clear how any such waiting period could apply to only some of the guaranteed privileges and immunities. A waiting period could not apply to most of the privileges and immunities, and if it applied only to some privileges and immunities, such as suffrage, did this mean that there were two layers of protected rights—some secured absolutely and others only contingently?[55]

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[53] *Corfield*, 6 F. Cas. at 552.

[54] U.S. CONST. art. IV, § 2, cl. 1.

[55] The incongruity of this position becomes especially clear when one realizes that the rights it rendered contingent were those that seemed particularly important or fundamental. As early as 1785 (in defense of a visiting Frenchman, the Chevalier de Longchamps), an anonymous writer argued: "The citizens are members of the civil society; and, according to our constitution, a year's residence is necessary to qualify one for the important privileges. The inhabitants and subjects, as distinguished from citizens, are strangers who are permitted to settle and stay in the country." A Citizen, *For the Chronicle of Freedom*, INDEP. GAZETTEER (Phila.), Feb. 5, 1785, at 2. Along similar lines, the Massachusetts Supreme Court in the 1820s cautioned that not all rights were immediately available under the Comity Clause: "[T]his privilege is qualified and not absolute," for there had to be qualifications on the exercise of "political or municipal rights." Abbot v. Bayley, 23 Mass. (6 Pick.) 89, 91–92 (1827). Thus, visitors "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." *Id.* at 92–93 (holding that a *feme covert*, who had been expelled by her husband, and who came to Massachusetts and main-

On the other hand, the limited definition of the protected privileges and immunities was awkward, for the Comity Clause guaranteed "all" privileges and immunities of citizens. It was therefore unclear how such rights could be confined to those that were "fundamental." Indeed, the very inflexibility of such a formulation was incompatible with the diversity and flexibility of state laws. It will be recalled that Bushrod Washington felt "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."[56] But this would have turned the Clause into a strangely rigid and narrow straitjacket—rigid because it would require each state to provide the same, inelastic range of liberty, and narrow because it would guarantee only what was fundamental, thus leaving visitors without equality in other local rights.

In fact, if anything was fundamental in American government, it was that different states protected different rights under their laws and that each needed the flexibility, by legislation or constitutional amendment, to adjust such rights. On this assumption, the Comity Clause ensured equality for out-of-state citizens, without limiting the freedom of each state to make its own choices about the rights it protected. The fundamental rights approach to the Comity Clause was therefore singularly inapt, for it limited both the equality and the freedom and thus would have defeated much of what the Comity Clause accomplished.

3. Protecting the Privileges and Immunities of Citizens as Such.—In light of what has been seen of the two approaches considered thus far, it is hardly surprising that there was a third, which did not encounter so many difficulties. At least an initial hint about this third approach is essential, for it eventually acquired prominence in the leading dissent in the *Dred Scott* case, when Americans had turned from disputes about what was protected to controversies about who was protected.

In this third approach, the Comity Clause secured visitors in the privileges and immunities of citizens as such—that is, in the privileges and immunities that local individuals enjoyed as citizens. For example, in Connecticut, the rights to own property and to sue and be sued were among the rights generally enjoyed by citizens, and these rights therefore had to be available under the Comity Clause to citizens of other states. In contrast, the right to receive poor relief and to vote belonged to only some citizens. Because these rights did not belong to citizens as a whole, but only, respec-

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tained herself as a single woman, while her husband married and cohabitated with another woman and remained a citizen and resident of another state, was entitled to sue as a *feme sole*).

Such views were caustically summarized in an opinion given during the Civil War by Attorney General Bates. Writing about privileges and immunities, he observed that some writers loosely "suggest, without affirming, that there may be different grades of citizenship, of higher and lower degree, in point of legal virtue and efficacy." Citizenship, 10 Op. Att'y Gen. 382, 388 (1862).

[56] *Corfield*, 6 F. Cas. at 551.

tively, to poor citizens and adult male citizens, they did not have to be available to citizens of other states. Of course, all citizens had the potential to be eligible for poor relief, but when considered merely as citizens—not the subset of citizens who met the additional qualifications required for poor relief—they could not be said to have a right to such relief, let alone suffrage. These were not privileges and immunities of citizens of Connecticut.[57]

From this perspective, a state could adopt whatever degree of freedom and equality, or constraint and discrimination, it wished for its own citizens. But a state could discriminate against visitors only if it also discriminated against some of its own citizens. If it allowed rights to its citizens merely on the basis of their citizenship, it had to allow such rights to visitors.

4. General Rights Rather than Particular Rights.—Incidentally, each of the three visions of what was protected was open to further refinement. One additional consideration was the old distinction between general rights and particular rights. In the context of this traditional distinction, the protected privileges and immunities included only general rights.

The common law had long differentiated particular and general rights. The former were the rights of particular persons in particular matters. The latter were the shared rights of natural subjects or the people as a whole—in other words, aspects of the freedom or liberty enjoyed by such subjects in general.[58] In concrete terms, the difference was that between the right to a piece of property and the more abstract right of owning property. Although the Comity Clause did not speak of "subjects," but instead focused on "citizens," it could be understood to echo the traditional notion of the general rights of subjects, the effect being to exclude particular rights.[59]

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[57] On the other hand, the Connecticut laws that sought to exclude paupers and vagabonds from other states were in tension with the Comity Clause. For this point, see REPORT OF THE ARGUMENTS OF COUNSEL, IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT, BEFORE THE SUPREME COURT OF ERRORS, AT THEIR SESSION AT BROOKLYN, JULY TERM, 1834, at 13–14 (Bos., Garrison & Knapp 1834) [hereinafter PRUDENCE CRANDALL].

Just how carefully this third understanding of the Comity Clause sorts out different rights can be observed in the right to contract, including the right to enforce a contract. Unlike the right to vote, which did not belong to minors, the right to enter into contracts belonged to all persons and hence all citizens, and it thus apparently had to be available to visitors. At first glance, one might think that the Comity Clause fails to distinguish the right to contract from the right to vote because a minor or other legally incompetent person could not make a contract for himself any more than he could vote. Yet even persons legally incompetent to contract for themselves could do so through a guardian or by subsequent ratification. The right to contract thus belonged to citizens as a whole, even if some of them could not exercise the right by themselves. Contracting was therefore among the "privileges and immunities of citizens in the several states."

[58] For example, in an early seventeenth-century English case, the Court of Common Pleas distinguished between "particular privileges" and the more "general liberties of the people." Norris v. Staps, (1616) 80 Eng. Rep. 357 (C.P.) 358; Hob. 210, 211.

[59] The question as to whether "citizens" included all natural subjects need not be pursued further here, but note that this perspective was concisely summarized in later litigation: "The term, *citizen*, is,

Justice Washington seems to have understood this point in *Corfield v. Coryell*. He denied the claim of visitors to gather oysters in New Jersey on the ground that the gathering of oysters was not a general right but a particular property right that happened to be held in common. As he summarized, it was "the common property of the citizens of such state," as if they were "tenants in common."[60] Accordingly:

> [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.[61]

Although Washington had spoken boldly of fundamental rights, this narrower distinction between particular and general rights appears to have been the basis of his holding—oyster-gathering being a particular right, a right in particular property, even if ownership was widely diffused.

There will be occasion to return to these three basic understandings of the Comity Clause, particularly the second and third approaches. For now, however, it is enough to observe that the privileges and immunities problem was one of assuring cross-jurisdictional rights to a mobile population, and that in disputes involving whites, the question tended to focus on *what* was protected. In contrast, when blacks sought privileges and immunities under the Comity Clause, the question would become *who* was protected.

II. THE SECOND MISSOURI COMPROMISE

In 1821, in Missouri, racial prejudice broke down the Comity Clause's solution to the problem of mobility in a federal system.[62] Increasing black mobility and Southern intransigence were already prompting a shift in the focus of privileges and immunities disputes from *what* to *who*. Events in Missouri, however, rapidly accelerated this process, prompting a debate that would lead ever more Americans to understand the Comity Clause in terms of the privileges and immunities of citizens of the United States.

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under a republican government, what the term *subject* is under a monarchy: it embraces high and low—rich and poor—male and female—white and colored—a general term which includes the whole republican family—all who are free and live under the same government, and owe to it permanent allegiance—subject to its duties—entitled to its privileges." PRUDENCE CRANDALL, *supra* note 57, at 25. The same sort of issue arose in questions about citizenship for purposes of jurisdiction under Article III of the U.S. Constitution.

[60] *Corfield*, 6 F. Cas. at 552.

[61] *Id.*

[62] The leading work on the collapse of comity is FINKELMAN, *supra* note 17, at 9, but this focuses mostly on unfree persons taken to free states. In contrast, it was the mobility of free blacks that first elevated the question to a national crisis and that mattered for the development of ideas about the privileges and immunities of citizens of the United States.

A. Race and the Collapse of the Comity Clause

In 1820, Missouri asked to be admitted to the Union with a constitution that would have required its legislature to bar free blacks from entering the state. Missouri's attempt to exclude free blacks focused national attention on the question of who could enjoy the privileges and immunities guaranteed by the Comity Clause, and Missouri thereby provoked responses, in Congress and then outside, that would evolve into what would become part of the Fourteenth Amendment. It is a story that was utterly familiar in the nineteenth century, but it has been almost entirely forgotten, thus leaving the Fourteenth Amendment's Privileges or Immunities Clause bereft of its history.

Missouri was located relatively far to the north, and antislavery Northerners were loath to concede a place for slavery there, let alone in the rest of the Louisiana Territory. On the other side, Southerners demanded admission for Missouri as a slave state and would soon also demand this for other parts of the Louisiana Territory. Much bitter debate ensued, until Congress, early in 1820, agreed to admit Missouri as a slave state but otherwise prohibited slavery in the Louisiana Territory above the latitude of 36 degrees, 30 minutes north.[63] This settlement reified the line between north and south but at least put off the danger of civil war.

It was not this first Missouri Compromise, however, but the second, in 1821, that matters here. After the adoption of the first compromise, when Missouri sought admission to the Union, the territory in 1820 submitted a constitution that generally protected slavery. Moreover, the proposed constitution stated that it shall be the "duty" of the General Assembly "as soon as may be, to pass such laws as may be necessary . . . [t]o prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever."[64] Although Missouri's general provisions preserving slavery did not obviously violate the U.S. Constitution, the requirement that the legislature exclude "free negroes and mulattoes" seemed to many Northerners to invite a breach of the Comity Clause. Indeed, by requiring that the legislature keep such persons from entering Missouri "under any pretext whatsoever," the Missouri Constitution seemed directly to demand that the legislature ignore the U.S. Constitution.[65]

The drafters of the Missouri Constitution were not unsophisticated. They therefore avoided a simple rejection of the U.S. Constitution. They understood that under the Comity Clause, Missouri could not deny the privileges and immunities of its citizens to free citizens of other states when they came to Missouri. Therefore, rather than directly require the state to deny the privileges and immunities of its citizens to free blacks from other

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[63] Missouri Enabling Act, ch. 22, §§ 1, 8, 3 Stat. 545, 548 (1820).

[64] MO. CONST. of 1820, art. III, § 26.

[65] *See* ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH 110 (2007).

states, the drafters merely sought to bar entry to free blacks and used the state's constitution to require the legislature to do this. In other words, their constitution attempted to avoid the privileges and immunities problem by keeping visiting blacks from coming within the scope of Missouri's duties to the citizens of other states. After the Articles of Confederation had recited its Comity Clause, it had carefully added that "the people of each State shall have free ingress and regress to and from any other State."[66] The U.S. Constitution, however, had dropped these words, and Missouri therefore had at least a plausible claim that the Constitution allowed it to prohibit "free ingress and regress."

Many Northerners, however, had little doubt that Missouri's Constitution, by requiring its legislature to bar free blacks, violated the Comity Clause of the U.S. Constitution. For example, Senator Burrill thought that the offending clause of the Missouri Constitution was "entirely repugnant to the Constitution of the United States."[67] He explained that "[i]t prohibits a very large class of persons from entering the State at all," and that "[e]ven if [they were] soldiers of the United States, people of this proscribed class cannot enter Missouri without violating the constitution of the State."[68] Burrill's focus on black men in the federal military was very apt, for unlike other members of their race, they might have not merely a right but a duty to travel to Missouri. The Missouri Constitution, however, reduced their duty to yet another "pretext" for entering the state. As Burrill explained, "[i]t was well known . . . that we have colored soldiers and sailors, and good ones, too, but under no pretext, whether of duty or any other motive, can they enter Missouri."[69] Burrill "did not suppose if people of this description, in the service of the country, should enter the State, it would be attempted by the State authorities to exclude them; but it was sufficient . . . to show the unconstitutionality of the clause."[70]

The question thus centered on the right of ingress. Missouri could have made the question more complicated by arguing that free blacks were not, or perhaps even could not be, citizens of the other states, for it was

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[66] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1. In its entirety, it read:

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

Id.

[67] 37 ANNALS OF CONG. 47 (1820).

[68] *Id.*

[69] *Id.*

[70] *Id.*

widely understood that "[g]reat difficulty seemed to arise in deciding the question, as to what constituted citizens in the different States."[71] The Missouri Constitution, however, did not rest on this question. In the alternative, Missouri could have made some use of what Burrill called "the power of prescribing certain probationary rules to those coming from another State"—that is, delays on access to privileges and immunities—but this too was "was a question" that Missouri "did not touch."[72] On the contrary, the people of Missouri "avoided it altogether" by declaring "that a certain class shall not come into their State at all, even though they may be citizens of other States, enjoying all the privileges of such."[73] Thus, although it would soon be much debated as to whether free negroes and mulattoes were citizens of their own states, the immediate question in 1821 was one of entry: "[H]ad the people of Missouri the Constitutional right to prohibit from entering that State a large class of persons who were[, for example,] citizens of the Commonwealth of Massachusetts?"[74]

B. The 1821 Congressional Resolution

Congress responded to Missouri's assault on the Comity Clause by declaring that the Clause's assurance of privileges and immunities was a right under the U.S. Constitution. Although Congress did not yet insist that the guaranteed privileges and immunities were the privileges and immunities of citizens of the United States, it was taking what would later seem to be the first step in that direction.

Northerners began by proposing that Missouri be denied admission to the Union until it cured the defect in its constitution. Senator Burrill, for example, insisted that "[a]s Congress 'might admit new States' into the Union, it was clear to his mind that Congress must determine the conditions on which they should come in."[75] This was a firm moral stand, but it descended into glib self-deception when Burrill added that "[i]f the constitution were not accepted . . . it would be easy to obviate any difficulty by passing an additional act authorizing the people of Missouri to form another convention and revise their constitution."[76] Southerners would view any rejection of the Missouri Constitution as an affront, and therefore, while Northerners demanded repudiation of the Missouri Constitution, Southern-

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[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 48.

[75] *Id.* at 49.

[76] *Id.* The views of Northern congressmen reflected popular Northern opinion. For example, the Vermont legislature submitted resolutions to Congress complaining that the Missouri Constitution "contains provisions to prevent freemen of the United States from emigrating to and settling in Missouri, on account of their origin, color and features" and that this was "repugnant to the Constitution of the United States." *Id.* at 80 (resolutions of the Vermont legislature on November 15, 1820).

ers made passionate threats that such an action would split the nation. The problem came close to unraveling the first Missouri Compromise, and Congress therefore had to consider how to reject the offending clause of the Missouri Constitution without rejecting Missouri.

A solution became possible because Southerners and Northerners took positions on slightly different issues. Southerners insisted that Missouri be admitted without delay and without any assertion that the Missouri exclusion clause violated the U.S. Constitution. But they were willing to leave room for a difference of opinion, as long as it was stated abstractly as a matter of constitutional interpretation. On this basis, Northerners retreated from a direct condemnation of the Missouri Constitution and took solace in an assertion of interpretative principle.[77] The result was that Congress accepted Missouri with its proposed constitution, but with the caveat that the clause excluding free blacks should not be construed to bar citizens of the states from any of the privileges and immunities guaranteed to them by the U.S. Constitution.

In the spring of 1821, after profound fears of sectional discord, this became the second Missouri Compromise:

> That Missouri shall be admitted into this Union on an equal footing with the original States, in all respects whatever, upon the fundamental condition, that the fourth clause of the twenty-sixth section of the third article of the constitution submitted on the part of said State to Congress, shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the States in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States: *Provided*, That the Legislature of said State, by a solemn public act, shall declare the assent of the said State to the said fundamental condition, and shall transmit to the President of the United States, on or before the fourth Monday in November next, an authentic copy of the said act; upon the receipt whereof, the President, by proclamation, shall announce the fact; whereupon, and without any

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[77] Southerners felt they got the better of the Northern states. Later, during the debates on what became the Kansas–Nebraska Act, Senator Badger of North Carolina recalled how Missouri became a state:

> Then how was the State got in at last? By a marvellous contrivance . . . . I really think it is one of the most remarkable species of humbuggery that ever was palmed off on any legislative body, composed of people who had attained the age of maturity—I do not say those who had come to the age of twenty-one, but those who had passed fourteen, if any such ever acted as legislators.

SPEECH OF THE HON. GEORGE E. BADGER, OF NORTH CAROLINA, IN THE UNITED STATES SENATE, FEBRUARY 16, 1854, ON THE NEBRASKA BILL 7 (Sentinel Office 1854). After quoting the second Missouri Compromise, Badger explained: "In other words, Missouri was admitted upon the 'fundamental condition' that the State should agree that her constitution was not paramount to the Constitution of the United States. That is the whole of it." *Id.* This was, he admitted, "absolute nonsense, but I suppose it was the best that could be done." *Id.* And when a fellow senator asked, "Did not Mr. Clay draw up that provision?" Badger answered: "I recollect hearing Mr. Clay once . . . say, in substance, that he laughed in his sleeve at the idea that people were so easily satisfied." *Id.* at 8.

> further proceeding on the part of Congress, the admission of the said State into the Union shall be considered as complete.[78]

In June, the legislature of Missouri adopted a statute that met this condition—although with a bristling protest that "the congress of the United States have no constitutional power to annex any condition to the admission of this state into the federal union."[79] Neither side was really content, but by the end of the summer President James Monroe proclaimed that "the admission of the said State of Missouri into this Union is declared to be complete."[80]

The congressional resolution may seem in retrospect to have been merely a weak restatement of what was already guaranteed by the Comity Clause. It may also seem in retrospect to have been tautological, for it accomplished nothing conceptually, other than to recognize that the privileges and immunities owed by a state to the citizens of other states were privileges and immunities guaranteed by the Constitution. This, however, was the justification for Congress's enforcement of the Comity Clause against Missouri. It therefore was of some significance to say that the privileges and immunities protected by the Clause were not merely horizontal claims among states but also vertical claims under the Constitution.

C. The Shifting Controversy: Were Free Blacks Citizens of the United States?

Although the second Missouri Compromise was significant for what it said, it was even more significant because it forcefully refocused the debate about privileges and immunities on the question of federal citizenship. In prior disputes about the Comity Clause, it had been possible to put aside the question of whether free blacks were citizens of the United States. After the adoption of the second Missouri Compromise, however, this question about federal citizenship increasingly became inescapable, thus prompting antislavery Americans to take up the position that would eventually become the Fourteenth Amendment's Privileges or Immunities Clause.

After the second Missouri Compromise, many states (including Missouri) still attempted to evade their duty under the Comity Clause by barring entry to free blacks.[81] The difference was that these states now needed to explain why such measures were not unconstitutional. Most Southerners had previously been content to deny blacks the privileges and immunities of

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[78] Res. of Mar. 2, 1821, 3 Stat. 645. For Clay's proposal of the resolution for the joint committee, see 37 ANNALS OF CONG. 1228 (1821).

[79] Act of June 26, 1821, 1825 Mo. Laws 68, 69.

[80] 37 ANNALS OF CONG. 1786 (1821).

[81] For some of the attempts by states to bar entry by free blacks, see EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 37 (2003). For Missouri's evasion of the condition of its statehood in 1825 and its outright violation of it in 1847, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 124 (1977).

local citizenship on grounds other than citizenship.[82] Congress had made clear, however, that the exclusion of citizens of other states was a violation of the Comity Clause. Southerners therefore had to explain why free blacks did not have a right to the privileges and immunities guaranteed by that Clause. They could have argued that free blacks were not citizens of their states, but if state citizenship was a state question, Southerners could not make this argument against the blacks from states that gave them citizenship.

The dispute thus almost inevitably shifted to a debate about who was a citizen of the United States. Unable to rely on arguments about the state citizenship of blacks, Southerners had to take the rather aggressive position that Comity Clause rights belonged only to citizens of the United States and that free blacks did not enjoy such citizenship. Northerners responded that free blacks were U.S. citizens and that they therefore had a right to the privileges and immunities protected by the Clause. The second Missouri Compromise thus triggered the development of the position that would eventually be vindicated in the Fourteenth Amendment.

Southerners were not unreasonable in thinking that the Comity Clause established a sort of general citizenship, but they were on weaker ground when they suggested that only federal citizens had the benefit of the Clause. Whatever general citizenship the Clause implied, it did so by giving assurances of privileges and immunities to state citizens. Northerners, however, accepted the supposition that Comity Clause rights belonged only to federal citizens and fought, instead, on the question of whether free blacks could be citizens of the United States.

From the Southern perspective, free blacks were not U.S. citizens because they had not been members of the political community that had formed the Constitution. In fact, blacks in some states began to participate in public life during the late eighteenth century. But nineteenth-century Southerners could support their view by pointing to the 1790 federal Naturalization Act (and subsequent versions of it), in which the Congress of the United States declared that "any alien, being a free white person . . . may be admitted to become a citizen thereof," upon meeting enumerated requirements.[83] On this sort of evidence, Southerners argued that even free blacks who were citizens of their states had not been members of the polity that adopted the U.S. Constitution. Free blacks therefore were not citizens of the United States and so were not entitled to the privileges and immunities or other rights guaranteed to citizens by the U.S. Constitution.

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[82] As a recent commentator on the Missouri Compromise observed, "Perhaps surprisingly, few legislators, even in the South, had formally disputed the citizenship of free blacks." FORBES, *supra* note 65, at 110. Although Charles Pinckney of South Carolina claimed in the House that he had written the Comity Clause and that he had never imagined that there could be a black citizen, free blacks clearly were citizens in a number of states, and in some of them (including two Southern states, Tennessee and North Carolina) free blacks had a right to vote—a right that was not always denied. *Id.* at 111, 113.

[83] An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).

Already in November 1821, Attorney General William Wirt enunciated the Southern position in an opinion on the right of free blacks to command coastal or ocean-going vessels.[84] The mobility of free blacks was particularly apt to rub against local prejudice when free blacks commanded vessels entering Southern ports. Such blacks displayed not only black freedom but also black authority. Accordingly, some Southern states, notably South Carolina and Louisiana, responded to the second Missouri Compromise by adopting statutes aimed at limiting the presence of black seamen who entered their ports.[85] The problem, however, also turned on a federal statute that limited the command of vessels in foreign and coastal trade to citizens of the United States. Therefore, on behalf of the collector of customs at Norfolk, Virginia, the Secretary of the Treasury asked Attorney General Wirt, "Whether free persons of color are, in Virginia, citizens of the United States, within the intent and meaning of the acts regulating foreign and coasting trade, so as to be qualified to command vessels?"[86]

Although the question was one of statutory interpretation, Wirt, a Virginia slaveowner, did not miss the constitutional implications. He began by presuming that the phrase "citizen of the United States" had the same meaning in the Constitution as in federal statutes.[87] On this premise, he relied on the Comity Clause, which he apparently understood to have created a shared, federal citizenship for citizens of the states, at least when they traveled to other states. He concluded from this that "no person is included in the description of citizen of the United States who has not the full rights of a citizen in the State of his residence."[88]

Starting at the state level, Wirt noted that a free black born and residing in Virginia possessed "none of the high characteristic privileges of a citizen of the State," meaning political rights.[89] Accordingly, if he were to have Comity Clause rights, "then, on his removal into another State, he acquires all the immunities and privileges of a citizen of that other State, although he possessed none of them in the State of his nativity," which could not have been in the "contemplation" of those who adopted the Constitution.[90] Moving to the federal level, Wirt examined the Constitution's qualifications for legislative and presidential office. "Free negroes and mulattoes can satisfy the requisitions of age and residence as well as the white man," and if such things were "sufficient to make him a 'citizen of the United States' in the sense of the constitution, then free negroes and mulattoes are eligible to

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[84] Rights of Free Virginia Negroes, 1 Op. Att'y Gen. 506 (1821).

[85] 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 97, 100, 109, 161 (Little, Brown & Co. 1862) (describing statutes adopted by South Carolina, Georgia, and Louisiana).

[86] *Rights of Free Virginia Negroes*, 1 Op. Att'y Gen. at 506.

[87] *Id.* at 507.

[88] *Id.*

[89] *Id.*

[90] *Id.*

those high offices, and may command the purse and sword of the nation."[91] On both state and federal grounds, therefore, it seemed obvious to Wirt that only those "who enjoyed the full and equal privileges of white citizens in the State of their residence" could be citizens of the United States.[92] This was merely statutory interpretation, but it was also an early backhanded declaration of what would become the conventional Southern position on the Comity Clause. Tellingly, it was echoed in even stronger terms by a later Attorney General, Roger B. Taney, who in 1832 wrote an opinion on the rights of black seamen, concluding that free blacks were not included in the term "citizens" as used in the U.S. Constitution.[93]

The shift in the Southern position—toward restricting Comity Clause rights to citizens of the United States—can be further observed in Kentucky. Even before the adoption of the second Missouri Compromise, the state's supreme court was familiar with "the argument, that free persons of color are not parties to the political compact," and the court responded in shades of gray: "This we can not admit, to the extent contended for. They are certainly, in some measure, parties," for "[a]lthough they have not every benefit or privilege which the constitution secures, yet they have many secured by it."[94] After the second Compromise, however, the court had to address the Comity Clause in terms of federal citizenship, and this now seemed a matter of black and white.

The occasion was an 1822 case, *Amy v. Smith*, in which an enslaved black woman sought her freedom.[95] Although a Kentucky statute barred actions by slaves, she claimed that this enactment violated her rights under the Comity Clause.[96] In the mid-1780s, she had been taken to Pennsylvania and Virginia, and on this basis she argued that she had successively become a citizen of each of these states, thus giving her the privileges and immunities of a citizen of Kentucky.[97] The court held, however, that she "can not have

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[91] *Id.*

[92] *Id.* In 1824, Wirt gave a very different opinion about a South Carolina statute. Adopted following the Missouri crisis, the statute provided for the imprisonment of any free black seaman while his vessel was present in any harbor or port of the state. When Britain complained about the imprisonment of one of its subjects, Wirt opined that this provision of the statute was unconstitutional, first because of the exclusive power of Congress over commerce among the states and with foreign nations, and second because of an inconsistent treaty with Britain. Validity of the S.C. Police Bill, 1 Op. Att'y Gen. 659, 661 (1824). This opinion was given immediately after the Supreme Court's decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which suggested that the possibility of exclusive congressional power over commerce among the states and with foreign nations. Perhaps more to the point, *Gibbons* did not involve any question about the citizenship of free blacks.

[93] Draft Opinion by Roger B. Taney, *in* Carl B. Swisher, *Mr. Chief Justice Taney*, *in* MR. JUSTICE 4345 (Allison Dunham & Philip B. Kurland eds., Univ. of Chi. Press 1964) (1832); *see also* WIECEK, *supra* note 81, at 139.

[94] Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70, 75 (1820).

[95] 11 Ky. (1 Litt.) 326 (1822).

[96] *See id.* at 328, 331–32.

[97] *Id.* at 327, 331–32.

been a citizen, either of Pennsylvania or of Virginia, unless she belonged to a class of society, upon which . . . was conferred a right to enjoy all the privileges and immunities appertaining to the state."[98] The court concluded that free blacks were so much "a degraded race" that "under the constitution and laws of the United States, they can not become citizens of the United States."[99] Moreover, "as the laws of the United States do not now authorize any but a white person to become a citizen, it . . . creates a presumption that no state had made persons of colour citizens."[100] On such reasoning, the plaintiff was not a citizen of Pennsylvania or Virginia and therefore "can not be entitled to the benefit of the clause of the constitution in question."[101]

One of the judges, Benjamin Mills, dissented, and he recognized that the majority opinion was responding to the second Missouri Compromise. On behalf of the plaintiff, he protested that she had been moved from state to state before the adoption of the Constitution, and therefore "the late Missouri question does not completely embrace it."[102] The Missouri question, however, had an inexorable effect on Southern opinion. Southerners now insisted that only citizens of the United States were entitled to the benefit of the Comity Clause and that such citizens did not include free blacks.[103]

Rather than dispute the underlying assumption about the Comity Clause, advocates for free blacks accepted it and fought back on the same terms: they insisted that free blacks were citizens of the United States who therefore enjoyed Comity Clause privileges and immunities. These counterarguments became more fully developed later, but a prominent early example can be observed in 1834 in Connecticut, where a Quaker woman, Prudence Crandall, had opened a boarding school for black girls from out of

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[98] *Id.* at 334.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 335.

[102] *Id.* at 343. Mills made clear in another case that he considered slavery contrary to "the general principles of liberty, which we all admire," but also emphasized that judges ought to decide cases "by the law as it is, and not as it ought to be." FINKELMAN, *supra* note 17, at 192 (quoting Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467 (1820)).

[103] Later Southern examples are abundant. For example, a Kentuckian argued:

> The only inquiry is, what constitutes citizenship, or, in other words, what is the true constitutional meaning of the word citizen? If the free negro be not a citizen, although he may be a subject, he is not embraced within this provision. . . . In accordance with this principle, a citizen of the United States, going into any state of this union, carries with him the same right of protection, under the laws of the state, to which its own citizens are entitled."

REPORT OF THE DEBATES & PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 923 (Frankfort, A.G. Hodges 1849) (statement of Mr. Bullitt). Similarly, in the debates about Nebraska, a senator from North Carolina observed: "[S]uppose these people were citizens of the United States, did not everybody know that if they were citizens of the United States, and had rights under the Constitution of the United States, which were withheld under this prohibition of the Missouri constitution, it was null and absolutely void?" SPEECH OF THE HON. GEORGE E. BADGER, OF NORTH CAROLINA, IN THE UNITED STATES SENATE, FEBRUARY 16, 1854, ON THE NEBRASKA BILL 7 (Wash., Sentinel Office 1854).

state.[104] The legislature promptly adopted a statute barring the unlicensed instruction of colored persons not inhabitants of the state, and Crandall was eventually prosecuted and found guilty.[105] Her lawyers moved in error, however, that the superior court "should have informed the jury, that said coloured persons were to be regarded as citizens of the states to which they respectively belonged and of the United States, and were entitled to the privileges and immunities secured by the 4th article of the constitution of the United States."[106] The closing argument for Crandall emphasized this point, explaining that since the Revolution, "all the citizens of the several States became citizens of the United States."[107]

Strikingly, both sides in the Comity Clause controversies took for granted that the privileges and immunities guaranteed by the Comity Clause were rights secured to citizens of the United States. Already before the second Missouri Compromise, the Comity Clause claims of free blacks had begun to be disputed in terms of whether they were parties to the federal political compact and the community it formed. But the debate now became a national dispute, and increasingly, for both Southerners and Northerners, it rested on the assumption that Comity Clause privileges and immunities belonged only to citizens of the United States.

Although the implications have yet to be seen here, they should already be discernable along the horizon. It is not simply that, at an abstract level, the Comity Clause seemed to establish a sort of "general citizenship."[108] Closer to the ground, men and women were beginning to demand that free blacks should have the privileges and immunities to which they were entitled as citizens of the United States. It was a hint of things to come.

D. Fundamental Rights as a Mode of Exclusion

Although the main point—the new focus on the privileges and immunities of citizens of the United States—has already been made, Part II must close by adding that the question of *what* the Comity Clause protected became part of the debate about *who* was protected. Many scholars look back on Justice Washington's discussion of fundamental rights in *Corfield v. Coryell* as if it can be understood simply as a timeless statement of principle. But, of course, it had a context. *Corfield* was one of the cases that occurred in the immediate aftermath of the second Missouri Compromise, and

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[104] Advertisement, 3 LIBERATOR (Bos.) 47 (1833).

[105] PRUDENCE CRANDALL, *supra* note 57, at iii–iv. At a first trial, in 1833, the jury was dismissed for failing to agree on a verdict. *Id.* at iv; *see also* WIECEK, *supra* note 81, at 163–64.

[106] Crandall v. State, 10 Conn. 339, 348 (1834) (reversing judgment against Crandall because the information failed to aver that the school or the instructors were unlicensed).

[107] PRUDENCE CRANDALL, *supra* note 57, at 28.

[108] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 675 (Bos., Hilliard, Gray & Co. 1833).

like other such cases, it suggests how ideals about fundamental rights limited claims of citizenship by free blacks.

In the wake of the second Missouri Compromise, Southerners (and those aligned with them) regularly defeated the Comity Clause claims of free blacks by suggesting that such persons did not enjoy the full, extensive, or fundamental rights of citizenship—this being the basis for denying that they were citizens. As has been seen, nothing gave a sharper edge to these arguments than to say that the rights to vote and hold office were essential or fundamental rights of citizenship. This made political rights a measure of citizenship. From this perspective, even many free blacks who enjoyed citizenship in their own states were not citizens, whether state or federal, for purposes of the Comity Clause.

In response, dissentient judges and lawyers protested that if political rights were characteristic of citizenship, then all sorts of other persons would also be excluded. For example, when Judge Mills dissented in *Amy v. Smith*, he pointed out that if full political participation were the measure of citizenship, not even most white men could be citizens:

> [L]et the position be assumed, that none are citizens but those entitled to the highest honors of the state, and it follows that no person, who is not a white male, and has not resided here for six years, and is not of the age of thirty-five years, can be a citizen; for such must be the qualifications of our chief magistrate.[109]

In Virginia, moreover, "those entitled to office and suffrage, must not only possess age and residence, but a freehold."[110] If this were the measure of citizenship, only "the aristocracy of each state" would be included among citizens.[111] Pressing his point, Judge Mills also pointed out the implications for "white females and infants," who "being not entitled to political advancement, can not be citizens."[112] The conceptual mistake, he concluded, arose "from not attending to a sensible distinction between political and civil rights. The latter constitutes the citizen, while the former are not necessary ingredients. A state may deny all her political rights to an individual, and yet he may be a citizen."[113]

But, of course, no one was really proposing to exclude *white* men, women, or children from citizenship. In the ensuing decades, persons seeking to exclude blacks would continue to tie citizenship to political rights, and persons seeking to include blacks would continue to suggest the danger of excluding nonvoting white men, women, and children.[114] The underlying

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[109] 11 Ky. (1 Litt.) 326, 338 (1822) (Mills, J., dissenting).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 342.

[114] For example, the arguments on both sides can be observed in the prosecution of Prudence Crandall. *See* Crandall v. State, 10 Conn. 339 (1834). The State argued that "men of colour" were not citi-

problem, however, was that the Comity Clause threatened local racial discrimination, and therefore, as everyone understood, the link between citizenship and political rights was being proposed only to impede blacks. If they could be barred from citizenship, state or federal, they could be prevented from claiming the privileges and immunities of citizens.

In this context, Justice Bushrod Washington's opinion about fundamental rights must be reconsidered. His decision in *Corfield v. Coryell* is usually examined on its own, as if one could pluck it out of context without depriving it of its significance. And to be sure, the case did not involve blacks. It was the occasion, however, on which Washington made a distinctive contribution to the debate about who could be a citizen. By putting the matter in terms of rights that were "fundamental," Washington offered a solution to the question of what was protected in terms so seemingly attractive that they have distracted attention from the implications for who was protected. Yet his fundamental rights approach to *what* really concerned *who*. It was a judicial compromise that gave a Southern twist to the Missouri Compromise.

Washington framed his point about fundamental rights in a way that deferred to the position of Congress in the second Missouri Compromise and then defeated that position by cutting off black citizenship. On the one hand, he included in his enumeration of privileges and immunities the right to travel—the right "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[115] If this

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zens of the state because they "cannot *vote*." *See id.* at 351. Her lawyers then protested that "the right of voting is not the criterion of citizenship," explaining that "the one has no natural or necessary connexion with the other." *Id.* To support this, they recited the now conventional point that there were all sorts of instances "where persons are citizens and do not vote":

> Formerly, property was a necessary qualification in Connecticut. Were none but persons of property citizens? Suppose a voter in Connecticut should lose his right of suffrage, by reason of criminal conduct, as by law he may do, does he cease to be a citizen? Does he become an *alien*? No female can vote, nor any minor; but are not females and minors citizens?
>
> If voting makes a citizen, what confusion! The same man in one state, is a full citizen; in another, half a citizen; in another a non-descript; in another, an alien. How absurd to create such distinctions in these states!

Id. For a slightly different but essentially similar account of these passages, see PRUDENCE CRANDALL, *supra* note 57, at 10.

Recognizing the stereotypical character of much of these debates, a Southerner countered:

> Perhaps we shall here again be met with the miserable subterfuge, that the right of suffrage is not essential to citizenship, as in females and minors. But this . . . scarcely deserves a serious consideration. The civil disabilities resting upon females and minors, are general and impartial to all in like circumstances, black as well as white; . . . there is no political degradation . . . .

GEORGE S. SAWYER, SOUTHERN INSTITUTES; OR, AN INQUIRY INTO THE ORIGIN AND EARLY PREVALENCE OF SLAVERY AND THE SLAVE-TRADE 300 (Phila., J. B. Lippincott & Co. 1859).

[115] Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). His statement of this right is interesting for what it omits. The right to travel associated with the Comity Clause was necessarily a right of ingress, residence, and egress—the first being of particular importance in debates about free blacks. Ingress, however, was precisely what Washington omitted, except to the extent it was implied by the others elements.

was a right of a citizen of a state, and if, as Washington added, it was a fundamental right, it could not be denied to the citizens of any other state. On the other hand, this notable Virginian and slaveowner ended his account of fundamental rights by expressly including suffrage.[116] Political rights were the standard example of what blacks did not have. Of course, some white men (as in Virginia) and many white women and children did not have such rights, and the fundamental rights theory was therefore not really plausible. But Washington had free blacks on his mind, and therefore, like so many other Southern judges, he made political rights the measure of citizenship for purposes of the Comity Clause.

Ironically, Northern opponents of slavery would one day seize upon Bushrod Washington's notion of fundamental rights precisely in order to assert the political rights of blacks.[117] Until then, however, the implications of Washington's opinion went in the other direction. His view was merely part of a broader trend among judges of Southern sympathies to emphasize political rights and thereby leave blacks without citizenship—a trend that would reach its apogee when Chief Justice Taney wrote his opinion in *Dred Scott v. Sandford*. By stating what was protected in political terms, these judges limited who was protected.[118]

More generally, the point of Part II has been to observe how the second Missouri Compromise refocused Comity Clause debates from *what* to *who*—in particular, to the question of whether blacks were citizens of the United States. Aspects of the citizenship question were familiar, but after 1821, the simple exclusion of free blacks was no longer a plausible way of defeating their claims under the Comity Clause. It therefore became necessary to defend such exclusion or other abridgment of Comity Clause rights by expressly denying that free blacks were citizens for purposes of the Comity Clause. One way of doing this was to deny that they were citizens of their states, but some states clearly accepted free blacks as citizens. Southerners therefore insisted that free blacks were not entitled to the benefit of the Comity Clause because they were not citizens of the United States. In response, antislavery Americans increasingly asserted that free blacks were citizens of the United States and that on this account they were entitled to Comity Clause privileges and immunities.

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[116] *Id.* He sold fifty of his slaves further south in 1821. WIECEK, *supra* note 81, at 126–27. And his views on the potential of blacks as fellow citizens are suggested by his membership to the American Colonization Society. *Id*.

[117] *See, e.g.*, *infra* note 246.

[118] Surveying such views, Attorney General Edward Bates later explained: "[T]here is a very common error to the effect that the right to vote for public officers is one of the constituent elements of American citizenship . . . . No error can be greater than this . . . ." Citizenship, 10 Op. Att'y Gen. 382, 384 (1862). In fact "there is no district in the nation in which a majority of the known and recognized citizens are not excluded by law from the right of suffrage." *Id.* at 385. Among those excluded were "paupers, idiots, lunatics, and men convicted of infamous crimes, and, in some States, soldiers, all females and all minor males." *Id.*

III. THE DRED SCOTT CASE

In 1857, the Comity Clause controversy, once again, came to the forefront of national politics, and by now the question inescapably centered on whether free blacks were citizens of the United States. Already in the aftermath of the second Missouri Compromise, it was disputed whether free blacks enjoyed citizenship and thus the benefit of the Comity Clause.[119] Now, however, in *Dred Scott v. Sandford*, this point came to be debated in the Supreme Court.[120] On the one hand, Chief Justice Taney, speaking for the Court, established the Southern interpretation of the Comity Clause, that free blacks could not be citizens of the United States and so could not have Comity Clause rights. On the other hand, Justice Curtis dramatically enunciated the contrary interpretation in the most prominent antislavery dissent in American history. These dueling interpretations elevated the question to even greater national prominence than in 1821. Although Taney entrenched the Southern interpretation so far as to make the coming conflict seem almost inevitable, Curtis elevated the antislavery interpretation, which would eventually, after the conflict, be secured in the Fourteenth Amendment.

A. Taney's Opinion

Like so many other Southerners, Chief Justice Roger Taney feared the implications of the Comity Clause for a mobile population of blacks, and like his Southern compatriots, he had a familiar answer: that blacks could not be citizens of the United States or otherwise citizens for purposes of the U.S. Constitution.

Dred Scott was a slave who had been sold in 1830 in Missouri to an army surgeon, Dr. John Emerson, who later traveled with Scott to the state of Illinois and the territory of Wisconsin—both of which were free jurisdictions.[121] Later, after returning to Missouri, Scott was transferred by Emerson's widow to her brother John Sandford. At this point, Scott sought his freedom in the federal circuit court for Missouri. His argument was that because the laws applicable in Illinois barred slavery, he had acquired his freedom when he had traveled to this Northern state.[122] After losing in the circuit court, he appealed to the U.S. Supreme Court.

The question of citizenship arose even before the Justices of the Supreme Court could reach the substantive questions, for merely to establish that the federal circuit court had diversity jurisdiction, Scott had to claim that he was a citizen of Missouri. Chief Justice Taney, however, denied

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[119] *See supra* Part II.C–D.

[120] 60 U.S. (19 How.) 393 (1857).

[121] *Id.* at 397.

[122] *See id.* at 431–32. For further details, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 250–65 (1978); Paul Finkelman, Scott v. Sandford*: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3 (2007).

that Scott could be a citizen for purposes of the U.S. Constitution, and although this conclusion concerned the initial question of diversity, it also led Taney to explore the substantive question of whether Scott was a citizen for purposes of the Comity Clause:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?[123]

Not surprisingly, Taney took the usual Southern position in Comity Clause cases; he argued that blacks were a "degraded" class, who could not be citizens for purposes of the Constitution.[124] It has been seen that some state courts took this view already in the immediate aftermath of the second Missouri Compromise, but Taney now gave it the authority of the U.S. Supreme Court.[125]

Taney began by distinguishing between "the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union."[126] From this perspective, even when a black person was admitted by a state as its citizen, he did not necessarily become a citizen of the United States, enjoying the privileges and immunities of such citizenship:

> It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State.[127]

Moreover, the Constitution gave Congress the power of naturalizing aliens:

> The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and

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[123] *Dred Scott*, 60 U.S. (19 How.) at 403. Here and in the next quotation, note that Taney discussed rights as well as privileges and immunities of citizenship. The phrase about "the rights, privileges, and immunities of citizens of the United States" was familiar from cession treaties. In other words, it was a different sort of guarantee from a different context. *See infra* Part IV.A. Nonetheless, Taney may have deliberately echoed the phrasing of cession treaties, for he was alluding not merely to the privileges and immunities of citizenship mentioned in the Comity Clause but also to other rights of citizenship under the U.S. Constitution, including the right to have the benefit of diversity jurisdiction. For these distinctions, see *infra* text accompanying notes 155–56. Some other nineteenth-century writers also talked about rights, privileges, and immunities in connection with the Comity Clause, but probably less self-consciously.

[124] *Dred Scott*, 60 U.S. (19 How.) at 409, 411.

[125] *See supra* text accompanying notes 95–101.

[126] *Dred Scott*, 60 U.S. (19 How.) at 405.

[127] *Id.*

> privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.[128]

As a result, no state on its own could "introduce a new member into the political community created by the Constitution of the United States."[129]

Of course, Taney was not really speaking of all new members of the political community. Only when a black alien was admitted by a state as a citizen was there a question about his citizenship for purposes of diversity jurisdiction and the Comity Clause. Taney therefore soon came to rest on the familiar Southern position that blacks, whether slave or free, could not be citizens for purposes of the United States and its Constitution. In other words, rather than persist in saying that a state could not introduce new members into the national political community, he now explained that it merely "cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it."[130]

Like earlier Southerners, Taney defended this exclusion by pointing to "the degraded condition of this unhappy race."[131] Since the second Missouri Compromise, Southerners had emphasized the degradation of blacks in order to make clear that even free blacks could not be citizens for purposes of the Comity Clause.[132] Taney now repeated this trope, arguing that, regardless of any distinctions "between the free negro or mulatto and the slave, . . . this stigma, of the deepest degradation, was fixed upon the whole race."[133]

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[128] *Id.* at 405–06.

[129] *Id.* at 406.

[130] *Id.* Taney's acceptance that national citizenship determined Comity Clause rights is noted by Kaczorowski, *supra* note 8, at 886–87.

[131] *Dred Scott*, 60 U.S. (19 How.) at 409.

[132] For an early use of this argument, see *supra* text accompanying notes 99–101 regarding *Amy v. Smith*, 11 Ky. (1 Litt.) 326 (1822). Chief Justice Taney had earlier made the argument when he was Attorney General in the 1830s: "[E]ven when free," blacks were a "degraded class." Roger Taney, Unpublished Opinion of Attorney General Taney, *quoted in* CARL BRENT SWISHER, ROGER B. TANEY 154 (1935). He concluded: "They were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term *citizens*." *Id.*; *see also* Finkelman, *supra* note 122, at 32.

The argument itself was so degraded that Attorney General Bates dispatched it with mordant humor: "[I]t is said that African negroes are a degraded race, and that all who are tainted with that degradation are forever disqualified for the functions of citizenship. I can hardly comprehend the thought of the absolute incompatibility of degradation and citizenship. I thought that they often went together." Citizenship, 10 Op. Att'y Gen. 382, 398 (1862).

Incidentally, the constitutional significance of the trope about a degraded race raises a question about the role of law in shaping racial stereotypes. In particular, did the legal posture necessary to defend slavery in the courts contribute to a hardening in the denigration of blacks as racially inferior?

[133] *Dred Scott*, 60 U.S. (19 How.) at 409.

In support of the exclusion of blacks from citizenship, Taney also hinted at the political rights of citizens. He undoubtedly was familiar with the opinions of Bushrod Washington and other Southern judges that the privileges and immunities secured by the Comity Clause included the right to vote. In this vein, he rhetorically asked whether the Clause had "embraced the negro African race . . . and put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent?"[134] The significance of the question was obvious.

Taney thus followed other Southern judges in holding that blacks were not citizens for purposes of the Constitution, and that they therefore did not have the privileges and immunities guaranteed by the Comity Clause. But in at least one respect his opinion in *Dred Scott* was different: it resolved the legal controversy so conclusively as to point toward another mode of dispute.

B. Curtis's Dissent

Among the dissenting justices, none rejected Taney's argument more vigorously than Justice Benjamin Curtis. Of particular importance here, Curtis gave national prominence to the antislavery position on the privileges and immunities of citizens of the United States. When Southern judges and others had said that blacks could not be citizens of the United States, antislavery Americans had long responded in kind, insisting that blacks could be citizens of the United States and therefore could be entitled to Comity Clause privileges and immunities. Now Curtis repudiated Taney in such terms, and he thereby elevated the privileges and immunities of citizens of the United States as a central antislavery demand.

Like the drafters of the Fourteenth Amendment about a decade later, Curtis understood that he first had to define who was a citizen of the United States. In his words, "under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States."[135] To defend this position about *who* was a U.S. citizen and thus within the Comity Clause's privileges and immunities, Justice Curtis would soon rely on the third understanding of *what* was included among such privileges and immunities.[136]

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[134] *Id.* at 406. Taney raised this argument by question and implication rather than directly because, in another part of his opinion, he sought to disconnect voting and citizenship, observing that in some states "foreigners not naturalized are allowed to vote," which seemed to show that even when "the State may give the right to free negroes and mulattoes . . . that does not make them citizens of the State, and still less of the United States." *Id.* at 422.

[135] *Id.* at 576 (Curtis, J., dissenting).

[136] *See infra* text accompanying note 144.

He understood, moreover, that like other antislavery judges, he had to put to rest the Southern objection that citizenship entailed political rights. Southerners, he noted, had objected:

> [T]hat if free colored persons . . . are . . . made citizens of the United States, then . . . such persons would be entitled to all the privileges and immunities of citizens in the several States; and, if so, then colored persons could vote, and be eligible to not only Federal offices, but offices even in those States whose Constitutions and laws disqualify colored persons from voting or being elected to office.[137]

Curtis answered that this sort of complaint rested on the "untenable" assumption that no one could be considered a citizen in the United States unless he was "entitled to enjoy all the privileges and franchises which are conferred on any citizen."[138]

Curtis backed up his response by observing that many states denied entire classes of individuals the right to vote or to hold office, without depriving them of citizenship. Echoing judges such as Mills in *Amy v. Smith*, Curtis explained that different states permitted different classes of persons to vote:

> One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females . . . . But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States.[139]

Of course, the right to vote was "one of the chiefest attributes of citizenship under the American Constitutions; and the just and constitutional possession of this right is decisive evidence of citizenship."[140] Yet Curtis did "not think the enjoyment of the elective franchise essential to citizenship."[141]

He thereby rejected the position taken by Justice Washington in *Corfield v. Coryell* that the Comity Clause guaranteed fundamental rights or any other any particular rights, including suffrage:

> The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each

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[137] *Dred Scott*, 60 U.S. (19 How.) at 582–83.

[138] *Id.* at 583.

[139] *Id.*

[140] *Id.* at 581.

[141] *Id.* The Supreme Court repeated this point when, after the adoption of the Fourteenth Amendment, it held that a woman had no right under the Privileges or Immunities Clause to vote in federal elections. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874). Ironically, as fate would have it, the case came out of Missouri.

> State, in accordance with its own views of the necessities or expediencies of its condition.[142]

Rather than impose a fixed baseline, the Comity Clause merely assured visitors of such rights as a state accorded all of its citizens:

> [T]his clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. . . . It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution . . . .[143]

Visitors could claim not fundamental rights, but rather the rights that belonged to locals on account of their "mere naked citizenship."

This interpretation of *what* was protected—earlier identified as the third understanding—was essential for Curtis's position on *who* was protected. In the wake of the second Missouri Compromise, Washington and other Southern judges had taken an exaggerated and "untenable" interpretation of the protected privileges and immunities to exclude blacks from federal citizenship.[144] Curtis therefore could defend the inclusion of blacks by falling back upon a much more plausible interpretation. According to Curtis, the privileges and immunities guaranteed by the Comity Clause were merely the privileges and immunities enjoyed by "all" citizens of a state—the privileges and immunities enjoyed simply on account of citizenship.[145] With this nonfundamental definition of the privileges and immunities of citizenship, it did not matter that free blacks lacked political rights; regardless, like children, women, and poor white men, free blacks could still be citizens of a state, and of the United States, who had a constitutional right to the privileges and immunities of citizens of the other states. Curtis thereby

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[142] *Dred Scott*, 60 U.S. (19 How.) at 583.

[143] *Id.* at 583–84.

[144] *See supra* text accompanying note 138.

[145] *Dred Scott*, 60 U.S. (19 How.) at 584. In effect, Curtis was reasserting Congress's 1821 resolution admitting Missouri to the Union. He recalled that Congress admitted Missouri on the condition that its constitution "shall never be construed to authorize the passage of any law . . . by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States." *Id.* at 588 (internal quotation marks omitted). Justice Curtis acknowledged that "this legislative declaration" could not "confer or take away any privilege or immunity granted by the Constitution." *Id.* At the same time, he observed "that it expresses the then conviction of the legislative power of the United States, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States." *Id.*

vindicated Dred Scott as a citizen of Missouri, and of the United States, with the benefit of diversity jurisdiction and Comity Clause rights.

C. Lincoln–Douglas Debates

It was only a short step from the intellectual clash in *Dred Scott* to the physical conflict of the Civil War. And the path seemed to be laid out by Abraham Lincoln and Stephen Douglas in their famous debates.

Speaking in Springfield in the summer of 1857, Senator Stephen Douglas echoed Taney's decision that "the negro is not and cannot be a citizen of the United States" and denounced antislavery opposition to this Southern stance.[146] Douglas asked: "What is the objection to that decision? Simply that the negro is not a citizen. What is the object of making him a citizen? Of course to give him the rights, privileges and immunities of a citizen."[147]

The next summer, at the close of the Republican Convention at Springfield, Abraham Lincoln responded. Reciting that "A house divided against itself cannot stand," he argued that, in the contest between slavery and freedom, the nation "will become all one thing, or all the other."[148] He therefore took aim at Douglas's defense of Taney, for Taney's conclusions about privileges and immunities were part of the "machinery" for advancing slavery.[149] As Lincoln explained, Taney took the view:

> That no negro slave, imported as such from Africa, and no descendant of such slave, can ever be a citizen of any State, in the sense of that term as used in the Constitution of the United States. This point is made in order to deprive the negro, in every possible event, of the benefit of that provision of the United States Constitution which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[150]

Three weeks later, in Chicago, Douglas declared his objection to Lincoln's reasons "for resisting the decision of the Supreme Court in the *Dred Scott* case."[151] Speaking of the future president, who sat facing him in the hall, Douglas explained:

> He says it is wrong, because it deprives the negro of the benefits of that clause of the Constitution which says that citizens of one State shall enjoy all the privileges and immunities of citizens of the several States; in other words, he thinks it wrong because it deprives the negro of the privileges, immunities, and

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[146] Senator Stephen A. Douglas, Kansas—The Mormons—Slavery, Delivered at Springfield, Illinois (June 12, 1857), *in* A POLITICAL TEXT-BOOK FOR 1860, at 154, 155 (N.Y., Tribune Ass'n 1860).

[147] *Id.*

[148] Abraham Lincoln, Speech at Springfield (June 17, 1858), *in* POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 1, 1 (Cleveland, O.S. Hubbell & Co. 1895).

[149] *Id.* at 3–4.

[150] *Id.* at 4.

[151] Senator Stephen Douglas, Speech on the Occasion of his Public Reception at Chicago (July 9, 1858), *in* POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS, *supra* note 148, at 8, 17.

> rights of citizenship, which pertain, according to that decision, only to the white man. I am free to say to you that in my opinion this government of ours is founded on the white basis. It was made by the white man, for the benefit of the white man, to be administered by white men, in such manner as they should determine.[152]

Today, mobility is taken for granted, and the right of a citizen of one state to the privileges and immunities of the citizens of other states seems a rather arcane question. In the mid-nineteenth century, however, it was a fighting matter.

In the legal battle, although Taney gave the Southern position the finality of a Supreme Court precedent, Curtis drew national attention to the antislavery response and thereby elevated it to a central antislavery position. The struggle against slavery now prominently embraced the ideal that free blacks were citizens of the United States and that they therefore had Comity Clause rights. But before observing how this Comity Clause question was resolved after the military conflict, it is necessary to pause to consider how it came to be rephrased.

IV. PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

The assumption that Comity Clause rights belonged to citizens of the United States eventually acquired succinct expression in terms of "the privileges and immunities of citizens of the United States." Both Southerners and Northerners used this locution, for it felicitously captured their shared assumption that the Comity Clause secured the rights arising from a general citizenship. Indeed, because the phrase expressed the underlying assumption about citizenship, it became an appealing label for Comity Clause rights, and each side found it a forceful way of asserting its position in terms of the underlying justification. It is therefore no surprise to find Southerners arguing that "[t]he citizens of each State are secured in the enjoyment of the privileges and immunities of citizens of the United States."[153] The phrase, however, was especially resonant for those who took the Northern position. In defense of the Comity Clause rights of free blacks, it became commonplace to insist upon "the privileges and immunities of citizens of the United States."

A. Different Contexts and Different Meanings

Of course, Americans alluded to "the privileges and immunities of citizens of the United States" in a range of different contexts, not all of which focused on free blacks or the Comity Clause. That is, in different contexts,

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[152] *Id.*

[153] CONG. GLOBE, 30th Cong., 1st Sess. app. at 903 (1848) (statement of Sen. Hunter of Virginia) (arguing that the U.S. Constitution's limits on states do not apply to territories and, more generally, that Congress has power to regulate the territories).

they used the phrase with different meanings. In the debates that centered on the rights of free blacks, however, "the privileges and immunities of citizens of the United States" were Comity Clause rights.

The importance of distinguishing among contexts can initially be observed in connection with cession treaties—the international treaties that ceded territories to the United States. In these documents, the United States assured the inhabitants of the ceded territories that they would enjoy "the privileges, rights and immunities of Citizens of the United States."[154] On this basis, it has been suggested that the cession treaties point to the meaning of the Fourteenth Amendment's Privileges or Immunities Clause.[155] The privileges and immunities clauses of the cession treaties, however, dealt with a distinct problem. The difficulty was to assure the inhabitants of the ceded territories that they would enjoy the rights of subjects or citizens of the United States—in other words, to guarantee that they would enjoy such rights in their own jurisdiction. This is why the treaties made "the privileges, rights and immunities" of citizens a positive duty of the United States. And although the word "rights" may have been intended as mere surplusage, it had the effect of clarifying that the United States was guaranteeing more than what was secured by the Comity Clause.[156]

In contrast, the arguments about the privileges and immunities owed to free blacks concerned a very different context and a very different problem—not which rights they enjoyed at home, but whether they were among the persons who could enjoy rights when they traveled. The privileges and immunities problem faced by free blacks was that some states excluded them—increasingly on the ground that they were not citizens of the United States and that they therefore were not entitled to Comity Clause rights. In this context, the antislavery demands for the privileges and immunities of citizens of the United States concerned not *what* was protected by the Comity Clause but *who* was protected. To resolve this question, antislavery Americans interpreted the Comity Clause to protect citizens of the United States, including free blacks. Giving support to this interpretation of the Comity Clause, the Fourteenth Amendment later would define who was a

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[154] For example, in the Florida cession treaty, the federal government provided that the inhabitants would be "admitted to the enjoyment of all the privileges, rights and immunities of the Citizens of the United States." Treaty of Amity, Settlement and Limits Between the United States of America, and His Catholic Majesty (Adams–Onis Treaty), U.S.-Spain, art. 6, Feb. 22, 1821, 8 Stat. 252. In a similar manner, in the Louisiana cession treaty, the federal government provided that the inhabitants would be "admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all of the rights, advantages and immunities of citizens of the United States." Treaty Between the United States of America and the French Republic, U.S.-Fr., art. III, Apr. 30, 1803, 8 Stat. 200.

[155] Lash, *supra* note 13, at 1285–87.

[156] Attorney General Edward Bates noted that sometimes "the words *rights*, *privileges*, *immunities* are abusively used, as if they were synonymous. The word *rights* is generic, common, embracing whatever may be lawfully claimed. *Privileges* are special rights belonging to the individual or class, and not to the mass. *Immunities* are rights of exemption only, freedom from what otherwise would be a duty, obligation, or burden." Citizenship, 10 Op. Att'y Gen. 382, 407 (1862).

citizen of the United States and would bar states from abridging the privileges or immunities of citizens of the United States.

For now, it should suffice to note that cession treaties and the exclusion of free blacks were different contexts, and what was said about the privileges and immunities of citizens of the United States in these contexts involved different problems, texts, and meanings. Thus, when cession treaties guaranteed the "privileges, rights and immunities of citizens of the United States," they were understood to assure a broad range of rights. But when Americans, in debates about free blacks, asserted the privileges and immunities of citizens of the United States, they were understood to be speaking about Comity Clause rights.

The importance of context is also apparent when one examines the privileges and immunities arguments not in favor of free blacks, but against slavery. At least some Americans opposed slavery roughly in terms of "the privileges and immunities of citizens of the United States."[157] The clearest example comes from Joel Tiffany, who argued against slavery in 1849 on the ground that neither the states nor the federal government could violate the "rights and privileges" or the "privileges and immunities" that are guaranteed to "a citizen of the United States" by the Constitution.[158] In thus opposing slavery, Tiffany did not draw a distinction between the rights of persons and the privileges and immunities of citizens; nor, when he focused on citizens, did he confine his argument to any particular level of government.[159] On the contrary, in rejecting slavery, he argued generally for privileges and immunities against both the federal government and the states, thus apparently coming close to what today would be called "incorporation."[160] Tiffany's argument, however, was not typical of antislavery Americans. Indeed, although Tiffany provoked local debate in Ohio over his advocacy of spiritualism, he does not seem to have stimulated even this much local interest in his views on privileges and immunities.[161]

In addition, some white abolitionists vaguely asserted privileges and immunities of federal citizenship as their own rights against the states.[162] These abolitionists usually were Northerners defending their speech rights in Southern states, and it thus is not always clear that their demands for pri-

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[157] CURTIS, DARLING PRIVILEGE, *supra* note 11, at 266–68; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 8, at 41–51.

[158] JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 57, 87 (Mnemosyne Publ'g Co., photo. reprint 1969) (1849). He did not, though, use the phrase "the privileges and immunities of citizens of the United States."

[159] *Id.*

[160] These rights, he explained, included habeas corpus, a republican form of government, protection against invasion and domestic violence, the right to bear arms, and the due process of law. *Id.* at 97, 107, 115, 117.

[161] One review has been located thus far, a brief but positive notice in a Washington, D.C. paper. Review, 4 NAT'L ERA (D.C.) 131 (1850).

[162] *See supra* note 11.

vileges and immunities went beyond ordinary Comity Clause claims for cross-jurisdictional rights.[163] At least occasionally, however, their statements may have gone further.

One way or another, Tiffany's arguments for slaves, and the arguments of other abolitionists for themselves, are the most prominent evidence offered thus far to show that there were privileges and immunities claims for something like incorporation. Obviously, such arguments offer only slim evidentiary foundations for broad conclusions about the antislavery movement or the Constitution. Nonetheless, incorporationist scholarship suggests that when the Fourteenth Amendment guaranteed the privileges or immunities of citizens of the United States, it must have been echoing these earlier hints of incorporation.

As already explained, however, there was a far more prominent debate over the privileges and immunities belonging to citizens of the United States, and this national controversy concerned not abolitionists, nor slaves, but free blacks. Certainly, abolitionists and slaves needed any rights they could get. At the same time, free blacks, being increasingly mobile, needed the benefit of the Comity Clause, and this was the problem that the states, Congress, and much of the nation came to debate in terms of "the privileges and immunities" that belonged to "citizens of the United States." Not surprisingly, therefore, when Americans disputed the fate of free blacks, they tended to speak of "the privileges and immunities of citizens of the United States" in a different way than did someone such as Tiffany—not to claim federal rights for slaves against their own states, but to defend the claims of free blacks to Comity Clause rights in other states.

The phrase "privileges and immunities of citizens of the United States" thus had different meanings in different contexts. It should already be evident that, in the leading debate about privileges and immunities—the national debate about state exclusion of free blacks—Comity Clause rights were understood to belong to citizens of the United States. Now it will be seen that in these debates, such rights increasingly were asserted as "the privileges and immunities of citizens of the United States."

B. Black Interest in the Privileges and Immunities of Citizens of the United States

Among those who paid attention to context and meaning were free blacks. The scholarship on privileges and immunities concentrates on the vague generalizations of white legislators in 1866. Also revealing, however, are the more concrete statements made by Americans, both white and black, before the Civil War. Although these earlier statements can be studied from white sources, they are examined here as presented by free blacks

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[163] The incorporationist scholarship rarely, if ever, acknowledges this sort of distinction and therefore systematically overstates the strength of such evidence.

in their newspapers. Whereas white sources mostly reported only white opinion, black newspapers tended to print a combination of black opinion and notable debates among whites. This evidence shows that free blacks agreed with antislavery whites about privileges and immunities, and it is valuable because, of all people, free blacks surely understood what was at stake.

The black newspaper evidence is especially valuable because it confirms the significance of context. As already noted, at least some antislavery Americans spoke about the privileges and immunities of citizens of the United States in allusive ways that appear to have moved toward incorporation.[164] Much more clearly and commonly, however, in the national debate over the status of free blacks, whites and eventually blacks asserted "the privileges and immunities of citizens of the United States" as a demand for Comity Clause rights. Nor should this be a surprise. In the dispute over the status of free blacks, what mattered were Comity Clause rights rather than incorporated rights.

In 1854, for example, the *National Era* reported on a debate in Congress over fugitive slaves. Senator Judah P. Benjamin of Louisiana asked Senator Charles Sumner of Massachusetts to answer a question about the return of fugitive slaves from the North, but Sumner responded with his own question about the privileges and immunities of free blacks in the South:

> BENJAMIN: I . . . wish to inquire of the Senator from Massachusetts whether he acknowledges any obligation imposed by the Constitution of the United States, for the return of fugitive slaves from the free States to those by whom they are held to service or labor in the slave States . . .
>
> SUMNER: And before I answer that question, I desire to ask the Senator from Louisiana, whether, under the clause of the Constitution of the United States, which secures to the citizens of every State the privileges and immunities of citizens of the United States, a colored citizen of Massachusetts can, without any crime, in South Carolina or Louisiana, be seized and thrown into prison, and then afterwards, on failure to pay certain alleged jail fees, be sold absolutely into Slavery?
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> BENJAMIN: I will answer that I think that is entirely unconstitutional.[165]

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[164] *See supra* text accompanying note 11.

[165] *Perfected Proceedings*, 8 NAT'L ERA (D.C.) 119 (1854). Incidentally, Sumner could not rest content with Benjamin's answer, and he therefore reminded the Senate of his desire for an enforcement bill, which was the sort of demand that would later underlie demands for the Fourteenth Amendment's Privileges or Immunities Clause:

> SUMNER: I am very glad that the Senator says it is entirely unconstitutional. I will then ask the Senator if he is ready, in his place, to introduce an act of Congress to carry out that provision of the Constitution to secure to the colored citizens of the North their rights in South Carolina and Louisiana?
>
> BENJAMIN: This is a very extraordinary method of answering a question. I have heard of the Yankee method of answering one question by asking another; but this is answering one by asking two. [Laughter.]

It was a rare moment when a Southerner agreed that free blacks in the South enjoyed "the privileges and immunities of citizens of the United States." And not insignificantly, it was of interest to a black newspaper.

Another example from the *National Era* concerned John Brown's trial for attacking the armory at Harper's Ferry. At the start of the trial in 1859, an ardent opponent of slavery, Lydia Maria Child, wrote from her home in Massachusetts to Governor Wise of Virginia to ask if she could attend Brown in prison. She felt "a natural impulse of sympathy for the brave and suffering man" and thought that "he needs mother or sister to dress his wounds and speak soothingly to him. Will you allow me to p[er]form that mission of humanity? If you will, may God bless you for the generous deed!"[166] Reprinting this letter, the *National Era* also published the Governor's caustic reply. The Governor noted that, in order to visit and tend to Brown in his cell, Mrs. Child would need the permission of the court and its officers. But then, attributing to her a suggestion that she needed permission to enter Virginia, he responded, with a sense of affront, that of course Virginia would honor her constitutional right to visit the state:

> *Why should you not be so allowed, madam? Virginia and Massachusetts are involved in no civil war*, and the Constitution which unites them in one Confederacy guaranties to you the privileges and immunities of a citizen of the United States in the State of Virginia. That Constitution I am sworn to support, and am therefore bound to protect your privileges and immunities as a citizen of Massachusetts coming into Virginia for any lawful and peaceful purpose.[167]

Blacks could not expect to enjoy "the privileges and immunities of a citizen of the United States in the State of Virginia." But the government of Virginia would ostentatiously protect a white abolitionist woman from Massachusetts in such privileges and immunities.

Blacks not only reported on the privileges and immunities of citizens of the United States but also complained that they lacked this freedom. This is not the sort of evidence that ordinarily finds its way into the histories of the Privileges or Immunities Clause. Little, however, could be more relevant or revealing.

In 1858, free blacks in Massachusetts, particularly Boston, presented a memorial to the state's legislature.[168] The memorialists, led by the Boston activist William Nell, complained that the *Dred Scott* decision had left them

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Id. (brackets in original).

[166] *Additions to the Documentary History: Lydia Maria Child and Gov. Wise*, 13 NAT'L ERA (D.C.) 184 (1859).

[167] *Id.*

[168] William C. Nell & Other Colored Citizens of Massachusetts, *Rights of Colored Citizens*, 29 LIBERATOR (Bos.) 11 (1859). Nell was a leader of the black community in Boston who organized, among other things, its campaign against segregated public schools. 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865, at 106 n.12 (Philip S. Foner & George E. Walker eds., 1980).

more vulnerable than ever in Southern states: "[B]y the laws of the Southern States, they are still prohibited, under the severest penalties, from visiting any of those States," and "a considerable number of the colored citizens of Massachusetts have already been seized in Southern ports . . . thrust into prison, and sold into interminable slavery."[169] The memorialists acknowledged that, following *Dred Scott*, Massachusetts had made an initial effort "legally to test" the rights of its black citizens. But this had been "repulsed" by South Carolina and Louisiana, and since then, Massachusetts had "lacked the courage to vindicate the rights of her colored citizens, leaving them a prey to the oppressor."[170]

When laying the foundation for these complaints, Nell and the blacks of Massachusetts asserted that they had a right to "the privileges and immunities of citizens of the United States."[171] They argued that because the *Dred Scott* decision "is in palpable violation" of the Comity Clause, it was of no authority:

> That it is, therefore, no more worthy of respect and consideration than though it denied to all the citizens of this Commonwealth the privileges and immunities of citizens of the United States, and declared Massachusetts to be no longer a constituent member of the Union; but ought to be solemnly protested against, and resisted to the last extremity, by your honorable bodies, and by all the people of the State, as an intolerable act of usurpation and tyranny.[172]

Massachusetts would, indeed, soon resist to the last extremity. For now, however, free blacks from Massachusetts, who feared the worst from Southern states, had to petition their own state to take a stand in defense of "the privileges and immunities of citizens of the United States."

Black understandings of the privileges and immunities of citizens of the United States rested on the same bitter genealogy of ideas that was familiar to whites. Nell spelled this out when he presented resolutions on his memorial to the 1858 Convention of the Colored Citizens of Massachusetts:

> Whereas, the recent decision of the Supreme Court of the United States in the Dred Scott case, by which that Court declares that we are not, and cannot become citizens of the United States, is in palpable violation of the 1st [sic] section of Article 4th of the Constitution of the United States . . . .
>
> Whereas, we deem the doctrine so ably laid down by Judge Curtis, of Massachusetts, in dissenting . . . to be impregnable. . . .
>
> Whereas, Stephen A. Douglas, in his campaign speeches in Illinois, is declaring that he does not believe it a great wrong to deprive a negro the rights of citizenship. He does not believe they ever were intended to be citizens. Our government, he says, was founded on a white basis—was created by white men. . . .

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[169] Nell, *supra* note 168, at 11.
[170] *Id.*
[171] *Id.*
[172] *Id.*

> Resolved, That this Mass[achusetts] Convention adopt the memorial sent from Boston to the last session of the Massachusetts Legislature, protesting against the Dred Scott decision . . . .[173]

In this manner, Nell condemned the decision that, in violation of the Comity Clause, denied "the privileges and immunities of citizens of the United States."[174]

Free blacks had good reason to be concerned about their Comity Clause rights, for they took a high risk when traveling to Southern states. And although their views find little place in the scholarship on incorporation, it is difficult to imagine that they misunderstood the significance of the privileges and immunities they demanded.

C. Bingham's Speech on Oregon: Rewriting the Comity Clause

The white congressman who most saliently advocated black Comity Clause rights in terms of national citizenship was Representative John Bingham of Ohio. In 1866, Bingham would draft the Privileges or Immunities Clause of the Fourteenth Amendment. It is therefore revealing that already in the 1859 debate over the admission of Oregon, he was speaking about the privileges and immunities of citizens of the United States. Like Missouri decades earlier, Oregon asked to be admitted to the Union with a constitution that would have barred entry to free blacks.[175] It was a familiar danger, and Bingham addressed it with the now conventional argument that free blacks enjoyed Comity Clause rights—or as he put it, that they enjoyed the privileges and immunities of citizens of the United States.[176] Indeed,

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[173] *Anniversary of the British West India Emancipation, Convention of the Colored Citizens of Massachusetts*, 28 LIBERATOR (Bos.) 132 (1858).

[174] *Id.* Another black convention, in Virginia, echoed this sort of demand at the end of the Civil War:

> Massachusetts may with perfect propriety say to Virginia, No matter with what wrongs, for the purpose of sustaining a bloody and barbarous system, you outrage humanity in the persons of colored men born and reared upon your own soil, I demand of you by the sacred guaranty of your constitutional obligations, that the humblest of my citizens, when a sojourner in your territory, shall be secure in all the great fundamental rights of human nature.

Opinion of Judge Underwood on the Right of Excluding the Testimony of Colored Men from the Courts of Justice, N.Y. TRIB., Oct. 22, 1865, *reprinted in* 1 PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865–1900, at 100 (Philip S. Foner & George E. Walker eds., 1986).

[175] OR. CONST. of 1857, art. XVIII, § 4. This provision was to become part of the Constitution only if the people, when adopting the Constitution, voted against the presence of free blacks. *Id.* It was added to propitiate those who argued that if the State did not allow slavery, it would be "overrun with free negroes." Letter from George H. Williams to George H. Himes (Aug. 26, 1907), *in* THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 32, 33 (Charles Henry Carey ed., State Printing Dep't 1926).

[176] Scholars have taken note of Bingham's speech but without recognizing that it took a familiar position against a familiar sort of threat, and they thereby assume that Bingham's defense of the privileges and immunities of citizens of the United States was his attempt to stake out a new sort of claim. MALTZ, *supra* note 81, at 37–38. In fact, it was an old wine in a not entirely new bottle. Incidentally, Bingham's

like many of his contemporaries, he argued for his interpretation about the Comity Clause by rewriting it.

The offensive provision of the proposed Oregon Constitution barred free blacks from entering, residing, holding real estate, making any contract, or maintaining any suit therein. Laying the foundation for his response, Bingham explained that "[a]ll free persons born and domiciled within the jurisdiction of the United States, are citizens of the United States from birth," and that "all aliens become citizens of the United States only by act of naturalization, under the laws of the United States."[177] On this basis, Bingham declared: "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."[178] Bingham then asked, "What says the Constitution"?[179] He answered by quoting the Comity Clause. He then elaborated:

> 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.[180]

Comity Clause rights resulted not merely from state law, but from the U.S. Constitution, and they belonged to all citizens of the United States. In this sense, Comity Clause rights were the privileges and immunities of citizens of the United States.

Bingham understood that the Comity Clause did not specify "citizens of the United States," but this was how Bingham interpreted it and how he, in effect, rewrote it. Like Southerners who defeated the Comity Clause claims of blacks by denying that such persons were citizens of the United States, Northerners such as Bingham assumed that the Clause referred to citizens of the United 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."[181]

In fact, Bingham was not alone in rewriting the Comity Clause. Both Northerners and Southerners simply altered the Clause to express what ev-

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speech was reported in at least one black newspaper. *Admission of Oregon, Speech of Hon. John A. Bingham, of Ohio, in the U.S. House of Representatives (Feb. 11, 1859)*, 13 NAT'L ERA (D.C.) 36 (1859).

[177] CONG. GLOBE, 35th Cong., 2d Sess. 981, 983 (1859) (statement of Rep. John Bingham).

[178] *Id.* at 984.

[179] *Id.*

[180] *Id.*

[181] *Id.*

eryone at this point assumed. On behalf of the South, for example, George Sawyer wrote that "[t]he Constitution has guaranteed to the citizens of each State (or of the United States) the enjoyment of all the rights, privileges and immunities of the several States"—this being an attempt to introduce the assumption about citizenship in a way that made sense of the Clause.[182] On behalf of the North, Horace Dresser also specified his assumption about "a federal, national, or American citizenship" by inserting it within brackets: "The citizens of each State shall be entitled to all the privileges and immunities of citizens [of the United States] in the several States"—this more typical mode of rewriting being an attempt to echo what had developed as a label for Comity Clause rights.[183] Of course, however they rephrased the Clause, Southerners denied that blacks were citizens of the United States, and Northerners were apt to take the other view. But either way, the rewriting clarified that states could not deny the privileges and immunities that the Comity Clause assured to citizens of the United States. It was a mode of interpretation, and indeed interpolation, that would soon be significant for the Fourteenth Amendment.

To modern scholars, attuned to modern concerns, "the privileges and immunities of citizens of the United States" must have meant the incorporation of the Bill of Rights, but to the Americans who struggled over the fate of free blacks in a nation divided by slavery, it did not. To these earlier Americans, whether Southern or Northern, white or black, the phrase was merely a concise, forceful statement of the privileges and immunities that Americans enjoyed in other states as citizens of the United States.

D. Not Incorporation

It is necessary to linger on the question of whether Bingham in 1859 was referring to incorporation, for some scholars have suggested that, when he asserted the privileges and immunities of citizens of the United States against the Oregon Constitution, he meant that the Comity Clause itself incorporated the Bill of Rights against the states.[184] Bingham, however, was simply reiterating the standard antislavery position on the Comity Clause:

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[182] SAWYER, *supra* note 114, at 299. Sawyer was a New Englander who had long lived in Louisiana. He wrote this volume in 1855. *Id.* at iii, v.

In arguments in 1860, on a writ of habeas against Southerners who had brought slaves into New York while in transit, one of the counsel for the slaves, William Evarts, noted: "It is claimed by the learned counsel for the appellants, that this should be construed as if it read: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens *of the United States*—in the several States.'" N.Y. COURT OF APPEALS, REPORT OF THE LEMMON SLAVE CASE: CONTAINING POINTS AND ARGUMENTS OF COUNSEL ON BOTH SIDES, AND OPINIONS OF ALL THE JUDGES 78 (N.Y., Horace Greeley & Co. 1860). To this, Evarts responded that "there is nothing in the condition of a citizen of the United States, which would warrant the suggestion, that there was any intention that he should carry into any State, social or political rights which citizens there did not enjoy." *Id.*

[183] Horace Dresser, *Slavery and the Slave Trade*, 43 U.S. DEMOCRATIC REV. 304, 308, 320 (1859).

[184] *See, e.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 8, at 61.

that this clause assured to visiting blacks, as citizens of the United States, the substantive rights that states accorded their own citizens. As might be expected, the question was one of cross-jurisdictional equality, not fixed federal substantive limits.

Like others who took the antislavery position—whether the litigants in the *Crandall* case or Justice Curtis in *Dred Scott*—Bingham was fighting for the privileges and immunities secured by the Comity Clause, which in this instance were the privileges and immunities that Oregon had given its own citizens and now proposed to deny to visiting blacks. Thus, although he spoke about substantive rights as being among the privileges and immunities of citizens of the United States, the context makes abundantly clear that he was simply making the usual Comity Clause argument that rights held under state law were equally assured to blacks by the Comity Clause:

> I maintain that the 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; and therefore I hold this section for their exclusion from that State and its courts, to be an infraction of that wise and essential provision in the national Constitution to which I before referred . . . .[185]

He then, once again, quoted the Comity Clause and explained that this was the provision of the Constitution under which free blacks were entitled to "the rights of life and liberty and property, and their due protection in the enjoyment thereof."[186]

Scholars who have discerned hints of incorporation in Bingham's speech about Oregon have ignored the earlier antislavery context of what he said. Rather than read forward from the antislavery arguments about how all citizens of the United States were entitled to the benefit of the Comity Clause, the scholars have read backwards from their twentieth-century assumptions that "the privileges and immunities of citizens of the United States" must be federal rights incorporated against the states.

Yet once the context of Bingham's speech is considered, his meaning becomes clear. The danger was the Southern view that blacks were not citizens of the United States—a position that largely defeated the Comity Clause. Against this threat, antislavery advocates and judges had come to argue that blacks enjoyed the benefit of the Comity Clause as citizens of the United States. Bingham made this argument against the Oregon Constitution, and with compressed eloquence, he summarized that he was arguing for the privileges and immunities of citizens of the United States. In this context, when Bingham said that "the rights of life and liberty and property,

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[185] CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham on Feb. 11, 1859).
[186] *Id.*

and their due protection in the enjoyment thereof by law" were among "the privileges and immunities of citizens of the United States," he meant exactly what one might expect. Like so many other antislavery advocates, he was defending the cross-jurisdictional claim of blacks under the Comity Clause—their claim under the U.S. Constitution, as citizens of the United States, to the substantive rights offered by states to their own citizens.

Thus, even before the Civil War, in disputes about the Comity Clause claims of free blacks, opponents of slavery prominently espoused such claims in terms of "the privileges and immunities of citizens of the United States." This was not the only context in which Americans used this phrase, but it was the most prominent. Of particular interest here, they sometimes clarified how they were interpreting the Comity Clause in favor of free blacks by rewriting the Clause to protect "the privileges and immunities of citizens [of the United States]." Not long afterward, when the Civil War ended, Bingham would propose to amend the Constitution in such terms.

V. THE PRIVILEGES AND IMMUNITIES BILL

Although the context of Representative Bingham's proposal might by now seem clear enough, there is more to be discerned, for the Privileges or Immunities Clause was preceded by a Privileges and Immunities Bill. Early in 1866, while drafting the Fourteenth Amendment, Congress briefly considered a bill "To declare and protect all the privileges and immunities of citizens of the United States in the several States."[187] This bill has never been examined for its role in the drafting of the Fourteenth Amendment.[188] But it is very important, as it removes any room for doubt about the meaning of the related clause of the Fourteenth Amendment.

The Bill aimed to protect the privileges and immunities owed to citizens of the states under the Comity Clause on the ground that these were "the privileges and immunities of the citizens of the United States."[189] Although the Bill failed on account of constitutional objections, the Fourteenth Amendment overcame this obstacle by elevating the Bill's main principle to a constitutional guarantee.

The Privileges and Immunities Bill is therefore the evidence that cinches the relationship between the Comity Clause disputes and the Four-

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[187] A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States, H.R. 437, 39th Cong. § 1 (as reported by H. Comm. on the Judiciary, Apr. 2, 1866, Printers No. 116).

[188] In one scholarly account, the Bill is mentioned in passing, but as a bill "to punish private invasions of basic rights." MALTZ, CIVIL RIGHTS, *supra* note 9, at 39 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1293–94 (1866)). This is true of the enforcement provisions, but does not capture the main import of the Bill. For more on the Bill's provisions allowing enforcement against private action, see *infra* note 198.

[189] H.R. 437.

teenth Amendment. Enough has already been seen to show the connection. But the Bill directly ties the earlier efforts to enforce the Comity Clause with what would become the Fourteenth Amendment's Privileges or Immunities Clause. In particular, it completes the genealogy of context, text, and meaning that runs from the aftermath of the second Missouri Compromise up to Bingham's drafting of the Privileges or Immunities Clause. It is, therefore, a sort of missing link.

A. The Civil Rights Act

The Privileges and Immunities Bill was designed as a companion to the Civil Rights Act. The Civil Rights Act generally protected individuals against discrimination under state law.[190] Further protection, however, might be needed against interstate discrimination, for this often kept individuals from even coming within the ambit of a state's law. The Privileges and Immunities Bill was therefore written to supplement the Civil Rights Act by enforcing the privileges and immunities guaranteed by the Comity Clause.

Congress passed the Civil Rights Act in 1866 to protect individuals from racial discrimination under state law. As the Civil War came to an end in 1865, Congress and the states, in the Thirteenth Amendment, abolished slavery.[191] But Southern states responded to emancipation by adopting "Black Codes," which kept emancipated blacks in a state of de facto slavery. These statutes constrained individuals on account of their race, barring them from a wide range of activities, such as entering into contracts or owning property, that were understood to be aspects of natural liberty.

In response to this primarily intrastate discrimination, Congress passed the Civil Rights Act. The statute began by declaring "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . . to be citizens of the United States."[192] It then assured all such citizens of equality in specified natural rights and due process:

> [S]uch citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none

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[190] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27–30.

[191] U.S. CONST. amend. XIII, § 1.

[192] Civil Rights Act of 1866, ch. 31.

> other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[193]

Other than the proceedings for security of person and property, these rights were all understood as natural rights—meaning aspects of the liberty that individuals enjoyed in the state of nature or absence of government.

The protection of natural rights was understood as the primary purpose of civil government, and in this sense, legally protected natural rights were also civil rights—thus giving the Civil Rights Act its name. Although the phrase "civil rights" had once typically been understood to mean all rights enjoyed under civil laws, the phrase had come, in the mid-eighteenth century, to mean only the natural rights protected by civil laws. From this perspective, Blackstone explained that "civil liberty . . . is no other than natural liberty, so far restrained by human laws . . . as is necessary and expedient for the general advantage of the public."[194] An equality of legally protected natural rights may these days seem meager, but these were the rights that were being denied by Southern states in 1866. They were also the sort of rights that seemed to distinguish free citizens from persons in servitude.[195] The Civil Rights Act, therefore, required equality of such rights and of due process and enforced this equality with criminal sanctions.[196]

The Civil Rights Act, however, provoked constitutional objections, and on these and perhaps also less principled grounds, President Johnson vetoed it. Congress therefore had to attend to the constitutional question, and although it overrode the veto of the Civil Rights Act in April 1866, Congress simultaneously used the Fourteenth Amendment to establish beyond any doubt its constitutional authority to adopt the Civil Rights Act.

B. The Privileges and Immunities Bill

Less familiar than the story of the Civil Rights Act is the parallel story of the Privileges and Immunities Bill. At roughly the same time that Congress dealt mostly with the intrastate rights of persons in the Civil Rights Act, it attempted to redress interstate rights—"the privileges and immunities of citizens of the United States"—in the Privileges and Immunities Bill. Like the Civil Rights Act, the Bill failed for constitutional reasons, and then became a foundation for the Fourteenth Amendment.

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[193] *Id.*

[194] 1 WILLIAM BLACKSTONE, COMMENTARIES *1, *125. Religious dissenters had demanded equal civil rights to obtain equality not only as to natural liberty under civil law but also as to the privileges accorded the Anglican establishment. Blackstone, however, defended the Anglican establishment by flipping around the term, saying that it meant only the natural liberty enjoyed under civil laws. *Id.* For the shifting meaning of "civil rights," see Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 386–87.

[195] *See* Hamburger, *supra* note 194, at 374.

[196] Civil Rights Act of 1866, ch. 31.

As suggested by its title, the Bill took the same position as Congress in 1821 and as Justice Curtis in 1857, but now more concisely asserted it in terms of "the privileges and immunities of citizens of the United States."[197] It thereby pointedly treated the privileges and immunities of citizens of the *states* as the privileges and immunities of citizens of the *United States*. When taken out of historical context, this may seem paradoxical. It was, however, merely an expression of the standard antislavery position. When Southerners argued that blacks lacked Comity Clause rights because they were not citizens of the United States, antislavery advocates answered that blacks were entitled to such privileges and immunities precisely because they were citizens of the United States.

The first clause of the Privileges and Immunities Bill laid out its substantive requirements. This clause began by declaring (in response to states such as Missouri and Oregon) that citizens of the United States had a right to travel to other states. It then specified other privileges and immunities (of the sort that Oregon had denied). Finally, it declared the general principle of cross-jurisdictional equality. The result was:

> That every person, being a citizen of the United States shall, in right of such citizenship, be entitled, freely and without hindrance or molestation, to go from the State, Territory, or district of his or her residence, and to pass into and through and to sojourn, remain and take permanent abode within each of the several States, Territories, and districts of the United States, and therein to acquire, own, control, enjoy and dispose of property, real, personal and mixed; and to do and transact business, and to have full and speedy redress in the courts for all rights of person and property, as fully as such rights and privileges are held and enjoyed by the other citizens of such State, Territory, or district; and, moreover, therein to have, enjoy, and demand the same immunities and exemptions from high or excessive impositions, assessments, and taxation as are enjoyed by such other citizens under the laws or usages of such State, Territory, or district, and to have, demand, and enjoy all other privileges and immunities which the citizens of the same State, Territory, or district would be entitled to under the like circumstances.[198]

The Bill thereby aimed to resolve the struggle over the Comity Clause that had begun forty-five years earlier.

Like the Civil Rights Act, the Bill did not merely state constitutional principles, but asserted them as a foundation for enforcement sections.

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[197] A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States, H.R. 437, 39th Cong. § 1 (as reported by H. Comm. on the Judiciary, Apr. 2, 1866, Printers No. 116).

[198] *Id.* Note that the Bill's initial clause was framed as a guarantee of the freedom of citizens rather than as a prohibition on the states. On this account, the Bill's enforcement provisions could bar private interference with the right, without requiring state action. In constrast, the Fourteenth Amendment specified, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Amendment thereby made clear it was simply a prohibition on the states, with obvious implications for its enforcement.

Much of the history of slavery seemed to be a history of Southern evasion of the Constitution, and the enforcement provisions therefore seemed essential. In its first section, the Privileges and Immunities Bill attempted to cut off evasion by specifying the right to travel and other details of the protected privileges and immunities. In its enforcement sections, the Bill took further measures against evasion by laying out criminal and civil remedies.[199]

Such was the legislative version of what Congress would soon propose as a constitutional amendment. Revealingly, it protected Comity Clause rights under the rubric of "A Bill [t]o declare and protect all the privileges and immunities of citizens of the United States in the several states."[200]

C. Shellabarger's Explanation of the Bill

The most extensive explanation of the Privileges and Immunities Bill came from its sponsor, Representative Samuel Shellabarger—a radical Republican lawyer from Ohio. Although the import of the Bill is clear enough from its words, Shellabarger's speech is important, for it confirms that the Bill was not meant to do anything more than supplement the Civil Rights Act by securing Comity Clause rights.

Shellabarger had proposed the Bill on April 2, 1866. Although this was shortly after President Johnson vetoed the Civil Rights Act, Shellabarger recognized that Congress would override the veto—something Congress did just days afterward. The Privileges and Immunities Bill got two readings in the House of Representatives, and the Judiciary Committee agreed to report in favor of it, but the Bill came back to the floor only in the summer of 1866, when there was no longer time for a final House vote.[201] The underlying problems, however, were not so much procedural as constitutional. Congress had the votes to repudiate Johnson's veto of the Civil

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[199] *Id.* §§ 2–5.

[200] *Id.*

[201] The next month, Representative James F. Wilson proposed a substitute bill. Amendment in the Nature of a Substitute to Bill H.R. 437, 39th Cong. (as reported by H. Comm. on the Judiciary, May 7, 1866). Wilson's bill came back to the House from the Judiciary Committee the following year. A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States, H.R. 1037, 39th Cong. (as reported by H. Comm. on the Judiciary, Jan. 23, 1867).

Incidentally, both iterations of Wilson's bill included a final paragraph stating: "That the enumeration of the privileges and immunities of citizenship in this act contained shall not be deemed a denial or abridgment of any other rights, privileges, or immunities which appertain to citizenship under the Constitution." *Id.* § 12. In other words, Shellabarger's legislation about the Comity Clause "privileges and immunities" of free blacks was not to have adverse implications in the other context in which federal law protected privileges and immunities. To be specific, Shellabarger's bill responded to the needs of free blacks for privileges and immunities and it therefore concerned only Comity Clause rights. But it will be recalled that cession treaties protected the "privileges, rights and immunities" of citizens of the United States, which in that context meant federal rights in general. It therefore was necessary to prevent the narrow meaning assumed in the one context from affecting the broader meaning assumed in the other context.

Rights Act, but in light of the constitutional objections, Congress did not press ahead with the Privileges and Immunities Bill.

Shellabarger responded by giving a speech in the House about "the right of Congress to pass this bill into a law," his goal being "to attract to its consideration the attention of my fellow-members of this House."[202] As has been seen, it was a familiar practice to rewrite the Comity Clause by spelling out contemporary assumptions about federal citizenship within inserted brackets.[203] Adopting this approach, Shellabarger observed that "[t]he design of this bill is to enforce that demand of the Constitution which declares 'the citizens of each State shall be entitled to all the privileges and immunities of citizens' [of the United States] 'in the several States.'"[204] Shellabarger added that "[t]his bill occupies this single ground, and aims at nothing beyond."[205]

He urged that the Bill was necessary in addition to the Civil Rights Act. The latter guaranteed equal civil rights under state law. The right to cross-jurisdictional equality, however, also needed attention, for as already noted, this was not necessarily a claim under state law. As Shellabarger observed about his bill, "Its scope is distinct from that of the 'civil rights bill.' That insures equality in certain civil rights. This protects all the fundamental rights of the citizen of one State who seeks to enjoy them in another State. The 'civil rights bill,' therefore, has, in no sense, rendered this law unnecessary."[206]

Shellabarger's bill was a guarantee about *who* enjoyed Comity Clause rights, not about *what* those rights were, and it is therefore perhaps forgivable that he was a little fuzzy on the question of what was protected. He understood that there had to be a distinction between the rights that were exclusively "local" and the others, to which visitors had a claim, and he adopted Bushrod Washington's notion that some were "fundamental" and others were "local, and not fundamental."[207] Unfortunately, this could not easily be reconciled with his statement a minute earlier that his bill was designed "to secure to the citizens of every State within every other State the 'privileges and immunities (whatever they may be) accorded in each to its own citizens.'"[208] Nor, more seriously, could it be reconciled with the Bill's statement that visitors to a state were to enjoy "all" of the privileges and

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[202] CONG. GLOBE, 39th Cong., 1st Sess. app. at 293 (1866) (statement of Rep. Shellabarger on July 25, 1866).

[203] *See supra* text accompanying notes 181–83.

[204] CONG. GLOBE, 39th Cong., 1st Sess. app. at 293 (1866). Although "[of the United States]" appears in the *Globe*, it obviously is not possible to discern whether Shellabarger indicated the brackets when speaking or inserted them when rewriting his speech, let alone whether the reporter or an editor did this.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

immunities of citizens of the state. Shellabarger admitted that there was some "confusion" about what was fundamental and what was not, but he at least was confident "it is universally agreed" that the rights "which Kent enumerates as 'fundamental,' cannot be taken away from any citizen of the United States by the laws of any State, neither from its own citizens nor from those coming in from another State."[209]

In drafting the Bill, Shellabarger had anticipated constitutional objections, and this was why he had framed its title in terms of the privileges and immunities of citizens of the United States. When the advocates of Missouri had complained in 1821 that Congress lacked the power to place its condition on Missouri's statehood, Congress had stressed that it was protecting rights guaranteed by the U.S. Constitution. Similarly, when Democrats in 1866 questioned whether Congress had the power to enforce constitutional rights against the states, Shellabarger entitled his Privileges and Immunities Bill to make clear that, in securing Comity Clause rights, it was protecting "the privileges and immunities of citizens of the United States."[210] As he explained, "these rights grow out of and belong to national citizenship and not out of State citizenship," and therefore "it is within the power and duty of the United States to secure by appropriate legislation these fundamental rights."[211]

Shellabarger recognized that opponents would try to defeat the bill by misinterpreting it—in particular, by suggesting that its words about federal citizenship would protect citizens from their own states or fellow citizens. Lest there be any such misunderstanding, Shellabarger emphasized that "this bill has been carefully limited":

> It protects no one except such as seek to or are attempting to go either temporarily or for abode from their own State into some other. It does not attempt to enforce the enjoyment of the rights of a citizen within his own State, against the wrongs of his fellow-citizens of his own State after the injured party has become or when he is a citizen of the State where the injury is done. This is because the bill is confined to the enforcement of this single clause of the Constitution.[212]

In other words, it "confine[s] its provisions to the single object of seeing that this clause of the Constitution was executed throughout the Republic."[213]

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[209] *Id.*

[210] A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States, H.R. 437, 39th Cong. (as reported by H. Comm. on the Judiciary, Printer's No. 116, Apr. 2, 1866).

[211] CONG. GLOBE, 39th Cong., 1st Sess. app. at 293 (1866).

[212] *Id.*

[213] *Id.* By way of elaboration, Shellabarger quoted a Massachusetts case, *Abbot v. Bayley*, to the effect that "the privileges and immunities of 'the citizens of each State,' in every other State can, by virtue of this clause, only be applied in case of a removal from one State into another." *Id.* (quoting *Abbot*, 23

Although the Privileges and Immunities Bill of 1866 did not get very far, it remains very significant, for it shows that the antislavery position on the Comity Clause led directly to the Fourteenth Amendment's Privileges or Immunities Clause. To explain why Congress had the power to enforce the Comity Clause, the Bill described such rights as "the privileges and immunities of citizens of the United States." This was not entirely persuasive as constitutional interpretation, and in part for this reason, it would soon enter federal law not in a statute, but in a constitutional amendment.

VI. THE FOURTEENTH AMENDMENT

The Fourteenth Amendment in 1868 constitutionalized a position that by then was widely familiar. Today, the Amendment's Privileges or Immunities Clause is usually understood on the basis of vague generalities in the congressional drafting debates, and it therefore seems rather puzzling. At the time, however, it was obvious that the clause reasserted a position already taken by antislavery lawyers in the aftermath of the second Missouri Compromise, by Justice Curtis in *Dred Scott*, and most recently, in 1866, by the Privileges and Immunities Bill. The Amendment's Privileges or Immunities Clause thus finally gave constitutional effect to the longstanding attempts to defend the Comity Clause as a right of federal citizenship. The Comity Clause had guaranteed to citizens of the states the privileges and immunities of citizens of other states. Now, after almost half a century of struggle, the Fourteenth Amendment settled that the privileges and immunities owed to the citizens of states under the Comity Clause were the privileges and immunities of citizens of the United States and, as such, were enforceable by Congress.

A. Constitutionalizing the Principles of the Civil Rights Act and the Privileges and Immunities Bill

The Civil Rights Act and the Privileges and Immunities Bill would together have barred both intrastate and interstate racial discrimination. The Act, however, had to be adopted over constitutional objections, and the Bill failed when it encountered such obstacles. Congress therefore, in July 1866, placed all such legislation on express constitutional foundations—not

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Mass. (6 Pick.) 89, 91 (1827)). Indeed, "[t]o conform the bill to this view of this constitutional provision, it was deemed best to limit it in accordance with that decision, and to make it secure to all the people those great international rights which are embraced in unrestrained and secure inter-State commerce, intercourse, travel, sojourn, and acquisition of abode." CONG. GLOBE, 39th Cong., 1st Sess. app. at 293 (1866). The Bill's protection of Americans who traveled across state boundaries thus would be like the protection of persons who traveled across international borders. On this basis, Shellabarger again emphasized: "It only attempts to see to it that the citizens of the United States shall have what it is solemnly and expressly declared by their national Constitution they shall be 'entitled to in the several States.'" *Id.* at 294.

by creating any new principle, but rather by giving familiar principles clear constitutional foundations.

It is well-known that the Fourteenth Amendment's clauses on equal protection and due process gave constitutional force to positions Congress had earlier taken in the Civil Rights Act. This statute had secured equality in various natural rights and the due process enjoyed under law. Echoing the statute, the Fourteenth Amendment guaranteed equal protection of the laws and due process, and in both ways it also established a foundation for enforcement legislation such as the Civil Rights Act.[214]

Similarly, the final version of the Fourteenth Amendment's clause on privileges or immunities guaranteed what Congress had considered protecting in the Bill "[t]o declare and protect all the privileges and immunities of citizens of the United States in the several states." This bill, as Shellabarger had explained, was designed "to enforce" the Comity Clause, "and aims at nothing beyond."[215] After his enforcement statute collapsed under the weight of constitutional objections, Congress, in the Fourteenth Amendment, asserted the privileges and immunities of citizens of the United States and gave Congress the power to enforce these rights. Thus, just as the Civil Rights Act was the precursor to the Amendment's clauses on due process and equal protection, so too the Privileges and Immunities Bill was the basis of its clause on privileges or immunities.

This genesis is evident from the drafting of the Fourteenth Amendment, which adopted the words of the Privileges and Immunities Bill. The Amendment was drafted by the Joint Committee of Fifteen on Reconstruction, and on February 3, 1866, while sitting on this Committee, Representative John Bingham of Ohio proposed the words: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states."[216] Making explicit what this would enforce, Bingham added a citation to the Comity clause: "Art. 4, Sec. 2."[217] On April 21, 1866, however, Bingham proposed the now familiar words "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[218]

What happened between early February and late April? Scholars have assumed that Bingham suddenly veered away from enforcement of the

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[214] The earlier history of equal protection provisions reveals that "the equal protection of the laws" meant equal protection of the natural liberty secured by law. *See* Hamburger, *supra* note 194, at 299 (tracing the history of ideas of equal protection and how they differed from more general ideas of equality).

[215] CONG. GLOBE, 39th Cong., 1st Sess. app. at 293 (1866).

[216] JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 60–61 (photo. reprint 2005) (Benjamin B. Kendrick ed., 1914) [hereinafter JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION].

[217] *Id.*

[218] *Id.* at 87.

Comity Clause and toward a bold new vision—a vision of incorporation—as if he were struck by inspiration or had an "epiphany."[219] In fact, he more probably was struck by the title of Shellabarger's bill. Shellabarger introduced his bill on April 2, when it was printed for members of the House.[220] Less than three weeks later, at the next drafting session of the Joint Committee, Bingham proposed that the Fourteenth Amendment contain phrasing very similar to the title that Shellabarger had given to his bill.[221]

Of course, this is not to say that Bingham simply copied the Bill. On the contrary, the Bill echoed the phrase with which Bingham and other opponents of slavery had been defending the Comity Clause since before the Civil War. The phrase was thus a succinct and familiar label for the Comity Clause rights that Bingham had already attempted to protect in the Fourteenth Amendment. But after Shellabarger used the phrase in his legislation, Bingham apparently realized that he should adopt the phrase in his Amendment.[222]

Later, during debates on the floor of the Senate, the Amendment's initial sentence was added—that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[223] This stipulation was prudent, for without it, Southerners might have contested the Northern assumption that free blacks were citizens of the United States.[224]

The Fourteenth Amendment thus finally resolved the dispute over the Comity Clause by placing the antislavery interpretation of it on a secure

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[219] *See, e.g.*, Lash, *supra* note 13, at 1302 ("John Bingham had an epiphany—one that altered his original views of Article IV and that caused him to completely rewrite his proposed amendment.").

[220] H.R. JOURNAL, 39th Cong., 1st Sess. 481 (1866).

[221] The previous meeting of the Joint Committee had been March 5, 1866, and although there was a meeting on April 16, the sole object of that meeting was to hear from Senator Stewart of Nebraska. Accordingly, the next drafting meeting was April 21, when Bingham introduced the phrasing drawn from Shellabarger's bill. *See* JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, *supra* note 216, at 78, 81–82, 87.

[222] As observed *supra* in note 198, Bingham's wording echoed the Bill's main principle, but not Shellabarger's attempt to justify enforcement in the absence of state action.

After Congress proposed the Fourteenth Amendment, some Southern governors attempted to substitute an alternative, part of which would have restored the Privileges or Immunities Clause to words that more closely followed the Comity Clause: that "the Citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states." *A Southern Proposal for a Fourteenth Amendment (Feb. 4, 1867)*, *in* 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 238, 240 (Walter L. Fleming ed., 1950). This, however, merely repeated the phrasing that had failed to protect free blacks under the Comity Clause, and that had not justified congresional enforcement. In any case, the entire Southern substitute was politically doomed from the start.

[223] U.S. CONST. amend. XIV, § 1. For the promptings from Senator Wade and the initial proposal from Senator Howard, see CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

[224] Arguably, either the definition of citizenship or the Privileges or Immunities Clause might have sufficed to protect free blacks in their Comity Clause rights. The goal, however, was not merely to make such protection possible, but to secure it in a way that would preclude any further evasion. Congress therefore had good reason to adopt both provisions.

constitutional footing. Today, it may be thought that the renewed protection for Comity Clause rights in the Privileges or Immunities Clause was merely redundant. At the time, however, it was essential. Conceptually, the Privileges or Immunities Clause was needed to repudiate the positions taken by Missouri and by Chief Justice Taney. On a more practical level, it was necessary to justify congressional enforcement. After a half century of state abridgments of the privileges and immunities of free blacks, the Fourteenth Amendment at last clarified that these rights were privileges and immunities of citizens of the United States. On this basis, blacks could finally hope to enjoy these rights, and Congress, under Section 5 of the Fourteenth Amendment, could hope to enforce them.

B. The Debates on the Fourteenth Amendment

Although the congressional and ratification debates on the Fourteenth Amendment are usually viewed as the core of the Amendment's history, this Article shows that, in a sense, they were merely the conclusion of earlier developments. To be sure, when the Privileges or Immunities Clause is stripped of its earlier history, the relevant evidence gets reduced to the debates, and, in this narrow decontextualized form, the vague, allusive oratory of the representatives and senators has sometimes seemed to refer to an incorporation of the Bill of Rights against the states. Yet when the debates are considered in the context of the half-century struggle over the rights of mobile blacks, it becomes clear what the congressmen meant.[225]

The arguments of many congressmen could be relied upon here to show how the debates make sense in light of the earlier history, but it should suffice, by way of illustration, to examine the words of two leading advocates of the Fourteenth Amendment: Bingham and Howard.[226] Their speeches are frequently relied upon as dispositive evidence that the framers of the Amendment intended incorporation. As will be seen, however, their words are much more consistent with the account given here.

1. Bingham.—Representative John Bingham not only drafted the Privileges or Immunities Clause but also prominently argued for the Fourteenth Amendment. Speaking on February 28, 1866, he defended the version of the Privileges or Immunities Clause then before the House. This was the early version, which simply granted congressional enforcement power as to the privileges and immunities of state citizens: "The Congress

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[225] In this sense, the methodology of this Article is the opposite of that in most scholarship on the Privileges or Immunities Clause. Rather than delve deeply into debates that have seemed largely inconclusive, this Article concentrates on the prior context, which clarifies their meaning.

[226] For a detailed and well-known survey of the views of congressmen, see Fairman, *Fourteenth Amendment*, *supra* note 9. It is acknowledged, even by some scholars sympathetic to incorporation, that at least some congressmen assumed that the Privilege or Immunities Clause merely echoed the Comity Clause. *See, e.g.*, Thomas, *supra* note 8, at 1643 (discussing Rep. Hiram Price); Curtis, *The Klan*, *supra* note 8, at 1411–12 (discussing Sen. Trumbull, albeit in 1871).

shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states . . . ."[227] Bingham bluntly described this as "that part of the amendment which seeks the enforcement of the second section of the fourth article of the Constitution of the United States."[228]

Although he had not yet reformulated the Clause to secure "the privileges or immunities of citizens of the United States," he already defended it in such terms. He rhetorically asked:

> 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 on 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?[229]

Bingham was recalling Congress's resolution on Missouri, even echoing Missouri's point about "any pretext whatsoever." But Bingham, unlike Congress in 1821, spoke of the privileges and immunities of citizens of the United States. He was taking a position familiar from the past—including his own past—not one espoused by future advocates of incorporation.

With this defense of the Comity Clause in mind, he exclaimed: "Why, I ask, should not the 'injunctions and prohibitions,' addressed by the people in the Constitution to the States and the Legislatures of States, be enforced by the people through the proposed amendment?"[230] He explained:

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question.[231]

On account of this narrow focus of the proposed clause, "[t]he adoption of the proposed amendment will take from the States no rights that belong to the States."[232] In other words, "[t]he proposed amendment imposed no obligation on any State, nor on any citizen in a State which was not now enjoined upon them by the very letter of the Constitution."[233] Why not? Because the Amendment merely enforced existing constitutional limits that

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[227] JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, *supra* note 216, at 61.

[228] CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham on Feb. 28, 1866).

[229] *Id.* For Bingham's role in drafting the Privileges or Immunities Clause, see JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, *supra* note 216, at 60–61, 87.

[230] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

[231] *Id.*

[232] *Id.*

[233] *The Last Reported Amendment of the Constitution*, BANGOR DAILY WHIG & COURIER, Mar. 2, 1866, at 1.

already were "addressed by the people in the Constitution to the States and the Legislatures of States."[234]

Bingham then went into detail about the Bill of Rights. But in doing so, he did not allude to incorporation, let alone incorporation through the Privileges or Immunities Clause. Instead, he made clear that he was talking about the Equal Protection Clause, and how it would allow Congress in effect to enforce the Bill of Rights. Alluding to the states, and apparently their legislators, he said:

> [I]n the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellowmen. Why should it not be so? That is the question. Why should it not be so? Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.[235]

It was a stirring passage, and it alluded to enforcement of the Bill of Rights, but Bingham was speaking of Congressional enforcement of the Equal Protection Clause. Under the Fourteenth Amendment, the states could not deny equal protection of the rights they guaranteed in their state bills of rights, and Bingham apparently assumed that this would in effect allow Congress to protect the rights assured by the Bill of Rights.[236] Certainly, he was not talking about the direct requirements of the Fourteenth Amendment, let alone its Privileges or Immunities Clause.

Only after making this point about equal protection did he get to privileges and immunities, and on this he recited what might be expected:

> Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? . . . As the whole Constitution was to be the supreme law in every State, it therefore results that the citizens of each State, being citizens of the United States, should be entitled to all the privileges and immunities of citizens of the United States in every State . . . .[237]

These were the Comity Clause rights that had come to be understood as the privileges and immunities of citizens of the United States.

Bingham therefore understood them very differently from the sort of rights secured by bills of rights, which were mostly the rights of persons. Bingham repeatedly distinguished between the privileges and immunities of citizens and the rights of persons. It was a distinction he had relied upon

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[234] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

[235] *Id.*

[236] The equal protection of the law was understood to mean the equal protection of natural rights protected by civil laws and of due process. *See* Hamburger, *supra* note 194, at 378.

[237] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

before the Civil War, and he now reiterated it.[238] For example, when surveying the Constitution's guarantees of liberty, he spoke of "these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person[s]."[239] Relying on this distinction, he observed that "[t]he alien is not a citizen," and this was why "[y]our Constitution says 'no person,' not 'no citizen,' 'shall be deprived of life, liberty, or property,' without due process of law."[240] Bingham often lapsed into ambiguity when arguing for the Fourteenth Amendment, but he was more than clear enough that the privileges and immunities of citizens belonged to them as citizens, not merely as persons. Nor should this be a surprise, for it will be recalled that he had described the Privileges or Immunities Clause as "that part of the amendment which seeks the enforcement of the second section of the fourth article of the Constitution of the United States."[241]

2. Howard.—Another leading exponent of the Fourteenth Amendment was Senator Jacob Howard of Michigan, who participated in drafting the Amendment and introduced the final version in the Senate. Although he spoke more loosely than Bingham, he revealed that he too did not assume incorporation. Indeed, like Bingham, he began noting that the first clause of Section One "relates to the privileges and immunities of citizens of the several States."[242] Like Bingham, moreover, he distinguished this first clause from the remaining clauses, which related to "the rights and privileges of all persons, whether citizens or others."[243] Both in emphasizing the privileges and immunities of state citizens and in distinguishing these from the rights of persons, he started his speech in a manner incompatible with incorporation.

Senator Howard then launched into detail about the first clause, saying this time that it "relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States."[244] He explained that the Comity Clause had in effect "constitute[d] *ipso facto* the citizens of each one of the original States

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[238] In 1859, when discussing the Oregon Constitution, Bingham had said: "I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen . . . ." CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. John Bingham). On this basis, after speaking of the rights of citizens under the U.S. Constitution to suffrage and office, he discussed "these wise and beneficent guarantees of political rights to the citizens of the United States, as such, and of natural rights to all persons, whether citizens or strangers." *Id.*

[239] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

[240] *Id.* at 1292.

[241] *Id.* at 1089.

[242] *Id.* at 2765 (statement of Sen. Howard on May 23, 1866).

[243] *Id.*

[244] *Id.*

[as] citizens of the United States."[245] The Comity Clause, moreover, entitled them, "as citizens, to all the privileges and immunities of citizens in the several States," and thus "[t]hey are, by constitutional right, entitled to these privileges and immunities, . . . and [may] ask for their enforcement whenever they go within the limits of the several States of the Union."[246] Not surprisingly, all of this alluded merely to the privileges and immunities secured by the Comity Clause.

Howard then, however, went in a different direction, which has seemed to many scholars to suggest incorporation. Having completed his discussion of the first clause, the Privileges or Immunities Clause, he said, "To these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press . . . ."[247] After listing these personal rights, he summarized that "here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution," and "some by the first eight amendments."[248] He thought that "all these immunities, privileges, [and] rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States . . . . They do not operate in the slightest degree as a restraint or prohibition upon State legislation."[249] Was this the beginning of an argument that Comity Clause rights and most of the Bill of Rights would now be somehow incorporated against the states by the Privileges or Immunities Clause?

In fact, Howard was not saying that the rights secured by the first eight amendments to the Constitution were among the privileges or immunities of citizenship, whether as protected by the Comity Clause or the Fourteenth Amendment. On the contrary, he distinguished the rights in the amend-

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[245] *Id.*

[246] *Id.* Elaborating this point, he speculated about "what are the privileges and immunities of citizens of each of the States in the several States," but he refused "to go at any length into that question at this time." Instead, he merely noted that the Supreme Court had not yet answered the question and that "we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago . . . by Judge Washington," whereupon Howard quoted Bushrod Washington's opinion in *Corfield v. Coryell*. *Id.*

This leads, incidentally, to the question of whether Howard recognized the implications of Washington's allusion to "fundamental principles," which was part of the passage Howard quoted. Washington spoke of "fundamental principles" in a case that did not directly concern slavery and, indeed, that accepted the right to travel, and his opinion thereby acquired respectability across sectional lines. It is at least possible that Howard recognized he was quoting a case that had once fortified the Southern position, for although it did this by including rights of suffrage within privileges and immunities, Howard was sufficiently radical that he may have welcomed the opportunity to suggest that blacks would enjoy voting rights when they moved to another state. In the end, however, Howard's view of Washington's opinion remains speculative.

[247] *Id.*

[248] *Id.*

[249] *Id.*

ments and Comity Clause privileges and immunities, summarizing that all of these were among the "immunities, privileges, [and] rights . . . guarantied by the Constitution or recognized by it."[250] Like Bingham, he had earlier distinguished the privileges or immunities of citizens from the rights of persons.[251] Here, he apparently continued to draw this distinction, this being why, after speaking of "privileges" and "immunities," he added the word "rights." As it happens, he was not entirely clear about this, for he said that all of these "are secured to the citizen solely as a citizen of the United States."[252] Nonetheless, when he said the privileges and immunities of the Comity Clause and the rights in the first eight amendments were among the "immunities, privileges, [and] rights" guaranteed by the Constitution, he evidently was distinguishing the rights of persons from the privileges and immunities of citizens.[253]

Indeed, he was talking about what would be accomplished by all three clauses of Section One, not merely the first. He was complaining about the absence of a "power given in the Constitution to enforce and carry out" its guarantees of liberty—notably those in the Comity Clause and the first eight amendments—and he added that "at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year."[254] Yet rather than say that the solution rested narrowly in the Privileges or Immunities Clause, or in incorporation through this clause, he more broadly declared, "The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[255] For many scholars this is, at last, a hint of incorporation through the Privileges or Immunities Clause.[256] Howard, however, was not speaking merely of the Privileges or Immunities Clause. Instead, he was generally referring to "the first section of this amendment," including not only the clause on privileges or immunities but also the clauses on equal protection and due process.[257]

Why did he suggest that all three of these clauses would compel the states to respect the first eight amendments? The answer is simple: the overwhelming problem faced by blacks was state discrimination, which de-

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[250] *Id.*

[251] *See supra* text accompanying note 238.

[252] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

[253] *Id.*

[254] *Id.* at 2765–66.

[255] *Id.* at 2766.

[256] Even Charles Fairman exclaims: "Here at last is a clear statement that the new privileges and immunities clause is intended to incorporate the federal Bill of Rights." Fairman, *Fourteenth Amendment*, *supra* note 9, at 58. Fairman thinks that Howard, in this speech, demanded incorporation—although Fairman notes that the Senate and House do not seem to have agreed with Howard and that even Howard seems later to have taken a different view. *Id.*

[257] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

prived them of freedoms that whites took for granted. What blacks therefore needed, desperately needed, was not incorporation, but the protection of their rights against discrimination. Thus, when talking about their rights, Howard had good reason to speak generally about Section One, not just about the Privileges or Immunities Clause, for all three clauses of the section prevented states from denying blacks the benefit of state bills of rights.

In other words, when Howard spoke about "the principles embraced in" the federal guarantees of rights, it is by no means clear that he was speaking of incorporation.[258] On the contrary, he seems to have been suggesting that these principles, as guaranteed in state bills of rights, would have to be respected by the states under all three clauses of the Amendment's first section.

This explains why Bingham and Howard could simultaneously emphasize Comity Clause privileges and immunities and yet also allude to the first eight amendments to the Constitution. It will be recalled that, like Bingham, Howard said the Privileges or Immunities Clause "relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States."[259] At the same time, also like Bingham, Howard said that Section One of the Fourteenth Amendment arose from concern about the principles in the Bill of Rights. How is this incongruity to be explained? Bingham and Howard evidently were suggesting that the Fourteenth Amendment—by ensuring due process, equal protection, and interjurisdictional equality—would require states to accord blacks the same rights that the states gave to whites.[260] As a result, Bingham and Howard could say that the Privileges or Immunities Clause would enforce Comity Clause rights but could also say that the Fourteenth Amendment would protect "the principles embraced in" the Bill of Rights.[261] Thus, there was no contradiction between what they said about the Comity Clause and what they said about the Bill of Rights; their statements were compatible because Section One of the Fourteenth Amendment dealt with problems of discrimination, not incorporation.

3. Overview of the Debates.—The debates are much more extensive than can be recited here, but the main point is simply that they are ambiguous, to which it can be added that there are more serious obstacles for the incorporation thesis than for the Comity Clause thesis. On the one hand, some statements in the debates could be understood as alluding to incorporation. On the other hand, other statements are utterly inconsistent with incorporation and clearly suggest that the central issue was a restoration of Comity Clause rights. For example, both Bingham and Howard explained

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[258] *Id.* at 2766.

[259] *Id.* at 2765.

[260] The difference was that whereas Bingham emphasized the role of equal protection, Howard spoke more generally about all of Section One.

[261] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

the first clause of Section One in terms of the Comity Clause, and both sharply distinguished the rights of persons from the privileges and immunities of citizens, thus making clear that the rights of persons were not among the privileges and immunities of citizens.

On such foundations does it make sense to conclude that the debates support incorporation? It is possible to read the debates in a manner consistent with the Comity Clause perspective. In contrast, the best that can be said for the incorporation thesis is that the debates have some passages that leave open this possibility and others that plainly do not.

Indeed, it gets worse. If the Fourteenth Amendment were understood to have incorporated the Bill of Rights, so profound a change would have been directly, candidly, and clearly discussed.[262] The point is not simply that, in the framing and ratifying debates, there would have been blunt advocacy of such an understanding, and candid, formidable opposition. Even more seriously, one would expect such a change to have arisen from an underlying national controversy over incorporation. It is therefore powerfully suggestive that there is no evidence of either a contemporary congressional debate or an underlying national controversy about incorporation. Incorporation was a dog that did not bark.[263]

All of this—both what was said and what was not said—brings the question back to the long-forgotten context. Precisely because the debates, standing alone, are so opaque, it is all the more important to consider the context.

C. The Genealogy

The national controversy over the Comity Clause rights of free blacks led directly to the Amendment's Privileges or Immunities Clause. It thus offers a sort of genealogy that reveals the Clause's meaning.

It has been seen that there were at least several contexts in which privileges and immunities were discussed prior to the adoption of the Fourteenth

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[262] One might add that if the Amendment had been designed to incorporate the Bill of Rights, this would have been directly and clearly stated in the Amendment. Nearly a century ago, a learned scholar observed:

> If this had been the intention of the framers of the privileges and immunities clause it is strange that very clear and direct language did not occur to them. How easily it might have been said, the limitations imposed by the first eight amendments upon the central government are hereby extended to the States.

D.O. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 233 (1918); *see also* Fairman, *Fourteenth Amendment*, *supra* note 9, at 82–83.

[263] Amar casts doubt on Fairman's argument from silence on the ground that silence is not dispositive. AMAR, *supra* note 4, at 197–200. Indeed, silence is not dispositive, especially when considered on its own. But when one considers not only the silence in the framing and ratifying debates but also the absence of an underlying national controversy over incorporation, what was not said is at least very suggestive. Moreover, the larger point here about the silence is not that it shows anything by itself, but rather that, in conjunction with other evidence, it is a further indication of the need to focus on the context—in particular, the genealogy that led up to the Privileges or Immunities Clause.

Amendment. One of these, however, mattered for the Fourteenth Amendment in a way that the others did not. There was a profound national controversy over whether free blacks could enjoy the benefit of the Comity Clause, and this controversy came to rest on whether free blacks were citizens of the United States. Not surprisingly, therefore, the advocates of the Comity Clause rights of free blacks came to assert such rights in terms of "the privileges and immunities of citizens of the United States." As evident from Curtis's dissent in *Dred Scott*, from Bingham's speech on the admission of Oregon, and most strikingly from Shellabarger's bill, the Comity Clause controversy led directly to the drafting of the Privileges or Immunities Clause. This controversy thus reveals the genealogy of the Clause. It is, in other words, not merely *a* context but *the* context.

This context explains much that is otherwise inexplicable about the Privileges or Immunities Clause. It explains why the Clause used its peculiar phrasing about "the privileges or immunities of citizens of the United States"—this having become, through the debate over free blacks, a familiar label for Comity Clause rights. The context also explains why the Clause protected the privileges and immunities of citizens, in contrast to the accompanying clauses, which protected the rights of persons.

Above all, the context reveals what the Privileges or Immunities Clause meant. Although the privileges and immunities of citizens of the United States were discussed in different contexts with different meanings, only one such context evidently became the genealogy of the Privileges or Immunities Clause. In this context it is clear that the Clause, reinforced by the definition of citizenship, resolved the dispute about whether states could deny free blacks the benefit of the Comity Clause.

Of course, there continued to be uncertainty about *what* were the protected privileges and immunities, and Southerners in particular still worried about the inclusion of political rights.[264] Expressing such concerns, one of the lawyers for Sandford in the *Dred Scott* case, Senator Reverdy Johnson, said he opposed the Privileges or Immunities Clause "simply because I do not understand what will be the effect of that."[265] But this is not to say there was any doubt that the Privileges or Immunities Clause concerned the Comity Clause. On the contrary, advocates of Privileges or Immunities Clause evidently understood—as probably did their opponents—that the provision finally guaranteed the Comity Clause's privileges and immunities as a matter of federal citizenship. After fifty years of struggle, in which opponents of slavery had come to assert the Comity Clause rights of free blacks as

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[264] *See supra* Part II.C–D.

[265] CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (statement of Sen. Johnson on June 8, 1866). Reverdy Johnson tends to be cited as if his observation were merely that of a particularly distinguished Southern lawyer. *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387, 1426 (1992). But in light of Johnson's role in *Dred Scott*, his comments need to be viewed more skeptically. For his part in *Dred Scott*, see Finkelman, *supra* note 122, at 27.

"the privileges and immunities of citizens of the United States," it is difficult to understand the Fourteenth Amendment's Privileges or Immunities Clause to have done anything but what the opponents of slavery had long sought for free blacks in such terms. To be precise, the Clause finally secured the antislavery understanding of who was entitled to Comity Clause rights and laid the foundation for Congress's enforcement power.

The genealogy thus shows how the Fourteenth Amendment at last brought the privileges and immunities controversy full circle. The Missouri dispute had done much to begin the slavery crisis, and the *Dred Scott* case had done much to precipitate its violent conclusion. All along, a central aspect of the conflict had been whether free blacks would enjoy the rights of a mobile citizenry in other states. Of course, on paper, the Comity Clause guaranteed such rights; in reality, however, Southern judges engaged in evasion. They argued that only citizens of the United States were entitled to make claims under the Comity Clause, and then emphasized that citizenship entailed political rights—the point being to deny the benefit of the Comity Clause to free blacks. In response, opponents of slavery accepted the underlying assumption about U.S. citizenship and the Comity Clause, but insisted that free blacks could be citizens of the United States. Antislavery Americans thus came to defend black participation in the privileges and immunities of state citizens on the ground that Comity Clause rights were the privileges and immunities of citizens of the United States. Although this interpretation of the Comity Clause had not, by itself, been enough to justify the constitutionality of the 1866 Privileges and Immunities Bill, the Fourteenth Amendment removed any doubt that it was a constitutional principle, which Congress could enforce.

VII. EPILOGUE: INCORPORATION AMENDMENTS

In closing, it is valuable to consider some additional evidence—evidence that is very different from what has been considered thus far. This Article has focused on the pre-Amendment context of the Privileges or Immunities Clause, showing that the Clause had nothing to do with incorporation. This Epilogue now shifts to the post-Amendment context, which confirms what has been seen from the earlier evidence. The later evidence reveals that after the adoption of the Fourteenth Amendment, there were national movements for a sort of incorporation. It shows, moreover, that when these movements campaigned for amendments to apply the First Amendment to the states, they acted on the assumption that the Fourteenth Amendment had not already done this.

It is unfortunate that these national movements for incorporation have gone largely unexamined in the literature on incorporation. The scholarship on incorporation regularly examines the debates over the Fourteenth Amendment. It even gives great weight to post-Amendment evidence—in order to include an 1871 speech by Bingham, in which he claimed that he

had really intended incorporation in 1866.[266] Like the pre-Amendment evidence, however, the post-Amendment evidence is much broader than is acknowledged.[267] Here, some of that broader later evidence will be examined—not the retrospective claim of a single congressman, but a pair of national movements that systematically sought aspects of what has come to be understood as incorporation.

A. The Nativists and the Secularists

The campaign for a sort of incorporation came from nativists and secularists. These Americans shared a theologically liberal antagonism toward ecclesiastical authority, and although they pursued this animosity in different ways, it led both groups to demand incorporation of the First Amendment against the states.

The nativists enjoyed national significance from the 1840s onward as defenders of "native" American liberty. They tended to be native-born Protestant Americans, who resented the immigration of Catholics, mostly from Ireland. Although nativists often despised these immigrants, they focused their theological fears on the danger from the hierarchical authority claimed by the Pope and other Catholic clerics.[268] In their assault on Catholicism, nativists systematically barred Catholics from voting, holding public office, and teaching in public schools—not, they said, out of personal antagonism to Catholics, but rather from a desire to preserve the liberty of Americans from the Catholic Church.[269]

They often summed up their goals under the rubric of separation of church and state. By this, they tended to mean the separation of the Church from the state, not the separation of Protestant religion from the state, for in the conventional nativist view, Protestantism required individuals to follow their consciences rather than the authority of any church.[270] Separation of church and state had not previously been an entirely respectable position, but through the anti-Catholicism of nativists, it soon acquired widespread popularity as a constitutional ideal.[271]

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[266] CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

[267] For incorporationist scholarship that recognizes that the Blaine Amendment might matter, see AMAR, *supra* note 4, at 254 n.*; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 8, at 169–70; Lash, *supra* note 8, at 1145–50. In focusing on the Blaine Amendment, however, these scholars' arguments miss the other proposed amendments, which began before *Slaughter-House*. They also miss the clear evidence that the movements behind these amendments took for granted that the First Amendment had not yet been applied to the states. This Part, incidentally, is largely based on PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 287–334 (2002).

[268] HAMBURGER, *supra* note 267, at 201–02.

[269] *Id.* at 218, 234–51.

[270] *Id.* at 228, 234–35.

[271] *Id.* at 229–30, 233 (noting how Protestant clergy gave respectability to nativist demands for separation of church and state); *see id.* at 234, 246–51, 275–78 (regarding nativist and related advocacy of separation of church and state).

The nativist movement attracted a wide range of otherwise discordant Americans, for it allowed Protestants who were riven by disputes over theological liberalism to unite under the banner of a theologically liberal assault on the Catholic Church. With this shared antagonism, relatively orthodox Calvinist Protestants happily worked alongside persons of more liberal views.[272] Even many secularists found common cause with Protestants against Catholics, thus allowing much overlap between the nativists and the secularists.[273]

The secularists developed as a national political movement in America in the 1870s, when they briefly enjoyed enough prominence to form an ill-fated political party. Religious radicals had already self-consciously adopted the label of "secularism" to provide an acceptable rubric for their loose combination of heterodox groups, including atheists, spiritualists, theistic humanists, and a host of other unconventional theists.[274] Building on their fragile unity, these unorthodox Americans in the 1870s sought a more robust form of cooperation in the National Liberal League, which united divergent secularists in a campaign for separation of church and state.[275]

Although secularists tended to share the nativist fears of Catholicism, they usually took a broader view of the danger, for they applied the theologically liberal critique of ecclesiastical authority not only to the Catholic Church but also to Protestant denominations. Indeed, many opposed all distinct religions. Thus, in demanding separation of church and state, they did not seek the separation of the Church from the state, but rather the separation of all churches or distinct religions from the state.[276]

Such were the national movements that in the 1870s agitated for what today would be called "incorporation" of the First Amendment. Although they failed to get incorporation through an amendment, their efforts show that, after the adoption of the Fourteenth Amendment, the preeminent advocates of incorporation assumed that the U.S. Constitution had not yet incorporated the Bill of Rights.

B. The Need for Another Amendment

Nativists and secularists assumed that they needed a further amendment to the Constitution. The main goal of nativists and secularists was to amend the First Amendment so that it would guarantee separation of church and state. In pursuit of this endeavor, they proposed amendments that,

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[272] *Id.* at 201, 213–14.

[273] This overlap was embodied in men such as Judge Hurlbut. *Id.* at 247–48; *see also infra* notes 278–83 and accompanying text.

[274] HAMBURGER, *supra* note 266, at 289, 294–95.

[275] *Id.* at 290, 294–95.

[276] *Id.* at 297.

among other things, would have applied the First Amendment to the states, it being clear to them that this had not already been done.[277]

An early and prominent demand for an amendment came from Elisha P. Hurlbut—a former New York State judge who, in 1870, published *A Secular View of Religion in the State and the Bible in the Public Schools*.[278] Hurlbut was a secularist, and not surprisingly, his theologically liberal anxieties about ecclesiastical authority found expression both in anti-Catholic nativism and in distrust of a wider range of orthodoxies. In writing his pamphlet, however, he focused on the danger from Catholicism, which he hoped to redress with an amendment to the Constitution. The amendment, which was drafted by a friend, rewrote the First Amendment to apply it to the states and then added a clause giving Congress power to take action against the Catholic Church:

> *Neither* congress *nor any state* shall make *any* law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances. *But congress may enact such laws as it shall deem necessary to control or prevent the establishment or continuance of any foreign hierarchical power in this country, founded on principles or dogmas antagonistic to republican institutions*.[279]

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[277] Incidentally, their demands for incorporation of the First Amendment are also important because religious rights have been the focus of some of the most interesting modern scholarship on incorporation. This scholarship suggests that the Fourteenth Amendment not only incorporated the Bill of Rights but also, at the same time, gave new meaning to some of its guarantees. In particular, the scholarship alleges that the Amendment introduced a right of religious exemption into the incorporated First Amendment rights. *See, e.g.*, AMAR, *supra* note 4, at 256–57; Lash, *supra* note 8, at 1117, 1129, 1156. It is therefore revealing that the national movements that advocated incorporation focused on religious liberty. Rather than assume that the Fourteenth Amendment had already incorporated the First Amendment, nativists and secularists assumed that a further amendment was necessary for this purpose. And rather than seek a right of exemption, they sought to reconstruct the First Amendment toward separation of church and state. *See* HAMBURGER, *supra* note 267, at 436 n.112.

[278] E.P. HURLBUT, A SECULAR VIEW OF RELIGION IN THE STATE AND THE BIBLE IN THE PUBLIC SCHOOLS (Albany, Joel Munsell 1870).

[279] *Id.* at 5. Hurlbut was animated by fierce religious animosities. When explaining his amendment, Hurlbut rhetorically asked: "But is not the proposed amendment calculated to abridge religious liberty?" *Id.* at 22. He answered in the negative, explaining: "There is a distinction to be taken between religious opinion and worship on the one hand, and organizations and practices in the name of religion on the other." *Id.* Rather than oppose religious liberty, he merely rejected religious organizations. The "theocracy" of such groups was "a fungus of religion," which "may be eradicated without hurting religion itself. Restraint of theocracy, is the way to religious health and freedom." *Id.* at 23.

Toward the end of his pamphlet, Hurlbut focused on a broad range of Christianity and proposed another amendment of his own making:

> To the end that the functions of civil government may be exercised without interference in matters of religion; neither the United States, nor any state, territory, municipality, or any civil division of any state or territory, shall levy any tax, or make any gift, grant or appropriation for the support, or in aid of, any church, religious sect or denomination, or any school, seminary, or institution of learning, in which the faith or doctrines of any religious order or sect shall be taught or inculcated,

Hurlbut worried that wherever Catholics were numerous, they were gaining influence over state and city governments, and he therefore sought to ensure that the religion clauses of First Amendment applied to the states and that Congress would have power to take more direct action.

Hurlbut explained that this incorporation was necessary because the Constitution had not already applied the First Amendment to the states: "The proposed amendment prohibits a *state* from establishing any religion, or preventing its free exercise. The writer has assumed, that there is nothing in the Constitution as it stands, which prevents a state from doing either."[280] He understood that judges could strain to reach another conclusion, but he doubted the propriety of such an approach:

> There are . . . clauses in the Constitution of the United States which might be tortured into a construction prohibitory of state establishment of religion, by a court which should lean against it; or might be held, as I think more properly, by an impartial legal tribunal, not applicable to the case: such as the clauses which provide that the privileges and immunities of the citizens of the several states shall be equal, and the United States shall guaranty to every state, a republican form of government.[281]

Evidently, no clause of the recently adopted Fourteenth Amendment was even worth listing as a possible vehicle for applying the Establishment Clause to the states. In any case, he rejected "tortured" interpretations, believing, "It is better that a Constitution should speak plainly than hint its meaning."[282] On such grounds, he reiterated his assumption "that there is nothing in the Constitution as it stands, which forbids a *state* from establishing a religion."[283]

Eventually, in the mid-1870s, the demands for a constitutional amendment became a national issue. The secularists, who were now organizing the National Liberal League, recognized the value of Hurlbut's proposal, and in 1874 and 1876 they added their own demands for amendments—thereby making incorporation of the First Amendment a central goal of their movement. Although the National Liberal League most centrally wanted to shift the First Amendment toward the secularist vision of separation, it also sought to extend the First Amendment to the states. Its proposals therefore simultaneously incorporated the First Amendment and added requirements designed to carry out its understanding of separation of church and state. The 1874 amendment provided:

> or in which religious practices shall be observed; or for the support, or in aid of any religious charity or purpose, of any sect, order, or denomination whatsoever.

Id. at 54–55 (emphasis omitted).

[280] *Id.* at 14.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 5.

> SECTION 1.— Congress shall make no law respecting an establishment of religion, or favoring any particular form of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.
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> SECTION 2.— No State shall make any law respecting an establishment of religion, or favoring any particular form of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances. No religious test shall ever be required as a condition of suffrage, or as a qualification to any office or public trust, in any State; and no person shall ever in any State be deprived of any of his or her rights, privileges, or capacities, or disqualified for the performance of any public or private duty, or rendered incompetent to give evidence in any court of law or equity, in consequence of any opinions he or she may hold on the subject of religion.
>
> SECTION 3.— Congress shall have power to enforce the provisions of the second section of this Article by appropriate legislation.[284]

The secularists gave two reasons for wanting "this enlargement of the First Amendment."[285] First, after reciting the Tenth Amendment, they noted that "the Constitution . . . contains no provision prohibiting the *several States* from establishing a State religion, or requiring a religious test for office, or disqualifying witnesses in the courts on account of their religious opinions, or otherwise restricting their religious liberty." Because of "this defect in the United States Constitution, some of the States are, as a matter of fact, actually guilty of grave infringements on the religious liberty of their citizens."[286] Second, the ratification of the proposed amendment "would be the death-warrant of all attempts to pervert the Constitution to the service of Roman Catholicism or any other form of Christianity"—a reminder of the central animosity that secularists shared with nativists.[287]

The National Liberal League's 1876 amendment took the same general approach as the 1874 version, but moved "in the direction of greater verbal precision and comprehensiveness."[288]

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[284] EQUAL RIGHTS IN RELIGION: REPORT OF THE CENTENNIAL CONGRESS OF LIBERALS, AND ORGANIZATION OF THE NATIONAL LIBERAL LEAGUE, AT PHILADELPHIA, ON THE FOURTH OF JULY, 1876, at 12 (Bos., Nat'l Liberal League 1876).

[285] *Id.*

[286] *Id.*

[287] *Id.* at 13 (quoting the 1874 proposal for the "Religious Freedom Amendment"). Attempting to fend off accusations of intolerance, the Liberals explained their position:

> But the proposition of this new Amendment is not made at all in the spirit of a bellicose partisanship: on the contrary it is made with the strongest conviction that consistency with democratic ideas is the absolute condition of a permanent republic; that this consistency must be found both in our national and State Constitutions; and that the only way to ensure it in our State Constitutions is to assimilate them to our national Constitution by virtue of some such provision as we now propose.

Id.

[288] *Id.*

> SECTION 1.— Neither Congress nor any State shall make any law respecting an establishment of religion, or favoring any particular form of religion, or prohibiting the free exercise thereof; or permitting in any degree a union of church and State, or granting any special privilege, immunity, or advantage to any sect or religious body or to any number of sects or religious bodies; or taxing the people of any State, either directly or indirectly, for the support of any sect or religious body or of any number of sects or religious bodies; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.
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> SECTION 2.— No religious test shall ever be required as a condition of suffrage, or as a qualification to any office or public trust, in any State. No person shall ever in any State be deprived of any of his or her rights, privileges, or capacities, or disqualified for the performance of any public or private duty, or rendered incompetent to give evidence in any court of law or equity, in consequence of any opinions he or she may hold on the subject of religion. No person shall ever in any State be required by law to contribute directly or indirectly to the support of any religious society or body of which he or she is not a voluntary member.
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> SECTION 3.— Neither the United States, nor any State, Territory, municipality, or any civil division of any State or Territory, shall levy any tax, or make any gift, grant or appropriation, for the support, or in aid of any church, religious sect, or denomination, or any school, seminary, or institution of learning, in which the faith or doctrines of any religious order or sect shall be taught or inculcated, or in which religious practices shall be observed; or for the support, or in aid, of any religious charity or purpose of any sect, order, or denomination whatsoever.
>
> SECTION 4.— Congress shall have power to enforce the various provisions of this Article by appropriate legislation.[289]

This improved amendment was designed to be "as comprehensive and as thorough as we can make it."[290]

These amendments were meant to remedy the failure of the Constitution to guarantee separation of church and state. As the secularists explained about the 1876 proposal, this amendment would complete the Constitution by "effect[ing] the total separation of Church and State."[291] To this end, however, the amendment also had to address the failure of the U.S. Constitution to apply its restrictions to the states. The amendment would therefore limit the power not only of Congress but also of "all branches and departments of the government, National, State, and municipal."[292]

By 1875, some more narrowly anti-Catholic nativists had joined the clamor for constitutional amendments. Of course, states had their own guarantees of religious liberty, but if Catholics acquired local political power, it might be important, in addition, to have the First Amendment's guar-

[289] *Id.* at 16.
[290] *Id.*
[291] *Id.* at 114.
[292] *Id.* at 114–15.

antees apply at the state level. Indeed, it seemed essential to improve the Amendment, so it would bar state funding from reaching Catholic institutions. On these assumptions, nativists followed the secularists in making highly publicized proposals. For example, in 1875, the former nativist politician Daniel Ullmann suggested:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised, or property acquired by taxation in any State for the support of public schools, or derived from any public fund therefor, shall ever be under the control of any religious sect; nor shall any money so raised, or property so acquired, ever be given or loaned to any religious sect or denomination.[293]

In late 1875 and 1876, Representative James Blaine proposed a similar amendment and made it the centerpiece of his campaign for the Republican nomination for the Presidency:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[294]

In fact, Blaine's amendment was only one of a range of congressional proposals of this sort.[295] And when Blaine's amendment failed, nativists di-

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[293] AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES: NON-SECTARIAN AND UNIVERSAL EDUCATION 12 (N.Y., Baker & Godwin 1876) (statement of Daniel Ullman). Another amendment provided: "2. 'The United States shall guarantee to every State in this Union, a republican form of government,' and an adequate system of free and universal unsectarian education." *Id.* (emphasis omitted). For a similar, later proposal by the Junior Order of United American Mechanics, see M.D. LICHLITER, HISTORY OF THE JUNIOR ORDER UNITED AMERICAN MECHANICS 241 (1908).

[294] 4 CONG. REC. 205 (1875); *see also* 4 CONG. REC. 5189 (1876). Upon being reported out of the Committee on the Judiciary on August 4, 1876, it passed in the House with modifications by a vote of 180 to 7. HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 277–78 (Burt Franklin 1970) (1896). In the Senate, the Judiciary Committee reported an amended version, which failed to receive a two-thirds majority, the vote being 28 for and 16 against. *Id.* at 278.

[295] In 1876, there were at least three other proposals in Congress. Representative O'Brien proposed, inter alia, "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; . . . nor shall any religious test be required as a qualification for any office or public trust in any State, or under the United States." Joint Resolution Proposing an Amendment to the Constitution, H.R.J. Res. 36, 44th Cong. (1876) (as proposed on Jan. 17, 1876). Representative Williams proposed, inter alia, "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof." Joint Resolution Proposing an Amendment to the Constitution of the United States, H.R.J. Res. 44, 44th Cong. (1876) (as proposed on Jan. 18, 1876). Representative Lawrence proposed, "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof." Joint Resolution Proposing an Amendment to the Constitution, H.R.J Res. 163, 44th Cong. § 1 (1876) (as proposed on Aug. 8, 1876).

In 1878, Senator Edmunds proposed, "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualifi-

rectly adopted similar provisions in the states or required them as conditions for the admission of new states.[296]

Almost all of the proposed federal amendments, secular and nativist, sought to alter the First Amendment's standard of religious liberty in order to achieve one or another version of separation of church and state. At the same time, all of the proposals clearly assumed that the Fourteenth Amendment had not already applied the First Amendment to the states.

It may be thought that the Blaine Amendment reveals little about attitudes concerning the Fourteenth Amendment, for Blaine made his proposal after 1873, when the *Slaughter-House Cases* may have dampened hopes for incorporation through that amendment.[297] Yet Blaine's amendment was only one of many, and it and the others from after the *Slaughter-House Cases* merely echoed what was proposed earlier. In the extensive discussion of the proposals, moreover, there is no indication that they were drafted in response to the *Slaughter-House Cases.* On the contrary, the assumption both before and after these cases was that there had been no incorporation. As Judge Hurlbut explained in 1870, his proposed amendment "prohibit[ed] a *state* from establishing any religion, or preventing its free exercise," for he assumed that "there is nothing in the Constitution as it stands, which prevents a state from doing either."[298]

Of course, much more could be said about what happened after the adoption of the Fourteenth Amendment. As has been explained elsewhere, although nativists failed to get a federal amendment incorporating the First Amendment, their ideals of Americanism laid the foundation for judicial incorporation of the Bill of Rights.[299] Their vision was a cultural development rather than a legal theory, and it was therefore all the more pervasive—eventually reaching many persons (including many Supreme Court Justices)

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cation to any office or public trust under any State." Joint Resolution Proposing an Amendment to the Constitution of the United States, S.J. Res. 13, 45th Cong. (1878) (as proposed on Jan. 10, 1878).

[296] *See* HAMBURGER, *supra* note 267, at 338–39.

[297] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[298] HURLBUT, *supra* note 278, at 14. Lest it be thought this was merely the view of advocates of the amendments, it should be noted that it was also the assumption expressed in a professional account of the law of religious societies published in April 1873, just before the *Slaughter-House Cases*:

> Subject to the equal protection of the laws required by the National Constitution of every state for persons within it, there is no restriction upon the power of the states except such as may be found in their own constitutions and laws, as to the support by law of church or religious establishments. No state attempts now to support churches by taxation, nor is it probable that any such aid could, in the present state of public opinion, be received by law, even if the state constitutions did not prohibit it.

William Lawrence, *The Law of Religious Societies and Church Corporations in Ohio*, 21 AM. L. REG. 201, 208 (1873). For scholarly disagreement about how treatises after adoption of the Fourteenth Amendment viewed the possibility of incorporation, see Wildenthal, *supra* note 18, at 170–255.

[299] HAMBURGER, *supra* note 267, at 434–49 (showing how nativism popularized cultural assumptions about "American" liberty—assumptions that flattened out the difference between state and federal bills of rights and left much of the nation, including the Justices of the Supreme Court, open to the idea that the same principles of liberty applied at both the state and the federal level).

who were not nativists in a narrow sense, but who came to share ideals of Americanism. In pursuit of these ideals, Americans increasingly celebrated what they considered American liberties—a flattened out vision of freedom, in which there was little difference between federal and state rights. They even sometimes expressed their understanding of American liberties in terms of a single American bill of rights. Of course, nativists saw themselves as defending majority values, and it is therefore no coincidence that their ideals of American liberty included a discriminatory conception of religious freedom, separation of church and state, which they self-consciously demanded as a means of protecting the American majority from dangerous minorities. In this context, the Supreme Court eventually incorporated much of the Bill of Rights against the states, and in so doing, it reinterpreted the First Amendment's guarantee of religious liberty in the majoritarian terms popularized by the nativists. All of this, however, has been recounted elsewhere.[300] Here, it should suffice merely to recognize that, in the decade after 1868, the national movements that sought incorporation of the First Amendment assumed that the Fourteenth Amendment had not already done this.

CONCLUSION

The Fourteenth Amendment's Privileges or Immunities Clause did not incorporate the Bill of Rights, but rather protected the privileges and immunities already guaranteed by the Comity Clause. There are hints of this meaning in the Clause itself. It concerned the privileges and immunities of *citizens* rather than the rights of persons. Moreover, in saying that no state shall *abridge* these privileges and immunities, it apparently meant only those privileges and immunities of citizens that already limited the states. The meaning is even clearer from the historical context—in particular, the genealogy of the Clause. In the controversy over whether free blacks had the benefit of the Comity Clause, antislavery Americans argued that free blacks were citizens of the United States and that they therefore were entitled to Comity Clause privileges and immunities. Antislavery Americans asserted this interpretation, moreover, in terms of "the privileges and immunities of citizens of the United States." This interpretation of the Comity Clause became a prominent antislavery position, and precisely because it did not prevail in the Supreme Court in *Dred Scott*, it had to be secured by the people in the Fourteenth Amendment.

1. *The Incorporation Thesis*.—Few legal questions have been examined as learnedly as that of incorporation. At the same time, in few questions of law has there been such a persistent effort to declare a "scholarly consensus"—as if incorporation could be established through confident as-

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[300] *Id.*

sertion.[301] In fact, what stands out about the incorporation thesis is that it repeatedly conflicts with the text, the debates, and the context.

The text is the initial problem, for the Fourteenth Amendment carefully distinguishes the rights of persons from the privileges and immunities of citizens. This distinction is revealing, and only by ignoring it does the incorporation thesis conclude that the Privileges or Immunities Clause applied the Bill of Rights to the states.[302]

The framing and ratifying debates are almost as awkward. The most favorable conclusion that can be drawn from the debates is that the incorporation thesis rests on carefully selected ambiguities. Some participants, such as Bingham and Howard, employed wandering arguments and loose generalities that could, in retrospect, be understood to refer to incorporation. Such passages, however, probably did not allude to incorporation, and they existed alongside other, less amorphous passages that associated the Privileges or Immunities Clause simply with Comity Clause rights.[303]

Last but not least, there is the context. The incorporation thesis makes sense only in the absence of the relevant underlying context. Indeed, incorporationist literature usually does not engage with the earlier history. When it does, it overlooks the difficulties faced by free blacks who crossed state lines. It thereby also overlooks the national controversy in which antislavery Americans demanded "the privileges and immunities of citizens of the United States" on behalf of free blacks. In particular, it misses the second Missouri Compromise; the racism of *Corfield v. Coryell*; Curtis's opinion in *Dred Scott*; the opinions of free blacks themselves; the Lincoln–Douglas debates; and the 1866 Privileges and Immunities Bill. The literature thereby overlooks the entire genealogy of the Privileges or Immunities Clause—a genealogy which shows that the Clause dealt with something althogether different from incorporation.

To the extent the incorporationist literature focuses on context, it typically insists on the importance of after-the-fact evidence. This allows the incorporation thesis to rest on a retrospective speech by Bingham. Yet even when attending to the post-Amendment evidence, the incorporationist literature largely ignores the incorporationist movements of the 1870s—national movements that assumed a further amendment was necessary for incorporation of the First Amendment. Of course, the incorporationist literature cannot ignore the *Slaughter-House Cases*, and the literature therefore complains that, when these cases rejected incorporation, they deprived the Privileges or Immunities Clause of its meaning.[304] This clause, how-

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[301] *See, e.g.*, BARNETT, *supra* note 26, at 292; Aynes, *supra* note 26, at 151 (quoting Barnett).

[302] Amar's account of incorporation at least recognizes the verbal distinction but then strains to show that it was not a substantive distinction. *See supra* note 4.

[303] See *supra* quotations from Bingham and Howard in text accompanying notes 228 and 243.

[304] In fact, Justice Miller had at least a rough understanding of the Privileges or Immunities Clause, as evident from his observation that "[i]ts sole purpose was to declare to the several States, that whatever

ever, protected free blacks from interstate discrimination, and whatever incorporationists think, this once seemed meaningful.

The incorporation thesis thus founders on the evidence or simply ignores it. The thesis elicits much passion, but it repeatedly conflicts with the text, the debates, and the context.[305]

2. The Privileges or Immunities of Citizens of the United States.—In contrast to what the evidence reveals about incorporation, it clearly shows that the Privileges or Immunities Clause protected Comity Clause rights. There is no need at this point to repeat the evidence—whether from the controversy about free blacks, from the debates, from the text, or from later events. Suffice it to say that there is much evidence, all of which shows that when the Fourteenth Amendment protected the privileges and immunities of citizens of the United States, it was securing a familiar antislavery position on the Comity Clause: the position that free blacks, being citizens of the United States, were entitled to the benefits of the Clause.

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those rights, as you gra[n]t or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873).

[305] In *McDonald v. Chicago*, Justice Thomas incorporates many of the incorporationist errors. 130 S. Ct. 3020 (2010) (Thomas, J., concurring in part and concurring in the judgment). He assumes that the text of the Privileges or Immunities Clause points to incorporation of the Bill of Rights, without explaining how this is compatible with the Fourteenth Amendment's distinction between the privileges or immunities of *citizens* and the rights of *persons*. *Id.* at 3063. He focuses on the meaning of the words "privileges" and "immunities," without considering the narrower meaning of the phrase of which they were a part. *Id.* at 3063–64. He relies on the guarantees of "privileges, rights and immunities" in cession treaties to understand the Privileges or Immunities Clause, without noticing that the guarantees in cession treaties employed a different phrase, in a different context, to convey a different meaning. *Id.* at 3068–70. He quotes Bushrod Washington's opinion about fundamental rights in *Corfield v. Coryell*, without recognizing that this was a racist opinion that laid the foundation for Justice Taney's opinion in *Dred Scott*. *Id.* at 3067. He relies on the familiar speeches by Bingham and Howard, without acknowledging the statements in the speeches that are incompatible with incorporation. *Id.* at 3071–74. He relies on quotations to show incorporation, without considering that many of them are also compatible with the Comity Clause interpretation, and he argues from the 1866 Civil Rights Act and the Freedmens Act, without mentioning the relevant legislative proposal, Shellabarger's, which prompted the phrasing of the Privileges or Immunities Clause. *Id*. at 3074–75. He argues that incorporation was a central and widespread demand on behalf of free blacks, without any evidence of a national campaign for incorporation in 1866 or earlier. *Id.* at 3078–79. He relies on only scattered post-Amendment evidence (including some of dubious relevance) to reach strong conclusions about what "the ratifying public understood," without mentioning the national movements that sought incorporation of the First Amendment on the assumption that the Fourteenth had not accomplished this. *Id.* at 3077. Above all, Justice Thomas does not even mention the half-century controversy about whether free blacks had the benefit of the Comity Clause—the dispute that led directly to the adoption of Privileges or Immunities Clause and that this clause was designed to resolve.

For some of these points and others, see Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?) in* McDonald v. Chicago, 30–44 (George Mason Univ. Law & Econ. Research Paper Series, 10-39, 2010), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/1039TwoFacesofJudicialRestraint20100812.pdf.

This Article's understanding of the Privileges or Immunities Clause should be considered more persuasive than the incorporation thesis on many levels. Whereas the incorporation thesis assumes that incorporation could have happened without blunt advocacy and opposition, both in Congress and in the press, the argument here locates the Privileges or Immunities Clause within a vigorous national debate. Whereas the incorporation thesis requires one to believe that the Privileges or Immunities Clause dealt with a question of substantive federal rights that was not central in the crusade against slavery, the argument here is that the Clause responded to a dispute about discrimination that was prominent in the antislavery struggle and that was profoundly important to free blacks. Whereas the incorporation thesis tends to focus on Congress in 1866 and 1868, the argument here is based on a problem and an evolving phrase that can be traced across the antislavery movement in a direct line from the second Missouri Compromise to the adoption of the Fourteenth Amendment. Whereas the incorporation thesis divines the intent of the Amendment's framers from loosely floating tea leaves in the debates, the argument here rests on the longstanding public records of Congress and the courts. Whereas the incorporation thesis tends to rely on Bushrod Washington's incantation of "fundamental" rights in *Corfield v. Coryell*, the argument here observes the racist significance of that case, which was a precursor of *Dred Scott*. Whereas the incorporation thesis rests on the views of a narrow range of white antislavery Americans to understand privileges and immunities, the argument here relies on the views of the antislavery movement as whole, including the views of free blacks. Whereas the incorporation thesis ignores the 1866 Privileges and Immunities Bill, the argument here recognizes that it was a missing link by which the continuing attempts to enforce the Comity Clause led to the phrasing of the Privileges or Immunities Clause. Whereas the incorporation thesis ignores the difference between persons and citizens in the Fourteenth Amendment, the argument here explains why the Amendment guaranteed equal protection and due process for persons, but privileges and immunities only for citizens—a distinction about which the advocates of the Amendment were acutely self-conscious. Finally, whereas the incorporation thesis cannot explain the national movements for incorporation in the 1870s, the argument here recognizes that such movements reveal what the Fourteenth Amendment had not done.

The choice is thus not very difficult. Should one rely on surmises, ambiguities, private or even secret intent, sudden inspirations, and what was said by one or two framers after the fact? Or should one rest on what once was the familiar public meaning of a familiar constitutional position with a familiar history in the antislavery movement—a history that ran for half a century right up into the public record of the framing of the Fourteenth Amendment? In the end, surmises, ambiguities, secret intent, sudden inspirations, and after-the-fact recollections are more the stuff of nineteenth-century novels than the realities of nineteenth-century constitutional law.

Rather than incorporation, the problem addressed by the Privileges or Immunities Clause was one that lay deeper in the conflict between prejudice and modernity. To be precise, the difficulty arose from the clash between local discrimination and the mobility that lay at the heart of America's modernity. The Comity Clause worked well enough to secure local freedom for whites who traveled across jurisdictional lines. But when out-of-state free blacks encountered local racism, the Comity Clause was no longer up to the task. Especially in the South, local prejudice defeated this constitutional provision. It therefore should be no surprise that free blacks needed to be federal citizens in order to enjoy the privileges and immunities of state citizens or that these rights came to be asserted as the privileges and immunities of citizens of the United States. What the Comity Clause failed to do during the struggle against slavery, the Fourteenth Amendment finally accomplished by barring states from abridging the privileges and immunities of citizens of the United States.