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THE MEANINGS OF THE “PRIVILEGES AND  
IMMUNITIES OF CITIZENS” ON THE EVE  
OF THE CIVIL WAR

David R. Upham\*

*[I]n a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess.*

—Lemmon v. People, 20 N.Y. 562, 608 (1860).

*The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; and shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.*

—CONF. CONST. art. IV, § 2, cl. 1 (1861).

*Resolved, That we deeply sympathize with those men who have been driven, some from their native States and others from the States of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic Party responsible for this gross violation of that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.*

—Supplemental Resolution proposed by Ohio’s  
Joshua Giddings and unanimously adopted by the  
Republican National Convention of 1860.<sup>1</sup>

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1 John Hutchins, *Reminiscences of the Thirty-Sixth and Thirty-Seventh Congresses XII*, 12 NAT’L MAG. 63, 69 (1890).

*Congress shall provide by law for securing to the citizens of each State the privileges and immunities of citizens in the several States.*<sup>2</sup>

#### INTRODUCTION

The Fourteenth Amendment to our Constitution provides, in part, that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>3</sup> This “Privileges or Immunities Clause” has been called “the darling of the professoriate.”<sup>4</sup> Indeed, in the last decade alone, law professors have published dozens of articles treating the provision.<sup>5</sup>

This Article proceeds from the same professorial ardor. Still, relative to many other treatments, this Article is both more modest and more ambitious. On the one hand, I do not propose to offer a full account of the original meaning of the Clause. On the other, I do aim to help build a genuine scholarly consensus by presenting compelling evidence that has been, for the most part, largely overlooked by contemporary scholars.<sup>6</sup>

The focus of this particular study is the interpretation of the “privileges and immunities of citizens” offered by American political actors, including not only judges, but also elected officials and private citizens, *before* the Fourteenth Amendment, and primarily, on the eve of the Civil War. This study proceeds in four parts.

First, the Article defends the relevance of this inquiry. I am to refute the conclusion of Justice Miller and (more recently) of Justice Thomas that the “privileges and immunities of citizens in the several states” secured by Article IV were generally understood to be sharply distinct from the “privileges or immunities of citizens of the United States” secured by the Fourteenth Amendment. Rather, the authors of the Clause largely believed that it would provide greater security to the privileges guaranteed in Article IV.

Second, the Article provides a brief account of the understanding of the Privileges and Immunities Clause before 1857, concluding that the provi-

2 L.E. CHITTENDEN, A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS OF THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, HELD AT WASHINGTON, D.C., IN FEBRUARY, A.D. 1861, at 473 (1864).

3 U.S. CONST. amend. XIV, § 1.

4 Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521) (comment of Justice Scalia).

5 A Lexis search of articles published between 2006 and 2015 inclusively shows nearly fifty law journal articles with titles containing the words “privileges” and “immunities,” thirty-six of which concerned the Fourteenth Amendment. *See, e.g.*, David S. Bogen, *Mr. Justice Miller’s Clause: The Privileges or Immunities of Citizens of the United States Internationally*, 56 *DRAKE L. REV.* 1051 (2008); Eric R. Claeys, *Blackstone’s Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 *SAN DIEGO L. REV.* 777 (2008); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 *MO. L. REV.* 1 (2007).

6 Some of the evidence presented here is now much more readily available to scholars, thanks to the explosive growth of scanned text, especially via Google Books and other sources of “big data.”

sion's original understanding was ambiguous and generated only sporadic (though important) national controversy and commentary. As a result, up to 1857, the Privilege and Immunities Clause's meaning remained largely obscure, even among jurists.

Third, the Article explains that from 1857 to 1861, in the course of national debates, at least three contrasting interpretations rose to substantial public prominence: (1) a pro-slavery, absolute-rights reading; (2) an absolute-rights reading endorsed by Republicans, which *sometimes* incorporated claims of black citizenship; and (3) a strictly interstate-equality understanding. The prominence of the first two readings represented radical developments relative to the third reading, a reading that had prevailed in the past and would prevail again in courts in the future. Consequently, there arose a substantial gap between the judiciary and the polity as a whole as to the meaning of the constitutional privileges of citizenship.

Fourth, this Article concludes by noting the ways in which this antebellum evidence illuminates both (1) the original understanding of the "privileges [and] immunities of citizens of the United States"<sup>7</sup> secured by the Fourteenth Amendment and (2) the vulnerability of this Amendment to judicial misconstruction in the *Slaughter-House Cases*.<sup>8</sup>

#### I. THE IDENTITY OF THE "PRIVILEGES AND IMMUNITIES" SECURED BY ARTICLE IV OF THE FOURTEENTH AMENDMENT

According to Justice Miller's majority opinion in the *Slaughter-House Cases*, the privileges guaranteed by Article IV are sharply distinct from those secured by the Fourteenth Amendment: the former involve the rights granted and established by the laws of the respective states, while the latter are rights created by federal law, including the Federal Constitution.<sup>9</sup> In *McDonald v. City of Chicago*, Justice Clarence Thomas, with express reliance on the work of Professor Kurt Lash, made a comparable claim.<sup>10</sup> If Justices Miller and Thomas are right, a consideration of the antebellum understanding of the Privileges and Immunities Clause would seem merely peripheral, only remotely relevant to an inquiry into the original understanding of the Fourteenth Amendment.

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7 U.S. CONST. amend. XIV, § 1.

8 83 U.S. (16 Wall.) 36 (1873).

9 *Id.* at 75–79 (concluding that "there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State" and that while the former, protected by the Fourteenth Amendment, are those rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws," the latter, guaranteed by Article IV, are the privileges that state law might "grant or establish").

10 561 U.S. 742, 822–38 (2010) (Thomas, J., concurring in part and concurring in the judgment) (citing, inter alia, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1294–96 (2010)).

There is, however, *abundant* evidence that the drafters of the Amendment believed that the privileges of citizenship to be protected therein were largely identical with those already embraced by Article IV.<sup>11</sup> As is well known, an initial draft of the Clause, as proposed by the Joint Committee on Reconstruction, would have empowered Congress “to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States.”<sup>12</sup> This proposal seemed the answer to the Senate’s resolution directing the Committee to establish, by constitutional amendment, congressional power to enforce certain existing constitutional provisions, including the Privileges and Immunities Clause.<sup>13</sup> And during Congress’s deliberations over the Amendment, a leading drafter and proponent, Ohio Congressman John Bingham, explained that Article IV protected the privileges and immunities of citizens *of the United States*,<sup>14</sup> an interpretation he had offered at least twice in Congress during the previous decade.<sup>15</sup> Several other participants also equated these privileges, including fellow Ohioans Samuel Shellabarger,<sup>16</sup> William Lawrence,<sup>17</sup> and John Sherman,<sup>18</sup> as well as Senators Jacob Howard and Luke Poland, of Michigan and Vermont, respectively.<sup>19</sup> And in the few years following their vote for the Amendment, both Bingham and Howard reiter-

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11 *McDonald*, 561 U.S. at 834 (noting that “much ambiguity derives from the fact that at least several Members described § 1 as protecting the privileges and immunities of citizens ‘in the several States,’ harkening back to Article IV, § 2”).

12 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

13 S. JOURNAL, 39th Cong., 1st Sess. 126 (1866).

14 CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).

15 See Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 11, 18 (1968) (discussing the District of Columbia Emancipation Bill in 1862 and an Oregon bill in 1859); see also APPENDIX TO THE CONG. GLOBE, 36th Cong., 2d Sess., 80 (1861) (Congressman Bingham declaring that “every citizen of the Republic, whether native or adopted, and into every part of which, under the Constitution . . . has the right to go, and there enjoy all the privileges and immunities of an American citizen, without let or hindrance from any local State government, or from any secession convention or lawless mob”). Bingham opposed an initial draft of West Virginia’s proposed constitution because its blanket prohibition on black immigration threatened, according to a proposal he helped draft, to exclude the “citizen[s] of either of the States of this Union” from the “privileges or immunities to which the said citizen[s] [are] entitled by the Constitution of the United States.” *The New State*, DAILY INTELLIGENCER (July 15, 1862), <http://chroniclingamerica.loc.gov/lccn/sn84026845/1862-07-15/ed-1/seq-2/>. Congress eventually voted to admit West Virginia on the condition that the anti-black-immigration provision be removed from the Constitution and be replaced with a provision for gradual emancipation. J.N. BRENNAMAN, A HISTORY OF VIRGINIA CONVENTIONS 66 (1902).

16 See Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 119–20 (2011).

17 CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

18 CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (stating that under Article IV, § 2, “a citizen of one State had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States”).

19 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (indicating Howard’s belief that the “privileges and immunities of citizens of the United States” included the “privileges and immunities of citizens of each of the States in the several States” guaranteed by Article IV);

ated the equivalence between Article IV privileges and the privileges of U.S. citizenship.<sup>20</sup> In sum, as David Bogen has concluded, “[t]he debates leave no room for doubt that the privileges or immunities clause of the Fourteenth Amendment referred to the same privileges and immunities as Article IV,” for “[e]very speaker” that discussed the relationship between the clauses “stated that the Fourteenth Amendment clause was derived from Article IV.”<sup>21</sup>

Further, during the ratification debates, supporters said flatly that the Privileges or Immunities Clause was “intended for the enforcement of [the Privileges and Immunities Clause].”<sup>22</sup> As James Bond has noted in his extensive surveys of the ratification debates, supporters of ratification (at least in the South) never stated nor even “implied that Section 1 guaranteed only those privileges and immunities peculiar to national citizenship, in contradistinction to [privileges] peculiar to state citizenship.”<sup>23</sup> These privileges were already in the Constitution, to be sure, but in Article IV.<sup>24</sup>

The identification of Article IV rights as privileges of American citizenship was not idiosyncratic or novel to the Reconstruction era. Many leading antebellum Americans, of various parties, identified Article IV’s privileges as the “privileges and immunities of citizens of the United States” or some variant thereof. During the 1858 Senate campaign, for instance, Abraham Lincoln called these privileges the “rights of a citizen of the United States,”<sup>25</sup> while Stephen Douglas labeled them the “rights and privileges awarded to

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*id.* at 2961 (including Poland’s claim that the Privileges or Immunities Clause “secures nothing beyond” the Privileges and Immunities Clause).

20 CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION* 36 n.17, 56–57 (2015) (citing CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867); CONG. GLOBE, 40th Cong., 3rd Sess. 1003 (1869)); see also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 78–79 (1993).

21 DAVID SKILLEN BOGEN, *PRIVILEGES AND IMMUNITIES* 51 (2003).

22 Madison, Letter to the Editor, *The Proposed Constitutional Amendment—What It Provides*, *N.Y. TIMES*, Nov. 15, 1866, at 2; see also Madison, Letter to the Editor, *The Constitutional Amendments—National Citizenship*, *N.Y. TIMES*, Nov. 10, 1866, at 2 (presenting the *Corfield* list of privileges as exemplars of “the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere” but had been “denied to the whole class, on account of color, and illy secured to *all* [citizens] in certain sections”).

23 JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 256–57 (1997).

24 James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 *AKRON L. REV.* 435, 450 (1985). Christopher Green’s recent survey yielded similar conclusions. See GREEN, *supra* note 20, at 52–55. For contemporaneous judicial authority, see *United States v. Rhodes*, 27 F. Cas. 785, 789 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151) (calling the rights secured by Article IV of the Confederation as “the privileges and immunities of free citizens in the United States”), and *Smith v. Moody*, 26 *IND.* 299, 305 (1866) (identifying Article IV privileges as “the privileges and immunities of general citizenship of the *United States*”).

25 Abraham Lincoln, Seventh and Last Debate with Stephen A. Douglas at Alton, Ill. (Oct. 15, 1858), in 3 *COLLECTED WORKS OF ABRAHAM LINCOLN* 283, 299 (Roy P. Basler ed., 1953).

citizens of the United States.”<sup>26</sup> A year later, Virginia’s governor Henry Wise reassured a Massachusetts abolitionist that she had a right to travel in Virginia because Article IV “guaranties to you the privileges and immunities of a citizen of the United States in the State of Virginia” including the right to travel “for any lawful and peaceful purpose.”<sup>27</sup>

Some antebellum jurists used similar language to explain the Clause. One authority was Charles O’Conor, one of the most celebrated attorneys in New York (and future presidential candidate and counsel for Jefferson Davis).<sup>28</sup> Having been hired by the Virginia legislature to defend the interests of a Virginia slaveowner sojourning in New York,<sup>29</sup> O’Conor argued that the Clause protected “the privileges of citizens of the United States”—that is, not “the privileges of citizens of the particular State in which they are wayfarers, or of the State in which they are domiciled, but the general privileges of a citizen of the United States.”<sup>30</sup> In *Dred Scott v. Sandford*, both Chief Justice Taney and Justice Nelson suggested a similar reading.<sup>31</sup>

Other prominent northern jurists likewise affirmed that Article IV secured the privileges of national citizenship. While Congress was drafting the Fourteenth Amendment, Indiana’s Supreme Court followed Justice Curtis’s dissent in *Dred Scott*<sup>32</sup> by calling these rights the “privileges and immunities of general citizenship of the *United States*.”<sup>33</sup> Perhaps most notably, two decades earlier, Justice Nathaniel Reed, of Ohio’s Supreme Court, had interpreted the Clause to read as follows: “That ‘the citizens (of the United States) of each State,’ or belonging to each State, ‘shall be entitled to all the privi-

26 Stephen Douglas, Speech at Bloomington, in *LIFE OF STEPHEN A. DOUGLAS, TO WHICH ARE ADDED HIS SPEECHES AND REPORTS* 120 (H.M. Flint ed., 1863) (speech delivered on July 16, 1858).

27 Reply of Governor Wise to Lydia Maria Child (Oct. 29, 1859), in *LETTERS OF LYDIA MARIA CHILD* 105 (John G. Whittier ed., 1882).

28 3 *THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 387 (1893).

29 N.Y. COURT OF APPEALS, REPORT OF THE LEMMON SLAVE CASE 15 (1860).

30 *Id.* at 44 (opening argument of Mr. O’Conor). In response, William Evarts (future Republican Attorney General of the United States) contested this distinction: “the natural and necessary construction of the clause is, that the privileges and immunities secured to citizens of each State, while within another, are the privileges and immunities that citizens of the State, where such privileges and immunities shall need to be claimed, enjoy,” or in other words “the privileges and immunities (whatever they may be) accorded in each to its own citizens.” *Id.* at 78 (argument of Mr. Evarts for Respondents). For antebellum judicial authorities suggesting that the Clause protected the rights of U.S. citizenship, see *Douglass’ Administrator v. Stevens*, 2 Del. Cas. 489, 502 (1819), and *Murray v. M’Carty*, 16 Va. (2 Munf.) 393, 398 (1811).

31 60 U.S. 393, 425 (1857) (stating that if a free black person had been a “citizen” under Article IV, “he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the *United States*” (emphasis added)); *id.* at 468 (Nelson, J., concurring) (raising the possible “right of the master with his slave of transit into or through a free State . . . being a citizen of the United States, which is not before us” which issue “turns upon the rights and privileges secured to a common citizen of the republic”).

32 *Id.* at 576 (Curtis, J., dissenting).

33 *Smith v. Moody*, 26 Ind. 299, 305 (1866).

leges and immunities of citizens (of the United States) in the several States.’”<sup>34</sup> According to Reed, the Clause protected certain national privileges throughout the Union: “the spirit and intention” of the Clause is “not to secure to the non-resident the same rights and indulgence with the resident in every State, but simply to secure to the citizen of the United States, whether a State resident or not, the full enjoyment of all the rights of citizenship, in every State throughout the Union.”<sup>35</sup> Not surprisingly, it was Ohioans in Congress who two decades later would most prominently endorse this “ellipsis” reading.<sup>36</sup>

For antebellum authorities, the Privileges and Immunities Clause protected the rights of “United States” citizenship in at least two ways. First, some explained that the Clause *established* a national *status* by naturalizing the citizens of each state in all the others.<sup>37</sup> Second, some thought the Clause secured national *privileges* because citizens of each of the states did enjoy them, and/or should enjoy them, in all the states of the Union.<sup>38</sup> This latter definition excluded those privileges of citizenship, such as political rights, that the states properly reserved to their own citizens—the privileges of state citizenship.<sup>39</sup> The qualifier “of the United States,” then, served to clarify that the Clause did not secure all the privileges of citizenship, but only those of national extent.

In none of these ways did the word “United States” refer to the *government* of the United States as a *creator* of rights. As both the Declaration of Independence and the Constitution indicate, the sovereign citizenry of the United States is a creator, not a creature, of the central government of the “United States.”<sup>40</sup> The citizens of the United States, armed with their privileges, created the (mere) government of the United States. Justice Miller, however, reversed this relationship<sup>41</sup> by effectively reading “privileges . . . of citizens of the United States” as the “privileges created by the government of the United States.”

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34 Wm. H. Williams, *The Arrest of Non-Residents for Debt—Constitutionality of the Law*, 2 WESTERN L.J. 265, 266 (1844).

35 *Id.* at 267.

36 *See supra* notes 16–19.

37 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (reporting Senator Howard’s explanation that Article IV’s effect “was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States”); THE FEDERALIST NO. 80 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

38 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (reporting Senator Howard’s identification of these rights as “the privileges and immunities of citizens of each of the States in the several States”).

39 *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422 (1857).

40 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (indicating that even before independence, the American people were “one People”); *id.* para. 32 (stating that the signatories are the representatives of “the good People of these Colonies”); U.S. CONST. pmbl.

41 *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (defining these rights as those that “owe their existence to the Federal government, its National character, its Constitution, or its laws”).



To support Miller's contra-textual distinction, Justice Thomas pointed to the antebellum treaties in which the United States pledged to admit the inhabitants of the ceded Louisiana, Florida, and Mexican territories to the privileges of citizens of the United States.<sup>42</sup> According to Thomas, these territorial provisions were generally thought to protect certain privileges arising under national, not state law, including the rights enumerated in the federal Bill of Rights, as distinct from the state-conferred privileges protected in Article IV. These national rights, they argue, were the privileges of citizenship to be protected by the Fourteenth Amendment.<sup>43</sup>

The major problem with this reading is twofold. First, there is little to no direct evidence that anyone involved in the adoption of the Amendment understood the Privileges or Immunities Clause in this way. That is to say, there is scant record of anyone drawing a connection with the territorial rights, let alone elaborating that the Amendment would turn the *treaty* rights, secured in only *some territories*, into *constitutional* rights, guaranteed in *all the states*.<sup>44</sup>

Second, this interpretation of the treaties is starkly inconsistent with the predominant antebellum interpretations. The original intent of the Louisiana and Florida treaties was to ensure that the inhabitants would not remain indefinitely in a subordinate status, but enjoy admission as citizens of an

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42 Treaty with France for the Cession of Louisiana, U.S.-Fr., art. III, Apr. 30, 1803, 18 Stat. 232, 233 ("The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States . . ."); Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, U.S.-Spain, art. VI, Feb. 22, 1819, 18 Stat. 712, 714 ("The inhabitants of the territories which His Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."); Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. IX, Feb. 2, 1848, 9 Stat. 922, 930 ("Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution . . .").

43 For Justice Thomas and Professor Lash's discussion of these treaties, see *McDonald v. City of Chicago*, 561 U.S. 742, 823–26 (2010) (Thomas, J., concurring in part and concurring in the judgment), and KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 47–66, 285–98 (2014). For the earliest scholarly notice of the relevance of these treaties to the Fourteenth Amendment, see Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 WHITTIER L. REV. 765, 783–90 (1985).

44 Professors Lash and Green cite a few connections between the Amendment and the territorial treaties in 1866, but these related to the Citizenship Clause (or its analogue in the Civil Rights Act) and not to the Privileges or Immunities Clause. GREEN, *supra* note 20, at 24–25; LASH, *supra* note 43, at 142–43, 186–87.

equal state of the Union.<sup>45</sup> The Clause, then, secured the inhabitants the collective right of “equal footing” as citizens of an equal state,<sup>46</sup> with collective naturalization extended concurrently with statehood.<sup>47</sup>

In the four decades before the Fourteenth Amendment, this original interpretation was significantly modified, as litigants, judges, and statesmen increasingly insisted that the treaties granted not eventual, collective statehood and concomitant naturalization, but immediate, pre-statehood rights, including the enjoyment of the status and rights of citizenship.<sup>48</sup> The treaties were increasingly read to admit individuals to certain privileges of citizenship—and these were to be enjoyed before and even after statehood. By implication, the treaties did not promise “equal footing” but subjected the states formed from these territories to special, *unequal* restrictions.

In identifying these individual rights, authorities did not generally distinguish them from Article IV privileges. Rather, the rights mentioned were largely identical. According to various antebellum authorities, these privi-

45 Secretary of State James Madison, who helped draft the Louisiana treaty, aimed “[t]o incorporate the inhabitants of the hereby ceded territory with the citizens of the United States on an equal footing,” that is to “constitut[e] them a regular and integral portion of the union.” EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812*, at 66 (1920). Congressman John Quincy Adams, who had helped draft the “Adams-Onís Treaty” (Florida) that bears his name, acknowledged that by force of the similarly worded Louisiana treaty, Arkansas was “entitled to admission as a slave State, as Louisiana and Mississippi, and Alabama, and Missouri, have been admitted, [for it] is written in the bond, and, however I may lament that it ever was so written, I must faithfully perform its obligations.” 12 CONG. DEB., 24th Cong., 1st Sess. 4681 (1836). His Spanish counterparts plainly had a similar understanding of the Florida treaty, for by the Spanish version, the inhabitants were promised admission “al goce de todos los privilegios, derechos é inmunidades de que disfrutaban los ciudadanos de *los demas Estados*,” that is in English, admitted “to enjoy all the privileges, rights and immunities enjoyed by citizens of *other States*.” D. LUIS DE ONÍS, *MEMORIA SOBRE LAS NEGOCIACIONES ENTRE ESPAÑA Y LOS ESTADOS-UNIDOS DE AMERICA, QUE DIERON MOTIVO AL TRATADO DE 1819*, at 10 (1820) (emphasis added); see also *City of New Orleans v. De Armas*, 34 U.S. (9 Pet.) 224, 235 (1835) (finding that the treaty provision was intended to ensure “that Louisiana shall be admitted into the union as soon as possible, upon an equal footing with the other states”).

46 *De Armas*, 34 U.S. (9 Pet.) at 235; see also *Coyle v. Smith*, 221 U.S. 559, 559 (1911) (setting forth this doctrine with respect to all states of the Union).

47 See *United States v. Laverty*, 26 F. Cas. 875, 876–77 (D. La. 1812) (No. 15,569); *Judson v. Eslava*, 1 Minor 2, 3 (Ala. 1820) (concluding that the treaty “does not secure Citizenship until the inhabitants are incorporated into the Union” so an alien residing in the Louisiana territory at the time of the cession but absent at the time of statehood was not a citizen by force of the treaty); *Durnford v. Johnson*, 2 Mart. (o.s.) 183, 201–02 (La. 1812); see also *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 170 (1892) (holding that “in the admission of a State a collective naturalization may be effected”).

48 *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (stating that the treaty “admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States”); *State v. Primrose*, 3 Ala. 546, 549 (1842) (stating that there could be “no doubt” that the treaty itself immediately “created citizens of the United States”).

leges included the right to acquire real as well as personal property,<sup>49</sup> the immunity against arbitrarily discriminatory taxation and other unequal burdens on property—including discriminations based on race and national origin<sup>50</sup>—and that equal protection and due process necessary to the equal enjoyment of these economic privileges.<sup>51</sup> These rights *may* have also

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49 *Tannis v. Doe*, 21 Ala. 449, 455 (1852) (mentioning the right “to hold lands in the United States”); *United States v. Lucero*, 1 N.M. 422, 434 (1869) (mentioning the right of Indians “to hold, purchase, or convey property as citizens and as men, without having to ask the sanction of any department of the government”); *Ward v. Broadwell*, 1 N.M. 75, 85 (1854) (identifying “the power of enjoying and acquiring property, of exercising the paternal and marital powers and the like”); B.F. Flanders, Chairman, Address of the State Republican Convention to the People of Louisiana (Sept. 25, 1865), in *PROCEEDINGS OF THE CONVENTION OF THE REPUBLICAN PARTY OF LOUISIANA* 20 (1865) (including the right to engage in “every trade and pursuit”); *cf.* *United States v. Ritchie*, 58 U.S. 525, 535–39 (1855) (indicating that the “privileges of citizenship” included the right to take and hold real property).

50 *People v. Naglee*, 1 Cal. 232, 242, 250–51 (1850) (upholding a special mining tax imposed on aliens and indicating that both the treaty *and* Article IV might prohibit such a tax on citizens naturalized under the Treaty); *United States v. Santistevan*, 1 N.M. 583, 591 (1874) (affirming that the treaty entitled former Mexican citizens to “the same rights of property as are enjoyed by all citizens of the United States”); JAMES MCKAYE, *THE MASTERSHIP AND ITS FRUITS* 13 (1864) (noting that under the treaty, “the free colored people of Louisiana have always held, and do now claim, that the government of the United States was solemnly bound to secure to them ‘all the rights, advantages, and immunities’ that were justly due to any other free inhabitants of the ceded territory” including “political and many civil rights and immunities”); Flanders, *supra* note 49, at 19–20 (declaring that “[t]he repressive influence of slaves prevented the full application of this article [of the Louisiana treaty]” and indicating that these rights included the right to testify in all civil and criminal cases, and the right to engage in “every trade and pursuit”). *But see* *Lodano v. State*, 25 Ala. 64, 65–67 (1854) (implicitly rejecting defendant counsel’s argument that by the Louisiana treaty, free black inhabitants had the same right as white inhabitants to buy and sell alcohol); *Tannis*, 21 Ala. at 455 (stating that a free black woman, naturalized under the treaty, would be entitled to the right to acquire property, “*if not incapacitated by the laws of the State in which the lands were situated,*” thus suggesting the validity of state laws imposing racial disabilities (emphasis added)).

51 *Les Bois v. Bramell*, 45 U.S. (4 How.) 449, 459 (1846) (acknowledging that the promise of admission to the rights of U.S. citizenship “implied, that after their admission they should be *equally protected*” (emphasis added)); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 376, 403 (1840) (Baldwin, J., concurring) (affirming that the former aliens had “the same constitutional right to invoke the protection of the *judicial power of the state or Union*, against the invasion of his rights of person or property, wherever he might be located” and asking rhetorically, “can the inhabitants enjoy the rights, privileges, and immunities of American citizens, if the United States can confiscate their lands, by declaring their titles void, and granting them to others; and could this be done after their incorporation?” (emphasis added)); *Delassus v. United States*, 34 U.S. 117, 133 (1835) (including “the perfect inviolability and security of property”); *Minturn v. Brower*, 24 Cal. 644, 660 (1864) (affirming that by the treaty “Mexicans then established in California, and having property therein, should retain and enjoy it or dispose of it as to them might seem proper” and assuming this guaranty applied to a post-statehood claim of former Mexicans naturalized by the treaty); *Ferris v. Coover*, 10 Cal. 589, 620 (1858) (indicating former

encompassed the right to vote (and other political rights) without regard to race.<sup>52</sup>

These rights, including the *possible* enjoyment of political rights, were largely identical to the enumerated privileges set forth in that most famous antebellum exposition of the Privileges and Immunities Clause—*Corfield v. Coryell*.<sup>53</sup> Therefore, in general, in the decades before the Civil War, there was largely a convergence in the interpretations of the respective “privileges and immunities” secured by the treaties and Article IV (according to *Corfield*).

## II. “THAT [LARGELY] UNEXPLORED CLAUSE OF THE CONSTITUTION”

### A. *Original Purpose and Early Interpretations—The Founders’ Consensus*

The Privileges and Immunities Clause of the Constitution (and its analogue in the Articles of Confederation) generated little commentary during the Founding era.<sup>54</sup> This silence probably resulted from the conservative, and thus uncontroversial, nature of the measure. Upon independence, the lack of a common king, empire, and subjecthood had threatened to make the former fellow-subjects effectively aliens vis-à-vis one another. The principal motive for the Clause was to ensure that despite the mutual independence of the states, the citizens of each would still enjoy a general citizenship throughout the Union—the former British North America.<sup>55</sup>

One question left largely unanswered was whether the standard of citizenship would be national or peculiar to each state. The Clause did not specify whether the privileges of citizenship were to be identified and/or defined with reference to a state, national, or other standard.

As I have previously noted, the early court decisions supported at least three different interpretations: (1) an interstate-equality guaranty by which a citizen of one state was entitled in the other states to an immunity against

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Mexican citizens “are entitled to the same protection in their property which is afforded to other citizens of the United States”).

52 *Carter v. Territory*, 1 N.M. 317, 340–46 (1859) (noting that a Mexican-born citizen was an eligible juror by force of the treaty). For extrajudicial evidence, see MCKAYE, *supra* note 50, at 13, Flanders, *supra* note 49, at 18–20 (suggesting that the rights of U.S. citizenship included an immunity from racial discrimination with regard to judicial and electoral rights), and CONG. GLOBE, 38th Cong., 2d Sess. 286 (1865) (remarks of Pennsylvania Rep. Kelley, arguing for black suffrage in the reconstructed South, in part, by citing the treaty, and noting that full citizenship, including equal voting rights, was required by the “solemn obligations assumed by the executive department of the national Government in the exercise of the treaty-making power”).

53 *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

54 For an extensive study of the limited Founding-era evidence, see David R. Upham, *Protecting the Privileges of Citizenship: Founding, Civil War, and Reconstruction*, in *CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY, HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY* 139 (Ronald J. Pestritto & Thomas G. West eds., 2005).

55 David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1487 (2005).

interstate discrimination; (2) an entitlement to certain national privileges of citizenship—primarily those travel and economic privileges enumerated in *Corfield*; and (3) an entitlement to certain privileges against adverse *federal* action.<sup>56</sup> The first position is largely identical to the interpretation that has prevailed at least since the *Slaughter-House Cases*.<sup>57</sup>

Still, in the first three decades of the Constitution, jurists appeared largely unconcerned by the possible tensions between these positions. The reason for this insouciance is probably, as Earl Maltz has indicated, that the Founders expected the several states, in their local laws, to accord their own citizens the same set of fundamental rights: “the idea of a state government failing to provide its own citizens generally with the rights discussed in *Corfield* was almost unthinkable.”<sup>58</sup> That is to say, there would likely be little distinction between the privileges of citizens of *the United States* and those of citizens *in the respective states*.

Indeed, at the risk of overstatement, it could be fairly said that at the founding, a general consensus as to the rights of humanity and citizenship prevailed, as evidenced in the state constitutions, the common law, and the Declaration of Independence—what Jefferson called an “expression of the American mind”—and of the “harmonizing sentiments of the day.”<sup>59</sup> During the ratification debates, both Federalists and Anti-Federalists celebrated this American consensus.<sup>60</sup> As James Wilson later remarked, the Constitution aimed not at “precise and exact uniformity in all [the states’] particular establishments and laws. It is sufficient that the fundamental principles of their laws and constitutions be consistent and congenial; and that some general rights and privileges should be diffused indiscriminately among them.”<sup>61</sup> As long as this consensus endured, a common standard of citizenship, including

56 *Id.* at 1498–510.

57 83 U.S. (16 Wall.) 36, 77 (1872) (“Its sole purpose was to declare to the several States, that whatever those rights, as you *grant or establish* them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.” (emphasis added)).

58 EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 34 (2003).

59 Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 7 *THE WRITINGS OF THOMAS JEFFERSON* 407, 407 (H.A. Washington ed., 1854).

60 *THE FEDERALIST* NO. 2, at 15 (John Jay) (Lawrence Goldman ed., 2008) (remarking that Americans are “one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs”); R.H. Lee, *Essentials of a Free Government*, in *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* 10, 11 (Walter Hartwell Bennett ed., 1978) (contending that the peoples of the several states have “derived all these rights from one common source, the British systems; and hav[e] in the formation of their state constitutions, discovered that their ideas relative to these rights are very similar”).

61 JAMES WILSON, *Of Man, as a Member of a Confederation*, in 1 *THE WORKS OF THE HONOURABLE JAMES WILSON* 319, 351 (Bird Wilson ed., 1804).

its privileges, would prevail across the several states without major controversy.

### B. *Emerging Strains to the Consensus*

But the Founders' consensus was fraught with ambiguities resulting from the institution of slavery. These ambiguities gave rise to multiple controversies; some involved the interstate privileges of citizenship under our national Constitution. As the historian Albert Hart noted a century ago, two questions emerged as the northern states abolished slavery. First, "did the clause on 'privileges and immunities of citizens' give a master a right to carry his slaves into another state?" Second, "[d]id it give negro citizens in one state the right to go into another state?"<sup>62</sup> Further, in the 1830s, a third controversy emerged as northern antislavery speech became more strident and southern proslavery citizens became less tolerant: Did the Clause allow antislavery citizens the right to travel in the slaveholding states and even communicate their opinions therein? These three questions would forcibly awaken the dormant issue of whether the standard of "privileges and immunities" would be national or local.

#### 1. Right of Slave Transit and Sojourning Slaveholders

In the first half of the nineteenth century, some traveling slaveholders sought judicial relief against increasingly intolerant northern antislavery laws. One constitutional argument was that the Privileges and Immunities Clause secured to sojourning slaveholders a right to travel with their slaves and thus an exemption from local antislavery law. The argument itself was remarkable in its novelty, given that the Framers of the Constitution had deliberately omitted such constitutional protection.<sup>63</sup> Even more remarkable was the argument's success. Before the 1850s, the supreme courts of Virginia,<sup>64</sup> Missouri,<sup>65</sup> and even Illinois<sup>66</sup> endorsed this reading of the Clause. In contrast, the high courts of both Massachusetts and Connecticut impliedly concluded

62 16 ALBERT BUSHNELL HART, *THE AMERICAN NATION, 1831-1841*, at 276-77 (1906).

63 See HENRY SHERMAN, *SLAVERY IN THE UNITED STATES OF AMERICA* 15 (1858) (noting that the latter clause of Article IV of the Confederation, omitted from the Constitution of 1787, "was evidently intended to protect the owner[ ] of slave property as well as ordinary merchandise, *in transitu* from the port of entry in one state to the place of ownership in another"); Upham, *supra* note 54, at 139, 146.

64 *Lewis v. Fullerton*, 22 Va. (1 Rand.) 15, 22 (1821), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

65 *Julia v. McKinney*, 3 Mo. 270, 272 (1833), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV ("The 2d section of the 4th article of the Constitution of the United States says that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. We are of opinion that it is the undoubted right of every citizen of the United States to pass freely through every other State with his property of every description, including negro slaves, without being in any way subject to forfeit his property for having done so, provided he does not subject his property by a residence to the action of the laws of the State in which he may so reside.").

otherwise.<sup>67</sup> But outside the courts, the asserted right of slave transit seems to have generated little discussion before 1850.

## 2. Right of Free Blacks to Enjoy the Privileges of Travel, Residence, Etc.

At the same time, Americans were growing sharply divided as to whether the freedmen (and their offspring) were citizens, and if so, what rights such citizens must enjoy under Article IV. While native-born free persons were entitled to citizenship by force of the common law,<sup>68</sup> here as elsewhere, racial prejudice overrode traditional principle.<sup>69</sup> Many states, especially in the South and Midwest, restricted the right of free blacks to travel,<sup>70</sup> to reside,<sup>71</sup> to acquire property,<sup>72</sup> to bear arms,<sup>73</sup> and to vote—and even to enjoy that basic protection of the laws secured by the rights to file suit<sup>74</sup> and to testify.<sup>75</sup>

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66 *Willard v. People*, 5 Ill. (4 Scam.) 461, 472 (1843) (affirming that by comity and the Privileges and Immunities Clause, citizens from other states have “a right of passage through the territory of another, peaceably for business or pleasure, and that too without the latter’s acquiring any right over the person or property,” including property in slaves (citing M. DE VATEL, *THE LAW OF NATIONS* 269–70, Bk. II, §§ 107–09 (Luke White trans., 1792))).

67 Without specifically mentioning the Clause, the courts asserted broadly that nothing in the Constitution gave any such right to sojourners. *Jackson v. Bulloch*, 12 Conn. 38, 40, 53 (1837); *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 224 (1836). For a good discussion of some of these cases, see PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 70–180 (MORRIS S. ARNOLD ed., 1981).

68 JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 287–88 (1978).

69 *Id.* at 288, 311–33.

70 On southern laws prohibiting the travel of free blacks, see for example Paul Finkelman, *When International Law Was a Domestic Problem*, 44 VAL. U. L. REV. 779, 806–812 (2010), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416–17 (1857) (referring to the “the special laws and from the police regulations” governing free blacks’ travel that the slaveholding states “considered to be necessary for their own safety”).

71 See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1865–73 (1993) (detailing southern and midwestern laws prohibiting black immigration). For cases upholding such laws, see for example *State v. Cooper*, 5 Blackf. 258 (Ind. 1839) (upholding Indiana’s exclusionary law), and *Nelson v. People*, 33 Ill. 390 (1864).

72 OR. CONST. art. I, § 35 (1859) (repealed Nov. 2, 1926) (prohibiting out-of-state free blacks from holding real estate).

73 Several cases affirm these statutes. See Clayton E. Cramer et al., “*This Right Is Not Allowed by Governments That Are Afraid of the People*”: *The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 831–33 (2010) (citing *Cooper v. Mayor & Aldermen of Savannah*, 4 Ga. 68 (1848); *State v. Newsom*, 27 N.C. (5 Ired.) 250 (1844)).

74 *Amy v. Smith*, 11 Ky. (1 Litt.) 326 (1822) (upholding Kentucky’s law restricting blacks’ right to file certain lawsuits).

75 At least five northern states—Ohio, Indiana, Illinois, Iowa, and California—adopted antebellum laws prohibiting blacks from testifying in cases involving whites. LEON F. LITWACK, *NORTH OF SLAVERY, 1790–1860*, at 93–94 (1961); see also *In re Dorsey* (E.D. Va.

Not surprisingly, courts in states enforcing such laws uniformly rejected the claims of free blacks, principally on the grounds that such persons were not citizens under the Constitution.<sup>76</sup> But an alternative argument was frequently made: even if they were citizens, free blacks were entitled only to *interstate* equality and not *interracial* equality or any other rights; that is, visiting free blacks were entitled to no exemption from local racist laws, but only to be treated as well, or as badly, as native, local free blacks.<sup>77</sup> In dicta, however, at least two northeastern courts tacitly disputed this strict interstate-equality reading.<sup>78</sup>

Unlike slave transit, black citizenship was a matter of prominent political controversy well before the 1850s. The three principal occasions for substantial debate were (1) the 1820 debates over the admission of Missouri under a state constitution that excluded free blacks, (2) the efforts in the 1840s by Massachusetts citizens and legislators to challenge the laws of South Carolina and Louisiana that prohibited the entry of free black seamen, and (3) the

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1864), *decision reprinted in* EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA, DURING THE GREAT REBELLION* app. 442, 442–43 (2d ed. 1865) (invalidating Virginia's law).

76 See, e.g., *Pendleton v. State*, 6 Ark. 509, 511 (1846) (upholding a law prohibiting the migration of free blacks); *Roberts v. Commonwealth* (C.C. Ky. 1848), in 74 NILES' NAT'L REG. 248, 248–50 (1848) (reaching the same holding and citing, inter alia, *State v. Cooper*, 5 Blackf. 258, which upheld Indiana's law).

77 *Costin v. Washington*, 6 F. Cas. 612, 613–14 (C.C.D.C. 1821) (No. 3266); *Wiley v. Parmer*, 14 Ala. 627, 631 (1848) (citing *Amy* and other cases to conclude that visiting citizens are entitled to the privileges enjoyed by local citizens *only* “under the like circumstances”); *Amy*, 11 Ky. (1 Litt.) at 335 (holding that because a law prohibiting blacks from filing certain lawsuits “operates as well upon citizens of this state, as upon those of any other, it cannot be a violation of the clause of the constitution in question”); *Leech v. Cooley*, 14 Miss. (6 S. & M.) 93, 99 (1846); *State v. Claiborne*, 19 Tenn. (1 Meigs) 331, 340 (1838) (holding that a newly resident free black was entitled only to the “privileges and immunities’ which free negroes” enjoy in Tennessee, and by the law of Tennessee, native-born emancipated slaves “are required to leave the State”). But see *Amy*, 11 Ky. (1 Litt.) at 344–45 (Mills, J., dissenting); *Roberts*, 74 NILES' NAT'L REG. at 249 (1848) (suggesting that if free blacks were citizens the Clause guaranteed certain absolute “civil rights,” including the “[t]he rights of personal security and property”).

78 *The Cynosure*, 6 F. Cas. 1102, 1103, 1103 n.3 (D. Mass. 1844) (No. 3529) (stating that the Privileges and Immunities Clause was “wholly ignored” by a Louisiana law that prohibited any “free negro, mulatto or person of color [from coming] into this state on board of any vessel or steamboat” (quoting 7 LAW REPORTER 227–28 (Peleg W. Chandler ed., 1845))); *Hobbs v. Fogg*, 6 Watts 553, 560 (Pa. 1837) (arguing against the full political citizenship of free blacks in Pennsylvania, because to confer such citizenship, would “overbear the laws imposing countless disabilities on him in other states,” with apparent reference to the Privileges and Immunities Clause); Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 892 n.268 (1997) (discussing *The Cynosure*); see also Editorial, *Remarks on the Opinion of the Supreme Court on the Rights of Coloured Persons in Relation to Suffrage*, 11 THE FRIEND 210, 220 (1838) (claiming that the *Hobbs* decision is “humiliating to a Pennsylvanian [for] we are not at liberty to adjust the rights of citizenship among ourselves without being limited and restrained by the slaveholding legislatures of the south” who deny to local free blacks “the rights which citizenship confers”).



debates in midwestern and western states of the 1840s and 1850s over proposals to restrict the immigration and commerce of free blacks.<sup>79</sup>

For the most part, advocates of black citizenship asserted or assumed that such laws violated the Privileges and Immunities Clause on the grounds that free blacks, as bona fide citizens, were constitutionally entitled to the privilege of travel, residence, commerce, etc.<sup>80</sup> These advocates rejected or conspicuously ignored the strict interstate-equality reading, even though *some* of the challenged laws (such as laws discriminating against migrating free blacks only) could have been challenged on that basis alone.<sup>81</sup> Friends of black citizens' rights were apparently unwilling to rely on the generosity that a state might show its own resident free blacks. As early as the 1820 Missouri debates (as in subsequent court cases), southern authorities had expressly invoked the right to expel free blacks in defense of the right of exclusion.<sup>82</sup> Racist public opinion in western states would surely have withheld such generosity to locals if the price were more black immigration.<sup>83</sup> Rather, proponents insisted that the Privileges and Immunities Clause guaranteed absolutely the rights of travel, residence, commerce, and perhaps to enjoy some other rights as well—state laws to the contrary notwithstanding.<sup>84</sup>

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79 For a good discussion of the Missouri Compromise debates concerning the Privileges and Immunities Clause, see Lewis H. LaRue, *Liberty, Equality, Privileges, Immunities: Lost Knowledge* 12–26 (Wash. & Lee Pub. Law & Legal Theory Research Paper Series, Working Paper No. 00-4, 2000), [http://papers.ssrn.com/paper.taf?abstract\\_id=247655](http://papers.ssrn.com/paper.taf?abstract_id=247655). For debates over Ohio's black laws and their alleged violation of the Privileges and Immunities Clause, see the legislative debates compiled in STEPHEN MIDDLETON, *THE BLACK LAWS IN THE OLD NORTHWEST* 49, 59–61 (1993). As to Massachusetts's objections, see *infra* text accompanying notes 87–89.

80 See *infra* subsection II.B.3

81 See *infra* Section III.D. But see REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLAINTIFF IN ERROR, CRANDALL VS. STATE OF CONNECTICUT (1834) (argument of William W. Ellsworth) (“[I]f citizens [of another state], then by the constitution of the U. States they are entitled to ‘all the immunities and privileges of the citizens of Connecticut,’ under like circumstances. I might say, perhaps, *any* citizens, but I have *no occasion to ask for more* than is in this state allowed to our colored population . . . .” (emphasis added)).

82 37 ANNALS OF CONG. 549 (1820) (statement of Rep. Barbour of Virginia) (“Has not Missouri a right to send off beyond her limits persons of color when free? Virginia has done it, and Missouri must have the same right as Virginia. And here Mr. B. repeated his question, had Missouri a power to get rid of all the free people of color now there, and yet not the power to prevent others from going there?”); see also *supra* note 50.

83 In the nineteenth century, slaveholding states became increasingly intolerant of the resident free-black population, and some western states gave serious consideration to proposals to expel the resident black population.

84 At times, some even argued that the Clause prohibited racial discrimination with respect to the suffrage, at least as applied to migrating black citizens. See, e.g., GEORGE H. MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 186 (1866) (noting that as early as 1778, Reverend William Gordon argued that “to exclude *freemen* from voting . . . for the colour of their skin[ ] . . . militates with the proposal in the Confederation, that the free inhabitants of each State shall, upon removing into any other State, enjoy all the privileges and immunities belonging to the free citizens of such State” (quoting William

In contrast, southern politicians, like southern courts, frequently invoked the interstate-equality, or *in pari conditione*, reading. The most prominent instance of this argument occurred in the 1840s, during the heated dispute over the “negro seamen acts.” By South Carolina’s law, for instance, free blacks found on board were subject to detention in local jails until the ship’s departure, and even to be sold as slaves if the shipowner failed to pay the expense of the detention.<sup>85</sup>

Controversial among some abolitionists since the 1820s, these laws generated national debate in the 1840s when Massachusetts leaders sought federal relief. In 1841, 150 prominent “citizens of the United States” from Massachusetts (including future Justice Benjamin Curtis<sup>86</sup>), petitioned Congress for action, and to “render effectual in their behalf the privileges of citizenship secured by the Constitution.”<sup>87</sup> In response, a majority of a House committee declared “no hesitation in agreeing with the memorialists, that the acts of which they complain, are violations of the privileges of citizenship guaranteed by the Constitution of the United States,” for “what may be the precise interpretation given to this clause of the Constitution” and “[h]owever extended or however limited may be the privileges and immunities which it secures, the citizens of each State are entitled to them equally, without discrimination of color or condition.”<sup>88</sup> In other words, the Clause prohibited, at least to some extent, interracial discrimination and not merely interstate discrimination. Still, the Committee concluded that Congress had no authority to provide that effective relief that could be found only in the courts or in the southern state legislatures.<sup>89</sup>

The minority report, however, authored by North Carolina’s Kenneth Rayner, reflected the southern opinion that even if free blacks could be citizens, each state “is bound to extend to the citizens of each and every state [only] the same privileges and immunities she extends to her own ‘under

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Gordon, *To the Convention of the Massachusetts-Bay*, INDEP. CHRON. (Boston), Jan. 8, 1778, at 1)); REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW-YORK 184–97 (Albany, E. & E. Hosford 1821) (reporting discussion by James Kent and others that racial discrimination as to voting rights might violate the Privileges and Immunities Clause).

85 Act of Dec. 20, 1822 and Act of Dec. 20, 1823, in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 461–66 (David J. McCord ed., 1840).

86 AUSTIN ALLEN, ORIGINS OF THE *DRED SCOTT CASE* 170 (Paul Finkelman et al. eds., 2006) (citing H.R. REP. NO. 27-80, at 7–8 (1849); Carl B. Swisher, *The Taney Period*, in 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 238–40, 628 (1974); Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995 (1996)). This position seems inconsistent with the interstate-equality reading later endorsed by Justice Curtis. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 583–84 (1857) (Curtis, J., dissenting).

87 ROBERT C. WINTHROP, *The Imprisonment of Free Colored Seamen*, in ADDRESSES AND SPEECHES ON VARIOUS OCCASIONS, at 351–52 (1852).

88 *Id.* at 341, 343.

89 *Id.* at 349–50.

like circumstances.’”<sup>90</sup> The quotation was probably to Story’s brief explanation of the Clause.<sup>91</sup> South Carolina’s legislature made a similar claim.<sup>92</sup>

Officials from Massachusetts and some other states openly repudiated this strictly interstate-equality reading. In an address sent to other state legislatures, the Massachusetts legislature called the *in-pari-conditione* reading “falcious to the last degree”:

What the precise extent of those privileges are, it is unnecessary here to inquire, so long as it must be conceded that they cover immunity from gross wrongs. So long as South Carolina arrogates the right of seizing, imprisoning, whipping and selling as slaves for life, any member of the social system of Massachusetts, without cause assigned, hearing or trial, just so long is that immunity referred to in the Constitution wholly set at nought.<sup>93</sup>

During the 1850 debates over the Fugitive Slave Act, the national argument over these acts resumed. Many northerners objected that southern violations of Article IV’s Privileges and Immunities Clause, by the negro seamen acts, had been more outrageous than any northern violation of Article IV’s Fugitive Slave Clause.<sup>94</sup> In response, leading Southerners again insisted that free blacks were entitled to not more than the “*privileges and immunities*

90 JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 82 (1951) (quoting H.R. REP. NO. 27-80 (1843)).

91 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1800, at 674–75 (1833).

92 Massachusetts cannot “challenge for them greater rights, immunities and privileges, within our territories, than are enjoyed by persons of the same class in South-Carolina.” *JOURNAL OF THE H. OF REPS. OF THE STATE OF SOUTH CAROLINA* 65 (1844).

93 Resolves Concerning the Treatment of Samuel Hoar by the State of South Carolina (Mar. 31, 1845), in *ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS, IN THE YEARS 1843, 1844, 1845*, at 626, 633, 635 (1845). Charles Sumner gave a more pointed response:

It is idle to reply that free blacks, natives of South Carolina, are [equally] treated to imprisonment and bondage. The Constitution of the United States does not prohibit a State from inflicting injustice upon its own citizens. . . . But a State must not extend its injustice to the citizens of *another* State,” for they are entitled to the “same ‘privileges and immunities’ as in his own State.”

Letter from Charles Sumner to Robert C. Winthrop (Feb. 9, 1843), in 2 *MEMOIRS AND LETTERS OF CHARLES SUMNER* 256, 259 (Edward L. Pierce ed., 1877); see also McPHERSON, *supra* note 75, app. at 442 (“Massachusetts may with perfect propriety say to Virginia—no matter with what wrongs, for the sake of sustaining a bloody and barbarous system, you outrage humanity in the persons of colored men born and reared upon your own soil, I demand of you, by the sacred guaranty of your constitutional obligations, that the humblest of my citizens when a sojourner in your territory, shall be secure in all the great fundamental rights of human nature.”).

94 Daniel Webster, *The Constitution and the Union* (Mar. 7, 1850), in *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 600, 620–21 (1886) (calling the imprisonment of free black seamen a “tangible and irritating cause of grievance at the North” as northerners deem “such imprisonments illegal and unconstitutional; and as the cases occur constantly and frequently, they regard it as a great grievance”).

accorded to citizens *in pari conditione* of the States where these laws obtain and are enforced.”<sup>95</sup>

Ohio’s Senator Salmon Chase responded by insisting that “the privileges of citizens in every other state” included “those rights and immunities, that security and that protection to which [*all*] *citizens* generally, male or female, minors or adults, are entitled.”<sup>96</sup>

But it was not merely the South where efforts were made to restrict the travel and economic rights of free blacks. In the Midwest and West, various proposals and laws generated extensive debate in the mid-nineteenth century. In Ohio, for instance, pro-racial-equality legislators successfully argued that the state’s “black laws”—which restricted free blacks’ right to travel, reside, work, and testify—violated Article IV, since the laws “require of the colored citizen coming from other States what is required of no other men, from any other section of our country” and thus “the colored citizens of other States, who come here to reside, are not by our laws entitled to the same ‘*privileges and immunities*’ as the citizens of this State.”<sup>97</sup>

### 3. Right of White Citizens to Travel (Even with Their Opinions)

Besides its efforts in Congress, Massachusetts attempted to launch a judicial challenge to these laws. The South’s violent response occasioned a parallel claim—that free white citizens of one state had not only an absolute right to travel but also, perhaps, to speak freely in the other states. In 1844, the Massachusetts legislature sent attorneys Samuel Hoar and Henry Hubbard to South Carolina and Louisiana, respectively, to file a federal suit against the

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95 PROCEEDINGS OF THE UNITED STATES SENATE, ON THE FUGITIVE SLAVE BILL 38 (1850); CONG. GLOBE, 31st Cong., 1st Sess. 1659 app. (1850) (remarks of Louisiana Sen. Pierre Soule); *see also id.* at 528 (remarks of Sen. Joseph Underwood of Kentucky); *id.* at 477 (South Carolina Sen. Andrew Butler). After the war, A.H. Stephens made a similar defense of the treatment of black seamen:

When [citizens of Massachusetts] are in South Carolina, they are upon the same footing as the citizens of that State, so far as concerns the criminal law of the State; and that imprisonment may be as rightfully resorted to, to *prevent* the commission of crime, as to punish it after its commission.

2 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE WAR BETWEEN THE STATES 74–75 (1870).

96 APPENDIX TO THE CONG. GLOBE, 31st Cong., 1st Sess., 477 (1850) (emphasis added). The most extensive, if not scholarly, elaboration of this argument occurred in a lengthy article, published in parts over several months in the *New Englander*. Joseph Larned, *Massachusetts and South Carolina*, 3 NEW ENGLANDER 411 (1845); *id.* at 606; 4 NEW ENGLANDER 195 (1846); *see also, e.g.*, 3 NEW ENGLANDER, at 621–23 (noting that the “absolute right[ ]” to enter could be *regulated* by quarantine laws but a racial exclusion law “*denies the title*”).

97 REP. OF THE SELECT COMM. ON THE SUBJECT OF THE REPEAL OF CERTAIN LAWS MAKING DISTINCTIONS ON ACCOUNT OF COLOR, in 45 JOURNAL OF THE H. OF REPS. OF THE STATE OF OHIO 123, 124–25 (1847). The Committee also concluded that the Constitution prohibited the states from reserving the common schools for whites, though the Committee did not specify the clause establishing the prohibition. *Id.* at 126; *see also* Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373, 377 & n.17 (2004) (citing and discussing Act of Feb. 10, 1849 § 6, 47 Ohio Laws 17, 18 (1849)).

negro seamen acts.<sup>98</sup> Both Hoar and Hubbard were effectively driven from the South under threat of mob violence, a threat sanctioned by state officials.<sup>99</sup> In response, many northerners complained that South Carolina and Louisiana had violated the Privileges and Immunities Clause not only by enforcing the negro seamen acts, but also by failing to protect Hoar and Hubbard's right to travel and file a lawsuit to challenge these acts.<sup>100</sup> As one contemporary recalled:

How such an event was related to the Constitution may be judged by reference to [the Privileges and Immunities Clause]. The anti-slavery men of the North bore this patiently, and only raised another degree their determination to achieve that sublime revenge which the poet [John Greenleaf] Whittier invoked on that occasion: "Have they chained our free-born men? Let us unchain theirs."<sup>101</sup>

The treatment of Hoar and Hubbard was only the most prominent example of the intolerance faced by white antislavery citizens visiting the South. From the 1830s onward, it became increasingly unsafe to travel in the South if one simply held, let alone expressed, convictions friendly to the freedom and citizenship rights of blacks, due to both legal restriction and politically sanctioned violence. There were few reported cases of prosecutions, because tolerated mob violence proved so effective.<sup>102</sup> One (in)famous incident involved an Oberlin student, Amos Dresser, who having been "found in possession of an anti-slavery paper with one of the so-called incendiary pictures, . . . was severely whipped and expelled from the South."<sup>103</sup>

In response to these outrages, some antislavery northerners understandably turned to the Privileges and Immunities Clause as a source of not only the right to travel, but also the freedoms of opinion, speech, and press.<sup>104</sup> With reference to the Dresser incident, Iowa's George Ellis declared that, by the Clause, a citizen of Iowa should enjoy in Louisiana "the right of free speech and free thought" as well as "the right of locomotion," for "he is just as completely guarded and protected [there] as if he were in his own State of

98 1 HENRY WILSON, *HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* 582-83 (Boston, Houghton, Mifflin and Co., 1872).

99 *Id.* at 578-86.

100 See *Mr. Hoar's Mission*, 7 S. Q. REV. 455, 456 (1845). For a good post-bellum, anti-slavery account of the "imprisonment of colored seamen" and Hoar and Hubbard's trips, see WILSON, *supra* note 98, at 576-86.

101 *The Anti-Slavery Revolution in America*, 86 LITTELL'S LIVING AGE 193, 202 (1865). The quotation is from Whittier's "To Faneuil Hall," which, Whittier explained, was "[w]ritten in 1844, on reading a call by 'a Massachusetts Freeman' for a meeting in Faneuil Hall of the citizens of Massachusetts, without distinction of party, opposed to the annexation of Texas, and the aggressions of South Carolina, and in favor of decisive action against slavery." JOHN G. WHITTIER, *VOICES OF FREEDOM* 155, 157 (4th ed. 1846).

102 HART, *supra* note 62, at 235.

103 *Id.* at 236. For other cases, see *id.* at 234-37.

104 See generally MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 138-39 (1986).

Iowa.”<sup>105</sup> These rights are to be enjoyed “wherever the flag of this Union may wave.”<sup>106</sup> In a similar vein, Yale jurist Joseph Larned<sup>107</sup> applied *Corfield*, Blackstone, and other authorities to reject the *in pari conditione* reading, and to vindicate the “absolute and unqualified” protection for “civil immunities in their largest and most extensive sense,” which rights included not only certain rights of person and property, but also the “rights of conscience.”<sup>108</sup>

The claim that the privileges of citizenship embraced the freedoms of communication seemed a plausible conclusion from *Corfield*. Justice Bushrod Washington had there defined “privileges and immunities of citizens” as those “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.”<sup>109</sup> The freedoms of speech and press would seem to qualify. Washington’s law teacher, James Wilson, had written, “The citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures”;<sup>110</sup> Wilson expressly identified this right as a privilege of *citizenship*, distinct from the rights of aliens.<sup>111</sup> In a similar vein, Kent argued that because the freedoms of speech and press were

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105 2 STATE OF IOWA, DEBATES OF THE CONSTITUTIONAL CONVENTION 906 (Luse, Lane & Co. 1857). Accord 9 COMMONWEALTH OF PENNSYLVANIA, PROCEEDINGS AND DEBATES OF THE CONVENTION TO PROPOSE AMENDMENTS TO THE CONSTITUTION 372 (Harrisburg, Packer, Barrett, and Parke 1838) (indicating that “[the] glorious privileges of American citizenship” included “the free interchange and communication of thoughts and opinions”).

106 2 STATE OF IOWA, DEBATES OF THE CONSTITUTIONAL CONVENTION, *supra* note 105, at 907; see also PROCEEDINGS OF THE FOURTH NEW ENGLAND ANTI-SLAVERY CONVENTION 123 (Boston, Isaac Knapp 1837) (declaring, with apparent reference to the Privileges and Immunities Clause, that “in the slaveholding States, by Lynch clubs and vigilance committees, as well as by unconstitutional laws, the use of the U.S. Mail—the *freedom of conscience, of locomotion, of speech, and of the press, is denied to those citizens of the United States . . . who hold to the doctrine of the Declaration of American Independence, as evinced in the cases of John Hopper of New York, of Albe Dean of Connecticut, and Amos Dresser of Massachusetts*” and that “by these outrages, the slaveholding States of this confederacy have already deprived a large portion of the citizens of the free States, of most of those privileges and blessings, for the security of which the Union was established” (emphasis added)).

107 2 CONNECTICUT BIOGRAPHICAL DICTIONARY 2008–2009 EDITION, 374–75 (Caryn Hannan ed. 2008) (providing short biography of Joseph Gay Eaton Larned).

108 Joseph Larned, *Massachusetts and South Carolina*, 3 NEW ENGLANDER 430 (1845). The rights protected were privileges of citizenship, and not universal human rights, for these had been “rights to which strangers to the British state had only a qualified and contingent title, and that to which persons born in the realm had, by the cardinal doctrines of the common law, an absolute and unqualified title.” *Id.* at 430.

109 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

110 JAMES WILSON, *Of Citizens and Aliens*, in THE WORKS OF THE HONOURABLE JAMES WILSON 443 (Bird Wilson ed., 1804) (emphasis added).

111 *Id.* That the freedoms of communication, especially political communication, were privileges of citizenship, and not universal human rights, was strongly suggested by Founding-era documents. See, e.g., OHIO CONST. art. VIII, § 6 (1803) (guaranteeing only to “[e]very citizen” the “indisputable right to speak, write or print upon any subject as he thinks proper, being liable for the abuse of that liberty”).

so essential to that “control over their rulers, which resides in the free people of these United States” that it has “become a constitutional principle in this country, that ‘every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press.’”<sup>112</sup>

Although analytically persuasive, this elaboration of *Corfield* remained outside the political mainstream for at least three reasons. First, citizens and officials in the South would simply not tolerate the open communication of anything resembling abolitionism. In denying Hoar the right to travel and challenge South Carolina’s laws, the state’s legislature heartily approved the coercion: Hoar came here “not as a citizen of the United States, but as the emissary of a Foreign Government, hostile to our domestic institutions, and with the sole purpose of subverting our internal peace.”<sup>113</sup> Louisiana’s legislature ratified Hubbard’s violent expulsion in similar terms.<sup>114</sup> Second, northerners lacked the political will to even suggest the extensive federal coercive presence that was necessary to ensure this freedom.<sup>115</sup> Indeed, some antislavery jurists tended to insist on the right to travel with one’s opinions, but not necessarily the right to communicate those opinions in other states.<sup>116</sup> Third, significant northern authority, especially James Kent, had supported the strict interstate-equality reading,<sup>117</sup> which was easily invoked to

112 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (1827) (quoting NEW YORK CONST. art. VII, § 8 (1821)); see also JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 263 (1842) (citing Blackstone to the effect that “the liberty of the press, properly understood, is essential to the nature of a free state”).

113 H.R. 1844 Leg. (S.C. 1844); Letter of Thomas W. Glover, Clerk of House of Representatives, to J.H. Hammond, Governor of South Carolina (Dec. 6, 1844), in JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA SESSION 1845–1846 Doc. No. 1, at 87 (1845).

114 The legislature protested “against the interposition . . . between the police regulations of this state and persons affected by them as an interference subversive of our domestic order and dangerous to the public peace” and proclaimed that “this state *will not recognize nor tolerate* any mission, private or public, for the purpose of bringing and prosecuting suits in behalf of colored persons at the expense of that state.” 3 WESTON ARTHUR GOODSPEED, THE PROVINCE AND THE STATES 111 (1904) (quoting this resolution) (emphasis added).

115 Editorial, *A Waste of Labor*, N.Y. TIMES (Mar. 16, 1860), <http://www.nytimes.com/1860/03/16/news/a-waste-of-labor.html> (noting that mob violence in the South was so prevalent against anyone suspected of antislavery opinions that any federal statute protecting such travelers would be a mere “dead letter”).

116 WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY 76–77 (2d ed. 1845) (contending that both the laws and lawless violence prevalent in the slaveholding states directly violate the Clause by preventing free black citizens and antislavery citizens from traveling in those states—even where the antislavery citizens had written against slavery in the free states).

117 See, e.g., *Livingston v. Van Ingen*, 9 Johns. 507, 577 (N.Y. 1812) (opinion of Kent, C.J.) (affirming that the Clause “means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights”); 2 KENT, *supra* note 112, at 61 (stating, with reference to racial discrimination in particular, that “if [citizens] remove from one state to another, they are entitled to the privileges that

reconcile the Clause with these brute political facts. If residents of the South would be subject to mob violence for expressing antislavery opinion, it was said, visitors from the North could constitutionally demand no better treatment.<sup>118</sup>

*C. That Politically Marginalized and Judicially “Unexplored Clause”*

Although politically prominent, these debates proved only sporadic, and were effectively marginalized in the wake of the Compromise of 1850. In the 1852 election, the two major parties effectively declared all slavery-related issues “settled” and denounced as troublemakers those who would raise these question again.<sup>119</sup> Former northern grievances were therefore relegated to a third party, the Free Soil Party, which declared,

the practice of imprisoning colored seamen of other states while the vessels to which they belong lie in port, and refusing the exercise of the right [by Hoar and Hubbard] to bring such cases before the Supreme Court of the United States, to test the legality of such proceedings, is a flagrant violation

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persons of the same description are entitled to in the state to which the removal is made, and to none other”).

118 POST OFFICE DEPARTMENT, REPORT OF THE POSTMASTER GENERAL (Dec. 1, 1835), *reprinted in* APPENDIX TO THE CONG. GLOBE, 24th Cong., 1st Sess. 6, 9 (1835) (“[T]his clause cannot confer on the citizens of one State, higher privileges and immunities in another, than the citizens of the latter themselves possess. It is not easy, therefore, to perceive how the citizens of the Northern States can possess, or claim the privilege of carrying on discussions within the Southern States by the distribution of printed papers which the citizens of the latter are forbidden to circulate by their own laws.”); S. COMM. ON THE JUDICIARY, INTERFERENCE OF FEDERAL OFFICERS IN ELECTIONS (Jan. 31, 1839), *reprinted in* APPENDIX TO THE CONG. GLOBE, 25th Cong., 3d Sess. 157, 160 (1839) (stating that federal law cannot constrain political activities of federal officeholders, for the states have the exclusive authority “to prescribe the privileges and immunities of their citizens”); *see also* *The North and South*, 4 MD. COLONIZATION J. 35, 53–54 (1847) (denying that northerners have “any right to speak and write to us” on slavery, for if in a southern state, such as Virginia, they have only “‘all privileges and immunities’ which Virginians themselves there enjoy”).

119 Gerhard Peters & John T. Woolley, *Democratic Party Platform of 1852*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29575> (last visited Feb. 30, 2015) (resolving that an affirmation of states’ rights embraces “the whole subject of slavery agitation in Congress” and that, in light of the Compromise of 1850, “the democratic party will resist all attempts at renewing, in congress or out of it, the agitation of the slavery question, under whatever shape or color the attempt may be made”); Gerhard Peters & John T. Woolley, *Whig Party Platform of 1852*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25856> (last visited Feb. 30, 2015) (accepting the Compromise of 1850 and declaring that “we deprecate all further agitation of the question thus settled, as dangerous to our peace; and will discountenance all efforts to continue or renew such agitation whenever, wherever, or however the attempt may be made”).



of the Privileges and Immunities Clause.<sup>120</sup> The election left this noisy little party with only four seats in the House of Representatives and 4.9% of the presidential vote.<sup>121</sup>

Besides this political marginalization, the Privileges and Immunities Clause remained largely unexplored even by jurists. As Attorney General Caleb Cushing remarked in 1856, the provision remained “that unexplored clause of the constitution.”<sup>122</sup> Indeed, before the late 1850s, the judiciary had not offered any clear, authoritative interpretation. As one jurist wrote at time, “[t]his clause has not yet received the attention which from its importance it would have been expected to command. It has been considered but in a few instances, and no general authoritative exposition of it has yet been declared.”<sup>123</sup>

This *judicial* reluctance was surely related to the deep *political* divides, whether over black citizenship or otherwise. When, in 1856, the Supreme Court finally decided a case arising under the Clause, Justice Curtis, speaking for a unanimous bench, carefully avoided any general interpretation, partly because the provision involved “matters of delicacy and great importance.”<sup>124</sup>

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120 Free Democratic Convention—1852: Platform, in *A POLITICAL TEXT-BOOK FOR 1860*, at 21 (New York, The Tribune Assoc. 1860).

121 DONALD R. DESKINS, JR. ET AL., *PRESIDENTIAL ELECTIONS, 1789–2008* 149 (2010).

122 Caleb Cushing, *Relation of Indians to Citizenship*, 7 *OPINION ATT'Y GEN.* 746, 751 (1856).

123 THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 600–601 (New York, John S. Voorhies 1857). In a footnote, the author explained that “[t]he case known as the Dred Scott Case, recently decided by the Supreme Court of the United States, is understood to have incidentally discussed this subject; but we have as yet no authoritative report of the judgment of the court.” *Id.* at 604, n.†; see also CHARLES B. GOODRICH, *THE SCIENCE OF GOVERNMENT* 285, 288 (Boston, Little, Brown and Co. 1853) (stating that the Clause’s “import and effect has not been the subject of consideration or of adjudication in the courts of the United States” and the Clause has “been the subject of error and mistake in opinions which have been put forth”); *The Case of Dred Scott*, 20 *MONTHLY L. REP.* 61, 80 (1857) (“Precisely what rights are guarantied by this clause, or how it is to be enforced, has never been judicially determined, nor has its practical construction been uniform . . .”).

124 *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1855) (“We do not deem it needful to attempt to define the meaning of the word *privileges* in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true, when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character, that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.”); see also *Sears v. Bd. of Comm'rs*, 36 Ind. 267, 276 (1871) (making this same claim in precisely these words); *Ward v. State*, 31 Md. 279, 290 (1869) (stating, with reference to *Conner*, that “[t]he Supreme Court [has] declined to give a general construction to this clause”); *CONG. GLOBE*, 39th Cong., 1st Sess. 2760, 2765 (remarks of Sen. Howard) (noting that the Supreme Court, in *Conner*, had refrained from describing either the “nature” or the “extent” of the rights guaranteed by the Clause). Justice Curtis, the author of the *Conner* opinion, was well aware of one of these delicate matters, for fifteen years earlier, he had signed the controversial petition challenging

### III. THE MEANINGS OF THE PRIVILEGES AND IMMUNITIES CLAUSE: 1857–1861

In the four years before the Civil War, however, the Privileges and Immunities Clause suddenly became a prominent subject of sustained national debate, whether in courts, legislative halls, or among the people at large. The aggravated fracturing of the American polity occasioned at least three distinct and conflicting interpretations of the Clause: (1) a pro-slavery, absolute-rights reading; (2) an anti-slavery, absolute-rights reading adopted by Republicans, which *sometimes* incorporated claims of black citizenship; and (3) the strictly interstate-equality reading still held by many northern and border-state Democrats, especially on the bench.

#### A. *The Pro-Slavery Absolute-Rights Reading*

In the 1850s, in courts, legislatures, and the press, southern Democrats and even some of their northern allies began to insist that the Privileges and Immunities Clause guaranteed a right of slave transit as part of the national privileges of citizenship secured by Article IV. As indicated above, the argument had first appeared in a handful of obscure cases. But in the 1850s, this litigation achieved national prominence. In California, a citizen from Mississippi, in a suit to recover custody of an alleged slave, argued before the state's supreme court that by force of the Privileges and Immunities Clause, he was exempt from local antislavery law while temporarily in California.<sup>125</sup> On the other coast, and more famously, this same argument was made in New York by Charles O'Connor, who had been hired by the State of Virginia<sup>126</sup> to defend the slaveholding rights of one of Virginia's citizens: Juliet Lemmon, whose alleged property (eight slaves) had been emancipated by New York authorities while she was sojourning in the state.<sup>127</sup> O'Connor argued that the Clause secured the privileges of U.S. citizenship:

The Constitution recognizes the legal character "citizen of the United States" as well as citizen of a particular State. The latter term refers only to *domicil*; for every citizen of a particular State is a citizen of the United States. And the object of this section is to secure to the citizen, when within a State in which he is not domiciled, the general privileges and immunities which, in the very nature of citizenship, as recognized and established by the Federal Constitution, belonged to that *status*; so that by no partial and adverse legislation of a State into which he may go as a stranger or a sojourner can he be deprived of them.<sup>128</sup>

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South Carolina's law restricting the travel of free blacks. See WINTHROP, *supra* note 87, at 351.

125 *Ex parte Archy*, 9 Cal. 147, 152–53 (1858) (argument of counsel for petitioner) ("Is [the Clause] consistent with a State regulation which would deny the immunities of a citizen in this State to a citizen of the State of Mississippi?").

126 FINKELMAN, *supra* note 67, at 302.

127 *Lemmon v. People*, 20 N.Y. 562, 599–600 (1860).

128 REPORT OF THE LEMMON SLAVE CASE, *supra* note 29, at 25 (internal citations omitted).

Under the Clause, every citizen sojourning in another state enjoys not “the privileges of citizens of the particular State in which they are wayfarers, or of the State in which they are domiciled, but the general privileges of a citizen of the United States;” he is entitled

to the rites of hospitality, to the ordinary enjoyment of society during his temporary sojourn with us, the undisturbed possession of his property, and the undisturbed enjoyment of his domestic relations, and of every accessory and incident of a purely personal or domestic character which he may be permitted to enjoy,

provided he does not invade “the peace and happiness of our people.”<sup>129</sup> In opposition, William Evarts endorsed the simple interstate-equality reading: the Clause merely secures “to the citizens of every State, within every other, the privileges and immunities (whatever they may be) accorded in each to its own citizens.”<sup>130</sup>

The highest courts in both California and New York gave serious consideration to this claim. In California, the court agreed. After citing with approval both the *Dred Scott* case and the pro-slave-transit interpretations offered by the Missouri and Illinois courts,<sup>131</sup> the judges declared “that the right of transit through each State, with every species of property known to the Constitution of the United States, and recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity.”<sup>132</sup> This conclusion was endorsed by both the participating judges.<sup>133</sup> A third member of the court, Stephen Field—the future author of the Court’s seminal opinion in *Paul v. Virginia*<sup>134</sup>—was conspicuously absent<sup>135</sup> and remained deafeningly silent about this controversial decision throughout his entire life.<sup>136</sup>

129 *Id.* at 44, 109.

130 *Id.* at 78.

131 See *Willard v. People*, 5 Ill. (4 Scam.) 461, 472 (1843); *Julia v. McKinney*, 3 Mo. 270, 272 (1833); see also *supra* notes 65–66 (discussing these cases).

132 *Ex parte Archy*, 9 Cal. 147, 163–64 (1858). The Court added, however, that local law would equally apply to the sojourner “in the prosecution of his business in this State,” so the sojourner could travel with and enjoy the services of his slaves, but not “hire out his slave, or use his labor in the prosecution of any business.” *Id.* at 168–69.

133 *Id.* at 171.

134 75 U.S. (7 Wall.) 168 (1868).

135 Judge Joseph Grodin, without citation, has written that Field “was on leave from the court, and out of the state at the time Archy’s case was decided.” Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141, 147 (2004).

136 CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 74 (Archon Books 1963) (1930) (“If Field sat in the case he recorded no expression of his opinion.”); see also STEPHEN J. FIELD & GEORGE C. GORHAM, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA, WITH OTHER SKETCHES 122–42 (1893) (recounting his experiences on the California court but making no mention of this (in)famous case). At the time, one local newspaper reportedly had the “assurance that Judge Field does not concur.” William E. Franklin, *The Archy Case: The California Supreme Court Refuses to Free a Slave*, 32 PAC. HIST. R.

In New York, however, a five-justice majority rejected the claim and adopted the interstate-equality reading. Writing for the court, Judge Denio held that the Clause meant simply “that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess.”<sup>137</sup> Still, three of the eight justices rejected this interpretation, sided with Virginia, and endorsed the right of slave transit, whether on constitutional or other grounds.<sup>138</sup>

The pro-slavery argument appeared prominently outside the courts as well. In 1858, former Attorney General Cushing seemingly complained that northern states had engaged in “abandonment or perversion of the Constitution” by assuming “to confiscate the property and other domestic rights of citizens of the South, sojourning or in transit at the North.”<sup>139</sup> Some pro-slavery jurists made similar claims.<sup>140</sup>

Prominent Democratic periodicals and jurists made the same argument, including the *Washington Union*, an organ of the Buchanan administration,<sup>141</sup> and the Jacksonian *Democratic Review*.<sup>142</sup> In the *Review*, Horace Dresser, like O’Conor, insisted that the Clause secured to sojourners certain absolute rights throughout the Union: the privileges of a “federal, national, or American citizenship,”<sup>143</sup> defined as the “immunities and privileges of citizenship” that subjects in British North America had enjoyed before independence “in their colonial capacity”; found in “the great catalogue of English

137, 152 (1963) (quoting SACRAMENTO DAILY UNION (Feb. 18, 1858)). I have not found any record of Field publicly making this assurance.

137 Lemmon v. People, 20 N.Y. 562, 608 (1860).

138 *Id.* at 632–37 (Clerke, J., dissenting); *id.* at 644 (Comstock, C.J., dissenting); *id.* (Selden, J., dissenting).

139 Letter from Sen. Henry Wilson to Hon. Caleb Cushing 5 (1860) (quoting Caleb Cushing’s remarks).

140 I THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 199, 316 (1858) (affirming that a bona fide citizen enjoys certain “privileges given to citizens of the United States” and arguing, with apparent reference to the Privileges and Immunities Clause, that the Constitution secures to the citizen the same “privileges and protection . . . awarded to him, through comity, by the courts of independent nations,” including the right of slave transit); M.T. WHEAT, THE PROGRESS AND INTELLIGENCE OF AMERICANS 591 (2d ed. 1862) (affirming that under the Clause, “[t]he title of citizen of the United States . . . protects the person and property . . . of whatever kind, of a citizen within the whole limits of the United States, as the person of the citizen is passing *in transitu* with his property” (emphasis added)). Marvin Wheat was a pro-slavery jurist from Kentucky. See HERMAN BELZ, A NEW BIRTH OF FREEDOM 28 (2000).

141 According to the editors, by the Clause, “[e]very citizen of one State coming into another State has, therefore, a right to the protection of his person, and that property which is recognized as such by the Constitution of the United States, any law of a State to the contrary notwithstanding.” APPENDIX TO THE CONG. GLOBE, 35th Cong., 1st Sess. 199 (1858) (quoting Editorial, *Free Soilism*, WASH. UNION (Nov. 17, 1857), <http://chroniclingamerica.loc.gov/lccn/sn82006534/1857-11-17/ed-1/seq-2/> (also cited in Lash, *supra* note 10, at 1278, n.169)).

142 Horace Dresser, *Slavery and the Slave Trade*, 43 U.S. DEMOCRATIC REV. 304, 307–11 (1859).

143 *Id.* at 308.

usages and customs,” including, ultimately, the right to become “a landholder, a householder, a slaveholder,” etc.<sup>144</sup> Unlike Justice Washington, then, Dresser found the standard not in the rights enjoyed by citizens of all free governments, including the several states since independence, but in the rights enjoyed just before independence and only in the North American colonies, where slavery was legal.<sup>145</sup> Conversely, Dresser repudiated Kent’s interstate-equality reading—and attributed Kent’s “loose and careless” interpretation to a failure to acknowledge “a fixed, permanent, federal citizenship, contradistinguished from State citizenship.”<sup>146</sup>

During the winter of secession, Confederate leaders endorsed this interpretation. In December 1860, Senator Jefferson Davis charted that some northern states had violated the citizens’ constitutional right to “free transit over all the other states” by seizing “property recognized by the Constitution of the United States, but prohibited by the laws of that State,”<sup>147</sup> and South Carolina’s secession convention similarly alleged that in New York, “even the [constitutional] right of transit for a slave has been denied by her tribunals.”<sup>148</sup> Finally, to avoid any such misconstruction, in their new and improved constitution, Confederate leaders attached a clarificatory provision to the Privileges and Immunities Clause:

The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; and shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.<sup>149</sup>

This pro-slavery interpretation must be considered novel, if not radical, in at least two respects. First, the evidence from the framing of the Constitution indicates that it was wholly opposed to the original understanding of Article IV.<sup>150</sup> Indeed, the claim could not have satisfied the standard famously proclaimed by the Virginia slaveholder Bushrod Washington in

144 *Id.* at 307.

145 If the English *common law*, instead of North American *colonial law*, had provided the national standard of “privileges and immunities,” neither slavery nor the right of slave transit would have been included. 2 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 368 (1862).

146 Dresser, *supra* note 142, at 310.

147 CONG. GLOBE, 36th Cong., 2d Sess. at 29–30 (1860) (quote of Sen. Jefferson Davis).

148 Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union (Dec. 24, 1860), in 2 ALEXANDER H. STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES* 671, 674 (1870).

149 CONFEDERATE CONST. art. IV. § 2, cl. 1 (1861); *see also, e.g.*, A.O.P. Nicholson, *The Permanent Constitution of the Confederate States*, NASHVILLE UNION & AM. (July 10, 1861), <http://chroniclingamerica.loc.gov/lccn/sn85038518/1861-07-10/ed-1/seq-2/> (stating that this provision does “no more than place upon the old Constitution the meaning which its framers intended it to have” and “the true reading of the old Constitution, as expounded by the highest judicial tribunal”). Nicholson was an ex-Senator from Tennessee and the postbellum Chief Justice of the Tennessee Supreme Court.

150 *See* Upham, *supra* note 54, at 139–45.

*Corfield*. The right to hold slaves was *not* enjoyed by the citizens of all free governments,<sup>151</sup> nor had it been enjoyed by the citizens of the several states since independence.<sup>152</sup>

Second, this new position marked a stark reversal from the position taken by southerners, and especially South Carolina, just a few decades earlier. This new position, affirming a constitutional right to *exemption* from local laws, could seemingly support the claims made on behalf of traveling black citizens. When faced with this implication in the *Lemmon* case, O'Connor provided this "very short answer. It is this: these free negroes are not and never can be made citizens of the United States."<sup>153</sup> In a similar vein, in 1859, Mississippi's High Court of Errors and Appeals frankly acknowledged that its treatment of free blacks from other states was flatly inconsistent with blacks' enjoyment of the rights of citizenship.<sup>154</sup> No longer did pro-slavery Americans use the interstate-equality reading of the Privileges and Immunities Clause to reject blacks' Article IV claims. Rather, pro-slavery jurists relied exclusively on the non-citizenship of free blacks to affirm the constitutionality of local racist policies.

Ironically, this new absolute-rights interpretation of the Clause gave southerners a (virtually) new argument<sup>155</sup> against black citizenship: free blacks could not be citizens precisely because they would thus be entitled, while sojourning in the slaveholding states, to the absolute rights of travel, property acquisition, speech, assembly, arms, etc., racist state laws to the contrary notwithstanding—and *this result was unthinkable*. This parade of hor-

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151 Free governments included the government of Britain, where slavery was illegal. Cf. 2 HURD, *supra* note 145, at 367–68 (arguing that the "common standard" of the rights to be enjoyed under the Clause should be the "preexisting quasi-international law of the colonies," and that "so far as the common law of England, operating as a personal law with national extent in the colonies or the States, was the standard of these rights, it did not maintain the claim of a slave-owner").

152 For example, Massachusetts abolished slavery by force of its constitution of 1780. *Massachusetts Constitution and the Abolition of Slavery*, MASS.GOV, <http://www.mass.gov/courts/court-info/sjc/edu-res-center/abolition/abolition1-gen.html> (last visited Feb. 30, 2015).

153 REPORT OF THE LEMMON SLAVE CASE, *supra* note 29, at 109.

154 Mississippi's court frankly, if not cheerfully, affirmed that the state did not generally treat free blacks as citizens, but rather, as "alien enemies," enjoying neither the right to reside, nor the right to "take nor hold property," nor even any "customary rights which are founded on the *jus naturali* or *jus gentium*," though such rights are given, by indulgence, to some native-born free blacks. *Heirn v. Bridault*, 37 Miss. 209, 232–33 (1859); see also *Mitchell v. Wells*, 37 Miss. 235, 249, 259 (1859) (holding that free blacks, even if treated as citizens in one state, could enjoy none of the "rights of citizenship as a member of the Union," and indicating that these privileges included "the right to sue" and "the right to acquire or hold property in this State").

155 The argument was not entirely new. See *Hobbs v. Fogg*, 6 Watts 553 (Pa. 1837); see also *supra* note 78 (discussing *Hobbs*).

ribles was famously set forth by Chief Justice Taney in *Dred Scott*<sup>156</sup> and echoed by pro-slavery jurists.<sup>157</sup>

The largely new, pro-slavery absolute-rights reading involved another possible northern objection: Should not sojourning abolitionists enjoy as much an exemption from local anti-abolitionist laws as sojourning slaveholders were claiming against local anti-slavery law? But Charles O’Conor and Justice Taney, at least, seemed to have anticipated this counter-claim. In his closing argument, O’Conor carefully qualified the absolute rights of sojourning citizens with this phrase: “without invading the peace and happiness of our people.”<sup>158</sup> He elaborated, “Over this right of free intercourse between the citizens of different States, the States have reserved no power except the police power. That natural and inalienable right of self-defence is indeed reserved to the States.”<sup>159</sup> Room was thus left for the southern states to insist that they could, in the interest of protecting the peace of the local white community, use the police power to suppress any speech they deemed incendiary.

Taney anticipated the objection by providing a more targeted and explicit—and thus ham-handed—qualification: the sojourning citizen would enjoy “the full liberty of speech in public and in private” but only “upon *all subjects upon which its own citizens might speak*.”<sup>160</sup> Taney conspicuously did *not* make this qualification with respect to the right to travel, hold meetings, and bear arms.<sup>161</sup> This awkward, incongruous qualification served the apparent

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156 If free blacks could be citizens, the Constitution

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

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857). If a citizen, a freedman might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the State officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the State in relation to a person of that description.

*Id.* at 425.

157 GEORGE S. SAWYER, *SOUTHERN INSTITUTES* 299–300 (1859) (arguing that as citizens, free blacks would enjoy the travel and economic privileges set forth in *Corfield*, exempt from racial and any other “arbitrar[y]” discriminations); WHEAT, *supra* note 140 at 593 (arguing that if free blacks were citizens, “the slave States have ever acted unconstitutionally with most of the free States”); *see also* BELZ, *supra* note 140, at 28.

158 REPORT OF THE LEMMON SLAVE CASE, *supra* note 29, at 109

159 *Id.*

160 *Dred Scott*, 60 U.S. (19 How.) at 417 (emphasis added).

161 *Id.*

purpose of ensuring that the precedent would support the sojourning citizens' constitutional right to hold slaves, but not his right to speak out against slavery.

Despite some favorable implications of the new southern position for anti-slavery constitutionalism,<sup>162</sup> for the most part, the new pro-slavery interpretation sparked outrage. Republicans saw the harbingers of the "next *Dred Scott*" decision that would declare slavery a constitutional right not only in the territories, but even in the free states—at least for sojourners. Indeed, not only had Chief Justice Taney established the groundwork for such a development, but Justice Nelson had expressly declared open the question of whether the constitutional "rights and privileges" of a "citizen of the . . . United States" included "the right of the master with his slave of transit into or through a free State."<sup>163</sup> In apparent response to the question, Justice McLean, in dissent, obtrusively asserted that the right of slave transit "is a matter which, as I suppose, belongs exclusively to the State."<sup>164</sup> As Lincoln noted, Nelson's opinion had essentially declared the state's authority over slavery to be an "open question."<sup>165</sup> New York's legislature feared the Court's answer to this question. In response to *Dred Scott*, the legislature quoted with outrage the dreams of "the devotees of slavery" that the "slave driver" will one day "call the roll of his manacled gang at the foot of the monument [sic] on Bunker Hill, reared and consecrated to freedom."<sup>166</sup> The reference was to a comment, attributed to Senator Robert Tombs of Georgia, that he would soon call the roll of his slaves at the foot of Bunker Hill.<sup>167</sup> Likewise, the

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162 See *infra* Section III.B.

163 *Dred Scott*, 60 U.S. (19 How.) at 468 (Nelson, J., concurring).

164 *Id.* at 550 (McLean, J., dissenting).

165 Abraham Lincoln, A House Divided: Speech at Springfield, Ill. (June 16, 1858), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 461, 467 (Roy P. Basler ed., 1953).

166 REPORT OF JOINT COMM. OF SENATE AND ASSEMBLY RELATIVE TO A CERTAIN DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF *Dred Scott*, Apr. 9, 1857, reprinted in 3 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK: EIGHTIETH SESSION 3 (1857); see also BAPTIST WRIOTHESLEY NOEL, THE REBELLION IN AMERICA 27 (1863) (arguing that by the *Dred Scott* decision, "the slaveholders might parade their whips and their chains over the whole land, laugh at the indignation of Massachusetts or Pennsylvania, [and] bring their droves of human chattels into every New England village"). One author suggested that by the *Dred Scott* decision, this "little provision . . . is likely soon to assume colossal dimensions." Polygamy, like slavery, might be given national protection, for "Mr. Brigham Young" might claim he has the "same 'privileges and immunities' in New York as to his baker's dozen; and thus polygamy in Utah would be polygamy in New York." *The Mormons*, HARPER'S WEEKLY, Apr. 25, 1857, at 1.

167 See Dresser, *supra* note 142, at 317 (arguing that Tombs has the "constitutional right to do so" pursuant to "the rights and privileges of a citizen of the United States" secured by the Privileges and Immunities Clause). New Hampshire's Senator John P. Hale reported hearing the (in)famous remark, but Tombs made it not with reference to Article IV, but to indicate his hope and expectation that the northern states would legalize slavery. See Letter from Hon. J.P. Hale to Theo. Parker (Dec. 23, 1856), in 2 LIFE AND CORRESPONDENCE OF THEODORE PARKER 223, 223–24 (John Weiss ed., 1864).



California court's pro-slavery decision was roundly denounced in local newspapers.<sup>168</sup>

The arguments made by the *Washington Union* and the state of Virginia (through O'Connor) only confirmed these fears.<sup>169</sup> Indeed, the fears seemed reasonable—as both the *New York Tribune* feared, and the *New York Herald* happily expected, that the Supreme Court would reverse the *Lemmon* decision.<sup>170</sup>

### B. *The Antislavery, Absolute-Rights Reading*

While pro-slavery Americans were advancing one absolute-rights reading of the Privileges and Immunities Clause, Republicans were promoting their own. The rise of the party had two prominent effects on the ways in which anti-slavery northerners used the Clause. First, perhaps ironically, the electoral success of the party induced anti-slavery northerners to set aside the once prominent issue of black citizenship. The new party had rescued free soilers and other anti-slavery citizens from marginalization and incorporated them into a national anti-slavery party with hopes of national success; but this success required the support of citizens, especially in the Midwest, who were at once both anti-slavery and racist. Indeed, the constitutions of several anti-slavery states specifically prohibited the immigration of free blacks. A winning Republican coalition required the alliance of pro-black-citizenship New Englanders with avowedly racist, but anti-slavery Midwesterners.

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168 Franklin, *supra* note 136, at 151–53 (stating that the “opinion shocked and angered many Californians” and chronicling the hostile reaction in the California press). It should be noted that the outrage was directed at two features of this anti-slavery opinion: (1) the interpretation of the Privileges and Immunities Clause, and (2) most outrageously, the conclusion that although his purported master had become a resident of California and was thus constitutionally subject to local anti-slavery law, he was entitled, as a matter of equity, to an equitable exemption, which meant that Archy would still be forcibly returned to slavery. *Id.* Eventually, Archy was freed by a federal court in a different habeas proceeding. *Id.* at 153.

169 APPENDIX TO THE CONG. GLOBE, 35th Cong., 1st Sess., 329 (1858) (“[W]hen the *Lemmon* case, now before the courts in New York, shall find its way to the same tribunal which decided *Dred Scott*, slavery . . . will be planted in every free State of the Union.”) (remarks of Rep. Mason Tappan from New Hampshire); E.P. Barrows, *The State and Slavery*, 73 BIBLIOTHECA SACRA 749, 796 n.1 (1862) (recounting the fears of Bostonian Joel Parker that the Supreme Court was already writing the pro-slavery opinion for the *Lemmon* appeal).

170 ANNUAL REPORT OF THE AMERICAN ANTI-SLAVERY SOCIETY 265 (1861) (citing the *New York Tribune's* opinion that O'Connor's argument “shadows forth the ground which that Court intends to occupy as the next step in advance,” and therefore “that there *can* be no law of any one of the Free States competent to its abolition within the limits of such State, while a single Slave State remains in the Union”); Editorial, *The Great Question of the Day—Is Secession Revolution or Not?*, N.Y. HERALD, Dec. 27, 1860, at 4 (allaying secessionists' fears as to slave-transit right under Article IV, because “[f]rom some of the grounds on which the decision in the *Dred Scott* case was based, there can be little doubt that the decision of the New York courts will be reversed, and the rights of the slaveholder maintained”).

The reaction to the *Dred Scott* decision manifested how the issue strained the Republican coalition. Republicans were united in rejecting Taney's claim that the Constitution mandated slavery in the territories, but divided as to the Court's principal holding—that free blacks were not citizens under the Constitution. The legislatures of Maine and New Hampshire, for instance, denounced the decision, and specifically insisted that free blacks born in those states were citizens and thus fully entitled to the privileges of citizenship in the other states under Article IV.<sup>171</sup> But west of the Appalachians, Republican leaders were divided. Consider, for instance, the 1858 debates over Oregon's proposed constitution, where the Bill of Rights protected Oregonians in such rights as the freedom of speech and press, as well as the freedom from the presence of free blacks: "No free negro or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein . . ." <sup>172</sup> At the Oregon constitutional convention, seemingly no one in opposition invoked the privileges of citizenship under Article IV, as the sole recorded objection was to prohibit blacks from filing suit was to deny them the universal *human* right of protection of the laws.<sup>173</sup> In Congress, however, Ohio's Congressman Bingham objected to the entire provision, and invoked not only human rights, but also the constitutional privileges of citizenship.<sup>174</sup> At the same time, however, his fellow Republican from Illinois, Senator Lyman Trumbull, tersely stated that he was "not prepared" to say that a state could not exclude free blacks from other states.<sup>175</sup>

Trumbull was wise to avoid the issue. During the Illinois Senate campaign of the previous year, Abraham Lincoln had badly stumbled over the question of free-black citizenship. In his initial response to the decision, Lin-

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171 Resolutions of the Legislature of the State of Maine, in Relation to the Decision of the Supreme Court of the United States in the Case of *Dred Scott*, Dec. 18, 1857, in MISCELLANEOUS DOCUMENTS OF THE SENATE OF THE UNITED STATES, 35th Cong., 1st Sess. No. 14, at 2 (1858); Resolution of the New Hampshire Legislature (June 27, 1857), in LAWS OF THE STATE OF NEW HAMPSHIRE, JUNE SESSION, 1857, at 1925 (1857). New Hampshire passed a clarifying law that affirmed that

neither descent, near or remote, from a person of African blood, whether such a person is or may have been a slave, nor color of skin, shall disqualify any person from becoming a citizen of this State, or deprive such person of the full rights and privileges of a citizen thereof.

Opinion of the Justices of the Supreme Judicial Court, 41 N.H. 553, 556 (1861) (quoting an Act to Secure Freedom and the Rights of Citizenship to Persons in This State and stating that the purpose of the statute was "to remove any doubts that might have arisen after the decision in the case of *Dred Scott*" as to black citizenship in the state).

172 OR. CONST. art. I, § 35 (1859) (repealed Nov. 2, 1926).

173 OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 384–85 (Charles Henry Carey ed. 1926) (remarks of Delegate Watkins) (arguing that such a prohibition would place free blacks outside "the pale and protection of our laws").

174 CONG. GLOBE, 35th Cong., 2d Sess. 984–85 (1859).

175 CONG. GLOBE, 35th Cong., 1st Sess. 1965 (1858).

coln indicated his opposition to the Court's holding that free blacks were not constitutional citizens.<sup>176</sup> A year later, Lincoln suggested that he favored free blacks' enjoyment of citizenship under Article IV as well as Article III, for he noted, with apparent disapproval, the Court's decision "to *deprive* the negro, in every possible event, of the benefit of [the Privileges and Immunities Clause]."<sup>177</sup>

During the fall debates with Lincoln, Douglas seized on this latter remark, and accused Lincoln of supporting black citizenship under the Clause. According to Douglas, such constitutional citizenship would invalidate Illinois laws that prohibited blacks' (1) immigration into the state, (2) participation in the suffrage,<sup>178</sup> and (3) intermarriage with whites.<sup>179</sup>

Lincoln's response was less than straightforward. Under pressure from Douglas, he eventually responded at the close of the fourth debate by saying that his objection was only that *other* states should be able to grant citizenship to free blacks, but that he would oppose any such action by Illinois.<sup>180</sup> But in the last debate at Alton, Lincoln performed a complete flip-flop, declaring that he *never* had any objection whatsoever to the Court's decision on black citizenship.<sup>181</sup>

Second, at the same time, however, the Republican Party's success brought to the center of American political debate the previously marginal

176 See 2 LINCOLN, *supra* note 165, at 398, 408 (arguing for Scott's citizenship "at least" under Article III).

177 *Id.* at 453 (emphasis added).

178 See 3 LINCOLN, *supra* note 25, at 9. Lincoln said:

If you desire negro citizenship, if you desire to allow them to come into the State and settle with the white man, if you desire them to vote on an equality with yourselves, and to make them eligible to office, to serve on juries, and to adjudge your rights, then support Mr. Lincoln and the Black Republican party, who are in favor of the citizenship of the negro.

*Id.*

179 See Douglas, *supra* note 26. Many antebellum authorities agreed that if free blacks were full citizens under Article IV, they would be entitled to intermarry with whites. See David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 233–35 (2015).

180 Abraham Lincoln, Fourth Debate with Stephen A. Douglas at Charleston, Illinois (Sept. 18, 1858), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 25, at 145, 179. In the House Divided speech, he said,

I mentioned that as one of the points decided in the course of the Supreme Court opinions, but I did not state what objection I had to it. . . . Now my opinion is that the different States have the power to make a negro a citizen under the Constitution of the United States if they choose. The *Dred Scott* decision decides that they have not that power. If the State of Illinois had that power I should be opposed to the exercise of it. . . . That is all I have to say about it.

*Id.* at 179.

181 Lincoln, *supra* note 25, at 283, 298–99 ("I never have complained *especially* of the *Dred Scott* decision because it held that a negro could not be a citizen . . . . I mentioned *as a fact* that they had decided that a negro could not be a citizen . . . . I stated that, *without making any complaint of it at all.*" (emphasis added)).

claim that the Privileges and Immunities Clause guaranteed citizens an absolute freedom of opinion—and even freedom of speech—state anti-slavery laws and practices to the contrary notwithstanding. Southern intolerance of anti-slavery speech seemed absurd insofar as it effectively prevented members of the second largest party from traveling in the South, let alone speaking there. Lincoln (in)famously could not safely campaign in the South.

During the 1860 campaign, Republicans increasingly complained that the slaveholding states had violated the Privileges and Immunities Clause by failing to secure the freedom of opinion to anti-slavery citizens. Sometimes the complaints extended not only to interstate intolerance, but also intrastate intolerance—that is, toward native-born citizens of those states. In Congress, Maine's John Perry complained that citizens of both free and slave states had been “driven out . . . not for anything they have *done*, but merely for *entertaining opinions* held by Washington, Jefferson, and Madison.”<sup>182</sup> Others made nearly identical arguments, sometimes invoking the ambiguous right to “entertain” opinions<sup>183</sup>—which rendered ambiguous whether it encompassed not only the right to *hold* opinions, but also the right to *express* them. The slave states violated the Clause, it was said, because citizens “for no other offence than that of being known to entertain sentiments unfavourable to slavery, have been banished from the state where they resided.”<sup>184</sup> To cite one example of this violence, during the 1860 campaign, William Wood, a recent Harvard graduate, was forcibly shipped out of Charleston “for expressing, under compulsion, his Republican predilections,”<sup>185</sup> thus demonstrating to Republicans that the Clause “has had no vitality” in the South.<sup>186</sup>

To more radical, anti-Constitution abolitionists, such violence proved that the Privileges and Immunities Clause “was worth less than the spoiled parchment it was written on.”<sup>187</sup> At the annual meeting of the American Anti-Slavery Society, held in May 1860, William Lloyd Garrison introduced the following cynical resolutions:

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182 CONG. GLOBE, 36th Cong., 1st Sess. 1039–40 (1860). Not all Republicans identified the freedom of opinion as a privilege of citizenship. Michigan's Henry Waldron, for instance, seemingly distinguished the two, by denouncing the South for violating Article IV by restricting the right to travel and file suit, but criticizing southern intolerance for anti-slavery speech under the First Amendment instead. *Id.* at 1872.

183 Richard Yates, Inaugural Address (Jan. 14, 1861), *reprinted in* 1 REPORTS MADE TO THE GENERAL ASSEMBLY OF ILLINOIS AT ITS TWENTY-SECOND SESSION 29 (1861) (complaining that “the life of a man [is] unsafe, who entertains the opinions of Washington and Jefferson on the subject of slavery”); *The Times*, 25 MONTHLY RELIGIOUS MAG. 127, 128 (1861) (“What would [a southerner] say of it if the citizens of Tennessee, as soon as they touched the soil of the Bay State, were mobbed or gibbeted for their opinions . . . ?”).

184 J.E. CAIRNES, *THE SLAVE POWER* 148 (1862).

185 *The Irrepressible Conflict*, 7 HARV. MAG. 135, 138 (1860).

186 *Id.*; see also JAMES PECKHAM, *GEN. NATHANIEL LYON, AND MISSOURI IN 1861*, at 415 (1866) (reprinting editorial written by Lyon in October 1860 in which he had argued that the South had violated the Constitution, for “several innocent persons from the North were seized and executed by mobs, for supposed abolitionist sentiments”).

187 *Barbarism Rampant*, in *ANNUAL REPORT OF THE AMERICAN ANTI-SLAVERY SOCIETY, FOR THE YEAR ENDING MAY 1860*, at 166, 167 (1861).

That the privileges accorded to southern citizens sojourning or travelling in the North, under this Union, are these: To speak with impunity whatever they please against free institutions and free society . . . . That the privileges accorded to northern citizens . . . in the South . . . are these: To wear padlock upon their lips . . . to speak in behalf of the enslaved at the peril of their lives; [and, with reference to the negro seamen acts] to be thrust into prison, and sold as Slaves on the auction-block, if they are of African descent . . . .<sup>188</sup>

Pursuant to these widespread grievances, Republicans formally asserted their rights to freedom of thought under the Clause.<sup>189</sup> At the National Convention in May 1860, Ohio's Joshua Giddings (a friend and mentor to John Bingham)<sup>190</sup> introduced the following resolution:

That we deeply sympathize with those men who have been driven, some from their native states and others from the states of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic party responsible for this gross violation of that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.<sup>191</sup>

The resolution was adopted unanimously.<sup>192</sup>

This plank is remarkable in several respects. First, although the resolution has manifest relevance to the original understanding of the Fourteenth Amendment,<sup>193</sup> it has been nearly entirely overlooked by legal historians.<sup>194</sup>

188 *Id.* app. at 326.

189 *See, e.g., Kentucky Republican Convention*, HOLMES COUNTY REPUBLICAN 3 (May 3, 1860) <http://chroniclingamerica.loc.gov/lccn/sn84028820/1860-05-03/ed-1/seq-3/> (reporting Republicans' resolution that "they claim the same privileges and immunities, as citizens of the Union, Democratic or other parties; the liberty of speech, of the press, and the ballot").

190 Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 600–01 (2003) (describing Bingham's friendship with and admiration for Giddings).

191 PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CONVENTIONS OF 1856, 1860, AND 1864, at 165 (Horace Greeley ed., 1893).

192 Hutchins, *supra* note 1, at 69.

193 Among other relevant facts, the delegates at the Convention included future Justice David Davis (part of the *Slaughter-House* Majority), two members of the Joint Committee on Reconstruction: Thaddeus Stevens and George Boutwell, as well as congressmen Frederick Frelinghuysen and John Broomall. Consider also this oft-quoted comment by Columbus Delano in 1866:

I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of the Southern slaveholders.

CURTIS, *supra* note 104, at 138–139 (quoting Speech of Hon. Columbus Delano, at Coshoc-ton, Ohio (Aug. 28, 1866), in SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY, 23, 23 (1866) [hereinafter SPEECHES OF THE CAMPAIGN OF 1866]). This comment appears to be a paraphrase of the 1860 platform; Delano, it turns out, was, with Giddings, a member of Ohio's delegation at the Convention, and had seconded Lincoln's initial nomination. PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CON-

For example, this resolution, coupled with Giddings's successful motion in 1856 to incorporate a "due process" plank in the 1856 Republican platform, laid the groundwork for Section 1: just as the party had in 1856 declared that the Due Process Clause prevented any federal action to foster slavery in the territories,<sup>195</sup> the party in 1860 added that the Privileges and Immunities Clause prevented the states from interfering with antislavery citizens' freedom of travel and opinion. These two clauses together formed what Bingham would later call that "immortal bill of rights."<sup>196</sup>

Moreover, this resolution indicates that by 1860, the Republican Party formally endorsed an absolute-rights reading of the Clause, and one that would protect citizens *even in their own state*. The resolve highlights the dramatic shift in popular constitutional interpretation; by 1860, the winning national party thus embraced a freedom-of-opinion interpretation that, however consistent with *Corfield*, had once been endorsed only by some marginal abolitionists. As a Giddings biographer noted, "[t]his was a strong utterance to go before the country with, and was opposed by many, but there was a general feeling that the veteran's vision was clear and that the country would ratify his judgment; and it did."<sup>197</sup>

At the same time, however, the party's endorsement of a national freedom of "opinion" avoided an emphatic stand on the question of whether the Clause entitled citizens to not only *privately* hold their opinions, but also the freedom to communicate those opinions. But during 1860 and 1861, several prominent Republicans expressly avowed that the Clause protected not only the *Corfieldian* right to travel, but also the privilege of open discussion.<sup>198</sup>

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VENTIONS OF 1856, 1860, AND 1864, *supra* note 191, at 149. During the ratification debates, Governor Dennison of Ohio would similarly comment that, before the War, a traveling citizen in the South had the "rights and dignity as an American citizen," including not only the "right to sue or be sued, [and] to contract or be contracted with," but also the right to "express your opinions freely upon the great questions that were dividing the American people." Governor Dennison's Speech, in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra*, at 44.

194 For a rare and recent exception, see this brief remark in Andrew T. Hyman, *The Due Process Plank*, 43 *SETON HALL L. REV.* 229, 252 n.120 (2013).

195 *PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CONVENTIONS OF 1856, 1860, AND 1864*, *supra* note 191, at 133.

196 *CONG. GLOBE*, 39th Cong., 1st Sess. 1034 (1866).

197 Byron R. Long, *Joshua Reed Giddings: A Champion of Political Freedom*, 28 *OHIO ARCHAEOLOGICAL & HIST. PUBL'N* 1, 47 (1919).

198 *Compare* Yates, *supra* note 183, at 29 (noting southern claims that it is "unsafe to tolerate freedom of speech, or the presence of suspicious persons," but still "we cannot and will not relinquish our right to the protection of the laws, under the constitution of our common country"), *with* Alex. W. Randall, Governor's Message (May 15, 1861), in *JOURNAL OF THE SENATE OF WISCONSIN* 4, 10 (1861) (listing rights that needed constitutional protection). Governor Randall of Wisconsin said:

The right of the people of every state to go into every other state and engage in any lawful pursuit, without unlawful interference or molestation; the freedom of speech and of the press; the right of trial by jury; security from unjustifiable seizure of person or papers, and all constitutional privileges and immunities,

Maine Congressmen Daniel Somes quoted the Clause to support his claim that northern citizens have a right to publish and speak abolitionist opinions in the South.<sup>199</sup> In an impassioned speech in Congress, Owen Lovejoy, with apparent reference to the Clause, invoked “the aid of the General Government to protect me, as an American citizen, in my rights as an American citizen” including “the right of discussing this question of slavery anywhere, on any square foot of American soil over which the stars and stripes float, and to which the privileges and immunities of the Constitution extend.”<sup>200</sup>

In a similar vein, Republican jurist Daniel Gardner, in his 1860 treatise on international law, affirmed that the Privileges and Immunities Clause secured certain “right[s] of American citizenship” and identified, among these “universal American rights,” not only the travel and economic privileges enumerated in *Corfield*, but also the “[f]reedom of speech and of the press, and security of life, liberty, and property.”<sup>201</sup> Just a year earlier, Bingham, for his part, had declared these “privileges and immunities of citizens” to include not only the *Corfield*ian economic liberties “to work and enjoy the product of their toil,” but also the freedom “to argue and to utter, according to conscience.”<sup>202</sup>

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must receive new guarantees of safety from tar and feathers, and halters and mobs.

Randall, *supra*; see also William Dennison, Governor’s Message (Jan. 7, 1861), in 1 MESSAGE AND REPORTS TO THE GENERAL ASSEMBLY AND GOVERNOR OF THE STATE OF OHIO FOR THE YEAR 1860, at 537, 563 (1861) (calling for Southern States to repeal “such of their laws as contravene the constitutional rights of the citizens of the Free States,” who rightly “claim and will insist upon all their constitutional rights in every State and Territory of the Confederacy”).

199 Daniel E. Somes, *Letter from Hon. Daniel E. Somes to Hon. Gerrit Smith*, BOS. LIBERATOR, Oct. 5, 1860, at 159.

200 APPENDIX TO THE CONG. GLOBE, 36th Cong., 1st Sess. 205 (1860). An unsigned, sarcastic op-ed in a Vermont newspaper read:

Has [South Carolina] not made large sacrifices of her native feathers and indignant tar, and bestowed them freely upon our foolhardy brethren, who, in the face and eyes of Section 2, of article 4, of the federal constitution: “The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States,” have had the recklessness to invade the sovereignty of said kingdom, for the nefarious purpose of circulating incendiary documents, such as the Bible and other kindred works?

Opinion, *The Union Turned Out*, LAMOILLE NEWSDEALER (Hyde Park, VT) (Dec. 28, 1860), <http://chroniclingamerica.loc.gov/lccn/sn84023428/1860-12-28/ed-1/seq-2/>.

201 DANIEL GARDNER, INSTITUTES OF INTERNATIONAL LAW, PUBLIC AND PRIVATE 480–83 (1860). Gardner would later write a strong defense of the legality of the Emancipation Proclamation. See ALLEN C. GUELZO, LINCOLN’S EMANCIPATION PROCLAMATION 193–94 (2004). New York jurist and abolitionist Edward Bullard likewise argued that the Clause secured the right of northern citizens to the “freedom of speech” in the southern states. EDWARD F. BULLARD, THE NATION’S TRIAL 47 (1863).

202 CONG. GLOBE, 35th Cong., 2d Sess. 984–85 (1859). Bingham here was quoting from Milton’s famous defense of freedom of the press; like James Wilson and others, Milton had identified this right as an immunity of “free government.” See John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England*, in 1 THE

C. *The Privileges and Immunities Clause as Proposed by the Washington Peace Conference*

After the election, during the Winter of Secession, Republicans did not forget their platform. In the debates over compromise measures, mostly designed to mollify secessionists, Republicans still insisted that something be offered to the North; a common proposal was a statute or constitutional amendment securing congressional enforcement of the Privileges and Immunities Clause. Some of these measures aimed merely at that equal protection necessary to permit safe travel and residence. The House Committee of Thirty-Three, for instance, called for enforcement of the Clause, and petitioned state legislatures to take the initiative, and thus obviate the need for federal action, to ensure that traveling citizens enjoy (1) “the same protection as citizens of such State enjoy” and (2) protection “against popular violence or illegal summary punishment, without trial in due form of law, for imputed crimes.”<sup>203</sup>

At the Washington Peace Conference, a quasi-constitutional convention held in February, an even broader constitutional amendment was debated and approved. The delegates included four of the fifteen future members of the Joint Committee on Reconstruction—Maine’s William Fessenden (the Committee’s chair), Iowa’s James Grimes, Massachusetts’s George Boutwell, and Maryland’s Reverdy Johnson—as well as other future members of the Thirty-Ninth Congress, such as New Jersey’s Frederick Frelinghuysen and Maine’s Lot Morrill.<sup>204</sup> The delegates also included Pennsylvania’s David Wilmot (of “Wilmot Proviso” fame), future Chief Justice Salmon Chase, and David Dudley Field, brother to future Justice Stephen Field.<sup>205</sup>

It was David Field who first introduced a proposal to incorporate into the proposed Thirteenth Amendment the *requirement* that Congress enforce the Privileges and Immunities Clause: “Congress shall provide by law for securing to the citizens of each State the privileges and immunities of citizens in the several States.”<sup>206</sup> Field said that this addition would make a compromise amendment “much more acceptable to the northern people,”<sup>207</sup> by “secur[ing] protection in the South to the citizens of the free States.”<sup>208</sup> For a similar purpose, Wilmot proposed a measure that would require Congress to provide monetary compensation to victims of mob violence.<sup>209</sup> Wilmot’s proposal had the distinct advantage of easy enforcement, as mere monetary

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PROSE WORKS OF JOHN MILTON 166, 188 (J.W. Moore ed. 1859) (stating that “the immediate cause of all this free writing and free speaking [is] your own mild, and *free*, and humane government” and that apart from “just *immunities* . . . [g]ive me the liberty *to know, to utter, and to argue freely according to conscience*, above all liberties” (emphasis added)).

203 CONG. GLOBE, 36th Cong., 2d Sess. 1261 (1861).

204 CHITTENDEN, *supra* note 2, at 18, 30.

205 *Id.* at 18–19, 28.

206 *Id.* at 162.

207 *Id.*

208 *Id.* at 169.

209 *Id.* at 208.



compensation would not require an extensive coercive presence to protect antislavery travelers and speakers.

Eventually, after some debate, the Convention adopted a proposal introduced by Frelinghuysen in this way:

The people of the free States have complained, and not without good reason, that one clause in the Constitution is not carried into effect in some of the slaveholding States. Their complaints are similar to those made on the part of the South, which it is the purpose of the seventh section to remove. If there have been instances at the North where mobs and riotous assemblies have obstructed the administration of justice in the case of fugitive slaves, so there have been instances at the South where mobs and riots have disregarded the rights of citizens of Northern States. I propose to deal fairly by all sections. Let us remove both causes of complaint. I move to amend the seventh section by adding thereto the following words: "Congress shall provide by law for securing to the citizens of each State the privileges and immunities of citizens in the several States."<sup>210</sup>

This section was approved on a strictly sectional vote: all of the free states, and two of the border slaveholding states (Delaware and Maryland) approved, while Kentucky and Missouri joined Virginia, North Carolina, and Tennessee in dissent.<sup>211</sup> The provision formed the last clause of the Convention's proposed Thirteenth Amendment.<sup>212</sup>

The debates over this proposed Privileges and Immunities Clause highlight three key features of Republican approaches to the original Privileges and Immunities Clause on the eve of the Civil War. First, the debates demonstrate the degree to which black citizenship divided northern opinion. When Illinois delegate Thomas Turner reiterated Field's initial proposal,<sup>213</sup> the measure was temporarily defeated by a poison pill introduced by Illinois's Stephen Logan, who moved to add the qualifier "'free white' before the word 'citizens.'"<sup>214</sup> Logan's racial amendment was approved by virtually all of the states outside the northeast, with only the New England states, New York, and Iowa dissenting.<sup>215</sup> Thus amended, however, the measure pleased no one and was unanimously rejected by all the state delegations.<sup>216</sup> Eventually northerners were able to coordinate and approve the "clean" version, as re-proposed by Frelinghuysen. A few southern delegates, after the Conference, attributed the failure to incorporate the racial restriction to northerners' thinly veiled effort to give free blacks Article IV rights.<sup>217</sup> Still, the available

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210 *Id.* at 384–85.

211 *Id.* at 385.

212 *Id.* at 473.

213 *Id.* at 380.

214 *Id.*

215 *Id.*

216 *Id.* at 381.

217 STATE OF MO., JOURNAL OF THE H.R., REPORT OF THE COMMITTEE TO THE PEACE CONFERENCE, 21, 1st Sess., App. at 574 (1861) (explaining that "after a failure, on our part, to make it apply only to 'free white' citizens, it was adopted by the vote of all the non-slaveholding States" and asserting that "the last clause makes it imperative on Congress to pro-

records indicate that northern delegates were concerned primarily, if not exclusively, with the rights of white citizens.<sup>218</sup>

Second, these debates also revealed the degree to which southern leaders feared, and at least some northerners hoped, that congressional enforcement of the Clause would secure not only the right to travel, but also the freedom of antislavery speech. Kentucky's James Guthrie objected that Wilmot's proposal would "encourage[ ] seditious speeches at the South,"<sup>219</sup> and Tennessee's William Stephens complained the resulting "seditious speeches and purposes" would "excite discontent among our slaves."<sup>220</sup> In the subsequent debates in the Senate, southern opponents likewise objected that this proposal would give "[a]bolition leaders the right to promulgate their doctrines in the slave States."<sup>221</sup> His Virginian colleague, Robert Hunter, was equally indignant:

Congress shall have power to pass laws to force the States to receive those persons whom they have excluded from police considerations—considerations of domestic safety. Yes, sir, to force the States to receive persons who would be dangerous to their peace; to force upon them, if you will, abolition lecturers; to force upon them persons whom they regard as the most dangerous emissaries that could be sent among them; to enable Congress to obtrude, in fact, into all the business of the States.<sup>222</sup>

In response, Northerners provided no reassurances. In the Convention, Wilmot tersely replied that Congress would not "protect a man in making seditious speeches in the slave States."<sup>223</sup> But he neither defined the word "seditious" nor said anything about *non-seditious* speech.<sup>224</sup> Meanwhile, in the House of Representatives, Connecticut's Alfred Burham was openly demanding protection for free speech in the South. In his view, a properly enforced Article IV would protect not only the property rights of the slaveholder (under the Fugitive Slave Clause), but the personal rights of freemen under the Privileges and Immunities Clause, including the freedom of speech and press:

Is not the right of protection to the person as high a right as protection to property? Shall this Government be destroyed because citizens of slave States are sometimes wrongfully deprived of their property by citizens of free States; and shall no complaint be heard when to us the freedom of the courts, the freedom of the elective franchise, the freedom of the press, the

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vide that citizens in one State shall have the same rights in all the States, without regard to color"); George Davis, Speech at Thalian Hall: The "Peace Congress" and Its Failure, *in* NORTH CAROLINA CIVIL WAR DOCUMENTARY 19, 21 (W. Buck Years & John G. Barrett eds., 2002).

218 See *supra* text accompanying notes 213–14.

219 CHITTENDEN, *supra* note 2, at 381.

220 *Id.* at 382.

221 DANIEL WAIT HOWE, POLITICAL HISTORY OF SECESSION: TO THE BEGINNING OF THE AMERICAN CIVIL WAR 474 (1914).

222 CHITTENDEN, *supra* note 2, app. at 495–96.

223 *Id.* at 381.

224 *Id.*

freedom of speech, and the freedom of conscience are all stricken down? [A]nd when our own unoffending citizens of both sexes, and of all ages, are insulted, tarred and feathered, imprisoned, robbed, scourged, and in many instances murdered, by lawless and irresponsible mobs? But, sir, I will not pursue this further. I say, sir, with the committee, let there be a faithful observance on the part of all the States, and of all the citizens thereof, of all their constitutional obligations to each other and to the Federal Government; and let such necessary laws be enacted as will carry out that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; and much will have been done towards restoring peace and harmony towards our distracted country.<sup>225</sup>

In particular, Burnham said, southerners had violated the Clause, for:

[T]o us there is no freedom of speech among them, and that we would be mobbed for speaking the sentiment of Washington and Jefferson. And, sir, it is even said tauntingly of our President elect, that he dare not go and advocate his principles in the State [Kentucky] where rest the bones of his kindred.<sup>226</sup>

Third, the measure, as proposed, avoided the complicated question whether Congress already had the power to enforce the Privileges and Immunities Clause. The Supreme Court, in *Prigg v. Pennsylvania*, had endorsed congressional power to enforce the Fugitive Slave Clause.<sup>227</sup> Many future Republicans, like Giddings and Chase, had denounced the decision.<sup>228</sup> Many, however, like Lincoln, that Kentucky native, fully endorsed *Prigg* and concluded that the Constitution not only empowered, but required Congress to enforce the Fugitive Slave Clause.<sup>229</sup> The authors of the proposed Thirteenth Amendment, however, avoided the question: the Clause stipulated that “Congress shall provide by law for securing . . .”;<sup>230</sup> in this way, the existence of this congressional power was either assumed or granted by imposing the duty to exercise it.

On March 2, 1861, the Senate overwhelmingly rejected the Peace Conference’s proposed amendment.<sup>231</sup> Two days later, upon his inauguration, Lincoln not only promised to enforce faithfully the Fugitive Slave Law but also advocated the adoption of a Privileges and Immunities Law: “And might it not be well, at the same time, to provide by law for the enforcement of that clause in the Constitution which guaranties that ‘The citizens of each State

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225 CONG. GLOBE, 36th Cong., 2d Sess. 971 (1861) (Speech of Hon. A.A. Burnham, Upon the Report of the Committee of Thirty-Three Upon the State of the Union to the House of Representatives).

226 *Id.* at 970.

227 41 U.S. (16 Pet.) 539 (1842).

228 William M. Wiecek, Slavery and Abolition Before the United States Supreme Court, 1820–1860, in *HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT: ABOLITIONISM AND AMERICAN LAW* 145–47 (John R. McKivigan ed., 1999).

229 Lincoln, *supra* note 25, at 283, 317–18.

230 CHITTENDEN, *supra* note 2, at 162.

231 The vote was twenty-eight to seven against. CHITTENDEN, *supra* note 2, app. at 571.

shall be entitled to all privileges [sic] and immunities of citizens in the several States?"<sup>232</sup> Lincoln did not elsewhere explain this proposal.<sup>233</sup> Still, the context, including his enthusiastic support for the whole Republican platform,<sup>234</sup> indicates that his goal was primarily, if not exclusively, to protect the travel and opinion (or even speech) rights of white northerners, and not (yet) to secure the citizenship of free blacks.<sup>235</sup> Neither he nor his fellow Republicans were hoping to enjoy merely an exemption from interstate discrimination.

#### D. *The Political Marginalization of the Interstate-Equality Reading*

On the eve of the Civil War, then, the dominant political parties in the North and South ignored or rejected the strict *in parti conditione* reading. Instead, Republicans feared, and southern Democrats hoped, that the Supreme Court would enforce the Clause so as to require the free states to tolerate slavery. Meanwhile, southern Democrats feared, and Republicans hoped, that the Congress would enforce the Clause so as to require the slave states to tolerate the presence and even speech of antislavery citizens—perhaps regardless of race.

Despite this apparent opposition, there was substantial overlap between these two positions—an overlap that could be called a political consensus in 1860: that a *national* standard determined the privileges and immunities to be enjoyed in the other states, local laws to the contrary notwithstanding. Some Republicans were attentive to this convergence and invoked the pro-slavery reading of the Clause to support their anti-slavery, pro-black-citizenship reading.

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232 Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 262, 264 (Roy P. Basler ed., 1953).

233 The next day, however, Lincoln again mentioned the Privileges and Immunities Clause to support not freedom of speech but moderation of speech: "We must remember that the people of all the States are entitled to all the privileges and immunities of the citizens of the several States. We should bear this in mind, and act in such a way as to say nothing insulting or irritating. I would inculcate this idea, so that we may not, like Pharisees, set ourselves up to be better than other people." Abraham Lincoln, Reply to Pennsylvania Delegation (Mar. 5, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 232, at 273, 274.

234 Abraham Lincoln, Letter to George Ashum (May 23, 1860), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 232, at 52–53.

235 To my knowledge, the only contemporary scholars to notice the importance of Lincoln's proposal are the political theorists Harry Jaffa and Joseph Fornieri, but both assert, erroneously, I believe, that Lincoln was aiming to protect free blacks. HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 266–67 (2000); Joseph R. Fornieri, Lincoln's Critique of Dred Scott as a Vindication of the Founding, in LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENT 20, 25 (Harold Holzer & Sara Vaughn Gabbard eds., 2007). But for contemporaries, the privileges to which Lincoln referred were those that "had not been fully enjoyed by citizens of the Free-Labor States while in the Slave-Labor States, for many years." 1 BENSON J. LOSING, PICTORIAL HISTORY OF THE CIVIL WAR IN THE UNITED STATES OF AMERICA 291 (1866).

Yale's William Larned, for instance, expressly embraced Taney's argument—*viz.*, that if free blacks were citizens, they would enjoy an absolute right travel, hold meetings, bear arms, etc.; Larned called this passage “the strongest portion of Judge Taney's argument.”<sup>236</sup> Taney's parade of horrors was no doubt Larned's fond hope. In response to Taney's fear that black citizenship would jeopardize the peace and safety of the slaveholding states, Larned replied that both “[t]he inconveniences resulting to the Southern states from the operation of this clause are greatly magnified.”<sup>237</sup> Moreover, such a concern could not justify the Court's nullification of the plain text of Article IV:

It is not the province of the Court to legislate, but to interpret. These topics of inconvenience, therefore, cannot be intended as arguments against the policy of the clause, but as indications of the meaning of the clause in the minds of those who made it. [Taney claims] that when the great men of the slave-holding states made or assented to this clause of the Constitution, that “the citizens of each state should be entitled” to the privilege of a general citizenship in the United States, they must have meant, not what their words [that is, “citizens”] say they mean, but what the circumstances of the case show they must have meant. But we ask, as we have often asked before, can conjectures of this kind, however plausible, nullify the plainest language of the Constitution? Indeed, when shall this kind of interpretation end?<sup>238</sup>

Larned then reiterated his endorsement of Taney's definition of the “privilege[s] of a general citizenship in the United States,” but with one glaring correction:

This clause gives to abolitionists the right to enter any state whenever they please, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they please; to hold public meetings upon public affairs, and to enjoy full liberty of speech, in public and private, *upon any subject whatever*.<sup>239</sup>

For Larned, therefore, Taney's interpretation was entirely accurate but with two major exceptions: (1) free blacks were, in fact, citizens of the United States, and (2) the privileges of national citizenship included the *full* freedom of speech, including abolitionist speech, state laws to the contrary notwithstanding.

In his treatise on slavery, John Codman Hurd likewise employed Taney's dicta to support his claim that the Clause secured national privileges to sojourning citizens.<sup>240</sup> Unlike Larned, however, Hurd was more subtle.

236 W.A. Larned, *Negro Citizenship*, in 15 *NEW ENGLANDER* 478, 517 (1857).

237 *Id.*

238 *Id.* at 518 (emphasis omitted).

239 *Id.* (emphasis added).

240 For Hurd, the standard was the common-law privileges enjoyed in British North America:

[T]he effect of this clause is to continue the pre-existing common law of the colonies so far as it contained a standard of the rights of citizens of one locality appearing as domestic aliens within another jurisdiction; although, by the revolu-

Although conceding the antebellum prevalence of the strictly interstate-equality reading,<sup>241</sup> Hurd cited *Corfield* as contrary, more favorable authority,<sup>242</sup> and also quoted at length, with virtually no commentary, the two dicta from Taney's decision that strongly indicated a national standard.<sup>243</sup> Hurd thus left it to his readers to draw the connection: that Chief Justice Taney and Justice Bushrod Washington had properly identified a national standard of privileges.

In the 1859 debates over Oregon's admission, two House Republicans likewise cited Taney in support of the Republican reading of the Clause. Henry Dawes, of Massachusetts, argued that if free blacks were citizens,

then according to the Constitution, as expounded in the *Dred Scott* decision itself, this provision [of the proposed Oregon constitution] which attempts, not only to drive them from its border, but to prevent their holding property, making contracts, suing in the courts, or even eating the bread of life within her borders, does violate [the Privileges and Immunities Clause].<sup>244</sup>

Bingham likewise cited Taney as authority supporting the identity of "the people" with "the citizens," with a nod to his Democratic colleagues "who profess a more than Eastern devotion to the Supreme Court of the United States, and its decision in the *Dred Scott* case."<sup>245</sup>

Even during Reconstruction, Republicans occasionally cited Taney's exposition of constitutional "privileges and immunities." In the Fourteenth Amendment debates, Missouri's Senator John Henderson cited Taney's opinion in discussing "all the personal rights, privileges, and immunities" of citizenship.<sup>246</sup> The author "Madison," writing in the *New York Times*, likewise marshaled Taney's authority to assert the existence of certain "rights of citizenship as a member of the Union," which "rights and privileges of a citizen of the United States . . . are summed up in [*Corfield*]," and would be pro-

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tion and the establishment of new forms of government, the privileges and immunities of citizenship in the case of domiciled inhabitants became altogether determinable by local law.

HURD, *supra* note 145, at 353.

241 *Id.* at 352 (noting that most legal authorities "would find the standard [of privileges and immunities] rather in the rights enjoyed by citizens domiciled in the forum of jurisdiction, than in a national standard of privilege" (footnote omitted)).

242 *Id.* at 351 (stating that Justice Washington "seems to recognize the existence of some national and quasi-international standard of rights which are 'fundamental and belong of right to the citizens of free governments'" (emphasis omitted) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230))).

243 *Id.* at 291–92, 347 (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 416–17, 428 (1857)).

244 CONG. GLOBE, 35th Cong., 2d Sess. 975 (1859); see also Avins, *supra* note 15, at 15.

245 CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859). A few years later, upon Taney's death, one obituary writer quoted Taney's parade of horrors and added indignantly, "as if the blessings of liberty ought not to prevail over any inconveniences to slave-holders." Charles M. Ellis, *Roger Brooke Taney*, 15 ATLANTIC MONTHLY 157 (1865).

246 BOGEN, *supra* note 21, at 51 (citing CONG. GLOBE, 39th Cong., 1st Sess., 3032–33 (1866)).

tected by the Amendment.<sup>247</sup> And in the courts, Republican judges in Indiana and Alabama cited Taney's opinion to invalidate, state laws that prohibited African Americans, respectively, from making enforceable contracts,<sup>248</sup> and from intermarrying with whites.<sup>249</sup> In sum, as David Bogen has affirmed, "[i]n a general sense, the framers of the Civil War Amendments shared Taney's view and thus sought to effectuate a broad spectrum of rights when they guaranteed the privileges and immunities of citizenship to blacks."<sup>250</sup>

In this political atmosphere, where the extremes met, the seemingly moderate, *centrist* interstate-equality reading became effectively marginalized. For the most part, in the *political* debates, few still vindicated this seemingly moderate, even judicious position. One notable exception came, not surprisingly, from a border state's delegation to the Peace Conference. In their subsequent report to the Kentucky legislature, they explained that congressional enforcement of the Privileges and Immunities Clause would be anodyne. The original Clause, they wrote, only "operates as a prohibition to each State from discriminating against the citizens of other States, and would make void all such legislation. The clause [proposed by the Conference] cannot do more than to make such discriminating laws void, and is therefore *harmless*."<sup>251</sup>

In other words, this provision of the proposed Thirteenth Amendment would be largely a vain and idle enactment.

In the courts, however, the interstate-equality reading still predominated—even in the northern states. Northern Democrats like Benjamin Curtis in *Dred Scott*, and Hiram Denio in the *Lemmon* case had seemingly endorsed the position.<sup>252</sup> This reading, moreover, was vindicated in several cases—even in the "reddest" of Republican states like Connecticut.<sup>253</sup> In Minnesota, the State Supreme Court proposed this apparently straightforward reading, as a way of resolving many disputes: "Such an interpretation would, it is confidently believed, furnish an easy and satisfactory solution of many troublesome questions."<sup>254</sup> Still, this holding, expressed as a *proposal*, indicates that many Americans did not share the court's understanding.

247 Madison, Letter to the Editor, *The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866.

248 *Smith v. Moody*, 26 Ind. 299, 302–03 (1866) (quoting *Dred Scott*, 60 U.S. (19 How.) at 422–23).

249 *Burns v. State*, 48 Ala. 195, 197–98 (1872) (arguing that Taney had indicated that laws prohibiting interracial marriage were incompatible with constitutional citizenship).

250 David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 947 (1985).

251 REPORT OF THE KENTUCKY COMMISSIONERS TO THE LATE PEACE CONFERENCE HELD AT WASHINGTON CITY 9–10 (1861) (emphasis added).

252 *Dred Scott*, 60 U.S. (19 How.) at 583–84 (Curtis, J., dissenting); *Lemmon v. People*, 20 N.Y. 562, 608 (1860).

253 See, e.g., *Reynolds v. Geary*, 26 Conn. 179, 183 (1857).

254 *Davis v. Pierse*, 7 Minn. 1, 9 (1862).

One may well speculate as to why judges, even in northern states, were so reluctant to adopt the Republican understanding of the Clause. At least two factors were probably important. First, given the long political dominance of Jacksonian Democrats, Republicans were underrepresented in the federal judiciary and, to a lesser extent, even the state courts. Second, the judicial temperament was likely to prefer the interstate-equality reading to the absolute-rights reading of the Clause, given that the latter was (seemingly) novel and partisan, and might require far more judicial oversight of the political branches—and force them to declare that they and their fellow state citizens were entitled to fewer rights than visitors.

### CONCLUSION

At the close of the Civil War, Republicans did not forget their antebellum project to enforce the Privileges and Immunities Clause. For many, complete victory required not only the defeat of secession and the abolition of slavery, but also, among other measures, the federal enforcement of the Clause. These efforts were manifest in treatises,<sup>255</sup> at least one state party platform,<sup>256</sup> a judicial opinion,<sup>257</sup> editorials,<sup>258</sup> congressional speeches<sup>259</sup> a

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255 WILLIAM GOODELL, *OUR NATIONAL CHARTERS* 56 n.41 (1863) (reiterating his objection from two decades earlier that the slave states “notoriously violated” the Clause by statutes and usages that prevented free blacks and antislavery citizens from traveling or residing in those states).

256 1 *HISTORY OF THE REPUBLICAN PARTY OF INDIANA* 36 (Russel M. Seeds ed., 1899) (reprinting the platform, including its resolution “[t]hat the Constitutional provision, ‘that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states,’ shall be enforced by proper Congressional legislation”).

257 *In re Dorsey* (E.D. Va. 1862), reprinted in MCPHERSON, *supra* note 75, at 442–43 (asserting “that the neglect to give practical effect to this constitutional provision has been an efficient cause of the war now desolating the country” including Congress’s failure to confer remedial authority on the federal courts, but that Congress would likely provide relief “at the approaching session” (opinion of Underwood, J.)).

258 Editorial, *What Shall Be Done with the Negro?*, NAT’L REPUBLICAN (Oct. 8, 1862), <http://chroniclingamerica.loc.gov/lccn/sn82014760/1862-10-08/ed-1/seq-2/> (decrying anti-black legislation in some northern states because native free blacks are “entitled to all the immunities and privileges of an American citizen”); Traveler, Letter to the Editor, BELMONT CHRON. (St. Clairsville, OH) (July 20, 1865), <http://chroniclingamerica.loc.gov/lccn/sn85026241/1865-07-20/ed-1/seq-2/> (stating that to address the “grave questions of human rights and national policy,” the Privileges and Immunities Clause “must soon be called out from its privacy and its principles tested”).

259 1 JAMES ABRAM GARFIELD, *Restoration of the Southern States: Speech Delivered in the House of Representatives* (Feb. 1, 1866), in *THE WORKS OF JAMES A. GARFIELD* 95, 110–111 (Burke A. Hinsdale ed., 1882) (calling for a constitutional amendment to authorize Congress to enforce the Due Process and the Privileges and Immunities Clauses—so that “American citizenship [might become] the shield that protects every citizen, on every foot of our soil”).



Senate resolution,<sup>260</sup> and ultimately the Joint Committee on Reconstruction's first draft.<sup>261</sup>

As indicated in the Introduction, the ambition of this Article is not to provide a comprehensive account of the original understanding of the Privileges or Immunities Clause. Still less does this Article hope to fully explain why this understanding was eviscerated by the Supreme Court. Nonetheless, the historical evidence presented here suggests the following hypotheses that are worth further investigation.

First, Justice Miller, in the *Slaughter-House Cases*, was almost certainly mistaken in asserting that apart from the purpose to secure the freedom and citizenship of African-Americans, “none of [the Reconstruction Amendments] would have been even suggested.”<sup>262</sup> To the contrary, even when Republicans proposed merely a containment policy on slavery, and were divided as to black citizenship, Republicans formally proposed statutes and constitutional amendments to better secure the white citizen's constitutional “privileges and immunities.” And in 1860, the main issue of concern was the white antislavery citizen's right to travel and reside throughout the Union, with full freedom to entertain, and perhaps communicate, his opinions.

Second, Justice Miller was very probably mistaken in asserting that the “privileges and immunities” to be protected by the Fourteenth Amendment were sharply distinct from the privileges secured by Article IV. The Amendment was preceded by a decades-old struggle, intensified on the eve of the Civil War, concerning the Privileges and Immunities Clause. This dispute concerned the persons protected, the privileges guaranteed, and the propriety of congressional enforcement. In contrast, there is no record of any antebellum struggle to protect some set of “privileges and immunities” *distinct* from those of Article IV.

Third, the evidence indicates why the authors of the Fourteenth Amendment elected to use the term “privileges or immunities of citizens *of the United States*.” As indicated above, the term had been used as a gloss on the Privileges and Immunities Clause, to clarify that the privileges to be accorded citizens from other states did not include the privileges, such as political rights, that each state might properly reserve to its own citizens. By using this clarifying term, the Joint Committee sought to address one of the chief objections to the Amendment's first draft: that *arguably* Article IV privileges included political rights.<sup>263</sup>

Fourth, the evidence helps explain Bingham's enthusiasm for the Due Process and Privileges and Immunities Clause, and his reason for calling those two provisions the “immortal bill of rights.” These two clauses had been quoted in the Republican Platform of 1860. And it was his mentor,

260 S. JOURNAL, 39th Cong., 1st Sess., 126 (1866).

261 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

262 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873).

263 See, e.g., APPENDIX TO THE CONG GLOBE, 39th Cong. 1st Sess., 135 (remarks of Rep. Andrew Rogers of New Jersey).

Joshua Giddings, who had moved for the platform to include these provisions.

Fifth, the evidence provides support for what may be called partial incorporation—of freedom of speech and of the press, in particular. Still, this author has seen no evidence supporting the claim that anyone before the Civil War believed that the “privileges and immunities of citizens” encompassed *all* the rights secured against federal violation by the first eight amendments. Further, the evidence strongly undermines any claim that Americans believed that the federal Constitution’s specific provisions exhausted the scope of these privileges. The right to travel and acquire real estate, for instance, figured prominently in nearly all the partial catalogues of citizenship’s privileges.

*Finally*, the evidence gives some suggestion as to why the eventual Privileges or Immunities Clause was vulnerable to judicial misconstruction, whether deliberate or accidental.

The Clause by its strict terms did not *settle*, but *raised* a question. Other Reconstruction amendments settled questions. Most Americans shared a roughly similar understanding of the phrase “neither slavery nor involuntary servitude shall exist”; proslavery Americans hated the idea, and antislavery Americans celebrated it. The Thirteenth Amendment settled that question. The Citizenship Clause of the Fourteenth Amendment likewise settled a major question. But the provision that that no state shall abridge the “privileges or immunities of citizens” was to forbid something that no major politician or judge ever embraced. The real point in dispute had been the very meaning of “privileges and immunities of citizens.”

Nor was this issue effectively settled by the war. To be sure, the proslavery, absolute-rights reading effectively died, but the two other interpretations—both the Republican and the interstate-equality reading—survived. While the Republican reading no doubt prevailed among the members of Congress and state legislators who adopted the Fourteenth Amendment, the interstate-equality reading probably still was dominant in the judiciary—where Republicans had far, far less dominance. Further, even Republican judges were likely resistant to the Republican political interpretation, for it had been born of decidedly partisan, even sectional passions, and to that extent, may have appeared improper and unreliable to a judicious temperament. Moreover, the weight of precedent seemed to support the apparently simple, moderate, and equitable interstate-equality understanding. The best precedent for the Republican position, ironically, was the Chief Justice’s opinion in *Dred Scott*, but that decision had been so thoroughly repudiated, especially by Republicans, that it no longer was much of a precedent at all.

It was not surprising, then, that in deciding the meaning of “privileges and immunities of citizens” during Reconstruction, the Supreme Court looked not to the Republican Party platform of 1860 and other antislavery interpretations, and, of course, not to the pro-slavery interpretations. Rather, the Court, in an opinion drafted by Democrat Stephen Field, looked to the interstate-equality reading offered by the Democrat Judge Denio in the *Lem-*

*mon* case. Indeed, *Lemmon* was the sole case cited in the Court's unanimous opinion in *Paul v. Virginia*. The equitable appeal of *Lemmon* was nearly irresistible in *Paul*: an insurance salesman from New York, while in Virginia, would be entitled to the same interstate equality that a slaveholder from Virginia had been entitled in New York.

*Paul v. Virginia*, in turn, became the sole case cited by the majority in *Slaughter-House*, when it interpreted the different "privileges and immunities" secured by Article IV and Amendment XIV. So *Lemmon*, authored by the northern Democrat Hiram Denio, became the progenitor of the *Slaughter-House Cases*, but it was Republican platform, speeches, and articles that were probably the progenitors of the Fourteenth Amendment. It was this sharp distinction—judicial versus political, corresponding to two different antebellum interpretations of the Privileges and Immunities Clause—that was probably responsible, in part, for the dormition of the Privileges or Immunities Clause.