

NATURAL LAW, ARTICLE IV, AND SECTION ONE OF THE FOURTEENTH AMENDMENT

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INTRODUCTION

The importance of the relationship between Article IV of the Constitution¹ and Section One of the Fourteenth Amendment² has been evident since the Amendment's ratification. During the congressional debates over the Fourteenth Amendment, the Amendment's framers often pointed to the terms "privileges" and "immunities" used in Article IV, Section 2 of the Constitution as precursors to the identical terms used in Section One of the Fourteenth Amendment.³ Indeed, modern commentators examining the history of the Amendment frequently acknowledge that the Privileges and Immunities Clause of Article IV, Section 2 served as a precursor of the Privileges or Immunities Clause of Section One of the Fourteenth Amendment.⁴ The language of the two clauses is similar, but more

1. "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.

2. The Privileges or Immunities Clause of Section One of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1.

3. Ohio Congressman John Armor Bingham, the principal draftsman of Section One of the Fourteenth Amendment, in an 1871 Report by the House Committee on the Judiciary discussing whether women's suffrage could be enacted under the Privileges or Immunities Clause, stated that the Clause "does not, in the opinion of the committee, refer to the privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2." H.R. REP. NO. 41-22, at 1 (1871), reprinted in *THE RECONSTRUCTION AMENDMENTS' DEBATES* 466 (Alfred Avins ed., 1967); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 168 (1986) (discussing H.R. REP. NO. 41-22). Similarly, Vermont Senator Luke Poland argued in the debates over the Fourteenth Amendment that the Privileges or Immunities Clause "secures nothing beyond what was intended by the original provision in the Constitution, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'" CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).

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

significantly, certain shared concepts underlie the two.

Prior to ratification of the Fourteenth Amendment, a well-developed body of case law regarding the Constitution's Privileges and Immunities Clause had been established.⁵ Members of Congress were able to utilize this jurisprudence to explicate the meaning of the terms "privileges" and "immunities" as used in Section One of the Fourteenth Amendment. Representative Bingham, the principal draftsman of Section One, and other Republicans believed that the Privileges and Immunities Clause of Article IV, Section 2 was designed to guarantee United States citizens certain privileges and immunities that were inherent in the concept of American citizenship.⁶ Several Republicans, however, believed that the Constitution provided no mechanism for congressional enforcement of the Clause.⁷

tected under the Privileges and Immunities Clause of Article IV, Section 2).

5. A number of cases had been decided under the Clause, including *Ducat v. Chicago*, 77 U.S. (10 Wall.) 410 (1871), *aff'g* 48 Ill. 172 (1868); *Downham v. Alexandria Council*, 77 U.S. (10 Wall.) 173 (1869); *Coryell v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); *People v. Coleman*, 4 Cal. 46 (1854); *Crandall v. State*, 10 Conn. 339 (1859); *People v. Thurber*, 13 Ill. 554 (1852); *Phoenix Ins. Co. v. Commonwealth*, 68 Ky. (5 Bush) 68 (1868); *Amy v. Smith*, 11 Ky. (1 Lit.) 326 (1822); *Ward v. State*, 31 Md. 279 (1869); *Haney v. Marshall*, 9 Md. 194 (1856); *Campbell v. Morris*, 3 H. & McH. 554 (Md. 1797); *Abbott v. Bayley*, 23 Mass. (6 Pick.) 92 (1827); *Lenmon v. People*, 20 N.Y. 562 (1860); *People v. Imlay*, 20 Barb. 68 (N.Y. App. Div. 1855); *Fire Dep't v. Noble*, 3 E.D. Smith 441 (N.Y.C.P. 1854); *State v. Medbury*, 3 R.I. 138 (1855); *Slaughter v. Commonwealth*, 55 Va. (14 Gratt.) 767 (1856); *Fire Dep't v. Helfenstein*, 16 Wis. 142 (1862). See RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) [hereinafter BERGER, FOURTEENTH AMENDMENT] (discussing some of the more prominent cases).

6. Representative Bingham noted that the Amendment granted Congress the power to enforce "in behalf of every citizen . . . the rights which were guaranteed to him from the beginning, but which guarantee has unhappily been disregarded by more than one State of this Union, defiantly disregarded, simply because of a want of power in Congress to enforce that guarantee." CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866). Similarly, Congressman Frederick Woodbridge, a Vermont Radical, stated that the proposed Amendment would

give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States.

Id. at 1088. Michael Kent Curtis has argued that Representative Bingham and other members of Congress believed that the Privileges and Immunities Clause of Article IV, Section 2 protected certain rights of national citizenship, including the Bill of Rights. While recognizing that "[t]his reading may have been incorrect," Curtis notes that "Bingham and others who framed the Fourteenth Amendment relied on a reading of the privileges and immunities clause of Article IV, section 2 by which it protected a body of national privileges and immunities of citizens of the United States, including those in the Bill of Rights." CURTIS, *supra* note 3, at 114. Raoul Berger has argued, however, that the majority did not share Representative Bingham's "unorthodox" view of the Privileges and Immunities Clause. See BERGER, FOURTEENTH AMENDMENT, *supra* note 5, at 96-97.

7. Prominent members of Congress, such as James Wilson of Iowa, floor manager of the Civil Rights Bill and Chairman of the House Judiciary Committee, may have disagreed with the notion that Congress did not have enforcement power under Article IV. Unlike Representative Bingham, Wilson indicated that Congress had the implied authority to enforce the Privileges and Immunities Clause against the states. See CONG. GLOBE, 39th Cong., 1st Sess. 1117-19 (1866).

In discussing the proposed Fourteenth Amendment, Congressman Thaddeus Stevens

This lack of congressional enforcement power led to problems when states refused to afford each other comity under Article IV.⁸ In order to remedy these deficiencies and to clarify what many Republicans thought was already contained in the Constitution, Congress drafted Section One of the Fourteenth Amendment.⁹ The people subsequently ratified the Amendment to protect the rights of the newly-freed black populace and to enshrine a guarantee of the fundamental rights of citizenship in the constitutional text.¹⁰

In addition to discussions during debate over the proposed amendment, the Privileges and Immunities Clause of Article IV, Section 2 was also mentioned in the context of the debate over the Civil Rights Bill of 1866,¹¹ which was designed to prevent inequalities with

stated:

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

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Some Republicans, however, thought that there was a congressional power to enforce the guaranteed privileges and immunities of citizens under either the Necessary and Proper Clause or the Guarantee Clause. For example, Congressman William D. Kelley, a Republican from Pennsylvania, stated, "I find in [the Constitution] now, powers by which the General Government may defend the rights, liberties, privileges, and immunities of the humblest citizen wherever he may be upon our country's soil."

CONG. GLOBE, 39th Cong., 1st Sess. 1062-63 (1866). Similarly, Congressman William Higby, a Radical Republican from California, stated that the proposed Amendment would "only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument." *Id.* at 1054; *see also* Bushnell v. Langston, 9 Ohio St. 77, 123-24 (1859) (discussing the lack of congressional enforcement power under the Clause).

8. There was not always compliance with the Full Faith and Credit and Privileges and Immunities Clauses of Article IV, Section 2 on the part of the states prior to ratification of the Fourteenth Amendment. As Paul Finkelman has noted,

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

PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 8 (1980).

9. U.S. CONST. Amend. XIV, § 1.

10. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge) (questioning whether it was enough to merely free slaves and noting that the Fourteenth Amendment "is not only justifiable, but necessary").

11. Section One of the Civil Rights Bill which was passed over the veto of President Andrew Johnson reads as follows:

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by

respect to certain fundamental rights of citizens occasioned by the Southern Black Codes.¹²

For example, James Wilson, a Republican from Iowa, stated that “[i]f the States would all practice the constitutional declaration [of the Privileges and Immunities Clause] and enforce it, . . . we might very well refrain from the enactment of this bill into a law.”¹³ Therefore, the Privileges and Immunities Clause was identified as addressing the same natural or common-law rights that were guaranteed under the Civil Rights Bill.

If free blacks were citizens of the United States, or could be given this status through congressional legislation, and if the national government had the power to address state government violations of the Privileges and Immunities Clause of Article IV, Section 2 through legislation, then there would be no question of the constitutionality of the Civil Rights Act of 1866.¹⁴ Representative Bingham, however, called the constitutionality of the Act into question,¹⁵ prompting

white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866). As the above excerpt demonstrates, many of the rights enumerated in the Bill were fundamental common-law rights. This fact is consistent with an interpretation of the Fourteenth Amendment as guaranteeing a closed set of common-law rights to citizens of the United States. See Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 685 n.10 (1997) [hereinafter Smith, *Citizenship*] (noting that the Fourteenth Amendment guaranteed privileges and immunities essential to citizenship, analogous to the “common rights” of English citizens).

12. See HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 81 (1908) (concluding that “nearly all [Members of Congress] said that [the Fourteenth Amendment] was but an incorporation of the Civil Rights Bill”); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 44 (1949) (noting that “[o]ver and over in the debate [about the Amendment], the correspondence between Section One of the Amendment and the Civil Rights Act is noted. The provisions of one are treated as though they were essentially identical with those of the other”). For a discussion of the Southern Black Codes, to which the Civil Rights Act was addressed, see THEODORE B. WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

13. CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866).

14. Act of April 9, 1866, ch. 31, 14 Stat. 27. The Civil Rights Bill declared that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed,” were “citizens of the United States.” *Id.* § 1. The Civil Rights Act was widely recognized as a precursor of Section One of the Fourteenth Amendment. George Latham of West Virginia stated that the “‘civil rights bill’ which is now law . . . covers exactly the same ground as the amendment,” CONG. GLOBE, 39th Cong., 1st Sess. 2833 (1866). Martin Thayer, a Republican from Pennsylvania, stated that the Amendment was “but incorporating in the Constitution the principle of the civil rights bill which has lately become law.” *Id.* at 2465; see also Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 566 (1991) (stating that “constitutionalizing the Civil Rights Act was a major purpose of the Fourteenth Amendment”).

15. See CONG. GLOBE, 39th Cong., 1st Sess. 1291-92 (1866). Some state appellate courts also declared the Civil Rights Act unconstitutional. See, e.g., *State v. Washington*, 36 Cal. 658 (1869); *People v. Rash*, 1 Del. (Houst.) 271 (1867); *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5 (1867).

Congress to draft the Fourteenth Amendment to ensure its constitutionality. Thus, once the meaning of the phrase, "Privileges and Immunities of Citizens," as used in Article IV, Section 2 has been determined, one can explain the specific enumeration of rights to be protected under the Civil Rights Act of 1866.¹⁶

Even after the Amendment had been ratified, the Supreme Court dissenters in the *Slaughter-House Cases* cited the Privileges and Immunities Clause as employing the terms "privileges" and "immunities" in exactly the same manner as they were used in Section One. In the *Slaughter-House Cases*,¹⁷ the majority narrowly construed the Privileges or Immunities Clause of the Amendment, holding that the privileges and immunities referenced were only certain limited rights of national citizenship.¹⁸ Several justices, however, wrote lengthy dissenting opinions, arguing that the protections afforded under the Clause were intended to be much broader.¹⁹ For example, according to Justice Field, the Privileges and Immunities Clause of Article IV, Section 2 provided that "[n]o discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens."²⁰ Similarly, Justice Field defined the relationship between the Privileges and Immunities Clause of Article IV, Section 2 and the Privileges or Immunities Clause of Section One of the Fourteenth Amendment as follows:

What [the Privileges and Immunities Clause of Article IV, Section 2] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the 14th Amendment

16. Professor John Harrison has noted that "[a]ny theory of the Fourteenth Amendment must . . . explain how it validates the Civil Rights Act." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390 (1992).

17. 83 U.S. (16 Wall.) 36 (1873).

18. A number of commentators have noted the decision's effect. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 37, 166 (1990) (arguing that the Court's decision rendered the Clause "a dead letter"); 2 LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* 106, 107, 204 (1968) (noting that the Court emasculated the Clause); Aynes, *supra* note 4, at 627-28; Charles Fairman, *What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U. L. REV. 49, 78 (1950) (suggesting that the Court's decision "virtually scratched" the Clause from the Constitution); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989) (arguing that the Court "ruthlessly eviscerated the Clause of practically all operative meaning"); Patricia Allan Lucie, *White Rights as a Model for Black: Or—Who's Afraid of the Privileges or Immunities Clause?*, 38 SYRACUSE L. REV. 859, 859-60 (1987) (noting that the Clause became extinct when the *Slaughter-House* decision was handed down); Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 2 (1987) (concluding that Court "guttured the privileges or immunities clause").

19. See *Slaughter-House Cases*, 83 U.S. at 83-111 (Field, J., dissenting); *id.* at 111-24 (Bradley, J., dissenting); *id.* at 124-30 (Swayne, J., dissenting).

20. *Id.* at 98 (Field, J., dissenting).

does for the protection of every citizen of the United States against hostile and discriminating legislation, against him in favor of others whether they reside in the same or in different states. If under the 4th Article of the Constitution, equality of privileges and immunities is secured between citizens of different states, under the 14th Amendment the same equality is secured between citizens of the United States.²¹

Thus, in congressional debates over the Civil Rights Act, debates over the Fourteenth Amendment, and in the *Slaughter-House Cases*, the Privileges and Immunities Clause of Article IV, Section 2 figured prominently. An understanding of the principles underlying the Clause is thus important in determining the meaning of Section One of the Fourteenth Amendment.

Scholars have long debated the meaning of the terms "privileges" and "immunities" as used in Section One of the Fourteenth Amendment and Article IV, Section 2.²² This Article continues this tradition by examining the provisions found in Article IV and their relevance in interpreting the Privileges or Immunities Clause of Section One.²³ In particular, the theoretical underpinnings of these provisions are discussed in detail in order to gain some understanding of the directives embodied in Section One.

During the nineteenth century, the prevalent view was that the "privileges" and "immunities" of citizens were those powers or capacities inherent in the concept of citizenship, which flowed from principles of natural law, the positive common law, and the state constitutions.²⁴ These natural or common-law privileges were perhaps

21. *Id.* at 100-01.

22. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*]; FLACK, *supra* note 12; Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Fairman, *supra* note 12.

23. This Article does not address the role of the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, in the drafting of the Fourteenth Amendment. For a discussion of the role the Fugitive Slave Clause played in the formation of the Fourteenth Amendment, see Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section One of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 858-72 (1997) [hereinafter Smith, *Privileges*]; see also Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History of Runyon v. McCrary*, 98 YALE L.J. 565, 565 (1989) (noting that "the fugitive slave clause, as interpreted by the United States Supreme Court, provided the framers of the Civil Rights Act with a theory of constitutional delegation of plenary congressional authority to secure fundamental rights which they invoked in their efforts to enforce civil rights").

24. Natural rights theory had been influential in American legal thought since the time of the Revolution. See generally ERWIN S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1965); CHARLES MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION* (1933); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). Several commentators have noted the significant influence of natural law theories on the framers of the Fourteenth Amendment. See, e.g., CURTIS,

equivalent to those rights intended to be protected through a guarantee of a "Republican" form of government under the Guarantee Clause of Article IV, Section 4.²⁵ This proposition, however, is not self-evident. It is not clear that the Guarantee Clause was thought to protect substantive rights. It may merely have been a protection from invasion or internal unrest. Thus, the questions that arise concern the nature of the rights that were guaranteed under Article IV, and which clauses in that Article provided those guarantees.

In addition to questions concerning the nature of the rights guaranteed under the provisions, questions concerning the nature of the protection afforded those rights also arise. The protection may have been substantive or merely "anti-discrimination" (equality-based) protection. The drafters of the Privileges and Immunities Clause of Article IV either intended to guarantee a core set of uniform, fundamental rights throughout the states, or merely *equal* civil rights. Substantive protection may have flowed from either the Privileges and Immunities Clause itself or from the guarantee of a "Republican" form of government. Thus, it is important to understand the nineteenth century interpretation of Article IV and the nature of the protection afforded thereunder.

Part I of this Article examines the theoretical foundations of the Privileges and Immunities Clause of Article IV, Section 2. Because principles of natural law and the law of nations served as a background for the framing of the Clause, a detailed analysis of these principles is useful in determining the purpose and scope of the Clause. Part II discusses the potential role of the Guarantee Clause of Article IV, Section 4 as working in conjunction with the Privileges and Immunities Clause of Article IV, Section 2 to provide substantive protection for the privileges and immunities of citizens. The guarantee of a "Republican" form of government may have embodied pro-

supra note 3; DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (1990); HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION (1968); David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections From Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 942 (1985); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235 (1984); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 891 (1986); Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 224 (1987) [hereinafter Maltz, *Reconstruction*] (stating that "Republicans were committed to the concept of natural rights, which they saw as embodied in the statement of the Declaration of Independence that all men were entitled to 'life, liberty and the pursuit of happiness'"); Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 350 (1995) (concluding that "the [Privileges and Immunities] Clause must be placed against the backdrop of the classical natural law tradition embraced by the 39th Congress").

25. See *infra* Part II (discussing the role of the Guarantee Clause in protecting substantive rights).

tection for certain common-law rights uniformly throughout the United States. Finally, Part III applies the conclusions concerning the Privileges and Immunities Clause and the Guarantee Clause of Article IV reached in previous sections in interpreting Section One of the Fourteenth Amendment.

The analysis indicates that the provisions of Section One of the Fourteenth Amendment are not indeterminate. Rather, they flow from a long and rich legal tradition that provides the context for their interpretation. When viewed in this light, it becomes clear that the Privileges or Immunities Clause of the Amendment was designed to guarantee a core set of rights thought to be inherent in citizenship. Moreover, the best interpretation of the Amendment appears to be that it was intended to afford not only "anti-discrimination," but also substantive protection for the privileges and immunities of citizens. This substantive guarantee, however, did not mean that the courts were free to invade the province of the state legislatures by dictating the *mode or manner* in which these privileges could be exercised. Rather, the Amendment left the states wide latitude to regulate these privileges and immunities with no fear of federal intrusion.

I. THE INTELLECTUAL BACKGROUND OF THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause of Article IV, Section 2 did not arise from a blank slate, but rather from a well-developed body of law concerning the natural relations of sovereign states. The Clause was viewed not only as an "individual rights" provision, but also as a "federalism" provision, maintaining the integrity of the federal system as well as the equality of the states as political entities.²⁶ The Clause, however, went beyond principles of comity, making the citizens of the several states one people and creating positive, conventional obligations in the place of "unwritten" principles of reason that served as legal default rules.²⁷

26. See David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 844 (1987) (noting that the Privileges and Immunities Clause of Article IV, Section 2 was designed to be as much a federalism provision, governing relations among the states, as it was to be an individual rights provision, guaranteeing that the citizens of the individual states would be recognized as citizens within foreign jurisdictions); John M. Gonzales, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism?*, 15 CAP. U. L. REV. 493, 499-500 (1986) (stating that Article IV, Section 2 was intended to prohibit state-imposed obstacles to effective federalism).

27. For example, in *Leimon v. People*, 20 N.Y. 562 (1860), the New York Court of Appeals upheld the freedom of slaves brought through New York in transit. Judge Thomas W. Clerke in his dissent argued that New York was bound to recognize slave property under the Privileges and Immunities Clause. Clerke stated:

One of the themes underlying the antebellum discussion of the Privileges and Immunities Clause of Article IV, Section 2 was the notion that the “privileges” and “immunities” of citizens—the inalienable rights of man and those powers or capacities of citizens flowing from the social compact—correspond to certain natural law rights existing anterior to the establishment of government.²⁸ A second theme underlying the discussion concerning the Privileges and Immunities Clause was the desire to place citizens of the United States under the same body of fundamental civil law.²⁹

The unification of these two seemingly divergent rationales is found in the relationship between natural law and the *jus gentium*, or law of nations.³⁰ The principles of natural law were thought to be founded in reason.³¹ They formed a set of axioms concerning human nature to which all rational individuals would assent, and from which propositions could be deduced through the exercise of reason.³² Therefore, one would expect that in societies where rational individuals formulated the laws, the laws would express these principles.³³ For example, John Locke’s influential natural law theory recognized that the principles of natural law tend to be adopted as conventional laws. Locke reasoned that:

The law of nature is the law of convenience too: it is no wonder, that those men of parts, and studious of virtues . . . should, by meditation, light on the right, even from the observable convenience and beauty of it; without making out its obligation from the

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

Id. at 642.

28. See Smith, *Citizenship*, *supra* note 11, at 723 (applying social compact theories popular in the nineteenth century to the interpretation of Section One of the Fourteenth Amendment); see also *infra* Part I.B (discussing the relationship between the common law and the Privileges and Immunities Clause of Article IV, Section 2).

29. See Smith, *Citizenship*, *supra* note 11, at 747 (noting that “[t]he purpose of the Privileges or Immunities Clause of the Fourteenth Amendment was to ensure that all citizens were afforded the same fundamental civil capacities inherent in the concept of citizenship in the United States, analogous to those that had existed from the time of the Roman law, as well as all of the natural rights of persons found in the English common law”).

30. See *infra* Part I.A (discussing the relationship between natural law and the law of nations).

31. See *infra* notes 88-91 and accompanying text.

32. See *infra* notes 89-90 and accompanying text.

33. John Norton Pomeroy argued in 1864 that as nations become more developed, the laws reflect more and more the “innate principles of natural justice common to all times and peoples which the Romans called *jus gentium*.” JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW § 8 (1864).

true principles of the law of nature, and foundations of morality.³⁴ As a result, one would expect that certain principles of government would be adopted by all civilized nations because these principles were founded in reason. As Emmerich Vattel, a seventeenth-century natural law theorist stated, “[h]appiness is the point where centre all those duties which individuals and nations owe to themselves; and this is the great end of the law of nature.”³⁵ Thus, the natural law was conceived of as a set of ideal principles which might not find complete expression in positive laws.

Thomas Hobbes, another influential natural law philosopher, also discussed the relation between the natural law and positive civil law in his treatise on government entitled, *Leviathan*. Hobbes seemed to go even further than Locke or Vattel, indicating that natural “laws” were not properly termed “law” until they were embodied in the positive civil law:

The Law of Nature, and the Civill Law, contain each other, and are of equall extent. For the Lawes of Nature . . . are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before; as being then the commands of the Common-wealth; and therefore also Civill Lawes.³⁶

Hobbes recognized these natural law principles not as “laws,” but rather as propositions founded upon reason. He reserved the term “laws” for the positive expression of these propositions by the legislature.

Indeed, Hobbes was not alone in viewing the natural law in this manner. Locke also noted this connection between the civil law and the law of nature: “[T]he municipal laws of countries . . . are only so far right as they are founded on the law of Nature, by which they are regulated and interpreted.”³⁷ Although there may be no coercive force available to enforce the principles of natural law in a state of nature, such coercive power does exist in society. This is the fundamental distinction between natural law and positive civil law. Neither of these bodies of law may be coextensive in any given society. There will be some degree of overlap, however, as the lawmakers utilize

34. JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 47 (Cambridge University Press 1980) (quoting JOHN LOCKE, *REASONABLENESS OF CHRISTIANITY*, ch. VII, at 142 (1823) (alteration in original)).

35. EMMERICH VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 47 (Charles D. Fenwick trans., T. & J.W. Johnson & Co. 1863) (1758) [hereinafter VATTEL, *LAW OF NATIONS*].

36. THOMAS HOBBS, *LEVIATHAN* 314 (C.B. Macpherson ed., 1968) (1651).

37. JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 13 (Prometheus Books 1986) (1690).

their powers of reason to conform the positive law to the natural law, even though they may not be consciously aware of this result.

Roman law, the source of many of the concepts elaborated upon by natural law philosophers, also recognized a distinction between natural and positive law.³⁸ The Roman conception of natural law, however, was not nearly as well developed as it was during the period spanning the seventeenth and nineteenth centuries.³⁹ The Roman law made a distinction between three separate types of private law: natural law (*jus naturale*), the law of nations (*jus gentium*), and the civil law (*jus civile*).⁴⁰ For example, in Justinian's *Institutes*, three categories of private law are described: laws derived from natural concepts, laws governing individual states, and laws typically followed by nations.⁴¹ Private law regulated and declared the private rights of persons under the Roman Code.⁴² The *jus civile* applied only to those who possessed the status of citizen, affording such individuals certain privileges under the law.⁴³ The *jus gentium* represented the body of law that applied to noncitizens living within the Roman Empire and contained principles of law common to all nations.⁴⁴ The *jus naturale* represented an ideal form of law, or principles of reason, upon which all other law was based.⁴⁵

This distinction between the civil law and the law of nations was familiar to courts in the United States even before the Constitution was framed. A number of courts referred to the distinction in deciding cases involving issues concerning interstate relations⁴⁶ as well as

38. See JUSTINIAN'S INSTITUTES 1.2 (observing that natural law is common to all people, whereas positive law is particular to a given state).

39. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 2 (Melville M. Bigelow ed., 8th ed. London, Little, Brown & Co. 1883) [hereinafter STORY, CONFLICT OF LAWS]. According to Justice Story, the concept of the law of nations was not as well developed under the ancient Roman legal system:

It is certain that the nations of antiquity did not recognize the existence of any general or universal rights and obligations, such as among the moderns constitute what is now emphatically called the Law of Nations. Even among the Romans, whose jurisprudence has come down to us in a far more perfect and comprehensive shape than that of any other nation, there cannot be traced out any distinct system of principles applicable to international cases of mixed rights.

Id.

40. See WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW 182 (1983) (listing natural law, civil law, and the law of nations as components of Roman law); Smith, *Citizenship*, *supra* note 11, at 735-36 (elaborating upon the distinctions made under the Roman law).

41. See JUSTINIAN'S INSTITUTES 1.1.

42. See BURDICK, *supra* note 40, at 182 (differentiating between private and public rights).

43. See *id.* at 199.

44. See *id.* at 200 (describing application of the *jus gentium* to govern persons who were not Roman citizens).

45. See *id.* at 182.

46. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 467-79 (1856) (discussing civil law and the law of nations under the Roman Empire); *Miller v. McQuerry*, 17 F. Cas. 335, 339

international relations.⁴⁷ These cases applied principles of Roman

(C.C.D. Ohio 1853) (No. 9,583) (discussing notions of natural law and civil law); *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 396-97 (Pa. Ct. C.P. 1788) (analogizing general principles applicable to foreign countries based on the law of nations to the sovereignty of states within the United States); *Miller v. Hall*, 1 U.S. (1 Dall.) 229, 232 (Pa. 1788) (discussing the law of nations).

The court in *Miller v. Hall* appealed to the law of nations as well as to the Privileges and Immunities Clause in rendering its decision. See *Miller*, 1 U.S. (1 Dall.) at 232. The court sided with the defendant, recognizing that "foreign laws" (i.e., a Maryland statute) could have effect outside of the jurisdiction of their origin. See *id.* The sovereign states were foreign nations with respect to each other, but the laws of one could become binding in the others through application of the principles of the law of nations and the Privileges and Immunities Clause of the Articles of Confederation. The Court reasoned:

[H]aving considered the principles of the law of nations, and the reciprocal obligation of the states under the articles of confederation, we are of opinion, that the act of assembly by which the Defendant has been discharged, must be considered as a general bankrupt law, made for general purposes. . . . It is true, that laws of a particular country, have in themselves no extra-territorial force, no coercive operation; but by the consent of nations, they acquire an influence and obligation, and, in many instances, become conclusive throughout the world.

Id. The court appealed not only to the natural law and the positive law of the Articles of Confederation, but also to the law of nations in reaching its decision in favor of the defendant:

From the nature of the act, then, it appears to be founded upon equitable grounds, for general and just purposes; it ought, therefore, to be regarded in all other countries, and should enjoy that weight, in our decisions, which it naturally derives from general convenience, expediency, justice and humanity. For, mutual convenience, policy, the consent of nations, and the general principles of justice, form a code which pervades all nations, and must be everywhere acknowledged and pursued.

Id. at 232-33. The Court thus emphasized that laws founded upon natural law and equitable principles deserved recognition as binding upon all nations, according to the law of nations. Furthermore, the Court indicated that these principles were binding as positive obligations, particularly since the states had consented to reciprocal obligations under the Privileges and Immunities Clause of the Articles of Confederation. See *id.* (discussing the "code" that all states should acknowledge).

47. The law of nations and the influence of the natural law in shaping that body of law was recognized in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), a case involving the legality of the slave trade. The court considered the issue of whether the slave trade was "contrary to the law of nations." *Id.* at 834. The United States government argued that the slave trade was not only contrary to the law of nature, but also to the positive laws of the various "civilized nations of the globe." *Id.* Thus, the government based its action in part on the understanding that the principles of natural law and the positive law of various countries form the law of nations, or *jus gentium*. See *id.* Both the inductive and deductive approaches to determining the principles of the law of nations were considered in arguments before the court. See *id.* at 834-36.

The court also discussed the law of nations in its opinion. See *id.* at 845. According to the court, in the international community, where no supreme power existed over sovereign nations, interference with the internal affairs of a state was forbidden. The court, therefore, acknowledged the sovereign power of each state to regulate the rights of those within its jurisdiction:

[E]ach nation may regulate every interior interest without giving offence, and without accountability to any other nation. The form of government, and mode of administration; religion and mode of worship; what shall be deemed to be property, and what shall not be; the mode of acquisition, possession, and alienation; what acts shall be deemed crimes, and what forfeitures shall ensue, are all subjects which each nation reserves to itself.

Id. at 835. The court looked to the positive law of various nations in determining that property in human beings was consistent with the law of nations. According to the court, "[i]t is impossible to say, that the slave trade is contrary to what may be called the common law of nations."

law and principles of the law of nations developed by continental jurists such as Grotius, Pufendorf, and Vattel,⁴⁸ despite the fact that America had inherited a common-law system from England. The American states, much like states in the international arena, were viewed (to a certain extent) as existing in a hypothetical state of nature,⁴⁹ from which the union among them emerged.⁵⁰ The impor-

Id. at 839 (quoting *Madrazo v. Willes*, 3 Barn. & Ald. 353, 358, 5 Eng. Rep. 208, 211 (1820)). Therefore, even though the court recognized that slavery might be contrary to natural law, it decided the case based on positive law, reasoning that positive expression of the will of nations could override principles of natural law. *See id.*

48. *See, e.g., Dred Scott*, 60 U.S. at 477 (referring to legal principles laid down by Vattel); *Camp*, 1 U.S. at 396-98 (citing the theories of Vattel).

49. In his concurrence in *Dred Scott*, Justice Daniel engaged in an extensive discussion of the views of Emmerich de Vattel, who presented a model of states as existing in a state of nature. Justice Daniel asserted that no state within the United States had the right to confer the privileges and immunities of citizenship upon individuals in other states. *See id.* at 483-85 (Daniel, J., concurring). Indeed, this was a consequence of the natural equality of states:

"The natural society of nations," says this writer [Vattel], "cannot subsist unless the natural rights of each be respected." . . . Again, in section 18th, of the same chapter, "nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not produce any difference. A small republic is no less a sovereign state than the most powerful kingdom."

Id. at 483-84 (citing Kent's *Commentaries*, Grotius, Heineccius, Vattel, and Rutherford as authorities on the law of nations).

50. In *Camp v. Lockwood*, the Court of Common Pleas of Philadelphia County cited Vattel's treatise on the law of nations extensively in deciding whether a Connecticut act could have extraterritorial effect. *See Camp*, 1 U.S. at 395. The Connecticut law declared that all property of any person who had joined the enemies of the United States or had assisted them during the Revolutionary War should be confiscated. *See id.* at 393. The plaintiff was a resident of Pennsylvania who formerly had resided in Connecticut. While in Connecticut, he had joined the British Army, and the state subsequently confiscated all of his property and refused to enforce payment of a debt that another Connecticut resident owed to him. The plaintiff brought suit in Pennsylvania to collect the debt. Citing Vattel, Burlamaqui, and Pufendorf, plaintiff's counsel (Rawle) suggested that the states should be viewed as existing in a state of nature:

[N]ations, with respect to each other, must be considered as individuals in a state of nature. . . . In a state of society, private property yields to the general good; but this is not the case in a state of nature; and therefore, it may be taken as an axiom, that where the act of a particular nation vests in itself the property of an individual, whether a subject or not, the right, thus acquired, extends no further than the jurisdiction of that nation, and the act upon which it is founded can have no extra-territorial force.

Id. at 395 (citations omitted). Therefore, under the plaintiff's reasoning, the law of Connecticut would not be binding in Pennsylvania, and the debt could be collected. The defendant argued, however, that Pennsylvania should respect the Connecticut act out of principles found in the "law of nations" and sanctioned under the Privileges and Immunities Clause of the Articles of Confederation. *See id.* at 398. Ingersol, the defendant's counsel, argued that there was not only a voluntary law of nations but also a necessary one. According to the reporter,

He [Ingersol] observed, that he did not controvert the general doctrine advanced by the opposite counsel, that the law of nations is the law of nature, applied to nations, and that one sovereign power cannot be bound by another; but he distinguished between the necessary, and the voluntary law of nations, which arises *ex comitate*; and insisted, that the laws of a nation actually enforced, are every where obligatory, unless they interfere with the independency of another legislature; for common convenience renders it necessary to give a certain degree of force to the statutes of foreign nations;

If nations unconnected by any tie, thus indirectly give effect to the laws of each

tance of the principles developed by legal scholars considering the relations among states in the international arena were acknowledged for their relevance in dealing with relations among the states in the American federal system.⁵¹

Part I.A of this Article explores the relationship among the law of nature, the law of nations, and the civil law. It further discusses the manner in which the principles of the law of nations served as the legal background for adoption of the Privileges and Immunities Clause of Article IV, Section 2. Part I.B then addresses the relationship between the common law and the *jus gentium*, or law of nations. This Part concludes that American "common law" served as a source of the fundamental privileges and immunities of citizens guaranteed under Article IV, Section 2. It is likely that these principles were thought to be constitutionally mandated through a substantive guarantee under the Privileges and Immunities Clause of Article IV, Section 2 or through their expression in state constitutions and other organic law.⁵² At a minimum, these principles served as an assumed

other, the principle upon which it is done, must with greater strength prevail in the case of a political union like that of the American states. . . . Thus, it is declared by the articles of confederation, that a citizen of one state, is a citizen of every state; and the congress are not, as Mr. Adams has termed them, an assemblage of ambassadors; but a sovereign power.

Id. (citations omitted). The defendant thus argued that the relationship between the states under the Articles of Confederation was stronger than that between foreign sovereigns. The states not only shared the law of nations, but also, in a sense, shared the civil law because citizens of one state were deemed to be citizens of all of the other states under the Privileges and Immunities Clause of the Articles of Confederation. Furthermore, the states in the Union had consented to be bound by the Constitution, and there existed a superior sovereign power embodied in the federal government, under which this law of nations could become binding. *See id.* at 399 ("The United States though individually sovereign and independent, must admit, not only the voluntary law of nations, but a peculiar law resulting from their relative situation."). This "peculiar law" arose from the Privileges and Immunities Clause of the Articles of Confederation and the respect that the states owed to the laws of other states in order to preserve the private rights of person and property, privileges and immunities, of citizens in the several states. *See generally* STORY, CONFLICT OF LAWS, *supra* note 39, at 9-10 (considering private rights of citizens of each state in relation to the others).

51. For example, Justice Story authored a treatise on the conflict of laws, acknowledging the importance of this area of law to the relations of the states within the American federal system:

The jurisprudence . . . arising from the conflict of the laws of different nations in their actual application to modern commerce and intercourse, is a most interesting and important branch of public law. To no part of the world is it of more interest and importance than to the United States, since the union of a national government with already that of twenty-six distinct States, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles.

STORY, CONFLICT OF LAWS, *supra* note 39, at 9-10.

52. In *Slaughter v. Commonwealth*, 55 Va. (13 Gratt.) 767 (1856), the court considered whether corporations were entitled to the guarantee of the Privileges and Immunities Clause of Article IV, Section 2. The court explicitly stated that "[i]n Virginia they [the privileges and immunities of citizens] may be regarded as set forth in our bill of rights and constitution." *Id.*

background of fundamental rights under the Clause.⁵³

A. *The Law of Nature, the Law of Nations, and the Civil Law*

In general, the phrase "law of nations" has been used to denote those principles of law common among the bodies of positive law found in various civilized nations.⁵⁴ Although some writers during the nineteenth century used the phrase "law of nations" synonymously with "*jus gentium*,"⁵⁵ the practice was not universally followed. The phrase "law of nations" was also commonly used to denote international law or the law governing relations among states.⁵⁶

As Charles G. Fenwick noted in an introduction to Vattel's widely-cited work on the law of nations, "[t]he celebrated Grotius understands by the 'Law of Nations' a law established by the common consent of Nations, and he thus distinguishes it from the natural law."⁵⁷ Similarly, O.W. Holmes, Jr., in editor's notes accompanying Chancellor Kent's *Commentaries on American Law*, also acknowledged the nineteenth-century confusion between the *jus gentium* and international law. Holmes concluded that "[t]he *jus naturale*, or Law of Nature, is simply the *jus gentium*, . . . seen in the light of a peculiar theory. . . . The confusion between *jus gentium*, or law common to all nations,

at 774.

53. Due to the evidence of congressional intent in the Reconstruction debates and the interpretation of the Privileges or Immunities Clause by the dissenters in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96-104 (1872) (Field, J., dissenting), other commentators have characterized the privileges and immunities of citizens as being derived from the common law. See McConnell, *supra* note 4, at 962 (stating that the Fourteenth Amendment was designed to guarantee "basic civil rights, the common law rights possessed by all free persons").

54. See BURDICK, *supra* note 40, at 182 (enumerating positive laws that arose from the law of nations, such as laws governing wars, territorial boundaries, the formation of governments, property rights, and trading obligations); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2 (O.W. Holmes ed., 12th ed., Little, Brown & Co. 1873) (describing the law of nations as a system of positive law).

55. VATTEL, LAW OF NATIONS, *supra* note 35, at 3a. According to Charles G. Fenwick, a translator of Vattel,

The Romans often confused the Law of Nations with the Law of Nature, giving the term "Law of Nations" (*jus gentium*) to the natural law, inasmuch as the latter was generally recognized and adopted by all civilized Nations. The Emperor Justinian's definitions of natural law, the Law of Nations, and civil law, are well known. "Natural law," he says, "is the law taught by nature to all animals." This is a definition of the Law of Nature in its widest extent, and not the natural law peculiar to man which is derived from his rational as well as from his animal nature. "The civil law," continues the Emperor, "is the law which is established by each people for itself and which is peculiar to each State or civil society; whereas that law which is established among all men by natural reason, and which is equally observed by every people, is called the Law of Nations, since it is a law which all Nations follow."

Id. (footnotes omitted).

56. See STORY, CONFLICT OF LAWS, *supra* note 39, at 2 (referring to principles of the law of nations relating to cases of international conflict).

57. VATTEL, LAW OF NATIONS, *supra* note 35, at 4a.

and *international law* is entirely modern.”⁵⁸ Thus, although the words were sometimes used in a different sense, the prevailing view was that the phrase “law of nations” was synonymous with the Roman *jus gentium*.

Both senses of the phrase “law of nations” are important, however, in grasping the nineteenth-century understanding of the Privileges and Immunities Clause of Article IV, Section 2. As a system of sovereign states, the United States represented a model wherein both principles of international law and the *jus gentium* were applicable. Principles of international law governed relations among the states while, under the Privileges and Immunities Clause of Article IV, Section 2, those rights of citizens that were fundamental—rights of citizens in all free governments⁵⁹—formed constituent elements of a *jus gentium* among the American states.

1. Roman and natural law foundations

Under the Roman law, the *jus gentium*, or law of nations, was the law developed to govern commercial dealings with peregrines, members of non-Roman communities within the Roman Empire, and other noncitizens.⁶⁰ Justinian’s *Institutes* draws a distinction between the civil law and the *jus gentium* as follows:

All peoples who are governed by laws and customs use law which is in part particular to themselves, in part a law common to all men: the law which each people has established for itself is particular to

58. KENT, *supra* note 54, at 1 n.1 (O.W. Holmes). Frederick Tomkins and William George Lemon, translators of the Roman writer Gaius, traced the evolution of the *jus gentium* and the *jus civile* in ancient Rome:

The *jus gentium* was strictly a Roman idea, and however much contempt may have been originally felt for the set of principles it included, these principles became at a later period intimately commingled with the *jus civile*, or municipal law, which, though not absolutely extinguished, was in a very great degree modified by their introduction. The conception of *jus naturale* arose from a combination of Roman and Greek ideas. . . . The Romans chiefly valued the *jus gentium* for its supposed accordance with this law of nature. . . . Law and politics have been in modern times immensely influenced by this theory of the Roman jurists.

THE COMMENTARIES OF GAIUS ON THE ROMAN LAW 22-23 (Frederick Tomkins & William George Lemon eds. & trans., Butterworths 1869).

59. This was the language used by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), to describe the rights protected under the Privileges and Immunities Clause.

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the *citizens of all free governments*; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

See *id.* at 551 (emphasis added).

60. See JUSTINIAN’S INSTITUTES 1.2.

that state and is styled civil law as peculiarly of that state: but what natural reason has established among all men is observed equally by all nations and is designated *jus gentium*, or the law of nations, being that which all nations observe.⁶¹

Thus, the common laws of nations were seen as being derived from natural law. Under Roman law, the *jus gentium* governed the actions of strangers within Roman territories, while the *jus civile* governed the actions of the citizens of Rome.⁶² As John Norton Pomeroy, a prominent nineteenth-century legal commentator, noted in his *Introduction to Municipal Law*, the rights afforded individuals under the *jus gentium* were somewhat less comprehensive than those afforded under the *jus civile*.⁶³ Pomeroy characterized non-citizens living in Roman territories as an "inferior population" who possessed certain limited rights, such as the right to hold property.⁶⁴ He noted, however, that the "citizen" possessed many rights that the non-citizen did not, such as the right to intermarry with Roman citizens, the right to "belong to the state," and the capacity to participate in the state's government and to share in state property.⁶⁵ Pomeroy concluded that this "inferior population" was "free personally, but subject politically, not slaves, yet not citizens."⁶⁶

In fact, the distinction between citizens and non-citizens was only one of many gradations of status that existed under the Roman law.⁶⁷ The most extreme distinction made in civil status was the distinction between slaves and freemen.⁶⁸ According to Pomeroy's account, slaves possessed "no civil rights; they were absolute property of the

61. *Id.* at 1.2.1.

62. See RICHARD W. LEAGE, *ROMAN PRIVATE LAW 1-2* (C.H. Ziegler ed., 2d ed. 1932).

63. See POMEROY, *supra* note 33, at 299 (describing the inferior status of noncitizens under Roman law).

64. See *id.* (detailing rights afforded and denied to noncitizens by the Roman state).

65. *Id.* Pomeroy summarized the condition of strangers or, *perigrini*, as follows:

As the strangers resident on Roman soil, and forming a portion of the commonwealth, were not included in the embrace of the purely national law (*lex civilis*), and took no part in civil affairs, they were left to the guidance of the *jus gentium*, or natural law, so far as it was recognized in these semi-barbarous epochs. With them the family was natural; property was acquired, held, and transferred in a simple and natural manner; obligations depended upon the good faith and intention of the parties, and not upon arbitrary forms of words.

Id. at 302.

66. *Id.* at 299.

67. According to Pomeroy, the term "status had reference to the capacity of the individual to acquire and enjoy rights, and was separated into several gradations, ranging from the one in which no civil rights were enjoyed, to the one which bestowed all the privileges and immunities of the Roman citizen." *Id.* at 301. Pomeroy characterized the fundamental rights enjoyed by citizens of Rome as "privileges and immunities," foreshadowing the language used in Section One of the Fourteenth Amendment. See Smith, *Citizenship*, *supra* note 11, at 696.

68. See POMEROY, *supra* note 33, at 301 (noting the division of status between slaves and freemen).

master, who held a power supreme over them, extending even to life."⁶⁹ In contrast, Pomeroy defined freemen as "[a]ll persons not in the condition of servitude."⁷⁰ This status, "however, did not confer equal civil rights."⁷¹ As previously noted, only citizens were entitled to equal civil rights, whereas strangers, or *perigrini*, were entitled only to those rights that existed under the *jus gentium*. Pomeroy concluded that this division between citizens and non-citizens was "of the utmost importance by the primitive law; in fact, it was only for the citizen that the civil law existed."⁷² It was the civil law that gave to the citizen "the coveted privileges which belonged to his order."⁷³

The distinction between positive law and natural law persisted even after the fall of the Roman Empire. For example, Samuel Pufendorf, a seventeenth-century natural law theorist influential in nineteenth-century America, also recognized a distinction between positive civil law and natural law. He argued that the civil law in most states was a positive expression of natural law and furthermore, that, as a dictate of natural law, citizens were bound by whatever positive civil laws the legislature enacted.⁷⁴ Pufendorf reasoned that

Whatever laws . . . are enjoined by the supreme civil command for their subjects to observe, under the threat of inflicting punishment in a human court of law upon the violators of the same, are called *civil laws*. These, whether taken from the body of the law of nature, or from the body of positive law, or proceeding from the mere free choice of the rulers, obtain the whole effect which they exert in a civil court from the force of supreme power lending its authority to them.⁷⁵

Thus, by definition the civil law was the body of positive law which was enforceable by the courts.

Pufendorf concluded that the commands of the natural law, although creating a moral obligation, did not carry with them a legal obligation unless positively expressed in the civil law.⁷⁶ Pufendorf did

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 302.

74. See 2 SAMUEL PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* 160-61 (James Brown Scott ed., William Abbot Oldfather trans., Clarendon Press 1931) (1672) [hereinafter PUFENDORF, *ELEMENTS*] (analyzing the relationship between natural law and civil law).

75. *Id.* at 160. Pufendorf believed that much of the natural law was indeed embodied in the positive civil law. See *id.* ("[I]n all commonwealths, most features of the law of nature, at all events such as those without which peace in the society itself cannot stand, have the force of civil law, or have been included in the body of civil laws.")

76. See *id.* at 161. Pufendorf made it clear that natural obligations were morally binding but not backed by the force of the state:

state, however, that when no positive civil law governed a case, a judge could resort to the natural law when he was compelled to render a judgment. Pufendorf described the role of the natural law as follows:

[I]n all states natural laws support the civil law like a military reserve, so that when the latter has failed on some occurrence which altogether demands a decision in a human court of law, there is recourse to the laws of nature and to the analogy resulting from their comparison, whereby, however, that which is borrowed, as it were, from the law of nature takes on the force of civil law.⁷⁷

Pufendorf, therefore, thought that the civil law of various nations reflected the natural law because it was based upon principles of reason. As a consequence, those who form society must be presumed to have desired to "establish nothing by civil laws which was contrary to natural law" because only an "insane man" could wish to do such a thing.⁷⁸ However, only the civil law was enforceable by the state; the

[I]f, now, some law of nature, due to some actions of the civil command, has not taken on the force of civil law, it obligates men, indeed, but in such a way that no action is brought because of its violation, nor punishment there inflicted, but the prosecution is left solely to the divine judgement-seat and to one's own consciousness of having violated that law.

Id. at 160. Elsewhere, Pufendorf reiterated this point:

We may well discuss the division of obligations into natural and civil, not so much on the ground that such a division explains the origin of obligations, as that it suggests the basis of their force in common life. And so a natural obligation is that which binds only by the force of natural law; a civil obligation that which is reinforced by civil laws and authority.

2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 385 (James Brown Scott ed., C.H. Oldfather & William Abbot Oldfather, trans., Clarendon Press 1934) (1688) (footnotes omitted) [hereinafter PUFENDORF, *JURE*].

77. PUFENDORF, *ELEMENTS*, *supra* note 74, at 161. American courts also recognized that positive law trumped principles of the law of nations. For example, in *Lemmon v. People*, 20 N.Y. 562 (1860), Judge Thomas W. Clerke argued in his dissent that even though property in slaves was not recognized under the law of nations, the positive provisions of the Constitution overrode the law of nations. Clerke argued that the majority was wrong

in supposing, because the law of nations refused to recognize slaves as property, the several States of this Union were at liberty to do the same; forgetting that the compact, by which the latter are governed in their relation towards each other, modifies the law of nations in this respect . . . [therefore, no state is] permitted in its dealings or intercourse with other States or their inhabitants to ignore the right to property in the labor and service of persons *in transitu* from those States.

Id. at 642-43 (Clerke, J., dissenting).

78. PUFENDORF, *JURE*, *supra* note 76, at 1133. Pufendorf continued, further analyzing the presumption that nothing enacted by the legislature and made part of the civil law was contrary to the principles of natural law:

[T]hose who in uniting to form a state bound themselves by a pact to obey the civil laws, must certainly be understood to have presupposed that they would establish nothing by civil laws which was contrary to natural law, and that the particular advantage of states, which is the source and cause of civil laws, would not be repugnant to their common end. Therefore, a civil law could, of course, be passed which is opposed to natural law; yet none but an insane man, and one who had in mind the destruction of the state, would wish to pass legislation of that kind.

natural law was not.⁷⁹

In discussing the distinctions among the ancient Roman *jus civile*, *jus gentium*, and *jus naturale*, Pufendorf concluded that the law of nature and the law of nations were identical.⁸⁰ He did not think that the law of nations was binding upon states, however, because no common superior existed among sovereign states to establish and enforce such a body of law.⁸¹ In making these distinctions, he laid the foundation for the nineteenth-century categorization of laws in the same manner.

Pufendorf further subdivided the natural law into categories based on origin. Citing Grotius, he made a distinction between two types of natural law commands—absolute and hypothetical. The former, he argued, were independent of any institutions created by man, but belonged to all men, while the latter flowed from institutions established by men.⁸² Thus, both Grotius and Pufendorf made a distinction between relative and absolute natural rights analogous to that later made in the nineteenth century by Chancellor Kent in his *Commentaries on American Law*.⁸³

Pufendorf did not believe that all of the civil law reflected the natural law.⁸⁴ Although Pufendorf considered obedience to any en-

Id.

79. See *id.* at 1181 (“[N]o man is called to account, or assessed a penalty, in the proper sense of the word, in states, for the violation of natural laws, which are not accorded the authority of civil laws.”).

80. See *id.* at 226-27. According to Pufendorf, the law of states was merely the law of nature applied to states instead of individuals:

It is held by many that the law of nature and the law of nations are one and the same thing, differing only in their external denomination. Hence Hobbes divides natural law “into the natural law of men and the natural law of states, which is commonly called the law of nations. The injunctions of both,” he adds, “are the same; but because states, upon being constituted, take on the personal properties of men, the law, which we call natural when speaking of the duty of individual men, on being applied to whole states and nations or peoples, is called the law of nations.” To this statement we also fully subscribe.

Id. at 226 (citation omitted).

81. See *id.* (“Nor do we feel that there is any other voluntary or positive law of nations which has the force of a law, properly so called, such as binds nations as if it proceeded from a superior.”).

82. See *id.* at 229.

83. See Smith, *Citizenship*, *supra* note 11, at 702-04 (discussing Chancellor Kent’s distinction between absolute and relative rights).

84. See PUFENDORF, *JURE*, *supra* note 76, at 199. Pufendorf did, however, presume that the civil law should be construed to reflect the natural law:

All civil laws, indeed, presuppose or incorporate the general principles at least of natural law, whereby the safety of the human race is maintained; and these latter are by no means done away with by the former, which are merely added to them as the distinct advantage of each state has required.

Id.

acted positive civil laws to be a precept of the natural law,⁸⁵ he did not think that the civil law and the natural law were coextensive. Pufendorf did not believe that the principles of the natural law were necessarily reflected in the civil codes of various nations or even of those parts of the civil codes that various nations shared.⁸⁶ Instead, Pufendorf asked, "what nation will claim so much for itself as to demand that all other nations be measured by its customs, and to adjudge that one barbarous which departs from them?"⁸⁷ The fact that the principles of natural law could not necessarily be derived from the civil laws of various nations did not mean, however, that the principles of natural law were not capable of being ascertained. For Pufendorf, the process was one of deduction rather than induction.⁸⁸ Pufendorf

85. See *id.* at 230. According to Pufendorf, the natural obligation to obey positive civil laws flowed from the voluntary adoption of the social compact by members of society:

[B]y our own consent we put ourselves under the direction of another whose commands the law of nature bids us to obey. It is, indeed, certain, that violators of civil laws mediately sin against the very law of nature by reason of such an agreement. Yet there is this great distinction abiding between hypothetical natural laws and positive civil laws, namely, that the reason for the former is sought from the condition of mankind as a whole, while the reason for the latter is taken from what appears to be of advantage for some certain state, or from the mere will of the legislator. And so positive civil laws are not hypothetical precepts of the natural law, but they borrow their power to obligate in a court of law, from a hypothetical precept.

Id.

86. See Walter Simons, *Introduction*, in PUFENDORF, JURE, *supra* note 76, at 24a.

87. PUFENDORF, JURE, *supra* note 76, at 189.

88. See Simons, *supra* note 86, at 21a. Courts in the United States also acknowledged both the inductive and deductive methods of arriving at the principles of the law of nations. For example, in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), the court recognized the law of nations not as a static source of authority, but one that could change over time as the propositions to which nations consented to be bound changed and as men came closer through use of reason to embodying the principles of natural law in the positive law of nations. Citing both the inductive and deductive methods of determining the principles of the law of nations, the court reasoned:

[T]he law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods.

Id. at 846. An implication of this view is that there might be principles of the law of nations that were not embodied in the positive law of *all* states:

It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognised, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe.

Id. In particular, the court emphasized the deductive approach to determining which principles were part of the law of nations.

I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of

thought that one could deduce the moral truths that formed the principles of natural law by starting with certain axioms concerning the nature of man.⁸⁹ He advocated looking to the nature of man to derive the axioms from which one could deduce the principles of natural law.⁹⁰

Thus, in Pufendorf's work, there is evidence that the natural law theorists relied upon by nineteenth-century legal scholars made a sharp distinction between the natural law and positive civil law enacted in various nations. The principles of the law of nations were viewed as being equivalent to the law of nature and were thought to be represented in the civil law of most civilized countries.⁹¹ Pufendorf made it clear, however, that the civil law alone was binding, and that only when the civil law was silent should judges refer to principles of natural law—principles of reason—in order to fill in the gaps.⁹²

moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment.

Id. Therefore, the court argued that where the positive law of the nation under whose jurisdiction the case had been brought was not inconsistent with natural law, courts could apply principles of natural law in deciding the case. *See id.* at 849-50.

89. *See* PUFENDORF, *JURE*, *supra* note 76, at 26 (arguing that the principles of natural law were capable of demonstration despite the human condition of freedom).

90. *See id.* at 205. According to Pufendorf, the principles of natural law flowed directly from the nature of man:

[T]here is no more fitting and direct way to learn the law of nature than through careful consideration of the nature, condition, and desires of man himself, although in such a consideration other things should necessarily be observed which lie outside man himself, and especially such things as work for his advantage or disadvantage.

Id. Pufendorf pointed out that this was also the position of Grotius in explaining the commission of actions that are not in conformity with the law of nature on the part of man: "For the same reason Grotius shortly thereafter undertakes to derive this wickedness from a comparison with *nature when following sound reason*. And yet in the words *sound reason*, as attributed to man, there is involved a reference to the law of society as given to man by the Creator." *Id.* at 30.

91. According to Pufendorf, the natural law consisted of principles of reason that could only be employed by judges where the civil law was silent:

[E]ven where the civil laws are written, inasmuch as not every way in which human evil may display itself can be expressly set forth, it is everywhere understood that natural law and reason supplies the defect of civil laws, and in cases where an express sanction is wanting, it lies at the discretion of the judge to define the punishments.

PUFENDORF, *JURE*, *supra* note 76, at 1187.

92. *See id.* Cases decided in the United States also presented the idea that only the positive law should be enforced by courts, although it might be based upon principles of natural law. For example, in *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9,583), the court observed that although the positive law may be founded upon principles of natural law, courts of law may look only to the positive law in deciding cases:

It is for the people, who are sovereign, and their representatives, in making constitutions, and in the enactment of laws, to consider the laws of nature, and the immutable principles of right. This is a field which judges cannot explore. Their action is limited to conventional rights. They look to the law, and to the law only. A disregard of this, by the judicial powers, would undermine and overturn the social compact.

2. *American commentators*

The work of natural law theorists such as Pufendorf and Locke formed the foundation upon which the work of nineteenth-century American legal scholars was built. Foremost among such scholars was Chancellor Kent, whose *Commentaries on American Law* was extremely influential within the nineteenth-century legal community. According to Chancellor Kent, the *jus civile* of the Roman legal system was analogous to the municipal law of the various states in the United States. In his *Commentaries*, Kent stated that "MUNICIPAL LAW is a rule of civil conduct, prescribed by the supreme power of a state. Municipal law, or the *jus civile*, is thus explained in the Institutes of Justinian."⁹³ Similarly, John Norton Pomeroy, another influential nineteenth-century legal commentator, wrote an entire treatise on municipal law, which he identified as being analogous to the Roman civil law.⁹⁴ Therefore, the phrase "municipal law" as used in the United States generally was deemed the equivalent of the "civil law."

Like Kent and Pomeroy, other nineteenth-century writers were also acutely aware of this distinction between the civil law and the *jus gentium* and the relation between the natural law and the *jus gentium*.⁹⁵ According to Edward Poste, a translator of the Roman writer Gaius, writing in 1875,

Modern writers would denote by *Jus gentium* the generally recognized principles of justice, principles which may be discovered by an induction of positive laws, that is, by a comparison of actually existing legislations, to be universally admitted, or, if not universally, by a majority or by a number of nations; while by Natural law they would denote a philosophic ideal, what might be otherwise denominated the moral law or the divine law, the law that ought to be everywhere established, though perhaps never yet adopted in actual legislation.⁹⁶

The distinction between the *jus gentium* and natural law recognized in the nineteenth century was based on the observation that principles of natural law were arrived at analytically through a deduction from first principles whereas the principles of the *jus gentium* were arrived at synthetically through an induction of positive laws.⁹⁷ Nine-

Id. at 339; see also *La Jeune Eugenie*, 26 F. Cas. at 846.

93. 1 KENT, *supra* note 54, at 507.

94. See POMEROY, *supra* note 33.

95. See, e.g., GAIUS, *ELEMENTS OF ROMAN LAW* 30 (Edward Poste trans., Clarendon Press 2d ed., 1875); POMEROY, *supra* note 33, at 299-302; see also *supra* notes 63-73 and accompanying text (discussing Pomeroy's views concerning the Roman law).

96. GAIUS, *supra* note 95, at 30.

97. As J.A.C. Grant has noted, "[t]hrough the stoics, [natural law] found its way into Roman jurisprudence, where it was welcomed as an explanation of the *jus gentium*, and was cham-

teenth century writers believed that as man's powers of reasoning improved and as he was better able to grasp the principles of natural law and embody them in the positive law of nations, there would be a greater correspondence between the natural law and the *jus gentium*. Thus, the conceptual framework prevalent in nineteenth-century thought resembled that constructed by Pufendorf in his works on natural law.

The prevalence of this conceptual framework in America led to its application in analyzing the rights of citizens. For example, Pomeroy divided the law governing the rights of individuals into two separate "departments."⁹⁸ According to Pomeroy, the first department consisted of "[t]hose rules which relate to the rights inherent in persons generally, as members of the state, or under its protection,"⁹⁹ while the second department related to "[t]hose which define the condition and status of certain particular classes of persons, and their peculiar rights and duties."¹⁰⁰ Thus, like Pufendorf, who distinguished between hypothetical and absolute natural law commands, Pomeroy also made a distinction analogous to Chancellor Kent's distinction between absolute and relative natural rights.¹⁰¹ Pomeroy described the absolute natural rights of individuals as "the right of personal security, the right of personal liberty, the right to acquire and enjoy private property, and the right of religious belief and worship."¹⁰² Furthermore, in defining these rights he pointed to "English history" and the "Magna Carta" as "the origin of these immunities."¹⁰³ He indicated, however, that many of these rights were enumerated in the United States Constitution:

The founders of our national Government, after having prosecuted a long war to maintain what they claimed to be their rights under the English constitution, were naturally zealous in preserving those rights in their own organic law. The Constitution of the United States is minute and specific in its safeguards against open or covert infringement of the personal rights of the people.¹⁰⁴

pioned by the greatest of the Roman jurists, including Gaius, Ulpian, and Cicero." J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 57 (1931).

98. See POMEROY, *supra* note 33, at 359.

99. *Id.*

100. *Id.*

101. See Smith, *Citizenship*, *supra* note 11, at 702-04, 717-18 (discussing the distinction made by Chancellor Kent between absolute and relative natural rights and the similar distinction found in the works of Pufendorf).

102. POMEROY, *supra* note 33, at 360.

103. *Id.*; see also *infra* notes 117-49 and accompanying text (discussing the widespread belief among commentators that Americans had inherited all of these rights from the English common law, creating a sort of common law among the American states).

104. POMEROY, *supra* note 33, at 364.

Thus, these fundamental rights found their way from the unwritten English constitution to the written Constitution of the United States.

Pomeroy proceeded to enumerate the rights found in the Constitution that embodied these common-law rights of individuals. He listed not only those rights found in the Bill of Rights, including the Ninth Amendment, but also rights found in the Constitution as originally drafted such as the Bill of Attainder Clause,¹⁰⁵ Ex Post Facto Clause,¹⁰⁶ Habeas Corpus Clause,¹⁰⁷ and Contracts Clause.¹⁰⁸ Significantly, Pomeroy noted that the state constitutions already guaranteed most of these rights since they contained "Bills of Rights similar to the foregoing."¹⁰⁹ Thus, not only did Pomeroy acknowledge that these rights were enjoyed by the citizens of all of the states, even though the federal Constitution may not have been applicable to the states prior to ratification of the Fourteenth Amendment, but he also termed the enumeration of these rights a "Bill of Rights" even though the rights that he listed included many that were found outside the first ten amendments to the United States Constitution.¹¹⁰

Pomeroy addressed not only those rights available generally to all persons, but also those rights that were limited to citizens. In discussing the "peculiar rights" of citizens, Pomeroy noted that these rights flowed from an individual's status as a citizen of the United States or of a particular state.¹¹¹ He concluded: "[t]hese immunities may be summed up in the fact of political protection, as distinguished from the simple personal protection which is the result of the more general rights of life, liberty, property, and religion."¹¹² Among these "peculiar rights" of citizenship, Pomeroy counted the "unlimited right to hold and enjoy property," which did not necessarily exist for

105. See U.S. CONST. art. I, § 10, cl. 1.

106. See *id.*

107. See *id.* § 9, cl. 2.

108. See *id.* § 10, cl. 1. Not only did Pomeroy enumerate rights outside of the Bill of Rights, but he also included certain rights that have not been incorporated, such as the Seventh Amendment guarantee of civil jury trial and the Second Amendment guarantee of the right of the people to keep and bear arms. See POMEROY, *supra* note 33, at 364-66.

109. See POMEROY, *supra* note 33, at 366. Pomeroy explicitly referenced a number of provisions of the English law, as well as the federal and state constitutions, as embodying these rights:

By the English law, as fundamentally established in Magna Charta, the Petition of Right, the *habeas corpus* act, and the Bill of Rights, and by the American law, as based on Federal and State constitutions, the personal liberty of the individual is guaranteed in the most solemn manner against private force and public aggression.

Id. at 372.

110. See *id.* at 364-66 (discussing the rights embodied in the Constitution).

111. See *id.* at 419.

112. *Id.*

aliens, who were often prevented from owning real estate.¹¹³ A citizen of the United States also possessed the "right to the protection of his Government at home and abroad."¹¹⁴ Finally, Pomeroy noted that Congress had passed legislation that granted to United States citizens "particular privileges" such as the "exclusive right to carry on the coasting trade among the ports of the United States."¹¹⁵ Pomeroy cautioned, however, that the rights of citizenship did not encompass political rights or "special privilege[s]," such as the right to vote.¹¹⁶ Thus, distinctions present in the Roman law between the *jus gentium* and the *jus civile* found their way into nineteenth-century analysis of the legal system in the United States and the rights that individuals in general, and citizens in particular, enjoyed under it.

B. *The Common Law*

The common law, like the Roman conception of the *jus gentium*, was a body of positive law developed over time that reflected principles of natural law or natural reason. Commentators have argued that ancient Roman law beginning with the work of Henry de Bracton heavily influenced the common law.¹¹⁷ As Chancellor Kent remarked in his *Commentaries*, however, the English common law developed greater protections for individual liberty than had existed under the Roman Code.¹¹⁸ The privileges and immunities of citizenship in America, borrowed from the civil as well as the common law, were far more comprehensive than those that had existed in ancient Rome.¹¹⁹ However, despite the fact that personal rights found under the Roman law may have been less extensive than those found in the common law, the concept of the *jus gentium* and that of a common

113. See *id.* at 423.

114. *Id.* at 424. One of the privileges or immunities described by Pomeroy was political protection. This reference indicates that the Privileges or Immunities Clause may encompass the guarantee of the Equal Protection Clause. However, the scope of the guarantee may be enlarged under the Equal Protection Clause since the Privileges or Immunities Clause only applies to citizens. Citizens have the right to protection, not only domestically, but also when they are traveling in foreign countries.

115. *Id.* at 425.

116. *Id.* ("The right of citizenship must not be confounded with the right of suffrage, and of taking part in the administration of Government. This is a special privilege confined to a comparatively small class . . .").

117. See Edward S. Corwin, *The "Higher Law Background" of American Constitutional Law*, 42 HARV. L. REV. 149, 172 (1928) (asserting that Bracton's importance stemmed from his synthesis of common law and the Roman idea of higher law); Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 471-72 (1961) (maintaining that Bracton's Romanism profoundly influenced English common law). Bracton was an ecclesiastic and royal judge who was Chief Justiciar of England under Henry III.

118. See 1 KENT, *supra* note 54, at 547-48.

119. See *id.* at 547.

law among states may be used interchangeably.

Prior to ratification of the Fourteenth Amendment, courts construing the Privileges and Immunities Clause of Article IV, Section 2 often stated that the Clause guaranteed certain common-law rights.¹²⁰ Thus, it is possible that the Clause was intended to guarantee common-law rights recognized by all of the states in the United States.¹²¹ Antebellum case law¹²² and the opinions of certain antebellum legal scholars¹²³ support this interpretation of the Clause. Furthermore, the dissenters in the *Slaughter-House Cases* also substantially adopted this view.¹²⁴

1. Case law

Many antebellum cases recognized the existence of an American "common law," derived from the English common law. In *Bank of Augusta v. Earle*,¹²⁵ for example, the following was argued before the Supreme Court: "It is [the] common law, which in every state and nation protects and secures the great body of our rights, and enforces obligations founded in morality. In all civilized nations, this law is substantially the same."¹²⁶ Similarly, Justice Thompson, in his dissent in *Wheaton v. Peters*,¹²⁷ gave a summary of the relation between the natural law and the common law which recognized judicial power to sanction the "application of the dictates of natural justice, and of cultivated reason, to particular cases."¹²⁸ Like the *jus gentium*, the common law was the product of many generations exercising their collective wisdom to determine principles conformable to reason. Justice Thompson argued that in deducing the principles of the common law, one should ask whether reasonable men would assent to be governed by such principles. "[T]he true mode of ascertaining a moral right," he contended, was "to inquire whether it is such as the reason, the cultivated reason of mankind must necessarily assent to."¹²⁹

120. See generally Smith, *Privileges*, *supra* note 23 (discussing case law arising under the Privileges and Immunities Clause).

121. Michael Conant has also argued that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to provide a federal guarantee for these common-law rights against the state governments. See Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 818-19 (1982).

122. See *infra* Part I.B.1.

123. See *infra* Part I.B.2.

124. See *infra* Part I.B.3.

125. 38 U.S. (13 Pet.) 519 (1839).

126. *Id.* at 536.

127. 33 U.S. (8 Pet.) 591 (1934).

128. See *id.* at 671-72 (Thompson, J., dissenting).

129. *Id.* at 672. This conception of the common law as founded upon general moral prin-

Justice Thompson, citing Justice Joseph Story's *Commentaries* as authority, contended that the inhabitants of the American colonies retained the common-law rights of Englishmen until a new government might decide to alter them.¹³⁰ In Justice Thompson's opinion, these English common-law rights formed part of the positive law of the United States when the people adopted the Declaration of Rights of 1774.¹³¹ Thompson's words demonstrate that one need not look to abstract principles of natural law in order to determine what common rights were enjoyed by citizens of the United States; rather, one can look to a well-developed body of positive law to determine the nature of those rights.¹³²

ciples that had been recognized over time was also expressed in argument before the Supreme Court in *Bank of Augusta v. Earle*:

The common law is said to be "common right." The expression seems a quaint one, but it is true to the sense. Right is antecedent to all law. The object of law is to secure right; not so much to define as to enforce it, and to prevent wrong. . . . It is this common law, which in every state and nation protects and secures the great body of our rights, and enforces obligations founded in morality. In all civilized nations, this law is substantially the same. Even in nations not admitted to be within that description, there is a strong resemblance: for example, in the laws of the Hindoos. The reason is obvious. Whether expounded in codes, or disclosed by judicial investigation and decision, the great principles of justice are identical; and it is the aim of all law to cultivate, extend, and enforce them. Statutes are but few in comparison. They are exceptions; the common law is the great body. The legislator acts chiefly upon matters which are indifferent.

Bank of Augusta, 38 U.S. at 535-36. Constitutions were identified as embodying these common-law rights:

Constitutions of states are frames of government. They give no civil rights. The utmost they aim at, in this respect, is to secure some of the most important of them, (as existing things,) by a solemn assertion of them, by excepting them from the encroachments of power, or by placing around them strong and permanent guards. This is the proper office of a bill of rights. In all forms of government, these rights are the same; however they may be trodden down in arbitrary ones, where there is no independent judiciary to protect them. The common law acknowledges and aids them.

Id. at 536.

130. See *Wheaton*, 33 U.S. at 687-88 (Thompson, J., dissenting). Justice Thompson invoked Justice Story's *Commentaries* as authority supporting his views:

Mr. Justice Story recognises the same principle in his *Commentaries*. Englishmen, says he, removing to another country, must be deemed to carry with them those rights and privileges which belong to them in their native country; and that the plantations formed in this country were to be deemed a part of the ancient dominions, and the subjects inhabiting them to belong to a common country, and to retain their former rights and privileges. That the universal principle has been (and the practice has conformed to it), that the common law is our birthright and inheritance, and that our ancestors brought hither with them, upon their immigration, all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundation of the common law.

Id. (citation omitted).

131. *Id.* at 688 (Thompson, J., dissenting) ("The old congress, in the year 1774, unaniously resolved, that the respective colonies are entitled to the common law of England.")

132. For example, among the important English statutes conferring rights to the English people were the Magna Carta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights, and the Act of Settlement. See CURTIS, *supra* note 3, at 75.

More specifically, the Privileges and Immunities Clause was tied to the protection of common-law rights in several antebellum cases. The court in *Ward v. Maryland*,¹³³ for example, asserted that the Privileges and Immunities Clause of Article IV, Section 2 was designed to guarantee certain rights defined by the common law.¹³⁴ Similarly, Chief Justice Williams made the following remarks in *Phoenix Insurance Co. v. Commonwealth*,¹³⁵ distinguishing between the fundamental privileges and immunities guaranteed under the Privileges and Immunities Clause and the charter of incorporation at issue in the case:

This clause of the Constitution . . . was adopted to secure the *natural, common, and fundamental* rights of the citizen, such as pertain to all free-born, whether male or female, young or old, rich or poor. With the securing these natural and common rights by the government comes correlative duties by the citizen to bear its burdens, defend its rights, and perform such duties as may legally be enjoined, many of them an artificial being, a mere legal entity, could neither bear, observe, nor perform.¹³⁶

Therefore, prior to ratification of the Fourteenth Amendment, courts often identified the rights guaranteed under the Privileges and Immunities Clause as being common-law or natural rights of American citizens. Despite recognition of the origin of these rights in the common law, courts emphasized the fact that they were made binding through their embodiment in the constitutional text.

2. Commentators

Several antebellum commentators also espoused the view that there existed an American common law derived from the English common law. In his *Commentaries on American Law*, Chancellor Kent, whom Justice Thompson cited,¹³⁷ described the way in which these common rights of Englishmen attached to the colonists and subsequently became the entitlement of American citizens:

The inhabitants of the colonies of Plymouth and Massachusetts, in the infancy of their establishments, declared by law that the free enjoyment of the liberties which humanity, civility, and Christianity

133. 79 U.S. (12 Wall.) 430 (1871).

134. See *id.* at 430. Justice Field seems to have given the Clause this interpretation in *Butchers Union Co. v. Crescent City Co.*, 111 U.S. 746, 760 (1884), decided after the *Slaughter-House Cases*. According to Justice Field, "[t]he States could not previously [before passage of the Fourteenth Amendment] have interfered with their privileges and immunities, or any other privileges and immunities which citizens enjoyed under the Constitution and laws of the United States. Any attempted impairment of them could have been as successfully resisted then as now." *Id.*

135. 68 Ky. (5 Bush) 68 (1868).

136. *Id.* at 75 (emphasis added).

137. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 671-72 (1834) (Thompson, J., dissenting).

called for was due to every man in his place and proportion, and ever had been, and ever would be, the tranquillity and stability of the commonwealth. They insisted that they brought with them into this country the privileges of English freemen; and they defined and declared those privileges with a caution, sagacity, and precision that have not been surpassed by their descendants. Those rights were afterwards, in the year 1692, on the receipt of their new charter, reasserted and declared.¹³⁸

Similarly, Justice Story noted in his *Commentaries* that the Declaration of 1774 entitled the colonists to the "common rights" of Englishmen.¹³⁹ According to Justice Story, the Congress of 1774 unanimously resolved:

"That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." They further resolved, "that they were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several and local circumstances." They also resolved, that their ancestors at the time of their emigration were "entitled" (not to the rights of men, of expatriated men, but) "to all the rights liberties, and immunities of free and natural-born subjects within the realm of England."¹⁴⁰

Thus, the idea that the civil rights of the people existed anterior to the establishment of the government, that these rights were expressed in a positive common law, and that these rights were founded upon principles of reason or natural law, was prevalent during the period between ratification of the Constitution and ratification of the Fourteenth Amendment. Furthermore, the relationship between Article IV, Section 2 and protection of these common-law rights was recognized by antebellum commentators.

3. *The Slaughter-House Cases*

Recognition of the fact that the privileges and immunities of citizens found their origin in the common law extended beyond early nineteenth-century case law and commentary. Indeed, this view found expression even after ratification of the Fourteenth Amendment in the opinions of Supreme Court justices construing the

138. 2 KENT, *supra* note 54, at 1-2.

139. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 105-06 n.4 (Thomas M. Cooley ed., 4th ed. Little, Brown & Co. 1873) (1833) [hereinafter STORY, COMMENTARIES ON THE CONSTITUTION].

140. *Id.* (citing Journal of Congress, Declaration of Rights of the Colonies, Oct. 14, 1774, at 27-31).

Amendment. The *Slaughter-House* dissenters asserted that the terms "privileges and immunities" referred to certain "common rights" of citizens of the United States that had existed prior to the formation of government.¹⁴¹ In his dissent, Justice Field opined that "[t]he [fourteenth] amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government."¹⁴² These "common rights" of American citizens were enumerated in a variety of documents comprising the organic law of the United States, including the various state constitutions and bills of rights, the United States Constitution, the Declaration of Independence of 1776, and the Declaration of Rights of 1774. As Justice Field stated in his dissent, echoing the remarks of Justice Story and Chancellor Kent in their influential works on American law,¹⁴³ these rights were inherited from the English common law:

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties."¹⁴⁴

This was the position urged by plaintiffs' counsel, who stated that the phrase "privileges and immunities," as used in the Constitution, "undoubtedly" referred to "the personal and civil rights which usage,

141. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96-97 (1873) (Field, J., dissenting) (stating that privileges and immunities are those rights that are fundamental and belong to citizens of all free governments).

142. *Id.* at 93 (Field, J., dissenting). Plaintiffs' counsel argued that the terms "privileges" and "immunities" referred to the traditional rights of freemen possessed by citizens since the time of Magna Charta. See *id.* at 54. According to plaintiffs' counsel, the Privileges and Immunities Clause dictated that the citizen's "privileges and immunities" must not be impaired, and all the privileges of the English Magna Charta in favor of freemen are collected upon him and overshadow him as derived from this amendment." *Id.* Plaintiffs' counsel also stated that the message of the Fourteenth Amendment was as follows:

To the State governments it says: "Let there be no law made or enforced to diminish one of the privileges and immunities of the people of the United States;" nor law to deprive them of their life, liberty, property, or protection without trial. To the people the declaration is: "Take and hold this your certificate of status and of capacity, the Magna Charta of your rights and liberties." To the Congress it says: "Take care to enforce this article by suitable laws."

Id. at 54-55.

143. See *supra* notes 118-19 and accompanying text.

144. *Slaughter-House Cases*, 83 U.S. at 104-05 (Field, J., dissenting).

tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country."¹⁴⁵

Arguably, the states had consented to respect certain principles of comity under Article IV, Section 2. The independence of the states and their power of self-government would not be trammled if they had agreed voluntarily to be bound by the Constitution and the principles of comity embodied in its provisions. Furthermore, the federal government represented a superior sovereignty that was created based upon the consent of all of the people through ratification of the Constitution.¹⁴⁶ Therefore, the condition of the states in relation to each other was not entirely that of sovereign foreign nations.¹⁴⁷ The United States constituted a single union of the people, who had established a government superior, in certain respects, to that of the states.¹⁴⁸ The people constituting the union had a sphere of power that they were entitled to exercise, certain privileges that they retained as both persons and citizens in establishing both the state governments and the federal government. Although it is certain that they delegated the power to *regulate* these privileges to their government,¹⁴⁹ they did not wholly relinquish or forfeit these privileges when establishing the state or federal governments.

II. THE GUARANTEE CLAUSE: A "REPUBLICAN" FORM OF GOVERNMENT

In interpreting the provisions found in Article IV, one must determine not only the nature of the rights guaranteed, but also the nature of the protection afforded. Do the provisions of Article IV such as the Privileges and Immunities Clause afford any form of substantive protection for a particular set of fundamental rights, or do they forbid merely discriminatory legislation passed by the legislature of one state and directed against the citizens of another? It is debatable

145. *Id.* at 55.

146. See Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 293 (1997) [hereinafter Smith, *Analysis*] (discussing the federal structure established under the Constitution).

147. See *id.* at 310-28 (arguing that the Constitution was conceived of as a compact among the people as well as the states).

148. See *id.* at 313-28 (arguing that the Constitution represented a partial consolidation of the states).

149. For example, in the most important case interpreting the Privileges and Immunities Clause prior to ratification of the Fourteenth Amendment, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (3,320), Justice Bushrod Washington noted that the fundamental privileges and immunities of citizens guaranteed under Article IV, Section 2 remained "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id.* at 552.

whether the Privileges and Immunities Clause was intended to afford substantive protection of fundamental rights by guaranteeing certain privileges and immunities of citizenship to individual citizens against the actions of their own state governments.¹⁵⁰ It has been suggested, however, that substantive protection of a uniform set of privileges and immunities prior to ratification of the Fourteenth Amendment could have been intended (1) as a result of application of the Necessary and Proper Clause, (2) through an inherent power of the federal government to protect its own citizens in the exercise of the rights of United States citizenship, (3) through application of the Due Process Clause of the Fifth Amendment, and finally (4) through the Guarantee Clause of Article IV, Section 4.¹⁵¹ The last of these possibilities is most consistent with the meaning of the Constitution as originally drafted, as well as the nineteenth-century understanding of the Constitution, but is by no means certain. Even if the Privileges and Immunities Clause were not intended to provide substantive protection for fundamental rights, the Guarantee Clause of Article IV, guaranteeing a "Republican Form of Government" to the states, may have been intended to fill this gap. As Professor William E. Nelson has noted, mid-nineteenth-century legal ideology involved notions of "equality," "natural law," and "the nature of republican society."¹⁵² Such references may reflect a recognition that the Framers intended to provide more than a mere guarantee of equality among the states. In drafting Article IV, they may have intended to delegate to the fed-

150. This was an alleged "inadequacy" of the Privileges and Immunities Clause. See Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 21 (1967).

151. See *id.* Representative James Wilson (R-Iowa) supported the second alternative in arguing that a constitutional amendment was not necessary in order for Congress to exercise the power of protecting citizens of the United States from the actions of state governments. Wilson stated:

I assert that we possess the power to do those things which Governments are organized to do; that we may protect a citizen of the United States against a violation of his rights by the law of a single State; that by our laws and our courts we may intervene to maintain the proud character of American citizenship; that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; that the right to exercise this power depends upon no express delegation but runs with the rights it is designed to protect

CONG. GLOBE, 39th Cong., 1st Sess. 1119 (1866). Representative Amos P. Granger of New York made a similar appeal to the "Republican Form of Government" Clause. See CONG. GLOBE, 35th Cong. 952, 2d Sess. (1859). Representative Bingham, however, thought a constitutional amendment was necessary to confer to Congress power to enforce the guarantees already present in the Constitution. According to Bingham, "no state ever had the right . . . to abridge the privileges or immunities of any citizen of the Republic although many of them have assumed and exercised the power, and that without remedy." *Id.* at 2542.

152. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 13, 24, 36 (1988).

eral government the power to maintain the integrity of the federal system by ensuring that the fundamental rights of citizenship were recognized in each of the states.

One possible interpretation of the Guarantee Clause is that it merely provided a guarantee to the state governments against usurpation of the government, and not to the people of the state.¹⁵³ The Clause provides, however, for protection from internal as well as external violence against the government or people of the state.¹⁵⁴ The guarantee of a "Republican Form of Government," therefore, would be mere surplusage under this interpretation of the Clause. Furthermore, affording protection to the state governments from something within their power to control, namely the form of the government they themselves are entrusted with running, seems illogical.

Arguably, consistent with the plain language found in the text itself, the Guarantee Clause was intended to be a national guarantee to the people of each state against "nonrepublican" forms of government.¹⁵⁵ In a sense, it was also a guarantee to all of the people of the United States that their rights would be protected through the Privileges and Immunities Clause, which entitled citizens to the privileges and immunities of citizens in the several states.¹⁵⁶

If one tyrannical state government decided to abridge these rights of citizenship, then both resident and nonresident citizens would be unable to enjoy these privileges and immunities within the tyrannical state. The fourth section of Article IV of the Constitution arguably prevents such abridgments of the privileges of citizenship by providing as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."¹⁵⁷

It is noteworthy that this provision is placed in that article of the Constitution governing interactions among the states. Other provisions in Article IV, such as the Privileges and Immunities Clause and the Full Faith and Credit Clause, establish the reciprocal relations

153. This interpretation of the Clause was rejected in *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1869).

154. See U.S. CONST. art. IV, § 4 ("The United States shall . . . protect each of [the states] against Invasion . . . [and] domestic Violence.").

155. The fact that the Supreme Court has interpreted the Clause to raise nonjusticiable political questions has reduced the value of this guarantee. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

156. See U.S. CONST. art. IV, § 2.

157. *Id.* § 4.

among the states.¹⁵⁸ The location of the Guarantee Clause in Article IV indicates that it was also involved in maintenance of the federal system and its stability.¹⁵⁹ As James Madison noted in *The Federalist No. 43*:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be maintained.¹⁶⁰

Madison justified this provision by asking, "who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?"¹⁶¹ Despite the fact that the Framers of the Constitution seemed to understand what they meant by a "Republican Form of Government," there was controversy concerning the scope of the Guarantee Clause, particularly during the nineteenth century.

A. *Original Intent and Natural Law Background*

What is meant by the phrase "a republican form of government" has been the subject of much debate.¹⁶² James Madison attempted to give a definition of a "republic" while trying to demonstrate that the Constitution did indeed establish a general government that was republican in form. Madison's definition is not particularly precise:

If we resort for a criterion, to the different principles on which dif-

158. See *id.* § 9 (Full Faith and Credit Clause); *id.* § 2 (Privileges and Immunities Clause).

159. For recent interpretations of the Guarantee Clause, see Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469 (1984); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). The fact that the Supreme Court has interpreted the Clause to raise nonjusticiable political questions has effectively emasculated this valuable provision maintaining the integrity of the federal system. See *Pacific States*, 223 U.S. at 149-52.

160. THE FEDERALIST NO. 43, at 282 (James Madison) (Edward Mead Earle ed., 1976).

161. *Id.* at 282-83.

162. There seems to be little in the way of legislative history indicating the original meaning ascribed to the phrase. Commentators often note that John Adams stated that he "never understood" what the Guarantee Clause meant and "believe[d] no man ever did or ever will." WILLIAM WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 72 (1972) (quoting Letter from John Adams to Mercy Otis Warren (July 20, 1807)). For a discussion of the history of the Clause, see generally *id.*; Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 565-69 (1962); Merritt, *supra* note 159 (arguing that the Guarantee Clause implies modest restraint on federal power to interfere with state autonomy); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984) (arguing that the Clause embodies rule of law values).

ferent forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.¹⁶³

Despite the lack of precision, from the above passage it is evident that republics, at a minimum, derived their political authority from the people and not from a subset of the people or a single individual. In *The Federalist No. 43*, Madison noted that the current state governments were republican in nature.¹⁶⁴ Therefore, some evidence of what constituted a "republican" form of government may also be derived from examining the state constitutions of this period.

In discussing the reference to a "Republican Form of Government" found in the Guarantee Clause, Madison observed the textual distinction between the guarantee of a republican form of government and "protection against invasion"¹⁶⁵ and "protection against domestic violence."¹⁶⁶ Based on Madison's definition of a "republican form" of

163. THE FEDERALIST NO. 39, at 251 (James Madison), reprinted in THE FEDERALIST (Jacob E. Cooke ed., 1961). Madison noted that there had been "extreme inaccuracy" in the ways in which the term "republican" had been used to designate different governments. See *id.* ("What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found."). Madison argued that Holland, Venice, Poland, and England had been inaccurately characterized as "republics" when, in fact, the governments of these countries had monarchical and aristocratic aspects. See *id.* at 251-52. The approach Madison took in arguing that the general government was republican in form was somewhat complex. Madison observed:

In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

Id. at 253. Thus, Madison pointed to the procedures for ratification, the structure of the legislature and limits on its power, and provisions for amendment of the Constitution as giving clues to the nature of "Republican" government. See *id.* at 253-57.

164. Madison maintained that the particular form of government in the states was not locked in by the Clause. The only requirement was that the form be "republican" in nature:

Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

Id. at 292.

165. *Id.* at 292-93 ("A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used, seems to secure each state not only against foreign hostility, but against ambitious or vindictive enterprizes of its more powerful neighbours.")

166. With respect to this provision, Madison stated:

It has been remarked, that even among the Swiss cantons, which properly speaking are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well

government and the placement of the Guarantee Clause next to these other clauses in Article IV, the purpose of the Guarantee Clause was most likely, in part, to ensure that the governments of the states would derive their powers directly from the people of the state. The core meaning of the Guarantee Clause was that the ultimate sovereignty was to reside with the people.¹⁶⁷

Several commentators, such as Pufendorf, had already described this idea of republicanism in their influential works on natural law.¹⁶⁸ Pufendorf argued that even if the people were to establish a king, they would retain certain rights that were "consistent with the nature of a state."¹⁶⁹ Government was established by the people through compact, and the people retained the ultimate sovereignty over the government that they had established to protect their rights of person and property.¹⁷⁰ Therefore, not only the federal government, but also the state governments must be seen as governments of delegated powers.

by the most democratic, as the other Cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

Id. at 293 (referring, most likely, to Shays' Rebellion).

167. *See, e.g.,* Merritt, *supra* note 159, at 24 n.130 (noting that Samuel Johnson's 1786 dictionary defined "republican" as "placing the government in the people"). James Madison wrote that a republic is "a government which derives all its powers directly or indirectly from the great body of the people." THE FEDERALIST NO. 39, at 251 (James Madison) (Edward Mead Earle ed., 1976); *see also id.* NO. 37, at 234 ("The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . ."); *id.* NO. 10, at 62 (stating that a republic is characterized by "the delegation of the Government . . . to a small number of citizens elected by the rest . . ."). Similarly, Alexander Hamilton stated that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail." *Id.* NO. 22, at 134 (Alexander Hamilton); *see also id.* NO. 57, at 384 (James Madison or Alexander Hamilton) ("The elective mode of obtaining rulers is the characteristic policy of republican government."). Finally, Justice James Wilson stated that republican governments were based on the "principle[] that the Supreme Power re[s]ides in the body of the people." *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793). Modern commentators have also recognized the central importance of the notion of popular sovereignty in interpreting the Guarantee Clause. Akhil Amar, for example, has called this the "central pillar of Republican Government." Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994).

168. *See* Simons, *supra* note 86, at 43a (discussing the nature of sovereignty). Walter Simons, commenting on Pufendorf's *De Jure Naturae et Gentium Libri Octo*, stated:

[Pufendorf] thinks that the power of the ruler is nothing else than the combined power of all the individuals who, organizing into a State, bestowed on the incumbent of the sovereign office a part of their power, which they held on account of their natural freedom. Here Pufendorf appears as the direct precursor of the theory concerning the origin and extent of human authority which forms the basis of the Constitution of the United States of America.

Id.

169. *Id.* at 1088 ("Now when a king is named by a people on their own volition, each person is presumed in that act to have reserved for himself all of his rights which are consistent with the nature of a state.")

170. *See* Smith, *Citizenship*, *supra* note 11, at 708, 715-16, 719-20 (discussing the theories of Locke, Pufendorf, and Burlamaqui).

American commentators espoused similar views. They believed that the residual sovereignty, including the pre-existing privileges of the people, was retained by the people and remained outside the reach of any government they might establish.¹⁷¹ For example, citing Chief Justice Jay, Justice Story adhered to this view of the state in his *Commentaries*.¹⁷² According to Justice Story, “[s]trictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each State, not granted to any of its public functionaries, is in the people of the State.”¹⁷³ This view is wholly consistent with Lockean social compact theory.¹⁷⁴ Because the rights of citizens, either abso-

171. This inference that a “Republican Form of Government” carried with it certain rights possessed by the people that no government could infringe was expressed by antislavery writers prior to ratification of the Fourteenth Amendment. See WIECEK, *supra* note 162, at 163. Furthermore, “[t]o some Republicans, as to their antislavery predecessors, the phrase ‘republican form of government’ incorporated the ideals of the Declaration of Independence in the Constitution.” *Id.* at 183. Charles Sumner, in particular, was an adherent of this view. Sumner introduced the following resolution into Congress, which was subsequently rejected:

To carry out the guarantee of a republican form of government, and to enforce the prohibition of slavery; Be it resolved . . . that in all states lately declared to be in rebellion there shall be no oligarchy, aristocracy, caste, or monopoly invested with peculiar privileges or powers, and there shall be no denial of rights, civil or political, on account of color or race, but all persons shall be equal before the law, whether in the courtroom or at the ballot box; and this statute, made in pursuance of the constitution, shall be the supreme law of the land, anything in the constitution or laws of any such state to the contrary notwithstanding.

CONG. GLOBE, 39th Cong., 1st Sess. 592 (1866). Sumner’s proposal was particularly radical in that it indicated that in a republican form of government all were entitled to equal political as well as civil rights—a proposition that most Republicans rejected. See *infra* Part III.B (observing that political rights were not intended to be guaranteed under the Fourteenth Amendment). However, other Republicans such as Senator James Nye (Nev.) and Representative Roswell Hart (N.Y.) stated that inherent in a “Republican Form of Government” were certain fundamental rights of the people. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1242 (1992).

172. See STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 139, at 145-47 (explaining that in republican forms of government all power was ultimately derived from the people).

173. *Id.* at 146-47 (citation omitted).

174. In fact, Justice Samuel Chase seemed to identify the principles of republicanism with social compact theory in his opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In a famous passage, Justice Chase stated:

There are certain *vital* principles in our *free Republican governments*, which will determine and overrule an *apparent and flagrant* abuse of *legislative power*; as to authorize *manifest injustice by positive law*, or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. An act of the legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact* cannot be considered a *rightful exercise of legislative authority*.

Id. at 388. In *Minor v. Happersett*, 88 U.S. 162, 165-66 (1874), the notions of republicanism, citizenship, and social compact theory were united in the discussion of whether, after the adoption of the Fourteenth Amendment, a woman who was a citizen of the United States and of Missouri had a constitutional right to vote. Similarly, in *United States v. Cruikshank*, the Supreme Court noted the tie between republicanism and the Fourteenth Amendment:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still re-

lute natural rights or those relative natural rights flowing from the social compact creating the body politic, existed anterior to the establishment of the government, these rights were considered beyond the power of the government to abridge or deny.¹⁷⁵ Justice Story reiterated this view when discussing the Constitution of the United States:

[In the United States] the government is the government of the people; all its officers are their officers, and they can exercise no rights or powers but such as the people commit to them. In such a case the silence of the Constitution argues nothing. The trial by jury, the freedom of the press, and the liberty of conscience are not taken away, because they are not secured. They remain with the people among the mass of ungranted powers, or find an appropriate place in the laws and institutions of each particular State.¹⁷⁶

In Justice Story's opinion, these "ungranted powers" could not be presumed to be given up to any of the governments established by the people, whether or not these rights were expressly secured. Indeed, these rights could not be presumed to be given up *either* to the federal government *or* the various state governments.

B. *The Nineteenth-Century Understanding*

This equation of nondelegated rights retained by the people with a "Republican Form of Government" was made by members of Congress during the Reconstruction Era as well.¹⁷⁷ For example, Senator James W. Nye of Nevada stated, "[T]he enumeration of personal rights in the Constitution to be protected, prescribes the kind and quality of the governments that are to be established and maintained in the states."¹⁷⁸ Nye argued that Congress could enforce the constitutional guarantee of a republican form of government, "making the enumeration of personal and natural rights and the protective features of the Constitution the definition and test of what is republican

mains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the [Fourteenth] amendment guarantees, but no more. The power of the national government is limited to enforcement of this guaranty.

92 U.S. 542, 555 (1875).

175. See Smith, *Citizenship*, *supra* note 11, at 689-90, 696, 704, 730.

176. STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 139, at 212.

177. The Guarantee Clause had been cited as a source of authority for congressional scrutiny of the constitutions of the southern states readmitted to the Union after the Civil War. See CONG. GLOBE, 40th Cong., 2d Sess. 2465 (1868) (remarks of Sen. Thaddeus Stevens); S. EXEC. DOC. NO. 40-57, 14-15 (1866); WIECEK, *supra* note 162.

178. CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866). Similarly, Representative Roswell Hart of New York stated that the Guarantee Clause ensured that the states would recognize the right to bear arms, freedom of religion, protections against unlawful search and seizure, and due process. See *id.* at 1629.

government."¹⁷⁹ Senator Richard Yates of New York also thought that the federal government could make the states observe certain fundamental rights under the Guarantee Clause:

I had in the simplicity of my heart supposed that "State rights," being the issue of the [civil] war, had been decided. I had supposed that we had established the proposition that there is a living Federal Government and a Congress of the United States. I do not mean a consolidated Government, but a central Federal Government which, while it allows the States the exercise of all their appropriate functions as local State governments, can hold the States well poised in their appropriate spheres, can secure the enforcement of the constitutional guarantees of republican government, the rights and immunities of citizens in the several States, and carry out all the objects provided for in the preamble of the Constitution . . . "establish justice," and "secure the blessings of liberty to ourselves and to our posterity."¹⁸⁰

Therefore, members of Congress, whose views were representative of nineteenth-century legal thinking, believed that there were certain rights that were retained by the people in every state, leading to uniformity with respect to a core set of fundamental rights among the people of the United States.

179. *Id.* at 1075.

180. *Id.* at app. 99. Michael Kent Curtis has noted that Section One of the Fourteenth Amendment was tied to the notion of a "Republican Form of Government" in the press during the ratification process. Curtis quotes from an editorial in the *Dubuque Daily Times*:

[A citizen has] a right to claim the privileges and protection of law. The right to "life, liberty, and the pursuit of happiness" is surely his; and the principle of a republican form of government cannot do less than secure to him those inherent rights which nature gives. This is the intent of the second clause of the condemned section above quoted. It prohibits any state from making laws to abridge the privileges rightly conferred on every citizen by the federal constitution, which instrument, before, only neglected to define who were entitled to the benefits conferred.

CURTIS, *supra* note 3, at 132 (quoting DUBUQUE DAILY TIMES, Nov. 21, 1866, at 1). In addition, Curtis quotes from a report of the Committee on Federal Relations of the Massachusetts House of Representatives that ties § 1 of the Fourteenth Amendment to both the Privileges and Immunities and Guarantee Clauses of Article IV:

It is difficult to see how these provisions [in Section One] differ from those now existing in the Constitution. The preamble to the Constitution grandly and solemnly declares: "WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Many of our ablest jurists agree with the opinion of the late Attorney-General Bates, that all native-born inhabitants and naturalized aliens, without distinction of color or sex, are citizens of the United States. The Constitution (Article IV, section 2) declares, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Sect. 4. The United States shall guarantee to every state in this Union a republican form of government.

Id. at 150 (quoting H.R. DOC. NO. 149, at 1-4 (Mass. 1867)).

Nineteenth-century commentators also agreed with these views.¹⁸¹ For example, John Norton Pomeroy stated that in the United States, "the individual is regarded as having surrendered a part of his purely natural rights for the general welfare; and the amount of this concession is as small as possible; while the sum of those retained by him, and recognized and enforced by the municipal law, is a maximum."¹⁸² Similarly, Justice Story seemed to whole-heartedly support the position that the states were restrained from violating the rights retained by the people because of the nature of republican governments:

Whether, indeed, independently of the Constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American revolution, no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A and transfer to B by a mere legislative act. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that any State legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power. The people ought not be presumed to part with rights so vital to their security and well-being, without very strong and positive declarations to that effect.¹⁸³

Justice Story thus recognized certain rights as existing prior to the establishment of both the state and federal governments. These rights

181. See, e.g., POMEROY, *supra* note 33, at 358; 2 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 139, at 261-62. Pomeroy summarized the relation of the people to the state as follows:

The national law . . . sees the whole nation as a body politic, and the separate individuals composing it, and awards to the latter all those rights which are deemed compatible with the safety and prosperity of the whole. How general or how limited will be this concession of privileges to the individual, will depend in great measure upon the political organization, upon the ideas of social order, which underlie the government. In our own country the theory is, that all power of government as a practical institution, is derived from the people themselves.

POMEROY, *supra*, at 358.

182. POMEROY, *supra* note 33, at 359.

183. See 2 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 139, at 261-62.

he termed the “fundamental maxims of a free government.”¹⁸⁴

This language is similar to that of Justice Bushrod Washington in *Corfield v. Coryell*,¹⁸⁵ who stated that there were certain rights pertaining to citizens in *all free governments*, which were guaranteed under the Privileges and Immunities Clause of Article IV.¹⁸⁶ The fact that the people had delegated to the government the power to *regulate* their rights did not mean that the government was granted the power to *abridge* these pre-existing rights of the people. Rather, textual provisions such as those found in Article IV showed that the Framers of the Constitution recognized these principles and provided for judicial enforcement of the privileges of citizenship by embodying them in the constitutional text.

The power of the federal government to enforce these rights of the people against the state governments may have been delegated specifically in the Guarantee Clause. According to Justice Story:

The Federalist has spoken with so much force and propriety upon this subject, that it supersedes all further reasoning. “In a confederacy,” says that work, “founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained.

But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature.”¹⁸⁷

Justice Story concluded that “[t]he only restriction imposed on [the states] is, that they shall not exchange republican for anti-republican constitutions, a restriction which, it is presumed, will hardly be considered as a grievance.”¹⁸⁸

Therefore, it would appear that in Justice Story’s opinion the federal government possessed the power to intervene if the states established governments that did not recognize these fundamental rights

184. *Id.* at 362.

185. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

186. *See id.* at 550-51 (discussing powers granted to the state and federal governments related to regulation of commerce).

187. 2 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 139, at 570-71 (quoting THE FEDERALIST NO. 21).

188. *Id.* (footnotes omitted).

retained by the people. If they established new governments recognizing these rights, then the federal government would have no power to prevent such innovations. Indeed, if the states employed novel or diverse means for regulating these privileges, the federal government would have no grounds to intervene.

This interpretation of the Guarantee Clause lived on even after ratification of the Fourteenth Amendment. In his analysis of Justice Story's *Commentaries*, Thomas Cooley, a noted nineteenth-century constitutional scholar, tied the Guarantee Clause to the Fourteenth Amendment and noted that the privileges to be guaranteed under the Fourteenth Amendment also existed anterior to the establishment of government:

The existing division of sovereignty which had been found equal to the preservation of our liberties, not only in times of peace and general harmony but in the trials of a most desperate civil strife, is not disturbed by [the Fourteenth Amendment]. It does, indeed, prohibit the States from exercising certain powers upon their citizens; but unless we are wholly mistaken in our assertion that they are not powers which the people, in framing free republican governments, are accustomed to intrust to their rulers, it will be perceived that the provisions of this article are not to be regarded as limitations upon power, but rather as precautions against possible usurpation and tyranny. The things forbidden were already forbidden by the fundamental principles of the social compact, and beyond the sphere of the legislative authority alike of the States and of the nation.¹⁸⁹

Therefore, even if the fundamental rights of citizenship were not afforded substantive protection against abridgment by state governments under the Privileges and Immunities Clause of Article IV, Section 2, they may have been afforded such protection under the Guarantee Clause of Article IV, Section 4.¹⁹⁰ Although certain commentators expressed this view during the nineteenth century, a lack of consensus regarding this interpretation rendered ratification of the Fourteenth Amendment necessary.

The provisions of Article IV may be viewed as establishing a federal system based upon a community of rights—a core set of rights that could be regulated in different manners by the various state governments, but which the states were obligated to observe in some form.¹⁹¹

189. *Id.* at 684.

190. See *infra* Part III.C (discussing the nature of the protection afforded under the Fourteenth Amendment).

191. See Smith, *Analysis*, *supra* note 146, at 272-78 (discussing the role of Article IV in establishing the federal structure under both the Articles of Confederation and the Constitution).

The federal government originally may have been intended to possess the power to arbitrate disputes concerning inequalities in these rights through Article III and to ensure that all of the states observed a core set of these rights, which they could regulate in different manners. Perhaps the only function of Section One of the Fourteenth Amendment, therefore, was to clarify this interpretation of Article IV.

III. ARTICLE IV AND THE FOURTEENTH AMENDMENT

The preceding analysis of the theoretical underpinnings of the provisions of Article IV of the Constitution lays the foundation for an understanding of the original meaning attributed to Section One of the Fourteenth Amendment. An examination of the Privileges and Immunities Clause and the Guarantee Clause leads to an explanation of (1) the rights thought to be protected under the Privileges or Immunities Clause of Section One of the Fourteenth Amendment, (2) the distinction made between civil and political rights by congressional Republicans debating the proposed Amendment, (3) the type of protection afforded under Section One, and (4) the belief on the part of congressional Republicans that the states would remain free to regulate the privileges and immunities of citizens in diverse manners after ratification of the Amendment. The following subparts attempt to resolve the controversy surrounding these issues.

Section One of the Fourteenth Amendment was designed to guarantee certain natural or common-law privileges and immunities of citizens.¹⁹² The guarantee did not extend to political privileges and immunities such as the right to vote or to hold political office, but rather encompassed privileges and immunities of *citizens*. Citizens were to receive both substantive as well as antidiscrimination protection.¹⁹³ They were to be guaranteed a closed set of privileges and immunities as well as *equal* privileges and immunities—equality of privileges and immunities as well as limited equality in the regulation of these privileges and immunities by the state governments.¹⁹⁴ Fi-

192. See *infra* notes 196-98 and accompanying text.

193. See *infra* Part III.C (discussing the nature of the protection afforded under Section One of the Fourteenth Amendment).

194. Earl Maltz has argued that the Fourteenth Amendment was drafted to enforce a guarantee of "limited absolute equality." See, e.g., Maltz, *supra* note 4; Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984) [hereinafter Maltz, *Fourteenth Amendment*]; Earl M. Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221 (1987) [hereinafter Maltz, *Republican Civil Rights*]. However, the equality intended under the Amendment was not entirely "absolute" with respect to the regulations governing the guaranteed privileges and immunities. "Unequal" regulations enacted pursuant to the

nally, the state governments were to retain their power of regulation of the fundamental privileges and immunities of citizens under Section One of the Fourteenth Amendment. All of these beliefs on the part of Republicans may be explained by appealing to concepts embodied in the nineteenth-century understanding of Article IV.

A. *Rights Protected Under Section One*

Section One of the Fourteenth Amendment guarantees that no state shall abridge the "privileges" or "immunities" of citizens of the United States.¹⁹⁵ As previously noted, these terms as used in Article IV, Section 2 were thought to denote certain natural or common-law rights of citizens.¹⁹⁶ Members of Congress agreed with this interpretation of the terms as used in Article IV and Section One of the Fourteenth Amendment.¹⁹⁷ Furthermore, the dissenting Justices in the *Slaughter-House Cases* came to the same conclusion.¹⁹⁸ Given this consensus, it is particularly surprising that the majority in the *Slaughter-House Cases* construed the Privileges or Immunities Clause as guaranteeing only certain limited rights of national citizenship.¹⁹⁹

1. *Members of Congress*

Congressional Republicans spoke often of the rights they wished to guarantee free blacks as being inherent, natural, or common-law rights. For example, during the debates over the Civil Rights Act, Senator Lyman Trumbull of Illinois argued:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union.²⁰⁰

Like Senator Trumbull, several members of Congress equated the fundamental privileges and immunities protected under Article IV, Section 2 with the rights of citizenship. For example, Representative

common good were contemplated under the Amendment.

195. U.S. CONST. amend. XIV, § 1.

196. See *supra* Part I (noting the belief that the privileges and immunities of citizenship relate to natural law rights outside the scope of government).

197. See *infra* Part III.A.1 (quoting members of the Senate and House during floor debates regarding the proposed Fourteenth Amendment).

198. See *infra* Part III.A.2 (examining the dissenting opinions of Justices Bradley and Field and their assertion that Section One of the Fourteenth Amendment guarantees certain common-law rights).

199. See *supra* notes 18-20 and accompanying text (discussing numerous critiques of the *Slaughter-House* decision).

200. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

Martin Thayer of Pennsylvania, in discussing the Civil Rights Bill, stated:

The sole purpose of the bill is to secure to [blacks] the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law²⁰¹

Finally, Senator Trumbull noted that the Bill provided that blacks were to be considered citizens and that:

they will be entitled to the rights of citizens. And what are they? The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman.²⁰²

Members of congress made similar statements in discussing the rights guaranteed under the Thirteenth Amendment, which some believed authorized passage of the Civil Rights Act.²⁰³ Thus, many Republicans agreed that all citizens should be entitled to the enjoyment of certain fundamental, common-law rights.

Moreover, members of Congress were aware of the theories of contemporary commentators who believed that there was a body of common-law rights to which all citizens of the United States were entitled. As Justice Story and Chancellor Kent wrote in their *Commentaries*²⁰⁴ and Representative Lawrence noted in debates over the Civil Rights Act of 1866,²⁰⁵ the colonists stated in the Declaration of Rights of 1774 that "the inhabitants of the English colonies of North Amer-

201. *Id.* at 1152.

202. *Id.* at 475.

203. *See id.* at 1780-81 (statement of Sen. Trumbull) (stating that all citizens born in the United States and not subject to foreign power are citizens); *see also id.* at 1833 (statement of Rep. Lawrence) (distinguishing certain civil rights, which must be protected for all citizens from political rights, which are left to the states); *id.* at 1255 (statement of Sen. Wilson) (characterizing the right to life, property, and liberty as being distinct from the right to participate in government); *id.* at 1151-52 (statement of Rep. Thayer); *id.* at 1124 (statement of Rep. Cook) (declaring that Congress has power to pass legislation enforcing Thirteenth Amendment); *id.* at 1118 (statement of Rep. Wilson) (calling on government to protect fundamental rights belonging to all men); *id.* at 602, 741 (statement of Sen. Lane) (asserting that former slaves are free, and that freedom encompasses all the rights, privileges and immunities of freemen); *id.* at 570 (statement of Sen. Morrill) (contending that all native born individuals are citizens); *id.* at 503-04 (statement of Sen. Howard) (arguing that narrow construction of the Thirteenth Amendment was against congressional intent); *id.* at app. 102 (statement of Sen. Yates) (arguing that there was no intent by Framers to exclude any race when declaring all men equal).

204. *See supra* notes 137-40 and accompanying text (discussing commentators' view that American common law derived from the English common law).

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

ica, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts [were entitled to certain rights such as] life, liberty, and property."²⁰⁶ Lawrence concluded that Congress had the power to provide for enforcement of these rights:

I maintain that Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property, and the means essential to that end, by penal enactments to enforce the observance of the provisions of the Constitution, article four, section, two, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State.²⁰⁷

Thus, members of Congress adopted the theory that citizens of the United States inherited certain common-law rights from England and that these rights were intended to be guaranteed under Article IV of the Constitution. These "inherent" rights are wholly analogous to those natural law rights that formed the constituent elements of an American "common law"—an American *jus gentium*—rights that were guaranteed in all free governments.²⁰⁸ The terms "privileges" and "immunities" used in Article IV to denote these common-law rights were thought to refer only to fundamental privileges and immunities of citizens in all free governments, and not special privileges or immunities.²⁰⁹

206. CONG. GLOBE, 39th Cong., 1st Sess. 1832-33 (1866). Lawrence stated:

[T]here are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.

....

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

Id. at 1833.

207. *Id.* at 1835.

208. See *supra* Part I.B (analogizing the common law to the *jus gentium* and noting that American common law was the source of fundamental privileges and immunities).

209. The notion that the Privileges and Immunities Clause of Section One of the Fourteenth Amendment only guaranteed certain "fundamental" privileges and immunities of citizenship is not a new idea, and is widely supported by statements made by members of Congress during the debates over the Amendment. Raoul Berger, for example, has concluded that the historical evidence indicates

that the "fundamental" rights which the framers were anxious to secure were those described by Blackstone—personal security, freedom to move about and to own property; they had been picked up in the privileges and immunities of Article IV, Section 2; the incidental rights necessary for their protection were "enumerated" in the Civil Rights Act of 1866; that enumeration, according to the framers, marked the bounds of the grant; and at length those rights were embodied in the "privileges or

2. *The Slaughter-House Cases*

Several member of the Supreme Court deciding the *Slaughter-House Cases* also thought that Section One of the Fourteenth Amendment was designed to guarantee certain common-law rights. The *Slaughter-House* dissenters referred to the Lockean triumvirate of life, liberty, and property as embodied in the Declaration of Independence as comprising the fundamental rights of citizens "of every free government." Justice Bradley stated in his dissent:

Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be . . . modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.²¹⁰

Thus, Justice Bradley reiterated Justice Washington's comments in *Corfield* that the fundamental privileges and immunities of citizens were those to which citizens of all free governments were entitled and that these were the privileges and immunities referred to in Section One of the Fourteenth Amendment.²¹¹ Justice Field made similar remarks in his *Slaughter-House* dissent, stating that "[t]he privileges and immunities designated [in Section One of the Fourteenth Amendment] are those *which of right belong to the citizens of all free governments*."²¹² Thus, the "privileges or immunities of citizens" referred to in Section One of the Fourteenth Amendment and Article IV, Section 2 were those privileges and immunities that were fundamental—that existed anterior to the formation of government, whether belonging equally to all men or flowing from the social compact among the members of society, its citizens.²¹³

immunities" of the Fourteenth Amendment.

BERGER, GOVERNMENT BY JUDICIARY, *supra* note 22, at 20-22. By developing a definition of the term "fundamental" and distinguishing fundamental from special privileges and immunities, one may determine what exactly the Privileges or Immunities Clause was designed to protect, instead of merely looking for particular exemplars of what were deemed "fundamental" privileges and immunities of citizenship at the time of ratification of the Amendment. See Smith, *Citizenship*, *supra* note 11, at 717, 734 (discussing the nature of the fundamental privileges and immunities of citizenship); Smith, *Privileges*, *supra* note 23, at 881-85 (same).

210. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 116 (Bradley, J., dissenting).

211. See *id.* at 117 (quoting Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230)).

212. *Id.* at 97 (Field, J., dissenting).

213. This was the conclusion of the first court to hear a case arising under the Privileges or Immunities Clause of the Fourteenth Amendment. In *United States v. Hall*, the federal court stated: "What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of

Modern commentators have noted that many of the rights enumerated in the Civil Rights Act, a precursor of Section One of the Fourteenth Amendment, were common-law rights such as the rights of property, contract, and security of person.²¹⁴ The statements made by Republicans in Congress as well as the views of the dissenting Justices in the *Slaughter-House Cases* indicate that the rights they identified as being guaranteed under Section One of the Fourteenth Amendment were the same as those that were common-law rights of citizens in both England and America. There was a consensus that these were rights enjoyed by citizens in all free governments, rights that were inherent in a republican form of government. The analysis in Parts I and II of this Article explains the nineteenth-century belief that the Fourteenth Amendment was thought to provide a national guarantee for such common-law rights. These were the same rights that were thought to be guaranteed under the Privileges and Immunities Clause of Article IV, Section 2,²¹⁵ and they were arguably the same rights that were inherent in a "Republican Form of Government."²¹⁶ Given Republicans' choice of the terms "privileges" and "immunities" in Section One of the Fourteenth Amendment, these statements concerning the rights to be guaranteed under the Amendment should come as no surprise. The choice of language was perfectly natural, and for those who were familiar with the understanding of these terms in the nineteenth-century legal community, the language is clear and relatively unambiguous.

right to the citizens of all free states . . . which compose this Union from the time of their becoming free, independent and sovereign." 26 F. Cas. 79, 81 (S.D. Ala. 1871) (No. 15,282) (quoting *Corfield*, 6 F. Cas. 546, 551).

214. See, e.g., McConnell, *supra* note 4, at 994-95. By implication, these were the types of rights that constituted the "privileges and immunities of citizens of the United States." As Professor McConnell has noted:

The 1866 [Civil Rights] Act protected black citizens in their enjoyment of numerous rights derived from state law, including the right to make and enforce contracts, to acquire, hold, and dispose of property, and to testify in court. If *Slaughter-House* is correct, then these rights were not privileges or immunities of citizens—a position impossible to square with the legislative history of the Amendment.

Id. at 999; see also Amar, *supra* note 171, at 1230 (noting that Senator Lyman Trumbull and Representative James Wilson used "broad common law and natural rights language" in support of the Civil Rights Act); 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, 50 (1996) (noting that the language of the Civil Rights Act can be construed to extend to common-law rights).

215. See *supra* Part I.B (contending that case law, legal scholars and Supreme Court Justices supported the idea that the Clause guaranteed certain common rights).

216. See *supra* Part II (discussing whether the Privileges and Immunities Clause protects citizens against state government action).

B. The Distinction Between Civil and Political Privileges and Immunities

It is widely recognized that political rights, such as the right to vote and to serve on juries, were not intended to be guaranteed under the Privileges or Immunities Clause of the Fourteenth Amendment.²¹⁷ As I have argued elsewhere,²¹⁸ such rights could not be *fundamental* privileges and immunities of citizens because they could exist only after establishment of the government. The same is true in general of all such special privileges. The distinction between political and civil rights was well-established in nineteenth-century legal thought. Chief Justice Taney made such a distinction in his opinion in *Dred Scott v. Sandford*, where he stated that “[u]ndoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices.”²¹⁹ Moreover, this conclusion is supported by the text of the Amendment, which guarantees privileges and immunities *of citizens*, and not political rights.²²⁰

Members of Congress responsible for drafting the Amendment noted that it was well established under the case law of the Privileges and Immunities Clause of Article IV, Section 2 that the phrase “Privileges and Immunities of Citizens” did not refer to political rights, but merely extended civil rights to foreign citizens. In support of this proposition, Representative William Lawrence of Ohio stated that the privileges referred to under Article IV were “such as are fundamental civil rights, not political rights, nor those dependent upon local law”²²¹ The fact that Representative Lawrence identified political rights with rights “dependent upon local law” indicates that political rights were thought to be wholly analogous to municipal

217. See CURTIS, *supra* note 3, at 29 (distinguishing political rights from those guaranteed under the Fourteenth Amendment); Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142, 145 (1984); see also CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (according to Senator Jacob Howard of Michigan, “[t]he right of suffrage is not, in law, one of the privileges or immunities . . . secured by the Constitution”).

218. See Smith, *Privileges, supra* note 23, at 873-81 (discussing the distinction between fundamental and special privileges and immunities under Section One of the Fourteenth Amendment).

219. *Dred Scott*, 60 U.S. at 422. Justice Benjamin R. Curtis made the same distinction in his dissent. See *id.* at 581 (Curtis, J., dissenting). However, complicating the analysis concerning rights addressed under Section One of the Fourteenth Amendment was the fact that the phrase “political rights” was sometimes used as a synonym for “civil rights.” The original version of Section One of the Fourteenth Amendment secured “to all citizens . . . the same political rights and privileges.” NELSON, *supra* note 152, at 51-52 (suggesting that the “political rights” language was dropped because it might be construed as guaranteeing to free blacks political rights such as the right to vote, hold office, serve on juries, and serve in the militia); see also Maltz, *Fourteenth Amendment, supra* note 194, at 965.

220. U.S. CONST. amend. XIV, § 1.

221. CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866).

regulations governing the exercise of the fundamental privileges and immunities of the citizenry.²²² Neither were afforded protection under Article IV, Section 2, and neither were intended to be afforded protection under Section One of the Fourteenth Amendment.

1. *The Civil Rights Bill*

During the debates over the proposed Civil Rights Bill, a precursor of Section One of the Fourteenth Amendment, Senate and House Republicans proclaimed that political rights would not be guaranteed under the Bill. After reading the passage from *Corfield v. Coryell*,²²³ which enumerated the fundamental privileges and immunities of citizens under Article IV, Senator Trumbull argued that the Civil Rights Bill did not provide for the elective franchise.²²⁴

As Representative Martin Thayer of Pennsylvania noted, the words in the Civil Rights Bill were "civil rights and immunities," not political privileges.²²⁵ He proposed that "no lawyer who is acquainted with the use of terms and the rules which regulate the construction of laws" could interpret the Bill to extend the suffrage laws.²²⁶ Representative Thayer gave the following analysis of the language of the Bill:

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

Then, again, the matter is put beyond all doubt by the subsequent particular definition of the general language which has been just used; and when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated.²²⁷

Similarly, Representative James Wilson of Iowa cited the definition of civil rights in Bouvier's *Law Dictionary* as "those [rights] which have

222. See *infra* Part III.D (discussing the states' retained power of regulation under Section One of Fourteenth Amendment).

223. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,320).

224. CONG. GLOBE, 39th Cong., 1st Sess. 475-77 (1866). Several members of Congress lamented the fact that the Fourteenth Amendment and Civil Rights Act did not confer the elective franchise. Senator Samuel Pomeroy stated that without suffrage, free blacks would have "no security," *id.* at 1182, and Senator Sumner posited that if the Amendment "is inadequate to protect persons in their . . . right to vote, it is inadequate to protect them in anything." CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869).

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

226. *Id.*

227. *Id.*

no relation to the establishment, support, or management of government."²²⁸ Moreover, years later a separate amendment, the Fifteenth Amendment, was enacted which explicitly guaranteed free blacks the political right to vote.²²⁹ Thus, later congressional action further supports contemporaneous congressional statements indicating that the privileges and immunities of citizens did not include political privileges.

2. *The Fourteenth Amendment*

The distinction between civil and political privileges that the Republicans made during the debates over the proposed Civil Rights Bill carried over to the debates concerning the proposed Fourteenth Amendment. During the Amendment debates, several members of Congress indicated that it was not their intention to confer political privileges under Section One. For example, many Republicans noted that the Fourteenth Amendment did not confer the right to vote upon free blacks.²³⁰ As Senator Trumbull stated, "the granting of

228. *Id.* at 1117; *see also id.* at 1367 (statement of Rep. Wilson) (explaining that some House members were concerned that courts may interpret civil rights to include suffrage); *see also id.* at 1757 (statement of Sen. Trumbull) (maintaining that the right to vote is determined by state legislation); *id.* at 1263 (statement of Rep. Broomall) (arguing that suffrage can only be intended by specific legislation). There was some confusion in terminology, however, in that some members of Congress thought that the phrase "civil rights" might encompass political rights as well. Senator Willard Saulsbury of Delaware, for example, was disturbed that the phrase "civil rights and immunities" in the Bill was a "generic term which in its most comprehensive signification includes every species of right that man can enjoy other than [natural rights]" and that "[t]he right to vote . . . is a civil right." *Id.* at 477; *see also id.* at 1291 (statement of Rep. Bingham) (arguing that political rights are a subset of civil rights); *id.* at 1157 (statement of Rep. Thornton) (noting that in numerous dictionaries, civil is synonymous with political); *id.* at 476 (statement of Sen. McDougall) (asking for clarification that political rights are not considered civil rights and Trumbull responding that they are separate and distinct).

229. U.S. CONST. amend. XV, § 1. ("The right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). During the debate over the Fifteenth Amendment, it was noted that the Fourteenth Amendment did not confer the right to vote. According to Senator Cragin:

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

CONG. GLOBE, 40th Cong., 3d Sess. 1003-04 (1869).

230. CONG. GLOBE, 39th Cong., 1st Sess. 2539-40 (1866) (statement of Rep. Farnsworth) (stating his support for the proposed Amendment but noting that it did not go far enough); *id.* at 2462 (statement of Rep. Garfield) (noting his regret that right to vote for blacks had not been written into Constitution); *id.* at 406-07 (statement of Rep. Eliot) (objecting to states' right to disenfranchise men of a given race); *id.* at 405 (statement of Rep. Shellabarger) (lamenting that whole races remain disenfranchised). Representative Wilson stated that suf-

civil rights does not . . . carry with it . . . political privileges. A man may be a citizen in this country without a right to vote The right to vote . . . depends upon the legislation of the various States.”²³¹

Senator Howard added:

[T]he first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.²³²

Representative Bingham reiterated this position in the context of debates over the proposed Fourteenth Amendment. Upon introducing the Amendment on the floor of the House, Bingham stated that “the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.”²³³ He further noted that “[i]t is a guaranteed [sic] right of every State in this Union to regulate for itself the elective franchise within its limits, subject to no condition whatever except that it shall not . . . transform the State government from one republican in form.”²³⁴ Thus, there was a consistent recognition that the privileges

franchise was “a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government.” *Id.* at 1117.

231. *Id.* at 1757.

232. *Id.* at 2766; see also Maltz, *Fourteenth Amendment*, *supra* note 194, at 942 (detailing the bitter debate in Congress over granting suffrage to blacks).

233. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). This was not the only time that Representative Bingham made a distinction between political and civil rights. In the debate over admission of Oregon as a state, Bingham distinguished political rights, which he indicated were conventional, from natural or inherent rights. According to Bingham, the “distinctive” political rights of citizens of the United States included:

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

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

234. CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867). Similarly, Senator Howard stated that Section One of the Amendment did “not give to either of these classes [whites or blacks] the right of voting.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

of citizenship did not encompass political privileges.

The views of Republicans debating the Civil Rights Bill and the proposed Fourteenth Amendment can be explained by appealing to the theories underlying the provisions of Article IV that influenced the drafting of the Amendment. As previously noted, special privileges were not guaranteed under the Privileges and Immunities Clause of Article IV, Section 2.²³⁵ Special privileges were localized. They were not privileges and immunities of citizens in all free governments, and not part of a *jus gentium* composed of those fundamental rights shared by substantially all of the states in the federal system. The privileges and immunities of citizens were those common-law rights that were guaranteed in the vast majority of the states and which were embodied in the state constitutions. Political privileges, such as the right to vote or to hold office, were special privileges. Indeed, the Privileges and Immunities Clause of Article IV, Section 2 did not give citizens a right to travel to foreign states to vote. Such political privileges were not fundamental privileges and immunities of citizenship guaranteed under the Privileges and Immunities Clause of Article IV, Section 2, or under Section One of the Fourteenth Amendment.

C. *The Type of Protection Afforded Under Section One*

As previously noted, there are two possible interpretations of the Privileges and Immunities Clause of Article IV, Section 2: (1) that it guaranteed substantive protection for a uniform set of fundamental privileges, or (2) that it guaranteed merely equal privileges and immunities of citizens.²³⁶ Even if the latter interpretation is correct, it may have been assumed that there was a core set of fundamental privileges and immunities of citizens that would be respected by all free governments and that, therefore, there would be in practice uniformity in the privileges and immunities of citizens throughout the United States. This uniformity may not have been mandated under the Privileges and Immunities Clause, but rather may have been a result of the similarity in the constitutions of the various states, which guaranteed in essence the same core set of fundamental rights of citizens. The privileges and immunities of citizens guaranteed under Article IV may have been conceived of as being elements of a *jus gentium*, or American common law, consisting of those fundamental rights that were shared in common among virtually every state in the

235. See *supra* notes 116, 209 and accompanying text.

236. See *supra* notes 25-26 and accompanying text.

federal system. Whether this common law was federalized through embodiment in the positive textual provisions of the Constitution is a point that has been debated.

Even if one concludes that the antidiscrimination reading of the Privileges and Immunities Clause of Article IV, Section 2 is the most historically accurate, it does not mean that the Privileges or Immunities Clause of Section One of the Fourteenth Amendment was intended to afford only antidiscrimination protection to citizens.²³⁷ The Privileges or Immunities Clause may also have been intended to remedy perceived defects in Article IV and to afford substantive protection as well.²³⁸ It may have been the framers' intent to mandate that the states uniformly respect certain fundamental rights of citizens, such that the states could not withdraw these rights without violating the prohibitions in Section One, even if the Privileges and Immunities Clause of Article IV, Section 2 guaranteed only antidiscrimination protection. This may have been the reason that the phrase "privileges or immunities of citizens of the United States" was used in Section One—to indicate that certain fundamental rights that all state governments must recognize were inherent in one's status as a citizen of the United States.²³⁹ The states might still be free to regulate in diverse manners the form in which these capacities of citizenship existed or the mode in which they could be exercised, but were under an obligation to recognize these pre-political privileges and immunities of citizens in some form.

Antidiscrimination protection under the Privileges or Immunities Clause of the Fourteenth Amendment may have been at the level of regulation of the privileges and immunities of citizens. The Clause may have guaranteed substantive as well as antidiscrimination protection in terms of the fundamental privileges and immunities that citizens were entitled to enjoy in all of the states, as well as the *privilege or immunity* of being subject only to *equal* regulation of these fundamental privileges and immunities. Thus, one of the privileges and immunities of citizens was enjoyment of *equal* civil rights. Not only is this interpretation of Section One as protecting only fundamental privileges and immunities of citizens consistent with the original

237. See Harrison, *supra* note 16, at 1451-54 (presenting the case for interpreting the Privileges or Immunities Clause of Section One of the Fourteenth Amendment as embodying an equality-based directive).

238. See, e.g., Fairman, *supra* note 12, at 77 (concluding that the Fourteenth Amendment "meant to establish some substantial rights" under the heading "privileges and immunities of citizens of the United States"); see also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 73 (1993) (arguing that the Fourteenth Amendment was designed to enforce existing substantive rights rather than establish new ones).

239. See Smith, *Citizenship*, *supra* note 11, at 683-85.

meaning of the Amendment, but this was also the interpretation adopted by the Supreme Court dissenters in the *Slaughter-House Cases*.²⁴⁰

The above analysis of the intellectual background of the provisions found in Article IV supports the substantive interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment. If the "privileges" and "immunities" of citizens were the fundamental common-law rights recognized in all free governments, then by ratifying Section One of the Fourteenth Amendment the people of the United States must have intended to guarantee that no state could withhold these fundamental rights. These were the rights that constituted a "Republican Form of Government," and every state must recognize such rights. This substantive guarantee would not tread upon the states' retained power to regulate the fundamental rights of the citizenry because the guarantee was relatively abstract. States could not prohibit citizens from exercising their right to enter into contracts, but they might pass different regulations governing the formation of contracts. States could not prohibit citizens from bringing suits against others, but they might pass different statutes of limitations. The substantive guarantee was not intended to mandate a certain set of regulations accompanying these fundamental rights. Section One for instance did not mandate any particular length for a statute of limitations, or that a state pass any statute of limitations at all.

D. Regulation of the Privileges and Immunities of Citizens

In the nineteenth-century mind, there was a well-defined notion of the legitimate sphere of government action in regulating the fundamental rights of the citizenry, which was not meant to be disturbed by the Fourteenth Amendment.²⁴¹ In his *Commentaries*, Chancellor Kent

240. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting) (rejecting the notion that privileges and immunities only attach to state citizenship, and not to United States citizenship).

241. The Supreme Court subsequently acknowledged the state's right of regulation as preserved under the Fourteenth Amendment in *Munn v. Illinois*, 94 U.S. 113 (1876). The Court stated that individuals, upon entering society, conferred upon the government the power to regulate "the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." *Id.* at 124-26. Justice Field, one of the *Slaughter-House* dissenters, recognized this broad police power in his dissent in *Munn*, maintaining that states possessed the power to "control the use and possession of [the citizen's] property, so far as may be necessary for the protection of the rights of others, and to secure them the equal use and enjoyment of their property." *Id.* at 145. Justice Field continued, stating:

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of sub-

discussed the general power of the government to regulate property rights in order to protect the rights of all the citizens when they come into conflict. Indeed, Kent emphasized the necessity of endowing government with such power:

But though property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the de-

jects. Whatever affects the peace, good order, morals, and health of the community comes within its scope Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property

Id. at 145-46. Justice Field later expounded upon these views in *Barbier v. Connolly*, 113 U.S. 27 (1885), in which he stated that the first section of the Fourteenth Amendment,

undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.

Id. at 31. The difference between an arbitrary deprivation of fundamental rights and a proper exercise of the state's police power is the difference between an abridgement of the privileges and immunities of citizens of the United States and a proper regulation of the exercise of these rights. Justice Field recognized this distinction:

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

Id. at 31-32.

posit of powder, the application of steampower to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.²⁴²

Thus, the proper role of the state governments in regulating the fundamental rights of the citizenry was well-settled when the people of the United States ratified the Fourteenth Amendment. This understanding of the role of government in regulating fundamental rights is reflected in both the statements of members of Congress and members of the Supreme Court interpreting the Fourteenth Amendment in the *Slaughter-House Cases*.

1. Members of Congress

During the debates over the Fourteenth Amendment, several members of Congress expressed the notion that the state governments should retain the power to regulate the privileges and immunities of their citizens.²⁴³ It was thought that the states should remain free to regulate the fundamental privileges and immunities of citizens even after the Fourteenth Amendment was ratified. They were to remain free to pass laws, for example, regulating criminal and civil conduct without investing in Congress the power to prescribe uniform criminal or civil codes for all of the states.²⁴⁴ On many occa-

242. 2 KENT, *supra* note 54, at 441.

243. Several commentators have noted the importance of maintaining the federal system and state sovereignty in the eyes of members of the Thirty-Ninth Congress, which approved the Fourteenth Amendment. See, e.g., BERGER, FOURTEENTH AMENDMENT, *supra* note 5, at 49-50 (exploring the divergence between Northern and Southern views concerning states' rights as reflected in congressional debate over the Fourteenth Amendment); Kaczorowski, *supra* note 23, at 572-73 ("Although the states could no longer deprive citizens of these rights, the framers [of the Civil Rights Act] intended that the states retain their authority to regulate the exercise and enjoyment of civil rights."). Raoul Berger, for example, quotes Horace Flack's *The Adoption of the Fourteenth Amendment* to support his interpretation of the Amendment under which the states would retain significant power to regulate the fundamental rights of citizens: "The 'radical leaders,' Horace Flack wrote, 'were as aware as any one of the attachment of a great majority of the people to the doctrine of States Rights . . . the right of the States to regulate their own internal affairs.'" BERGER, FOURTEENTH AMENDMENT, *supra* note 5, at 50 (alteration in original) (quoting FLACK, *supra* note 12, at 68). In Berger's opinion, "[o]ne of [Michael Kent] Curtis' major flaws is his refusal to face up to Bingham's repeated recognition that control of internal matters was left to the States." *Id.* at 131; see also Maltz, *Reconstruction*, *supra* note 24, at 230 (submitting that the concept of federalism was influential in limiting Republican efforts on behalf of freedmen).

244. Representative Bingham objected to the original version of the Civil Rights Bill, protesting that since the term "civil rights" embraced all rights, the Fourteenth Amendment would strike down every state constitution that made distinctions on the basis of race and color. See CONG. GLOBE, 39th Cong., 1st Sess. 1414 (1866) (statement of Sen. Davis) ("The principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass

sions, Republicans forcefully demonstrated their intent that the states retain their power of regulation and that the Fourteenth Amendment not mandate a uniform civil or criminal code for the states.²⁴⁵

civil and criminal codes for every State of the Union.”); CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Shellabarger) (arguing that the Fourteenth Amendment would effectively “reform the whole criminal and civil Code of every State government”). The distinction between the phrases “civil rights” and “privileges and immunities” is therefore evident. As Raoul Berger has noted, these phrases were not synonymous or used interchangeably. See Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well*, 62 U. CIN. L. REV. 1, 27-28 (1993) (emphasizing that “privileges and immunities” was used instead of “civil rights” because “privileges and immunities” had a more limited meaning).

An explanation for the distinction may be found in the theory presented in this Article. The phrase “civil rights” could be construed as referring to the positive regulations or modes in which the privileges and immunities of citizenship were exercised. Mandating an equality of civil rights would indeed reform the civil and criminal codes of the states and call for a uniformity in legislation among the states. The phrase “privileges and immunities,” however, could be construed as referring only to those capacities of citizenship existing anterior to the establishment of the government that are regulated through municipal laws passed by legislatures.

245. See CURTIS, *supra* note 3, at 68-69. Curtis notes in particular the objections of Representative Robert S. Hale of New York, *id.* at 69 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1063-65 (1866)), and Representative Giles W. Hotchkiss, *id.* at 71 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866)). Senator Garrett Davis of Kentucky contended that the Civil Rights Act might authorize Congress to “pass a civil and criminal code for every State in the Union.” CONG. GLOBE, 39th Cong., 1st Sess. 1414 (1866). Senator Willard Saulsbury argued that the Act placed limitations on the “police power” of the states. See *id.* at 478. Representative Andrew J. Rogers indicated that Section One of the Fourteenth Amendment would “interfere with the internal police and regulations of the States.” *Id.* at app. 134. Senator Edgar Cowan, playing devil’s advocate, argued that the mandate for equality in regulation under the Civil Rights Act:

confers upon married women, upon minors, upon idiots, upon lunatics, and upon everybody native born in all the States, the right to make and enforce contracts, because there is no qualification in the bill, and the very object of the bill is to override the qualifications that are upon those rights in the States.

Id. at 1782. Representative Wilson added during the debate over the Civil Rights Bill that “[w]e are not making a general criminal code for the States.” *Id.* at 1120. Wilson also stated that “the rights” of individuals “possesse[d] as a citizen of the United States” could “only be secured to him by laws which operate within the State in which he resides.” *Id.* at 2513. Representative Thomas Davis of New York, in debates over the Civil Rights Act, argued that “this Government is one of delegated powers, and . . . every law . . . is circumscribed by the limitation of the Constitution. The States have reserved all sovereignty and power which has not been expressly or impliedly granted to the Federal Government.” *Id.* at 1265-66. Representative Samuel Shellabarger posited that the Civil Rights Bill’s “whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinction based on race or former condition in slavery.” *Id.* at 1293. Finally, Columbus Delano, a Republican Representative from Ohio, worried that under the Civil Rights Bill, “Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers . . .” *Id.* at app. 158; see also HAROLD M. HYMAN, A MORE IMPERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 438-40 (1973) (highlighting Republicans’ concerns regarding how the Fourteenth Amendment would impact separation of powers, federalism, and civil liberties); NELSON, *supra* note 152, at 114-15 (discussing Republicans’ fear that the Fourteenth Amendment would confer upon Congress the power to reverse state common law); Maltz, *Fourteenth Amendment*, *supra* note 194, at 936 (stating that “the concept of federalism was one overarching concern”); Maltz, *Reconstruction*, *supra* note 24, at 230-36 (discussing Republicans’ concern that the Fourteenth Amendment would unduly expand congressional authority over basic rights).

For example, Representative Bingham, the principal draftsman of Section One of the Fourteenth Amendment, commented that “[t]he Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, . . . but leaves it as the reserved power of the States, to be by them exercised.”²⁴⁶ Bingham distinguished between fundamental rights and their instantiation in municipal law. He argued that “[t]he rights of life and liberty are theirs whatever States may enact,” but also noted,

[W]ho ever heard it intimated that any body could have property protected in any State until he owned or acquired property there according to its local law. . . . I undertake to say no one. As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States. . . . But suppose any person has acquired property not contrary to the laws of the State, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection?²⁴⁷

Representative Bingham concluded that the states should remain free to regulate these fundamental privileges of citizenship:

[T]he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by the Constitution.²⁴⁸

246. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866). Representative Bingham also stated that “the citizens must rely upon the State for their protection. I admit that such is the rule as it now stands.” *Id.* at 1093. Representative Bingham cited *The Federalist No. 45*: “The power reserved to the Federal States will extend to all the objects which, in the ordinary course of affairs concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *Id.* (quoting THE FEDERALIST NO. 45 (James Madison)).

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

248. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866); see also *id.* at 2542 (statement of Rep. Bingham) (noting that “this amendment takes from no State any right that ever pertained to it”); *id.* at 1090 (statement of Rep. Bingham) (asserting that adoption of the proposed amendment would not deprive states of any rights); *id.* at 1088 (statement of Rep. Bingham); Fairman, *supra* note 12, at 33 (exploring Bingham’s position that the Fourteenth Amendment merely gave Congress the power to enforce the Bill of Rights); Gingras, *supra* note 4, at 44-45

Other Republicans also acknowledged the states' retained power of regulation.²⁴⁹ Senator George F. Edmunds of Vermont, for example, made a distinction between the *regulation* of a right and its *destruction* or *abridgment*. "Every lawyer," Edmunds stated, "knows . . . that it is one thing to have a right which is absolute and inalienable, and it is another thing for the body of the community to regulate . . . the exercise of that right."²⁵⁰ Edmunds elaborated:

I may be daily deprived of my liberty under the regulations of the State, which apply to us all alike. If I am deprived of it, rightfully or wrongfully, I can only get restored to it by the process of the law under the regulations that legislation shall provide. My friend admits that one of the privileges of a citizen of the United States is to hold property. Where is he to hold it? He must hold it in some State or Territory, must he not? Now, then, is he to acquire it in spite of the State law by an instrument unwitnessed, unsealed, unsigned? By no means. He must conform to the regulation of the local law which declares that his deed must be witnessed by two witnesses, must be sealed, must be acknowledged, must be deliv-

(discussing Bingham's views).

249. Representative Shellabarger indicated that the state governments could exercise the right to regulate the fundamental privileges and immunities of citizens without abridging them:

Now, the inquiry I wish to make is this: suppose that at the time of taking a statutory apprentice, or at the time of the birth of a child, the age of majority for the child and the expiration of the apprenticeship is fixed by the law of this District, or of any of the States, at the age of twenty-one years; and suppose the State, or the Legislature of this District, in the exercise of municipal legislation, should change the law so as to terminate the minority and the apprenticeship at eighteen instead of at twenty-one years, and thus should take from the parent and from the master three years of service, would that be depriving the citizen of property without due process of law, within the meaning of Magna Carta or of the Constitution of the United States? Is not the property in these personal relations within the full control of the municipal legislation of every supreme legislature?

CONG. GLOBE, 37th Cong., 2d Sess. 1636 (1862). Similarly, Senator Richard Yates of Illinois also distinguished between regulating the rights of citizens and destroying them. According to Senator Yates:

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

CONG. GLOBE, 40th Cong., 2d Sess. app. 350 (1868). In this passage Yates was discussing political rights, such as the right to vote and to hold office. *See id.* Although he did not consider these rights to be privileges and immunities of citizenship, his distinction between the destruction of a right and its regulation is still instructive.

250. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).

ered. And yet no man here thought of supposing that a privilege of a citizen was denied, although it is confessedly by my friend agreed to be a privilege, from the fact that the States regulate the exercise of it. . . . [E]verybody knows that a right may be perfectly secure and yet may be subject to regulation.²⁵¹

Thus, congressional Republicans made a distinction between the legitimate regulation of a fundamental right and its abridgement. Section One was designed to prohibit the latter while refraining from interfering with the former.

Although the states remained free to regulate the mode or manner in which the privileges and immunities of the citizen might be exercised, they were not free to abridge or destroy these rights—they were inherent or inalienable rights of the citizen. According to Representative William Lawrence of Ohio, matters involving contracting, suing, and property rights were left to the states “subject only to the limitation that there are some inherent and unalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws.”²⁵²

There were other constraints, however, placed upon the state’s power of regulation. Regulation of the fundamental rights of the citizen had to be “equal.” This guarantee of equal regulation was said to be a principle of “republicanism.” As Senator Lot M. Morill of Maine stated:

The peculiar character, the genius of republicanism is equality, impartiality of rights and remedies among all citizens, not that the citizen shall not be abridged in any of his natural rights. The man yields that right to the nation when he becomes a citizen. The republican guarantee is that all laws shall bear upon all alike in what they enjoin and forbid, grant and enforce. This principle of equality before the law is as old as civilization, but it does not prevent the State from qualifying the rights of the citizen according to the public necessities.²⁵³

Thus, although as a general principle regulation of the privileges of citizenship had to be equal, this equality directive could be superseded when the public necessity required.

This equality may have been one of the “privileges and immunities” of citizens. As Senator Wilson stated concerning the term

251. *Id.*

252. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866). Representative Lawrence also stated in response to concerns regarding invasion of the powers of the state governments, “I answer that it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded.” *Id.* at 1837.

253. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866).

"immunities" in the Civil Rights Act, it "merely secure[d] to citizens of the United States equality in the exemptions of the law."²⁵⁴ In particular, it was the function of the Civil Rights Act to enforce the privilege or immunity of citizenship of being subject to *equal regulation* of the fundamental privileges and immunities of citizenship. The language of the Act guaranteed "the same" rights of citizenship. Representative Shellabarger said with respect to this requirement that:

except so far as [the Civil Rights Bill] confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition of slavery.²⁵⁵

Similarly, Senator Trumbull argued that the Civil Rights Bill "will have no operation in any state where . . . all persons have the same civil rights without regard to color or race."²⁵⁶ Thus, the power to regulate the rights of citizens was left in the hands of the state governments under both the Civil Rights Act and the Fourteenth Amendment. As Representative Bingham acknowledged, Section One of the Fourteenth Amendment took "from no State any right that ever pertained to it."²⁵⁷

The distinction between fundamental privileges and immunities and the regulations governing these privileges therefore explains the contrast between the substantive language of Section One of the Fourteenth Amendment and the equality-based language of the Civil Rights Act the Amendment was designed to constitutionalize.²⁵⁸ The language of the Amendment provided for a substantive guarantee of fundamental privileges and immunities. Equality-based protection of these fundamental privileges was derivative since each citizen was guaranteed the same core set of fundamental rights. However, one of the fundamental privileges guaranteed was the privilege of being

254. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Senator Trumbull added that the Act "in no manner interfere[d] with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union." *Id.* at 1761.

255. *Id.* at 1293. Representative Shellabarger argued further that, "if this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would . . . be an assumption of the reserved rights of the States and the people." *Id.*

256. *Id.* at 476, 1761 (statement of Sen. Trumbull) (asserting that Section One would not interfere with those States' municipal regulations that already provided equal protection).

257. *Id.* at 2542.

258. See Harrison, *supra* note 16, at 1387-88, 1391-96, 1424-33 (discussing the contrast between the equality-based language of the Civil Rights Act and the substantive language of the Amendment).

subject only to *equal* regulation. Thus, citizens received merely equality-based (anti-discrimination) protection with respect to the regulations governing the fundamental privileges and immunities of citizens. They did not receive a *substantive* guarantee that certain regulations would or would not be put into place to govern the exercise of citizens' fundamental privileges.

2. *The Slaughter-Houses Cases*

The principle of equality in regulation was recognized by both the Miller majority and the dissenters in the *Slaughter-House Cases*.²⁵⁹ For example, Justice Bradley stated in his dissent that “[c]itizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as the legislature may rightfully prescribe.”²⁶⁰ According to Justice Miller, “[t]he power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of the country, always conceded to belong to the States, however it may now be questioned in some of its details.”²⁶¹

Justice Miller, quoting Chancellor Kent, articulated the test for whether a regulation by a state pursuant to its police power violated the Fourteenth Amendment's prohibition of state legislation abridging the privileges and immunities of citizens:

“Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,” says Chancellor Kent, “be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.” This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.²⁶²

Justice Miller indicated that the regulation in question in *Slaughter-House* was appropriate because exclusive privileges, such as the monopoly contemplated under the Louisiana statute, were not tradi-

259. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

260. *Id.* at 113 (Bradley, J., dissenting).

261. *Id.* at 62.

262. *Id.* (footnotes omitted).

tionally forbidden.²⁶³

In contrast to Justice Miller, Justice Field found in his dissent that the state of Louisiana had exceeded the limits of its police power in passing the regulation because it had "infringed" upon a fundamental right of the people.²⁶⁴ Justice Bradley acknowledged that "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted."²⁶⁵ He also stated, however, that "there are certain fundamental rights which this right of regulation cannot infringe."²⁶⁶

Thus, the distinction between a permissible regulation of a fundamental privilege or immunity and its abridgement was carried over to the congressional understanding of the Privileges or Immunities Clause of Section One, as well as the interpretation of the Clause by the *Slaughter-House* dissenters. These regulations prescribing the mode or manner in which the fundamental rights of citizens could be exercised were municipal regulations.²⁶⁷ The sovereignty of the states was to remain intact under the Amendment.²⁶⁸ Later, Justice

263. *Id.* at 66 ("Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.")

264. According to Justice Field, the states limited in a legitimate way the fundamental privileges and immunities of their citizens when they properly exercised their police power:

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

Id. at 87 (Field, J., dissenting).

265. *Id.* at 114 (Bradley, J., dissenting).

266. *Id.* (Bradley, J., dissenting). Justice Bradley later commented on this power of regulation in *Missouri v. Lewis*, where he stated that the Amendment "does not profess to secure to all persons in the United States the benefit of the same laws or the same remedies. Great diversities in these respects may exist in two States separated by an imaginary line. . . . Each State prescribes its own mode of judicial proceeding." 101 U.S. 22, 31 (1879).

267. *See id.* at 59-61 (describing the content of regulations as being within the municipal power).

268. Several statements by members of Congress indicate their concern that the sovereignty of the state governments not be impaired by the new amendment. For example, Representative Roscoe Conkling, a member of the Joint Committee on Reconstruction, argued that "the proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty." CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866). Similarly, Representative Columbus Delano stated, "[T]here are certain rights of citizenship that are exclusively within the control of the States." *Id.* at app. 157. Finally, Representative Robert Hale declared that "all powers having reference to the relationship of the individual to the municipal government, the powers of local jurisdiction and legislation, are in general reserved to the states." *Id.* at 1063; *see also* FLACK, *supra* note 12, at 68 ("Radical leaders were as aware as anyone of the attachment of a great majority of the people to the doctrine of States Rights . . . the right of the States to regulate their own internal affairs . . ."); Alfred H. Kelly, *Comment on Harold Hyman's Paper, in NEW*

Bradley, one of the *Slaughter-House* dissenters, emphasized in the *Civil Rights Cases*²⁶⁹ that Section Five of the Fourteenth Amendment did not authorize Congress "to create a code of municipal law for the regulation of private rights."²⁷⁰ This belief can be explained by noting that the fundamental privileges and immunities of citizens differ from special privileges or municipal regulations. The latter were not dictated under either the Privileges and Immunities Clause of Article IV, Section 2 or under the Privileges or Immunities Clause of the Fourteenth Amendment.

The distinction between a fundamental privilege or immunity of the citizen and the regulation of the mode or manner in which the privilege or immunity may be exercised can be traced to the distinction between the *jus gentium* and the civil law. The privileges and immunities of citizenship were those common-law rights of the citizen that were thought to exist anterior to the formation of government, such as the right to hold property and to contract, whereas civil rights were the expression of those common-law rights in the positive law of the various states. By guaranteeing that no state could abridge the "privileges or immunities of citizens," Section One of the Fourteenth Amendment was designed to protect the fundamental common-law rights of the citizenry, but did not extend to enshrine any particular instantiation of these rights in the civil and criminal codes of the various states. Thus, the Fourteenth Amendment allowed for great diversity in the way in which the state governments chose to regulate the fundamental rights of the citizenry. It only prevented the complete abridgement of these rights.

CONCLUSION

This Article has endeavored to explain certain beliefs of members of Congress concerning the meaning of Section One of the Fourteenth Amendment by analyzing the provisions of Article IV, which served as precursors to Section One. The "privileges" and "immunities" guaranteed under Article IV, Section 2 were the same as those later guaranteed under Section One of the Fourteenth Amendment. These privileges and immunities were those capacities of the citizen that existed anterior to the establishment of government, but which could be regulated pursuant to the "common good" by the govern-

FRONTIERS OF AMERICAN RECONSTRUCTION 55 (Harold Hyman ed., 1966) (concluding that "commitment to traditional state-federal relations meant" that "the radical Negro reform program could be only a very limited one").

269. 109 U.S. 3 (1883).

270. *Id.* at 21.

ment that was subsequently established. These privileges and immunities of citizens were those rights afforded citizens in all free governments—governments that were characterized as “republican” in form. They were the natural or fundamental rights that had been borrowed from the English common law and which were embodied in the positive law of the new nation. They were not thought to include political privileges and immunities, such as the right to vote or to hold public office.

Although several commentators have argued that the privileges or immunities of citizenship guaranteed under Section One that were traditionally within the regulatory control of the state governments (such as the right to contract and to testify) are afforded merely anti-discrimination (equality-based) protection under the Amendment,²⁷¹ it is likely that they were originally intended to be provided substantive protection as well. The privileges and immunities guaranteed under the Amendment were those that were enjoyed by citizens in all free governments. Thus, they would presumably exist and be guaranteed in all of the states. The states remained free to regulate the exercise of these fundamental capacities of citizenship in different ways through municipal regulation. They did not, however, remain free to abridge them. In this respect, Section One of the Fourteenth Amendment did not present any great change, since these principles were already embodied in provisions of the original constitutional text, as well as in the state constitutions and other organic law.

Understanding the nineteenth-century distinction between the *regulation* of a privilege (the law governing the mode or manner in which a privilege could be exercised) and the underlying privilege itself is the key to resolving the “riddle”²⁷² concerning the nature of the protection afforded under the Privileges or Immunities Clause of

271. See, e.g., Harrison, *supra* note 16, at 1410-33 (presenting the case for interpreting Section One as only protecting against discrimination). William E. Nelson contends that “[b]y understanding section one as an equality guarantee, the puzzle of how Congress could simultaneously have power to enforce the Bill of Rights and not have power to impose a specific provision of the Bill on a state is resolved.” NELSON, *supra* note 152, at 119. Nelson notes that many of the states ratifying the Fourteenth Amendment did not provide for all of the same Bill of Rights protections in their state constitutions and yet did not oppose ratification or change their constitutions to reflect the federal Bill of Rights after ratification. See *id.* at 117-18.

272. John Harrison has formulated the “riddle” of the text as follows:

Herein lies the riddle. The Equal Protection Clause seems to have the necessary focus on equality, but its subject matter is limited to the protection of the laws, and it extends beyond citizens to all persons. The Privileges or Immunities Clause has the right subject matter and the right coverage, because it is about citizens’ rights, but it appears to be a substantive limitation, not a ban on discrimination. Neither seems to require equality with respect to the rights of citizenship set out in the Civil Rights Act. How, then, did the Fourteenth Amendment constitutionalize the Act?

Harrison, *supra* note 16, at 1392.

the Fourteenth Amendment. As the text makes plain, the privileges or immunities of citizenship are guaranteed against “abridg[ment].” This is best read as a substantive guarantee of the privileges and immunities of citizenship. However, the text does not on its face address the *regulations* governing these fundamental capacities of the citizenry—the civil rights embodied in the municipal law of each state.

The anti-discrimination (equality-based) reading of the Clause picks up on the nineteenth-century understanding that one of the privileges or immunities of citizenship was the guarantee that one would be subject only to *equal* regulation of the mode or manner in which fundamental privileges could be exercised. Thus, the privileges of citizens were afforded substantive protection and anti-discrimination (equality-based) protection derivatively. Meanwhile, the *regulation* of these privileges or immunities received *at best* an equality-based guarantee.²⁷³ This explains how the Fourteenth Amendment constitutionalized the Civil Rights Act, which guaranteed citizens the “same rights” of citizenship. It also explains the patently substantive textual guarantee of “privileges” and “immunities” and the seemingly inconsistent view repeated time and again by members of Congress that the Fourteenth Amendment did not dictate the civil or criminal codes of the states—it did not afford a substantive guarantee for the *regulations* governing the privileges or immunities of citizens. Thus, the Fourteenth Amendment fully preserved the federal system, while affording citizens a federal constitutional guarantee of their most fundamental rights.

273. The guarantee of equality was not “absolute.” Regulations that were unequal in some sense but were necessarily so because they were in the interest of the public good did not “abridge” citizens’ fundamental privileges and immunities. Moreover, nineteenth-century legal scholars recognized a variety of forms of natural inequalities that pre-existed the state. The state’s recognition of these natural inequalities was not thought to constitute an “abridge[ment]” of citizens’ fundamental privileges and immunities.

