THE ORIGINAL UNDERSTANDING OF THE PRIVILEGES AND IMMUNITIES CLAUSE: MICHAEL PERRY'S JUSTIFICATION FOR JUDICIAL ACTIVISM OR ROBERT BORK'S CONSTITUTIONAL INKBLOT?

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I. INTRODUCTION: WHAT WE HAVE OVERLOOKED

The original understanding of the Constitution and most of the activist decisions of the Warren, Burger, and Rehnquist Courts are irreconcilable.[1] This idea has been an important strand of the conventional wisdom concerning the implications of original intention adjudication.[2] The problem with this strand of wisdom, according to Michael Perry's *The Constitution in the Courts*,[3] is that it is plainly wrong. Far from being hostile to judicial activism, if Perry is right, the "progressive" decisions of the modern Court actually are vindicated by originalism.[4] The purveyors of the conventional wisdom, such as Robert Bork, had not grasped what recent scholarship teaches: the original intention method of constitutional interpretation is about, and is only about, the historical inquiry for establishing what value or principle a constitutional provision was originally understood to represent.[5] It is not about, though Bork and others have confused it with, the inquiry necessary to decide what a constitutional

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[1] This idea has been a familiar refrain of critics of the modern Court's allegedly activist decision-making. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977). Critics of the Court have not been alone in believing this idea, however. Even many of the scholar-defenders of the Court's activist decisions have accepted it. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

[2] My characterization of this idea as "conventional wisdom" is not meant to imply that it was universally accepted, but only that it was far more widely accepted than the converse. *See* BORK, *supra* note 1 at 1; BERGER, *supra* note 1, at 1; Brest, *supra* note 1, at 204. Indeed, so widely accepted was the idea that the Court's activist decisions and the original understanding of the Constitution are contrary that many defenders of these decisions deemed it important to try to discredit the originalist method of constitutional adjudication before advancing their own theories for identifying constitutionally protected rights. *See, e.g.*, Brest, *supra* note 1, at 204. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 236-84 (1988), for an excellent discussion and refutation of the arguments holding that original intention adjudication is unworkable.

[3] *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994).

[4] *See id.* at 191.

[5] *See id.* at 54-69.

principle, as originally understood, means in the context of an actual dispute.[6] Nothing about originalism requires that a judge adopt a "conservative" philosophy or role when this non-historical inquiry, which Perry terms "specification," is undertaken.[7] Those mired in the conventional wisdom also failed to comprehend that the historical or originalist inquiry often does not yield only one plausible conclusion about what principle a provision of the Constitution was originally meant to represent.[8] The definition of originalism, Perry emphasizes, does not preclude a judge from embracing a plausible principle simply because, as is often the case, it is more likely than an alternative plausible principle to legitimize activist decisions.[9] Thus, in Perry's view, Bork's critique of the modern Court's alleged failure to adhere to the original meaning of the Constitution is a hollow polemic.[10] The Court's activist decisions can, and should, rest on original intent.[11]

Perry undertakes to demonstrate the correctness of his understanding of originalism and its implications for activist judicial review based on an examination of scholarly commentary on the Fourteenth Amendment, particularly commentary on the Fourteenth Amendment's Privileges or Immunities Clause.[12] This commentary, on Perry's reading, supports his conclusion that it

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[6] *See id.* at 54-55.

[7] *See id.* at 28.

[8] *See id.* at 55-56. For critical provisions (those usually relied upon to justify modern progressive/activist decisions), such as Section one of the Fourteenth Amendment, it rarely (perhaps never) yields only one plausible conclusion. *See* U.S. CONST. amend. XIV, § 1.

[9] *See* PERRY, *supra* note 3, at 54-69.

[10] *See id.* at 4-10.

[11] *See id.* at 28-53, 191.

[12] *See* U.S. CONST. amend. XIV, § 1. *See also* PERRY, *supra* note 3, at 116-17. Section one of the Fourteenth Amendment states in pertinent part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, § 1.

"The words 'privileges' and 'immunities' first appear in the Constitution in Article IV, § 2, and their recurrence in the Fourteenth Amendment naturally inspires comparison." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-2, at 548 (2d ed. 1988). Article IV, section 2 of the Constitution states "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

is plausible to construe the Privileges or Immunities Clause as having been intended to protect an expansive and open-ended category of citizen freedoms. So inclusive, in Perry's view, is the plausible scope of the originally intended category of privileges or immunities that it can support nearly all the modern Court's most controversial activist decisions.[13]

The importance to his argument of Perry's assertions respecting the category of privileges or immunities originally protected can hardly be overstated.[14] Whether or not the Privileges or Immunities Clause is even implicated by the freedoms that Perry claims the federal courts can protect depends, for the most part, on the breadth of the original category of privileges or immunities.[15] Notwithstanding Perry's assertions to the contrary, as we shall see, scholarly agreement concerning the freedoms meant to be shielded by the Privileges or Immunities Clause is quite limited.[16] At least three camps of opinion can be identified. Perry has joined scholars, such as John Harrison[17] and William Nelson,[18] in the camp adhering to the broadest view of the originally intended category of privileges or immunities.[19] These scholars maintain that the original definition of privileges or immunities was either as Perry defines it, or that an expansive definition is as likely to have been the original understanding as competing narrower definitions.[20] Scholars such as Raoul Berger[21] and Earl Maltz[22] constitute a second camp of opinion. These scholars

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[13] *See* PERRY, *supra* note 3, at 140-41.

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See* John Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 YALE L.J. 1385 (1992).

[18] *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

[19] *See* PERRY, *supra* note 3, at 140-41; Harrison, *supra* note 17, at 1385; NELSON, *supra* note 18, at 1.

[20] *See, e.g.,* Harrison, *supra* note 17, at 1385; NELSON, *supra* note 18, at 1.

[21] *See* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989).

[22] *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-69 (1990).

maintain, albeit with differences of opinion respecting its definition, that the original understanding of privileges or immunities was restricted to a fixed category of freedoms far more limited than the Perry camp's definition.[23] For convenience and for reasons that will become apparent, I refer to this limited category of freedoms as "fundamental rights." Robert Bork[24] is in a third camp.[25] In his view, the Privileges or Immunities "[C]lause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter."[26] As Bork explains, "[a] provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it."[27]

The debate between the first two camps of opinion noted is usually waged, explicitly or implicitly, in terms of what seems an obvious question: which understanding of privileges and immunities was the dominant view of those who provided us with the Fourteenth Amendment?[28] This debate appears to have no clear winner. Yet the seemingly intractable debate about this question lends credibility to Perry's claims that originalist inquiries often yield indeterminate results, and his definition of privileges or immunities is plausible, even if there is no consensus that the privileges or immunities, originally meant to be protected, constituted a broad, open-ended category.[29]

All this interest in the original meaning of privileges or immunities appeared to be much ado about a constitutional provision that the Supreme Court was intent on ignoring until 1999, when the Court resurrected the Privileges or Immunities Clause from 130 years of disuse in *Saenz v. Roe*.[30] The Court's

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[23] *See* BERGER, *supra* note 21, at 1; MALTZ, *supra* note 22, at 1.

[24] *See* BORK, *supra* note 1, at 166.

[25] *See id.*

[26] *Id.*

[27] *Id.*

[28] John Harrison states, for example, that the, "positive law, antidiscrimination reading [of the privileges or immunities clause] . . . was very common, and, . . . it was probably the dominant view." Harrison, *supra* note 17, at 1419.

[29] *See* PERRY, *supra* note 3, at 140-41.

[30] 119 S.Ct. 1518 (1999).

"rediscovery" of the Privileges or Immunities Clause, however, is not so critical to Perry's argument as it may seem. Assuming consistency with the Constitution's original understanding is the measure of constitutional legitimacy and Perry's Privileges or Immunities Clause thesis is correct, the Court's activist decisions are constitutionally legitimate regardless of the Court's failure to recognize the source of this legitimacy.[31]

Since the Court often purports to consider the Constitution's original meaning, Perry's argument cannot be written off as another exercise in academic theorizing that is unlikely to have any impact. Thus, my purpose in this study is to test the correctness of Perry's argument and competing arguments about the rights protected by the Privileges or Immunities Clause. I do not propose to do this, however, by adding yet another layer to the existing debate on which view of privileges or immunities was dominant among the Fourteenth Amendment's enactors. This debate is rooted in a mistaken assumption: scholars erroneously have treated the rival understandings of privileges or immunities held by the Fourteenth Amendment's enactors as if they are mutually exclusive.[32] In reality, as we shall see, the rival understandings overlapped. Failure to take this into account is a crucial error. Its mischief is compounded when scholars give only lip service, as Perry has, to the significance for the originalist project of the extraordinary majorities necessary to amend the Constitution.[33] Consequently, as I contend in Parts II through V, the theoretical conception of the originalist inquiry must be revised as it applies to discerning what privileges or immunities originally meant. I also contend that this revision critically alters the terms of the debate about the original understanding of privileges or immunities. The debate about the dominant view of the Fourteenth Amendment's enactors is misplaced. All that is necessary to reject an expansive definition of privileges or immunities in favor of a narrower one is to show that the number of enactors holding the narrower view was large enough, whether a majority or not, that no constitution-amending majority existed without their assent. In view of this, I want to test Perry's claims, the claims of other scholars and the *Saenz* Court about the original understanding of privileges or immunities from the perspective of the correct conception of the originalist inquiry.[34] I undertake this re-examination of historical evidence

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[31] *See id.*; PERRY, *supra* note 3, at 140-41.

[32] *See* discussion *infra* Parts III, IV, V.

[33] PERRY, *supra* note 3, at 39.

[34] *See id.* at 46.

and scholarly commentary, bearing on the original understanding of privileges or immunities, in Part VI.[35] The findings yielded by this re-examination are not so friendly to the modern Court's activist decisions as Perry undoubtedly would wish. Not only is the set of "freedoms," which a constitution-amending majority of enactors of the Fourteenth Amendment would have protected, narrower than Perry would have the Court protect, but there is no general principle defining this set of freedoms from which the Court can derive "new" privileges or immunities.[36] Although it is hyperbole, Bork is correct in an important sense, as I will show in Part VII, to describe the Privileges or Immunities Clause as an inkblot.[37]

II. RICHARD KAY'S EXPLANATION OF THE ORIGINALIST INQUIRY AND ITS IMPLICATIONS FOR PERRY'S THESIS

According to Perry, those who believe the originalist project is unworkable "could do no better . . . than to consult Kay's work."[38] Perry states that "Kay has effectively rebutted . . . criticisms to the effect that it is virtually impossible to discern the original understanding of a constitutional provision or even to know what the 'original understanding' means . . . ."[39] This ringing endorsement of Kay's approach to the originalist inquiry is well warranted, in my judgment. However, close scrutiny of this approach reveals that Perry has ignored its implications in reaching his conclusions regarding the meaning of privileges or immunities originally meant to be shielded from state abridgement.[40]

At the heart of Kay's approach to discerning original meaning is the identification of an area of meaning shared by a law-making majority of those possessing authority to approve a law.[41] For constitutional amendments, the authoritative law-making bodies and the minimal majorities necessary for law-

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[35] *See infra* Part VI.

[36] *See* PERRY, *supra* note 3, at 46.

[37] *See* BORK, *supra* note 1, at 166; *infra* Part VII.

[38] PERRY, *supra* note 3, at 46. *See* Kay, *supra* note 2, at 247-51.

[39] PERRY, *supra* note 3, at 46.

[40] *See id.*

[41] *See* Kay, *supra* note 2, at 247-51.

making are specified, of course, in Article V.[42] The Fourteenth Amendment followed the more common of the two Article V paths to approval: proposal by a two-thirds majority of each House of Congress and ratification by three-fourths of the legislatures of the states.[43]

The path to approval for a new constitutional provision involves so many individuals that an interpreter, hoping to find one original intention or meaning for the provision, often, perhaps usually, finds instead multiple and varying intentions. Given this, "the task of determining one original intention might appear hopeless."[44] It is not. As Kay explains,

> the difficulty [of multiple and varying intentions] is intractable only if there are multiple and totally *contradictory* intentions. This could happen if, for example, a constitutional provision was created with some constitution-makers intending it to mean x and only x, while other constitution-makers intended it to mean not-x and only not -x. Such contradiction is extremely unlikely, however, because although the intentions involved are held by different people, those intentions are associated with the adoption of identical language. The use of the same language suggests a common core of meaning shared by all. Any different intentions are, therefore, likely to be overlapping not contradictory.[45]

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[42] *See* U.S. CONST. art. V. Article V states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one of the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

[43] *See* U.S. CONST. art. V; U.S. CONST. amend. XIV.

[44] Kay, *supra* note 2, at 248.

[45] *Id.*

Thus, Kay maintains that it ordinarily should be possible to conclude that nearly all of those invested with authority to make law or a constitutional provision intended that it apply to a core area of concern.[46] "As we move out from this core . . . [area of application or core meaning] to somewhat less obvious applications, we can expect to find fewer individuals who intended the law to extend so far."[47] It follows that the odds of successfully defending as authoritative a meaning broader than the core meaning, decrease as the breadth of a law's meaning or its distance from the core meaning increases.[48] "Still, as long as it is probable that a necessary law-making majority shared a particular understanding, it will be appropriate to so interpret the provision."[49]

There are three observations relevant to Perry's argument that can be gleaned from Kay's model of the originalist project.[50] First, a judge committed to originalism will often be confronted with competing definitions of a constitutional principle that are overlapping. Certainly, as will be clear, this is the case for defining the privileges and immunities originally meant to be protected by the Fourteenth Amendment. Moreover, as I will elaborate, Perry's definition of historical indeterminacy is not suited to making a choice among overlapping definitions of a constitutional provision, but instead makes sense only when the rival meanings of a constitutional provision are incompatible.[51] Second, Kay's model posits an inverse relationship between the breadth of a constitutional provision's definition and that definition's probability of having been embraced by a constitution-amending majority.[52] If Kay is right about this, then at least in the context of rival overlapping meanings, Perry is simply wrong to intimate, as he does, that originalism entails no theoretical disadvantage for accepting a broad reading of a constitutional provision, as opposed to a plausible narrower reading.[53] It would seem reasonable, in fact, to employ a

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[46] *See id.* at 249.

[47] *See id.*

[48] *See id.*

[49] *Id.*

[50] *See* PERRY, *supra* note 3, at 59.

[51] *See id.*

[52] *See* Kay, *supra* note 2, at 249-50.

[53] *See id.*; PERRY, *supra* note 3, at 59.

presumption favoring the narrower of two competing meanings when historical inquiry leads to uncertainty regarding the breadth of a constitutional provision. After all, a narrower area of application is at least somewhat more likely to have been the area originally intended by an extraordinary majority. Although closely related to the foregoing, a last important observation is implicit in Kay's comments.[54] In the context of rival overlapping meanings, the votes of a minority, adhering to a narrow definition of a constitutional provision, in effect, define the constitutional provision's area of application if their votes were necessary to achieve a constitution-amending majority. For example, let us assume that, for a constitutional amendment, x represents some relatively narrow area of application and y represents an area of application in addition to x. The choice of the originalist judge in the context of overlapping definitions is between the relatively narrow definition represented by x and the broader definition x + y. If forty percent of those voting to propose an amendment (in either the House or Senate) meant to restrict the amendment's area of application to x and sixty percent meant to reach x *and* y (x + y), the only area of application that has attained the requisite imprimatur of a constitution-amending majority is x. This is equally applicable to the states. If forty percent of state legislatures meant x and sixty percent meant x and y, only the relatively narrow area of application represented by x was approved by a constitution-amending majority. Thus, Kay stresses that not finding an area of application where a constitution-amending majority's intentions coincide is likely to be rare, but "often shared intentions may be narrow and the area of possible but unintended meanings consequently broad."[55]

III. THE REACH OF THE PRIVILEGES OR IMMUNITIES CLAUSE ACCORDING TO PERRY

The words of the Fourteenth Amendment's Privileges or Immunities Clause—"no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[56]—pose two obvious

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[54] *See* Kay, *supra* note 2, at 249-50.

[55] *Id.* Consider this: historian, Michael Benedict, found that about half of Republicans in the House of Representatives were in the "Radical camp" when the Fourteenth Amendment was under consideration. *See* MICHAEL BENEDICT, A COMPROMISE OF PRINCIPLE (1974). As we shall see, it is doubtful that all Radicals thought of privileges or immunities as having the breadth Perry would attribute to this concept. Yet, even if every Radical Republican in the House held Perry's view of privileges or immunities, this number would not have constituted the two-thirds majority required to propose the amendment.

[56] U.S. CONST. amend. XIV, Section 1.

questions for those interested in the original meaning of the clause. What privileges or immunities did a constitution-amending majority of the enactors of the clause intend to protect? Furthermore, what constituted an abridgement of these privileges and immunities? Perry's answer to the first question, as previously indicated, is crucial to his defense of the modern Supreme Court's controversial progressive decisions.[57] Perry, of course, recognizes that the modern Court has relied on the Fourteenth Amendment's other Section one Clauses guaranteeing due process and equal protection of the law, to justify most of these decisions, rather than the Privileges or Immunities Clause.[58] Moreover, Perry acknowledges that, from an originalist perspective, this reliance appears mistaken for the due process (or substantive due process) decisions and questionable for the equal protection opinions.[59] The Court's "mistake," however, only "presents a minor formal problem, not a major substantive one,"[60] for Perry.[61] As he explains, the "legitimacy . . . [of a decision of the Court] depends, not on the Court invoking the right clause, but on the result being supported by some clause—by some provision of the constitutional text."[62] In Perry's view, most of the modern Court's controversial decisions are (or could be) supported by the original understanding of the Fourteenth Amendment's Privileges or Immunities Clause.[63] The problem with this view, as I endeavor to explain at length, is that Perry seriously overstates the breadth of the category of privileges or immunities originally understood as protected.[64]

As Perry sees it, the Privileges or Immunities Clause protects from state abridgement all the privileges or immunities (freedoms to and freedoms from) that citizens enjoy under both state and federal law, as well as the "freedom of

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[57] Although what was meant by abridgement is an interesting question in its own right, how state government abridged an unprotected "privilege or immunity" is of no significance for my argument.

[58] *See* PERRY, *supra* note 3, at 136 (citing BORK, *supra* note 1, at 180).

[59] *See id.* at 137.

[60] *Id*

[61] *See id.*

[62] *Id.*

[63] *See id.* at 137, 140-41.

[64] *See* PERRY, *supra* note 3, at 140-41.

a citizen to do or to refrain from doing as he or she wants in the 'pursuit' . . . of his or her 'happiness.'"[65] Not surprisingly, in Perry's judgment, "it would be difficult to conclude that the court had protected . . . a privilege or immunity—a citizen freedom—not meant to be protected."[66] Before undertaking a critique of Perry's definition of privileges or immunities, that are not to be abridged, it is crucial to clarify the breadth of his definition and provide an overview of disagreement with this definition.

Most students of the Privileges or Immunities Clause, including Perry, agree on one point: the Privileges or Immunities Clause was meant to protect, in some fashion, the freedoms enumerated in the Civil Rights Act of 1866.[67] Property and contract rights, access to the courts and personal security were the principal concerns of the Act.

Although Congress successfully overrode President Andrew Johnson's veto of the Civil Rights Act, his argument that it was unconstitutional was shared by a number of Republicans in Congress.[68] Whatever else the Fourteenth Amendment and its Privileges or Immunities Clause were intended to address, as I elucidate in Parts IV and VI (3) herein, there is little doubt that constitu-

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[65] *Id.* at 127.

[66] *Id.* at 141.

[67] *See id.* at 118; *see also supra* text accompanying notes 72-76. Section one of this Act defined citizenship of the United States to include the former slaves and then stated:

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

Id. (citing Civil Rights Act of 1866, 14 Statutes 27 (1866)).

[68] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866). The President objected stating: "I regret that the bill . . . contains provisions which I cannot approve, consistently with my sense of duty to the whole people and my obligations to the Constitution of the United States." ALFRED AVINS (ed.), THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 759 (1967).

tionalizing the rights specified in the Civil Rights Act of 1866 was a primary objective.[69] Agreement among scholars on the original intended scope of protected privileges and immunities ends here.

On Perry's reading, however, the privileges and immunities enumerated in the Civil Rights Act of 1866 were never meant to exhaust the category of privileges or immunities. Among others in this category, Perry includes "each and every privilege or immunity citizens enjoy under the laws of the state."[70] As far as state law is concerned, then, Perry regards the original understanding of privileges or immunities as coextensive with the "privileges and immunities" currently recognized in a state's statutory and other positive law.[71] This is, of course, a dynamic and evolving subcategory of privileges and immunities.

According to Perry, "[i]t is *clear* that the privileges and immunities meant to be protected . . . include all the privileges and immunities citizens enjoy . . . under state law."[72] Perry assures us that scholars agree on this point.[73] Perry's certitude notwithstanding, all scholars do not agree on this point.[74] Consider Earl Maltz's conclusion about the original intended scope of privileges or immunities: "[t]he clause was perceived as guaranteeing a relatively small set of rights which, though somewhat unclear at the margins, was none-

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[69] *See supra* note 113-114 and accompanying text.

[70] PERRY, *supra* note 3, at 124. Perry further states

> [t]hat in 1868, when the Fourteenth Amendment became a part of the Constitution, there were, compared to today, relatively few privileges and immunities citizens enjoyed under state law, where as today, in the age of the welfare state, there are . . . relatively many such privileges and immunities, is beside the point: The Privileges or Immunities Clause was meant to protect, not merely *some* of the privileges and immunities citizens enjoy under state law, but *all* of them.

Id. at 125. (emphasis in original).

[71] *See id.*

[72] *Id.* at 140 (emphasis added).

[73] *See id.* at 124.

[74] *See e.g.*, MALTZ, *supra* note 22, at 109; Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KENTUCKY L.J. 1, 5 (1993-94); BERGER, *supra* note 21, at 67-90.

theless fixed for all time in 1866."[75] Consider as well Raoul Berger's view of protected privileges and immunities: "the Framers [of the Fourteenth Amendment's Privileges or Immunities Clause] regarded 'privileges or immunities' as words of art having a circumscribed meaning."[76] Berger has unrelentingly maintained that expansive definitions of the privileges and immunities protected by the Privileges or Immunities Clause, such as Perry's, are only wishful thinking and the evidence shows that the clause was intended to shield only the privileges and immunities enumerated in the Civil Rights Act of 1866.[77] Likewise, Kay finds interpretations limiting the originally understood scope of privileges or immunities more historically compelling than expansive constructions of the clause's original meaning.[78] Although Perry dissents from Berger's conclusions[79] and also disagrees with Kay's view,[80] this hardly points to a consensus among scholars.

Perry does admit that not all students of the Privileges or Immunities Clause would take his next step.[81] Nevertheless, he believes that it is plausible that the clause was meant to forbid the states to abridge "each and every freedom of a citizen to do, or to refrain from doing, as he or she wants, in the 'pursuit' . . . of his or her 'happiness.'"[82] If this is correct, it means that a constitution-making majority of those approving the Privileges or Immunities Clause understood it as delegating to some future decision-maker an open-ended invitation to bring to bear a libertarian philosophy for determining what constitutes privileges and immunities protected from state government. This decision-maker

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[75] MALTZ, *supra* note 22, at 109.

[76] Berger, *supra* note 74, at 5.

[77] *See* BERGER, *supra* note 21, at 67-90. *See also* Raoul Berger, *Lawyering vs. Philosophizing: Facts or Fancies,* 9 U. OF DAYTON L. REV. 171, 183-87 (1984).

[78] *See* Kay, *supra* note 2, at 266-69.

[79] Perry does not expressly dissent from Berger's conclusions about the privileges or immunities clause. *See* PERRY, *supra* note 3, at 117. However, Perry's position is clearly at odds with Berger's, who is not among those scholars Perry cites for the original meaning of privileges or immunities. *See id.*

[80] *See* Kay, *supra* note 2, at 266-69. Perry expressly declares his disagreement with Kay. *See* PERRY, *supra* note 3, at 220 n.71.

[81] *See* PERRY, *supra* note 3, at 134-35.

[82] *Id.* at 127.

should be the courts, in Perry's judgment.[83]

Perry also describes, in expansive terms, the privileges and immunities meant to be protected by federal law. This subcategory of privileges and immunities includes, in his words, "all the privileges and immunities citizens enjoy, against either the national government or state government, under federal law, including federal constitutional law."[84] It should be noted that many "federal privileges and immunities" could not be abridged even had the Privileges or Immunities Clause not been added to the Constitution. For many of these privileges and immunities, protection from abridgement by the states is dependent not on the Privileges or Immunities Clause, but on the exercise of federal power under other constitutional provisions.[85] This is not the case, however, for the national Bill of Rights[86]—around which almost all the controversy concerning the relationship between federal privileges and immunities and the original understanding of the Privileges or Immunities Clause has centered.[87] In the view of some constitutional scholars, the Privileges or Immunities Clause is the only provision of the Constitution that is a good candidate for transforming the Bill of Rights freedoms, protected from the federal government, into privileges and immunities protected as well from state abridgement.[88] Perry apparently concurs with the view of these scholars and believes that commentators, especially Michael Kent Curtis,[89] have demonstrated that it is, at the very least, plausible that the Privileges or Immunities Clause was intended to accomplish this transformation.[90] On the other hand, historian

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[83] *See id.* at 192-204.

[84] *Id.* at 126.

[85] *See, e.g.*, Heart of Atlanta v. United States, 379 U.S. 241 (1964). In *Heart of Atlanta*, the Court held that congressional action to secure the right of access to desegregated lodging, restaurants and other "public accommodations" is justified under the Interstate Commerce Clause, for example. *See id.*

[86] *See* U.S. CONST. amends. I-X. The Bill of Rights ordinarily refers to the "[f]irst ten Amendments to the U.S. Constitution providing for individual rights, freedoms, and protections." BLACK'S LAW DICTIONARY 168 (6th ed. 1990). However, the focus of this article, as well as Perry's focus in this regard, is on the first eight amendments.

[87] *See* PERRY, *supra* note 3, at 126. Perry acknowledges this controversy. *See id.*

[88] *See, e.g.*, MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); MALTZ, *supra* note 22, at 117-18.

[89] *See* CURTIS, *supra* note 88, at 66-67.

Forrest McDonald,[91] said of Berger's work refuting Curtis that it is "utterly devastating."[92] Likewise, Charles Fairman[93] and others have insisted that the Privileges or Immunities Clause did not incorporate the Bill of Rights.[94]

To summarize briefly, the debate about the original meaning of privileges or immunities, as is so often true of disputes about a constitutional provision's meaning, is actually about the provision's intended level of generality. Berger and Maltz are representative of scholars contending that the predominant intention of the enactors of the Privileges or Immunities Clause was to protect only a relatively narrow category of what I have labeled "fundamental freedoms."[95] Berger would confine this category to the rights denoted in the Civil Rights Act of 1866.[96] Maltz acknowledges a lack of clarity among the enactors, but he insists that the predominant view restricted the category to a relatively narrow and fixed set of rights, including those in the Civil Rights Act of 1866 and probably Amendments I through VIII (the Bill of Rights) of the Constitution.[97] Scholars in Perry's camp of opinion obviously see the predominant intention of the enactors as justifying protection of a sweeping and open-ended category, including all "privileges and immunities" conferred by state and federal law, as well as, in Perry's view, freedom from all "unnecessary restraints" interfering with a citizen's personal choices.[98] Two points should be re-emphasized about these camps of opinion. Firstly, they do not represent dichotomous choices. Secondly, Perry's expansive view is at a serious disadvantage for

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[90] *See* PERRY, *supra* note 3, at 154.

[91] *See* Forrest McDonald, *Book Review*, Chronicles 29, 31 (October 1989) (citing BERGER, *supra* note 21, at 183).

[92] *Id.*

[93] *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

[94] *See id. See also, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962); James Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 464-65 (1985).

[95] *See* BERGER, *supra* note 21, at 63; MALTZ, *supra* note 22, at 109.

[96] *See* BERGER, *supra* note 21, at 63.

[97] *See* MALTZ, *supra* note 22, at 109, 117-18.

[98] *See* PERRY, *supra* note 3, at 117.

demonstrating that it was the view of a constitution-amending majority.[99] That is, those enactors holding Perry's definition of the scope of privileges or immunities would have accepted that the rights in the Civil Rights Act of 1866 and the Bill of Rights should be secured from abridgement.[100] However, those adhering to a position that only a fixed set of fundamental rights should be protected would not have accepted the sweeping, open-ended category described by Perry.[101] Obviously, Bork's appraisal of the original understanding of the Privileges or Immunities Clause is not consonant with either of these camps.[102]

IV. PERRY ON INDETERMINACY

As with his more general case for indeterminate originalist inquiries, Perry's case for his definition of the privileges or immunities, originally meant to be secured by the Privileges or Immunities Clause, is not built on his own investigation of the historical record.[103] He instead relies primarily on the work of other constitutional scholars and on the fact that these scholars disagree with one another.[104] There is no blinking this disagreement. Indeed, despite Perry's assertions to the contrary, scholars do not all agree even with the proposition that the Privileges or Immunities Clause was meant to protect all privileges and immunities created by state law.[105] If Perry cannot defend his definition of the scope of privileges or immunities by pointing to a scholars' consensus, can he defend it by pointing to historical indeterminacy and then claim that his definition is just as plausible as competing definitions? My answer is that he cannot if he insists on his definition of historical indeterminacy.

According to Perry, indeterminacy exists when there is more than one plausible original understanding of a constitutional provision and it is reasonable to

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[99] *See id.*

[100] *See id*

[101] *See id.*

[102] *See* BORK, *supra* note 1, at 166.

[103] *See* PERRY, *supra* note 3, at 117.

[104] *See id.*

[105] *See id.*

disagree about which is the more plausible.[106] Perry adds that an "originalist judge who . . . decides in favor of an interpretation of a constitutional provision that seems to her less plausible, even if only slightly less, than a competing interpretation is not unqualifiedly committed to the originalist approach."[107] To restate this in terms of Kay's model of the originalist inquiry, indeterminacy exists when the historical evidence for each of the possible original meanings of a constitutional provision is so closely balanced that each meaning appears to have the same probability of having been approved by the requisite constitution-making majority.[108]

This kind of indeterminacy assuredly does not characterize the historical record on the scope of privileges or immunities. Instead, this record substantiates what Kay's model for discerning original intent predicts—the narrowest of the rival readings is substantially more plausible (more probable) than competing readings.[109] An impressive case can be made for the position that the Privileges or Immunities Clause was meant to protect the rights denoted in the Civil Rights Act of 1866.[110] The case for a broader reading of privileges or immunities is decidedly less impressive.[111]

Although I address the historical record on the scope of privileges or immunities in Part VI of this discourse, I want to underscore, at this juncture, that even many of the scholars on whom Perry relies most heavily agree with my assessment of the relative weight of the historical evidence.[112] John Harrison, for example, figures prominently among the scholars cited by Perry. Yet Harrison concedes that he would "hesitate to attribute to most participants in the framing and ratification of the Fourteenth Amendment any precise notion of the meaning of Section one, other than that it was designed to forbid Black Codes and constitutionalize the Civil Rights Act of 1866."[113] Another of

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[106] *See id.* at 56.

[107] *Id.* at 68.

[108] *See* Kay, *supra* note 2, at 266-69.

[109] *See id.*

[110] *See id.*; *supra* text accompanying notes 72-77.

[111] *See* discussion *infra* Parts VI. A.3., B., C.

[112] *See infra* Part VI.

[113] Harrison, *supra* note 17, at 1397.

Perry's favorite scholars, William Nelson, states, "[a]t the very least, Section one was understood to remove all doubts about the constitutionality of the 1866 Civil Rights Act and thus to give Congress legislative power in reference to basic rights of contract, property, and personal security."[114] As these citations suggest, an originalist judge is not faced with historical indeterminacy if the choice is between the Civil Rights Act definition of privileges or immunities and Perry's much broader definition.

Perry might protest that the originalist is not faced with this choice because it is not plausible to believe that the Civil Rights Act of 1866 exhausted the privileges and immunities meant to be guarded against state abridgement. However, this is not evident from the scholarship on the Privileges or Immunities Clause or the historical record of the clause's enactment. Beyond the rights in the Civil Rights Act of 1866, what privileges or immunities the constitution-amending majorities proposing and ratifying the Fourteenth Amendment's Privilege or Immunities Clause meant to protect is hotly disputed. Recall that Berger has insisted over and over that the Privileges or Immunities Clause was not intended to do more than put the rights in the Civil Rights Act on a constitutional footing.[115] At least for defining the scope of privileges and immunities sheltered by the Privileges or Immunities Clause, Berger's position cannot be dismissed by asserting that he has not understood the distinction between specific applications of a constitutional principle and the constitutional principle.[116] Berger's position, stated in Kay's terms, is that the Civil Rights Act represents the outer boundary of the originally intended area of application of the Privileges or Immunities Clause.[117] As I explain later, in my judgment, Berger is more emphatic about this than probably is warranted. Still, the gauge of a constitutional definition's plausibility is surely the probability, based on historical evidence, that the definition was embraced by a constitution-amending majority of the provision's enactors. From this perspective, Berger's definition of protected privileges and immunities is not only plausible, but is more plausible than Perry's definition.

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[114] NELSON, *supra* note 18, at 115.

[115] *See* BERGER, *supra* note 21, at 63.

[116] *See* T. McAffee, *Reed Dickerson's Originalism—What It Contributes to Contemporary Constitutional Debate*, 16 S. ILL. U.L.J., 617, 648 (1992). According to Thomas B. McAffee, Berger makes this mistake in expounding the original meaning of the Equal Protection Clause. *See id.* Even Perry acknowledges that Berger seems aware of this distinction. *See* PERRY, *supra* note 3, at 219 n. 65.

[117] *See* BERGER, *supra* note 21, at 31-42.

Assuming for now that there is more evidence for the Civil Rights Act definition of privileges or immunities and thus, indeterminacy in Perry's sense does not exist, the case for grounding modern judicial activism on the Privileges or Immunities Clause appears doomed. Virtually none of the "rights" that have been announced in the modern Court's more controversial decisions would be privileges or immunities. Abortion rights, for example, would not implicate the Privileges or Immunities Clause. However, the case for using the Privileges or Immunities Clause to impart legitimacy to the modern Courts controversial decisions cannot be disposed of this easily.

V. THE OVERLOOKED DISTINCTION BETWEEN OVERLAPPING AND MUTUALLY EXCLUSIVE ORIGINAL MEANINGS AND THE IMPLICATIONS FOR PERRY'S INDETERMINACY ARGUMENT

Based on Perry's definition of indeterminacy, the critical question for originalist inquiries can be stated thus: is one of the plausible original meanings of a constitutional provision more plausible than its competitors? Perry's assumption that this one question fits all originalist inquiries equally well is mistaken.[118] As noted earlier, this question is better suited to competing definitions of a constitutional provision that are mutually exclusive than to the overlapping rival definitions of privileges or immunities. That is, the choice concerning privileges or immunities is not between x and y, where x represents an area of privileges or immunities incompatible with the area represented by y. Rather, the choice is between x and x + y or between x and x + y + z and so forth, where x represents the rights denoted in the Civil Rights Act of 1866 and y and z represent additional areas or categories (classes) of privileges or immunities. Remember that nearly all scholars agree that the Privileges or Immunities Clause was intended to protect the rights enumerated in the Civil Rights Act of 1866. The only significant question is whether the Privileges or Immunities Clause was intended to protect more than these rights. If the question is whether Perry's expansive definition of privileges or immunities, or the rights enumerated in the Civil Rights Act of 1866, is the more probable understanding of the constitution-amending majority approving the Fourteenth Amendment, there can be but one answer. Recall that the historical evidence tracks Kay's observation that, in the context of overlapping rival definitions of a constitutional provision, there usually exists an inverse relationship between the breadth of a definition and the probability of the definition having attained

[118] *See* PERRY, *supra* note 3, at 125.

the imprimatur of a constitution-amending majority.[119] Therefore, Perry's question should be replaced with a more apt question: is it probable that the necessary extraordinary majority meant for the category of privileges or immunities to include some set of privileges or immunities in addition to the rights enumerated in the Civil Rights Act of 1866? In particular, did a constitution-amending majority intend to secure from state abridgement all "rights" conferred by state law, the freedoms enumerated in the federal Bill of Rights and the freedom of a citizen to do, or refrain from doing, as she wants in pursuit of happiness? The applicability to these questions of the point made earlier, about the power of a minority to determine the breadth of a constitutional provision's definition, is apparent. If passage of the Fourteenth Amendment depended on the votes of those who intended that protected privileges and immunities include only the rights secured by the Civil Rights Act of 1866 (even if this was only a minority of enactors), then an extraordinary majority intended to protect only these rights.

VI. THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

My analysis of the questions posited above is based largely on contextual evidence. By this I mean historical materials relating to the impetus for the Privileges or Immunities Clause, statements made by those who proposed and ratified the Fourteenth Amendment about their understanding of the Clause, other relevant historical materials and the relationship of the clause to established constitutional principles. In the course of my analysis, I examine and critique the conclusions about the originally intended scope of privileges or immunities of those scholars on whom Perry has relied so heavily, particularly William Nelson, John Harrison and Michael Curtis.[120]

For Perry, my emphasis on contextual evidence undoubtedly gives too little emphasis to how a present-day reader might construe the words of the Privileges or Immunities Clause. He notes that "[e]ven on its face, . . . the clause forbids states to abridge, not just some of the privileges and immunities of citizens, but any of them . . ."[121] Certainly, it is true that the language of the clause suggests an intention to protect any and all the citizen's privileges and

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[119] *See* Kay, *supra* note 2, at 252.

[120] *See* Nelson, *supra* note 18, at 115; Harrison, *supra* note 17, at 1397; CURTIS, *supra* note 88, at 66-67.

[121] PERRY, *supra* note 3, at 125.

immunities. This is question begging, however. What the originalist wants to know is how the enactors defined the category of privileges or immunities, all of which was to be protected. We cannot discover *their* category of privileges or immunities unless we put aside, as best we can, "our contemporary preconceptions and values, and . . . reconstruct those of our subject."[122] The probability that we will find our own preconceptions in a constitutional provision, in the absence of an analysis grounded in contextual evidence, is especially high for passages stated in recondite language, such as the Privileges or Immunities Clause. Moreover, the scholars on whom Perry depends for his definition of privileges or immunities claim that historical evidence supports their conclusions.[123]

A. "FUNDAMENTAL RIGHTS" VERSUS "ALL RIGHTS" CONFERRED BY STATE LAW

Those who proposed and ratified the Fourteenth Amendment were well acquainted with the idea of protecting privileges and immunities from state governments. Article IV of the Articles of Confederation[124] and the Privileges and Immunities or Comity Clause[125] of Article IV Section 2 in the Constitution of the United States, embedded the idea in the highest federal law, at least so far as prohibiting in certain respects discrimination by a state directed against citizens from another state.[126]

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[122] Kay, *supra* note 2, at 252.

[123] *See, e.g.*, NELSON *supra* note 18; Harrison, *supra* note 17.

[124] The Articles of Confederation referred to courtesy among the states, interstate comity stating:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State . . . .

Articles of Confederation, art. IV, cl. 1 available in RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 12.7 (3d ed. 1999)

[125] *See* U.S. CONST. art. IV, § 2, cl. 1. "The major clause of Article IV dealing with comity is Section two, Clause 1, also known as the Comity Clause or the Privileges and Immunities Clause of Article IV." ROTUNDA & NOWAK, *supra* note 124, at § 12.7.

[126] *See* BERGER, *supra* note 21, at 31-36.

Not unexpectedly then, the pre-Reconstruction understanding of privileges and immunities secured by the Comity Clause was an important part of the congressional debate over the Fourteenth Amendment's Privileges or Immunities Clause. Particularly important were the several court decisions expounding on the scope of the Comity Clause.[127] Among these decisions, Perry calls attention to only a portion of *Corfield v. Coryell*.[128] The portion of *Corfield* he cites—the part of *Corfield* which seems invariably to be cited in favor of an activist reading of the Privileges or Immunities Clause—describes privileges and immunities in, what are, admittedly expansive terms.[129] Notwithstanding this, few of the court decisions prominently mentioned in the Reconstruction debates appear to have held that the scope of "rights" secured by the Comity Clause extended to all privileges and immunities conferred by state law.[130] Not even the *Corfield* court gave the Comity Clause such an expansive reading. Although Perry ignores it, the *Corfield* court concluded that, "we cannot accede to the proposition . . . that, under . . . [the Comity Clause] of the constitution, the citizens of the several states are permitted to participate in *all* the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens . . . ."[131] In another of the Comity Clause cases garnering attention in the Reconstruction debates, the Maryland Supreme Court stated,

> it seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, opposed to a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected.[132]

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[127] *See* Earl Maltz, *Fourteenth Amendment Concepts in the Antebellum Era,* THE AM. J OF LEGAL HISTORY 305, 335-39 (1988). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 474-475 (1866) (remarks of Senator Trumbull).

[128] 6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

[129] *See* PERRY, supra note 3, at 125 (citing Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa 1823)). *See also* CURTIS, *supra* note 88, at 66-67 (citing this part of *Corfield* as corroborating evidence for his argument that the Privileges or Immunities Clause was meant to protect all of the Bill of Rights).

[130] *See* MALTZ, *supra* note 22, at 334-46.

[131] *Corfield,* 6 F.Cas. at 552 (emphasis added).

[132] Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797).

The thorough research done by Earl Maltz on the antebellum usage of the privileges and immunities concept confirms that the Comity Clause was understood as having a limited reach.[133] In his words, "most courts concluded that the concept of privileges and immunities did not encompass all rights which were associated with citizenship in a particular state: rather, only those rights which were in some sense 'fundamental' were viewed as protected."[134]

That the only privileges and immunities protected by the Comity Clause were those deemed fundamental is clearly indicated even in *Corfield*: "what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental . . . ."[135]

It is true that fundamental rights are described in expansive terms in *Corfield*—in terms that lend credence to Perry's definition of the scope of privileges and immunities protected by the Privileges or Immunities Clause. To highlight only the part of *Corfield* cited by Perry, protected privileges and immunities include,

> those privileges and immunities . . . *which belong of right to the citizens of all free Governments.* They may . . . be all comprehended under the following general heads: protection by the Government, the enjoyment of life and Liberty, with the right to acquire and possess property of every kind, *and to pursue and obtain happiness and safety,* subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.[136]

Although Perry cites *Corfield* to vouch for the plausibility of his argument that the "freedom of a citizen to do, or to refrain from doing, as he wants [is a privilege or immunity],"[137] *Corfield* falls short of supporting even the less expansive assertion that all "rights" conferred by state law are privileges or immunities. Perry makes no mention of the *Corfield* reference to fundamental

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[133] *See* MALTZ, *supra* note 22, at 335-39.

[134] *Id.* at 336.

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

[136] PERRY, *supra* note 3, at 125 (emphasis in original).

[137] *Id.*

privileges and immunities. And yet, at the risk of stating the obvious, this reference was unmistakably intended to limit the scope of the Comity Clause for the very purpose of ensuring that it would not be read as encompassing "all" rights created by state law. *Corfield,* in fact, concluded that there was no right to fish for oysters protected by the Comity Clause.[138]

The idea that fundamental rights defined the scope of privileges and immunities clearly carried over from the antebellum era to the Reconstruction period. Lyman Trumbull,[139] chair of the Senate Judiciary Committee during the debates leading to proposal of the Fourteenth Amendment, posed the same question posed in *Corfield* and gave, to an extent, the same answer: "What rights are secured to the citizens of each State under . . . [the Comity Clause] provision? Such fundamental rights as belong to every free person."[140] Even Senator Jacob Howard,[141] whose speech introducing the Fourteenth Amendment to the Senate, Perry notices because Howard quoted from *Corfield* to explain privileges or immunities, said later in the same speech, Section one together with congressional enforcement power in Section five "will if adopted by the States, forever disable every one of them from passing laws trenching upon those *fundamental rights and privileges* which pertain to citizens of the United States . . . ."[142]

In the linguistic fashion of the day, it was not uncommon to speak of fundamental rights as natural rights and of civil rights or civil liberties as a subset of natural or fundamental rights that were regulated by the state for the common good.[143] Whether the term used was fundamental rights, natural

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[138] *See Corfield*, 6 F.Cas. at 546.

[139] Lyman Trumbull, Republican from Illinois served in the United States Senate from March 4, 1855 to March 3, 1873. *See* AVINS , *supra* note 68, at 759. Senator Trumbull was a Justice of the Illinois Supreme Court from 1848-1853 and Chairman of the Senate Judiciary Committee from 1864-1872. *See id.*

[140] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

[141] Jacob M. Howard, Republican from Michigan served in the United States Senate from January 17, 1862 to March 3, 1871. *See* AVINS, *supra* note 68, at 758. Howard was elected as a Whig Representative to the 27th Congress, and then drew up his first Republican platform in 1854. *See id.*

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

[143] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474-475 (remarks of Senator Trumbull).

rights or civil rights,[144] it is abundantly clear that use of these terms usually was meant to delimit the scope of rights that could be protected by the federal government from state abridgement. Rights that were not fundamental were described, more often than not, at least in congressional debates, in terms such as creatures of law or creations of government and were commonly conceived to be at the mercy of state government.[145] "Political rights," for example, particularly suffrage and the right to hold public office, were repeatedly characterized in this fashion.[146] Thus, the author of the Fourteenth Amendment's Privileges or Immunities Clause, John Bingham, noted, in his characteristically flamboyant style,

> citizens of the United States; . . . although not equal in respect of political rights, are equal in respect of natural rights. Allow me . . . to disarm prejudice and silence the demagogue cry of "negro suffrage," and "negro political equality," by saying, that no sane man ever seriously proposed political equality to all . . . . Political rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of qualified electors of any State . . . .[147]

James Wilson, chairman of the House Judiciary Committee during the early Reconstruction period, also thought in terms of this distinction:

> [w]hat do . . . [civil rights and immunities] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in several States? No; for suffrage is a political right which has been left under the control of the several States . . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools . . . . The definition given to the term "civil rights" in Bouvier's Law Dictionary . . . is supported by the best authority. It is this: "Civil rights are those which

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[144] *See supra* text accompanying notes 147-148.

[145] *See supra* text accompanying notes 147-148.

[146] *See supra* text accompanying notes 147-148. *See also* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). (remarks of Rep. James Wilson); CONG. GLOBE, 39th Cong., 1st Sess. 1151 (remarks of Rep. Alfred Thayer).

[147] CONG. GLOBE, 35th Cong., 2nd Sess. 985 (1859) (remarks of Bingham).

have no relation to the establishment, support, or management of government". . . . [C]ivil rights are the natural rights of man . . . .[148]

Statements similar to these can be found throughout the record of congressional debates. Although so-called "political rights" probably were not the only class of rights thought to be excepted from fundamental rights by a number of the Fourteenth Amendment's enactors, I want initially to concentrate on voting and other political rights to demonstrate that the idea that the Privileges or Immunities Clause shielded only a limited set of fundamental rights was common to a great many, if not most, of those who gave us this clause.

1. ORIGINALIST ARGUMENTS THAT VOTING AND OTHER "POLITICAL RIGHTS" ARE PRIVILEGES OR IMMUNITIES

a. PERRY'S CLAIM THAT THE ENACTOR'S VIEW IS NOT DETERMINATIVE

Perry actually concedes that those who gave us the Fourteenth Amendment did not recognize a right to vote or certain other political rights as privileges or immunities.[149] However, he insists that this is not determinative for a judge committed to originalism.[150] What matters is that the Privileges or Immunities Clause was meant to protect all privileges or immunities (all rights/freedoms to and freedoms from) and today our public policies recognize political rights, such as voting, as rights.[151] In Perry's view, therefore, the enactor's distinction was between benefits and forms of conduct considered rights and benefits and forms of conduct not considered rights. Yet what the enactors of the Fourteenth Amendment considered rights or privileges does not determine what we consider rights or privileges. If a benefit or a particular conduct comes to be recognized as a right by the public policy of a state, the benefit or conduct is a privilege that cannot be "abridged" because the enactors meant the Privileges or Immunities Clause to protect from abridgement all "rights" created by state law. From Perry's perspective, then, the Court's "one person, one vote" deci-

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[148] CONG. GLOBE 39th Cong., 1st Sess. 1117 (1866) (remarks of Wilson).

[149] *See* PERRY, *supra* note 3, at 141.

[150] *See id.* at 142.

[151] *See id.*

sions beginning with *Reynolds v. Sims*[152] are only new specifications of the original understanding of the Privileges or Immunities Clause built on the proposition that today, voting is recognized by public policy as a right.[153]

Perry's argument, however, misses (or seeks to evade) the point of the many enactors who excluded voting, and other political rights, from Privileges or Immunities Clause protection. They did not defend the exclusion of voting on the ground that it was not even a specie of citizen "rights," but instead defended exclusion on the ground that it was not the kind of right (fundamental, civil or natural) that the Privileges or Immunities Clause was meant to protect. To put this another way, these enactors thought the definition of privileges or immunities did not include voting and other non-fundamental rights. They were not merely classifying voting as a "non-right." Consider this emphatic statement by Senator Howard denying that voting was a privilege or immunity under Section one:

> I deny that the right to vote is one of those rights referred to by Mr. Jefferson, who penned the Declaration . . . . It is not one of the rights given us by nature. It is not the same as the right to breath the air . . . . It is not the right of liberty even; not one of those inalienable rights referred to in the Declaration, conferred upon all men in virtue of their creation, but a conventional right, to be granted or withheld as society may deem best; one which has always been treated as such; one which cannot and does not exist without law . . . .[154]

This clearly did not spring from an aberrant political philosophy. Much the same distinction between rights, in much the same words, is found in the remarks of Bingham[155] and Wilson,[156] cited earlier.[157] Likewise, the pre-

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[152] 377 U.S. 533 (1964).

[153] *See* Reynolds v. Sims, 377 U.S. 533 (1964); PERRY, *supra* note 3, at 142.

[154] CONG. GLOBE, 39th Cong., 2nd Sess. 185 (1866).

[155] John A. Bingham, Republican from Ohio served in the House of Representatives from March 4, 1855 to March 3, 1863 and March 4, 1865 to March 3, 1873. *See* AVINS, *supra* note 68, at 760. Bingham was Judge Advocate of the Union Army with rank of major, 1894; special judge advocate in the trial of the conspirators against the life of President Lincoln. *See id.* Bingham was the draftsman of the first section of the Fourteenth Amendment. *See id.*

[156] James F. Wilson, Republican from Iowa, served in the House of Representatives from December 2, 1861 to March 3, 1869 and then served in the Senate from March 4, 1883 to March 3, 1895. *See* AVINS, *supra* note 68, at 764. Wilson was the Chairman of the

Reconstruction explications of privileges and immunities are consistent with this distinction.[158] The historical evidence still to be reviewed in this discourse also confirms that many, and perhaps most, enactors of the Fourteenth Amendment thought in terms of this distinction.

Perry does not defend his idea that the enactors accepted a distinction between rights and non-rights. He simply asserts the idea as if it is incontestable.[159] Yet, in addition to the contrary evidence, as we shall see, a distinction between rights and non-rights is not part of the argument for a broad reading of privileges or immunities advanced by scholars such as Nelson and Harrison.[160]

b. NELSON'S HISTORICAL INDETERMINACY FRAUD

If Perry is to salvage his claim that "all rights" conferred by state law are privileges or immunities, he must retreat to the proposition that history is indeterminate on the issue of whether the Fourteenth Amendment's enactors considered voting and other political rights privileges or immunities.[161] William Nelson defends precisely this proposition. For the reasons already proffered, indeterminacy, in the sense that both a narrow and a broad definition of the originally protected category of privileges or immunities are equally probable, is not likely in the context of overlapping rival meanings. Nevertheless, Perry leans so heavily on Nelson's arguments, and arguments like his, that Nelson's case for the plausibility of the proposition that political rights were protected by the Privileges or Immunities Clause must be considered.[162] I think it will be apparent that Nelson's case is feeble and that the number of enactors who believed that the definition of privileges or immunities excluded political rights was more than sizable enough to have precluded a definition of the Privileges

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House Judiciary Committee in the 39th Congress. *See id.*

[157] *See supra* notes 147-148 and accompanying text.

[158] *See* MALTZ, *supra* note 22, at 335-39.

[159] *See* PERRY, *supra* note 3, at 141-42.

[160] See Harrison, supra note 17, at 1397.

[161] *See* NELSON, *supra* note 18, at 125-32.

[162] *See* PERRY, *supra* note 3, at 142; NELSON, *supra* note 18, at 125-32.

or Immunities Clause embracing such rights.[163]

Nelson reports that "not every republican accepted the distinction between civil and political rights . . . ."[164] The right to vote was the particular political right that was most controversial during the Reconstruction period and the political right on which Nelson focuses.[165] According to Nelson the issue of "the impact of the [Fourteenth] Amendment on voting rights . . . [was] never decided by either Congress or the state legislatures."[166] One camp of opinion held that there is a distinction between political rights and civil rights and that the Fourteenth Amendment "had nothing at all to do with voting."[167] The other camp held the view that the Privileges or Immunities Clause created no obligation on the states to confer a right to vote or any other right, but did forbid "arbitrary" discrimination when conferring rights, including the right to vote.[168] The problem for the originalist, in Nelson's words, is that "Congress, as a collective body, never decided or even addressed the question of whose views and interpretation would be enacted into law by adoption of the Fourteenth Amendment."[169]

Certainly, Congress did not formally, as a body, take a position on the issue of Section one's impact on voting. Of course, Congress almost never, formally declares, as a body, that an amendment must be specified in a particular way on a particular matter. Nelson's description of the outcome of the quarrel between these two camps is evasive.[170] The number in Congress, expressing an opinion on the question of the relation of the Privileges or Immunities Clause to voting, provides cogent evidence of how many, if not most, felt about this is-

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[163] *See* NELSON, supra note 18, at 125-32.

[164] *Id.* at 127.

[165] *See id.*

[166] *Id.* at 126.

[167] *Id.* at 132. Nelson's characterization of this camp's view is misleading. This camp's position was not that the Fourteenth Amendment "had nothing at all to do with voting." *Id.* The enactors in this camp did not think voting was a Section one privilege or immunity, but they did hope that Section two would discourage racially discriminatory suffrage regulations.

[168] *See id.*

[169] *See* NELSON, *supra* note 18, at 132.

[170] *See id.*

sue. Contrary to Nelson's depiction of a historical conundrum respecting this opinion, most of the Fourteenth Amendment's enactors probably saw the amendment as permitting the states to exercise discretion in determining the qualifications for voting.[171]

Of the evidence Nelson cites for the "no discrimination" view, the largest share consists of statements made by members of Congress.[172] He suggests, for example, that Senator Howard may have been in the "no discrimination" camp.[173] To corroborate his suggestion, Nelson juxtaposes two statements from Howard's speech introducing the Fourteenth Amendment to the Senate.[174] The first is a declaration by Senator Howard that Section one does "not give to either of these classes [whites or blacks] the right of voting."[175] Nelson follows this with Howard's comment that the amendment, "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[176] The implication Nelson leaves is that Senator Howard believed the amendment did not require the states to extend the right of suffrage to anyone, but it must be conferred on a racially nondiscriminatory basis, if it is conferred at all.[177] The sentence that actually follows Senator Howard's statement that Section one of the "amendment does not give to either of these classes the right of voting" is this: "[t]he right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law."[178] The Senator continued, "[i]t has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all

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[171] *See id.*

[172] *See id.* at 127-32.

[173] *See id*

[174] *See id.*

[175] NELSON, *supra* note 18, at 129.

[176] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). *But see* NELSON, *supra* note 18, at 129.

[177] *See* Nelson, *supra* note 18, at 129.

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

society and without which a people cannot exist except as slaves . . . ."[179] The sentence that actually precedes Senator Howard's statement that the amendment "establishes equality" is the statement quoted earlier that the amendment protects only "fundamental rights and privileges."[180] The better explanation of Senator Howard's position in this speech is that he believed the Fourteenth Amendment required only that all fundamental rights had to be extended to citizens on a racially nondiscriminatory basis. In any event, his position on the relation between voting rights and the Fourteenth Amendment becomes unmistakably clear in what he said about Section two. "It is very true," declared Senator Howard, "that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race."[181]

Of the statements made in Congress that Nelson cites for the no discrimination view, most are drawn not from the discussion of the Fourteenth Amendment, but from the debate on the Fifteenth Amendment,[182] which aimed at barring racial discrimination in voting.[183] Among the statements Nelson draws attention to are those made by Senators Edmunds,[184] Sumner[185] and Yates.[186]

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[179] *Id.*

[180] *See id.*

[181] *Id.* Howard's view on this matter was not less clear in what he said about the Privileges and Immunities Clause in the original Constitution:

> [U]nless [those senators asserting that a right to vote was secured by the Fourteenth Amendment] can derive the right of voting from this ancient second section of the fourth article upon the ground that the citizens of each State are entitled to all the privileges and immunities of citizens of the several States, they must give up the argument; and I assert here with confidence that no such construction was ever given to the second section of the fourth article of the Constitution.

CONG. GLOBE, 40th Cong., 3rd Sess. 1003 (1869) (remarks of Howard).

[182] *See* U.S. CONST. amend. XV. The Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Section 2 states, "[T]he Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

[183] *See* NELSON, *supra* note 18, at 126, 129-31.

[184] George F. Edmunds, Republican from Vermont served in the United States Senate

Edmund unquestionably was of the opinion that the right to vote was a privilege and immunity of a citizen of the United States.[187] This position, however, was vigorously condemned by most of those who spoke about the need for the Fifteenth Amendment, including Senators Cragin,[188] Dixon,[189] Drake,[190] Fessenden,[191] Frelinghuysen,[192] Howard[193] and Patterson.[194] Drake, for example,

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from April 3, 1866 to November 1, 1891. *See* AVINS, *supra* note 68, at 758. Senator Edmunds was chairman of the Senate Judiciary Committee. *See id.*

[185] Charles Sumner, of the Free Soil and Republican Parties from Massachusetts, served in the United States Senate from April 24, 1851 to March 11, 1874. *See* AVINS, *supra* note 68, at 759. Sumner was a Lecturer at Harvard Law School from 1835-1837. *See id.*

[186] Richard Yates, Union Republican from Illinois served in the United States Senate from March 4, 1865 to March 3, 1871. *See* AVINS, *supra* note 68, at 760. Yates was elected as a Whig Representative to the 32nd and 33rd terms of Congress. *See id.*

[187] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1000-01 (1869).

[188] *See id.* at 1003-04. Aaron H. Cragin, from New Hampshire, served in the United States Senate from March 9, 1865 to March 3, 1877. *See* AVINS, *supra* note 68, at 757. Senator Cragin was elected by the American Party as a Representative to the 34th Congress and elected as a Republican Representative to the 35th Congress. *See id.*

[189] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1030 (1869). James Dixon from Connecticut served in the United States Senate from March 4, 1857 to March 3, 1869. *See* AVINS, *supra* note 68, at 757. Senator Dixon was elected as a Whig Representative to the 29th and 30th terms of Congress. *See id.* Dixon was an unsuccessful Democratic Party candidate for re-election in 1868. *See id.*

[190] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1002 (1869). Charles D. Drake, Republican from Missouri served in the United States Senate from March 4, 1867 to December 19, 1870. *See* AVINS, *supra* note 68, at 758.

[191] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1033 (1869). William P. Fessenden, Whig and Republican from Maine, served the United States Senate from February 10, 1854 to July 1, 1865, and March 4, 1865 to September 9, 1869. *See* AVINS, *supra* note 68, at 758. Senator Fessenden was elected as a Whig representative to the 27th Congress. *See id.*

[192] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 980 (1869). Frederick T. Frelinghuysen, Republican from New Jersey, served in the United States Senate from November 12, 1866 to March 3, 1869, and from March 4, 1871 to March 3, 1877. *See* AVINS, *supra* note 68, at 758. Frelinghuysen was Attorney General of New Jersey from 1861-1866 and Secretary of State of the United States from 1881-1885. *See id.* Although the remarks from Frelinghuysen were made prior to the remarks from Edmunds that sparked numerous senators to offer a rejoinder, Frelinghuysen's position is clearly at odds with Edmund's position. *See* CONG.

retorted that Edmund's view was "exceedingly erroneous" and, if accepted, would mean "every State provision with regard to voters is completely overridden."[195] The statement of Sumner that Nelson cites suggests that he successfully opposed language in the Fourteenth Amendment that would have "abandon[ed] to the States the power to discriminate against colored persons."[196] Fessenden's remarks clarify what Sumner muddled:

> I was directed to report the Blaine amendment, which . . . does recognize most distinctly the power, which nobody at the time denied, of the States to regulate suffrage . . . . [Mr. Sumner] opposed very strenuously the adoption of that amendment, and it was defeated in the Senate . . . but afterward *we adopted another amendment recognizing the same principle unquestionably* . . . .[197]

Yates, in common with Edmunds and Sumner, believed that the Fifteenth Amendment was "surplusage" because the right to vote was already in the Constitution, although he actually located the right in the Fourteenth Amendment and in the "Guarantee Clause."[198] Nelson cites that part of a comment made by Yates that appears to confirm that Yates and Sumner successfully struck from the Fourteenth Amendment all language permitting the states to award the right of suffrage on a racially discriminatory basis:[199]

GLOBE, 40th Cong., 3rd Sess. 980 (1869).

[193] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1003 (1869). *See also supra* note 150 and accompanying text.

[194] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1002 (1869). James W. Patterson, Republican from New Hampshire, served in the United States Senate from March 4, 1867 to March 3, 1873. *See* AVINS, *supra* note 68, at 759. Senator Patterson was also a Professor at Dartmouth College. *See id.*

[195] *Id.*

[196] NELSON, *supra* note 18, at 126, 129-31.

[197] CONG. GLOBE, 40th Cong., 3rd Sess. 1033 (1869) (emphasis added) (remarks of Fessenden).

[198] *See id.* at 1004.

[199] *See* NELSON, *supra* note 18, at 131.

> The fourteenth amendment was worded as it was because of the position assumed by the Senator from Massachusetts and myself and certain other persons in the Senate whom it is not necessary to mention. We maintained that Congress had the power by congressional law to enforce suffrage upon all the States in every section of the Union.[200]

Yates' first sentence refers to the defeat of the Blaine amendment. But, following the second sentence, which actually reiterates his position that Congress' power was sufficient to regulate suffrage without the Fourteenth Amendment, Yates continued with revealing candor: "It was unpopular. The Republicans viewed the scheme with jealousy. For that reason, to exclude that conclusion, the declaration was made that the question of suffrage properly belonged to the States."[201]

The outcome of the debate on the Fifteenth Amendment also points away from any conclusion that the Privileges or Immunities Clause was originally understood as prohibiting racially discriminatory regulation of voting. The attempts to substitute a suffrage statute for the proposed Fifteenth Amendment, on the theory that discrimination in voting was already constitutionally forbidden, were thoroughly trounced and the Fifteenth Amendment was formally proposed to the states.[202] Raoul Berger suggests that this outcome (the decision to propose the Fifteenth Amendment) shows that Nelson's contention that the Fourteenth Amendment was understood as prohibiting racially discriminatory voting rights is spurious.[203] Certainly on the face of it, the effort to enact the Fifteenth Amendment's prohibition on racially discriminatory suffrage does indicate that the Fourteenth Amendment was not thought to provide such a prohibition. In fact, however, the congressional vote to propose the Fifteenth Amendment does not necessarily amount to this. Yates voted for the Fifteenth Amendment's prohibition of such discrimination despite regarding it as unnecessary for establishing a constitutional bar against racially discriminatory suf-

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[200] CONG. GLOBE, 40th Cong., 3 rd Sess. 1006 (1869). *But see* NELSON, *supra* note 18, at 131.

[201] CONG. GLOBE, 40th Cong., 3rd Sess. 1006 (1869).

[202] Senator Summner's proposal in this regard, for example, was defeated by a vote of forty-seven nays to nine yeas. *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1041 (1869). *See also* MALTZ, *supra* note 22, at 147.

[203] *See* Raoul Berger, *"Fantasizing About the Fourteenth Amendment: A Review Essay,"* 1990 WIS. L. REV. 1043, 1048 (1990).

frage regulations.[204] An argument can be made that a constitution-amending majority saw the Fifteenth Amendment as merely added insurance against any misunderstanding, despite believing that the Fourteenth Amendment was an antidiscrimination measure that applied to voting rights. Although "[t]he statement most frequently made in debates on the Fourteenth Amendment is that it did not . . . confer . . . the right to vote," Nelson suggests that this fact does not preclude the possibility that most still believed that when a state made the ballot available, it must be on a race neutral basis.[205] There is a remote possibility that this line of argument explains the vote on the Fifteenth Amendment, but the weight of historical evidence renders it a remote possibility indeed.

One part of the historical record that is difficult, if not impossible, to reconcile with this line of argument is that attendant to the actions of Congress, between the proposal of the Fourteenth and Fifteenth Amendments, to compel the former Confederate states to give blacks the right to vote. The Reconstruction Acts of 1867 forced the former Confederate states to accept the Fourteenth Amendment and to accept racially neutral suffrage for adult males as a precondition for regaining representation in Congress and eliminating military rule.[206] That adoption of the Fourteenth Amendment would render efforts to secure racially neutral suffrage unnecessary apparently was not a view widely entertained in Congress.[207]

Even after the Reconstruction Acts made adoption of the Fourteenth Amendment likely, the majority in Congress apparently feared the South would revert to racially discriminatory suffrage. To allay this fear, Congress inserted so-called fundamental conditions in the acts readmitting these states to representation in Congress. These fundamental conditions prohibited the former

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[204] *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1004 (1869).

[205] NELSON, *supra* note 18, at 125.

[206] *See* AVINS, *supra* note 68, at xiii.

[207] Quite the opposite was true, as exemplified by Senator Patterson's assessment of the situation:

> [W]e have given the ballot to seven hundred thousand black native citizens of the United States; and why? Not because we recognize that they or white men have a natural right to vote, for we first offered to the South a scheme of reconstruction in [the second section of the Fourteenth Amendment by] which the freedman might be excluded from the voting population; but . . . to create out of the black men of the South a loyal voting population . . . .

Confederate states from revoking the change to race neutral male suffrage forced into their state Constitutions by the Reconstruction Acts.[208] Instead of the Fourteenth Amendment, it was typically the Guarantee Clause that was invoked as the constitutional support for fundamental conditions and the Reconstruction Acts.[209] In fact, many in Congress expressed reservations about the constitutionality of fundamental conditions because, as senator Conkling stated, "[w]ithout going back of the fourteenth amendment . . . it seems to me clear that by the unmistakable force of its language [in Section two] the regulation of suffrage in the States belongs to the States themselves."[210]

The Fourteenth Amendment's second section does seem to present a considerable obstacle for Nelson's view of the Fourteenth Amendment and voting rights.[211] It is difficult to escape the conclusion that the words were meant to discourage, but not to forbid, the states from adopting discriminatory voting regulations. In fact, most of those who spoke about the implications of Section two for voting construed it as implying that racial discrimination was not forbidden by the Fourteenth Amendment.

Echoing Senator Conkling,[212] Howard said of Section two, "[h]ere is a

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CONG. GLOBE, 40th Cong., 2nd Sess. 1408 (1868) (remarks of Patterson). *See also id.* at 578 (remarks of Republican Congressman Halbert Paine).

[208] *See* AVINS, *supra* note 68, at XV. *See also* CONG. GLOBE, 40th Cong., 2nd Sess. 2601-2748 (1868) (the congressional debate on fundamental conditions).

[209] *See* AVINS, *supra* note 68, at xiii and xiv. *See also* CONG. GLOBE, 40th Cong., 2nd Sess. 2665 (1868) (Senator Conkling's discussion of attempts to use the Guarantee Clause for these purposes).

[210] CONG. GLOBE, 40th Cong., 2nd Sess. 2665 (1868).

[211] *See* U.S. CONST. amend. XIV, § 2. It states in pertinent part,

> But when the right to vote at any election . . . is denied to any of the male inhabitants of . . . [a] State, being twenty-one years of age, and citizens of the United States, . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id.

[212] Roscoe Conkling, Union Republican from New York, served in the United States Senate from March 4, 1867 to Mary 16, 1881. *See* AVINS, *supra* note 68, at 757. In 1882, Senator Conkling declined appointment as Associate Justice to the United States Supreme Court. *See id.*

plain, indubitable recognition and admission on the very face and by the very terms of this Fourteenth Amendment of the right and power of each State to regulate the qualifications of voters."[213] Speaking in favor of the Fifteenth Amendment, Senator Frelinghuysen's comment on this matter was to the same effect: "[T]he . . . [Fourteenth] [A]mendment contemplates, after its adoption, a state of things in which the States will withhold from a certain class of male adults the right to vote . . . . We want a further amendment."[214] Recall that Sumner had maintained during debates on the Fifteenth Amendment that he and his allies had prevailed in successfully striking language from the Fourteenth Amendment, which would have allowed the states to enact racially discriminatory voting rights regulations.[215] Recall also, however, that Senator Fessenden, had replied that "we adopted another amendment recognizing the same principle [that discrimination was permissible]."[216] It is Fessenden's interpretation of events, and not Sumner's, that is more accurate. When the Fourteenth Amendment, in its present form, was under consideration, the Republican Radicals in Congress had complained, often bitterly, that Section two permitted racial discrimination in determining which individuals were permitted to vote.[217]

While moderate Republicans approved it and Radical Republicans lamented it, there is no misunderstanding the Section's implications for voting expressed by virtually all Republicans who spoke to the matter. In addition to those noted

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[213] CONG. GLOBE, 40th Cong., 3rd Sess. 1003.

[214] *Id.* at 980.

[215] *See supra* note 196 and accompanying text.

[216] *See supra* text accompanying note 197.

[217] *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (remarks of Representative Stevens); *Id.* at 3172 (remarks of Representative Windom); *Id.* at 3210 (remarks of Representative Julian).

Senator Johnson, for example, said of Section two that, despite Sumner's success in striking language expressly mentioning "race or color," "This accomplishes the same purpose. It says to the States, ... If, therefore, you exclude . . . any particular race, or . . . color contradistinguished from the white man, we admit you have a right to exclude them . . . ." CONG. GLOBE, 39th Cong. 1st Sess. 3028 (1866). In the House, Representative Windom protested angrily, "[t]he freedman . . . is still to remain a political pariah, without even the power to defend himself at the ballot-box." CONG. GLOBE, 39th Cong., 1st Sess. 3169 (1866).

above, Ashley,[218] Baker,[219] Boutwell,[220] Julian,[221] Morton,[222] Poland,[223] Stevens,[224] Stewart,[225] Wade[226] and Wilson[227] all took the position that Section two

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[218] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2881 (1866). Representative James M. Ashley from Ohio served in the United States House of Representatives from March 4, 1859 to March 3, 1869. *See* AVINS, *supra* note 68 at, 760.

[219] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2881 (1866). Representative Jehu Baker from Illinois served in the United States House of Representatives from March 4, 1865 to March 3, 1869, March 4, 1887 to March 3, 1889. *See* AVINS, *supra* note 68, at 760.

[220] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2508 (1866). George S. Boutwell, Republican from Massachusetts, served in the United States Senate from March 17, 1773 to March 3, 1777. *See* AVINS, *supra* note 68, at 757. Boutwell also was elected to the United States House of Representatives for the 38th, 39th, 40th, and 41st terms of Congress. *See id.*

[221] *See* CONG. GLOBE, 39th Cong., 1st Sess. 3209 (1866). George W. Julian, from Indiana, served in the United States House of Representatives from March 4, 1849 to March 3, 1851 as a Free-Soiler, and March 4, 1861 to March 1871 as a Republican. *See* AVINS, *supra* note 68, at 762. In 1852, Julian was an unsuccessful Free-Soil candidate for Vice President. *See id.*

[222] *See* CONG. GLOBE, 40th Cong., 2nd Sess. 725 (1868). Oliver H. P.T. Morton from Indiana served in the United States Senate from March 4, 1867 to November 1, 1877. *See* AVINS, *supra* note 68, at 759.

[223] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2963 (1866). Luke P. Poland, Republican from Vermont, served in the United States Senate from November 21, 1865 to March 3, 1867. *See* AVINS, *supra* note 68, at 759.

[224] *See id.* CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866). Thaddeus Stevens from Pennsylvania served in the United States House of Representatives from March 4, 1849 to March 3, 1853. *See* AVINS, *supra* note 68, at 764. Stevens was leader of the House Radical Republicans in the 39th Congress and was House Chairman of the Joint Committee on Reconstruction in the 39th Congress. *See id.* Additionally, Stevens was Chairman of the Managers appointed to conduct impeachment proceedings against the President, Andrew Johnson. *See id.*

[225] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866). William M. Stewart from Nevada served in the United States Senate from December 15, 1964 to March 4, 1875. *See* AVINS, *supra* note 68, at 759.

[226] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2770 (1866). Benjamin F. Wade from Ohio served in the United States Senate from March 15, 1851 to March 3, 1869. *See* AVINS, *supra* note 68, at 759.

permitted discriminatory voting regulations. Even Yates, although trying to put the best face on it, clearly concurred with Fessenden's view of events.[228]

Nelson's explanation of Section two's implications for voting rights turns on the relationship of Section two to Section one.[229] As with his more general argument on voting rights, Nelson presents two possible interpretations of the original understanding of this relationship and contends that the historical evidence could lead an originalist to choose either one. For the first of these "competing" interpretations, Nelson claims that Section one could have been understood as protecting civil and political rights.[230] If it was so perceived, "then [s]ection two . . . could [have been understood] as a remedy for infringements of the rights."[231] That is, Section one was intended to forbid discrimination in voting rights and Section two was the weapon to enforce the prohibition on discrimination in Section one. Alternatively, "if Section one was understood to have nothing to say about suffrage, then Section two could be read as an authorization to states to limit voting rights in return for reduced representation."[232] The problem for Nelson is that his effort to portray these as equally valid originalist interpretations is unsupported by the historical record.

Nelson admits that the Joint Committee responsible for drafting the Fourteenth Amendment decided not to include the phrase "the same political rights and privileges" in section one.[233] He suggests, however, that "[t]he committee . . . substituted the word 'immunities' for the words 'political rights,' thereby . . . secur[ing] 'all privileges and immunities of citizens.'"[234] Despite

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[227] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1255 (1866).

[228] *See id.* at 3038. Yates stated, "I shall support these propositions. They are not such as I approve . . . . I believe in the good common sense of . . . [Mr. Fessenden] who says that if he cannot get the best dinner he would take the next best . . . ." *Id.* Referring to the representation penalty in Section two, Yates continued, "although we do not obtain suffrage now, it is not far off, because the grasping desire of the South for office . . . will at a very early day hasten the enfranchisement of the loyal blacks." *Id.*

[229] *See* NELSON, *supra* note 18, at 51.

[230] *See id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

Nelson's claim that "[w]e can never know why the language . . . was changed"[235] and his effort to make it appear that "immunities" could have been understood by some as the equivalent of political rights, what we do know indicates that the effort to smuggle political rights into Section one through the word "immunities" does not work. "What is an immunity?" James Wilson asked.[236] His answer was straightforward: "[s]imply 'freedom or exemption from obligation; an immunity is a 'right of exemption only,' as an exemption from serving in an office . . . ."[237] Recall that Wilson, along with other members of Congress, expressly disavowed construing civil rights *and* immunities as encompassing suffrage and other political rights.[238]

Senator Howard clearly thought that Section one of the Fourteenth Amendment had nothing to do with voting and reacted with incredulousness to the argument that it could be made to shelter a right to vote.[239] His reaction was typical. Senator Cragin,[240] for example, shared Howard's distaste with this argument:

> I remember that it was announced upon this floor by more than one gentleman and denied by no one so far as I recollect, that the amendment

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[235] NELSON, *supra* note 18, at 52.

[236] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

[237] *Id.*

[238] *See id.*

[239] Howard's response to the argument that the Fifteenth Amendment was unnecessary because of the Fourteenth Amendment bears repeating at length:

> I feel constrained to say . . . that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained. No such thing was contemplated on the part of the committee which reported the amendment; and if I recollect rightly, nothing to that effect was said in debate in the Senate when it was on its passage. . . The construction which is now sought to be put upon the first section of this fourteenth article . . . is plainly and flatly contradicted by what follows in the second section of the same article. . . . .The second section . . . [p]lainly and in the clearest possible terms recogniz[es] the right of each State to regulate . . . suffrage . . . .

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

[240] *See supra* note 188 and accompanying text.

> did not confer the right of voting upon anybody, ... I am surprised that such a position should be taken at this late hour in the debate. There is no doubt about the question. It was the understanding of Congress and of the people of this country that that amendment did not confer and did not seek to confer any right to vote . . . .[241]

Nelson concedes that "Cragin's point was reiterated constantly in congressional and state legislative proceedings and in the newspapers."[242] Of course, it can be maintained that Cragin, and those who agreed with him, still believed that when a state made the franchise available, it must be on a race neutral basis. But, if the context of Cragin's statement is borne in mind, this proposition seems highly unlikely. Cragin, after all, was taking exception to the position that an amendment prohibiting racial discrimination in voting regulations was unnecessary because such a prohibition was already in the Fourteenth Amendment. Cragin and those reiterating his point probably understood their argument in its most straightforward sense: Section one did not protect voting rights period. Certainly, the chorus of voices in Congress, defending and condemning Section two when the Fourteenth Amendment was under consideration, did not believe Section one protected a right to vote.[243] Virtually no one in Congress made an argument that Section one forbade discriminatory suffrage laws and Section two was meant to enforce Section one's prohibition. Those in Congress almost unanimously spoke as if Section one and two, taken together, did not forbid discrimination in the conferral of voting and other political rights.[244] As Steven's stated, when he introduced the Fourteenth Amendment to the House, "I had fondly dreamed that . . . all our institutions [would be] freed . . . from every vestige of . . . inequality of rights . . . . This bright dream has vanished . . . ."[245]

It is true, as Nelson argues, that some proponents of the Fourteenth Amendment hoped Section two would have the effect of broadening suffrage.[246]

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[241] *Id.*

[242] NELSON, *supra* note 18, at 126.

[243] *See supra* notes 212-228 and accompanying text.

[244] *See id.*

[245] CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).

[246] *See* NELSON, *supra* note 18, at 50-51.

A number of congressional leaders held out this hope.[247] However, Nelson should acknowledge that the very congressional leaders whose remarks he cites for evidence that Republican leaders in Congress considered racially discriminating suffrage regulations wrong, also said that the Fourteenth Amendment left state control over suffrage rights intact.[248]

Contrary to Nelson's assertion that we do not know why Section one's language is as it is,[249] we know, with reasonable assurance, the basic political considerations that set the parameters of how far the Fourteenth Amendment could

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[247] Senator Howard, for example, underscored "that this [Fourteenth] Amendment is so drawn as to make it the interest of the once slaveholding States to admit their colored population to the right of suffrage. The penalty of refusing will be severe." CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866). *See also supra* text accompanying note 168; CONG. GLOBE, 39th Cong., 1st Sess. 1272-1280 (remarks of Senator Fessenden).

[248] *See* NELSON, *supra* note 18, at 217 n.73. Nelson refers to the remarks of Conkling, Bingham, Fessenden and Wilson. Consider the following from the very speeches that Nelson notes:

> "It [the Fourteenth Amendment] leaves every state unfettered to enumerate all its people or not, just as it pleases. If New York chooses to count her black population as political persons, she can do so. If she does not choose to do so the matter is her own, and her right cannot be challenged." CONG. GLOBE, 39th Cong., 1st Sess. 359 (1866) (remarks of Conkling).

> "[W]hy not go for a constitutional amendment which will declare, once for all, that no State . . . shall make any distinction in the right of voting . . . ? I will answer . . . that I am ready to go for that. But a majority of those with whom I am associated think this [Fourteenth Amendment] is all that is needed at present . . . . I am content with that." CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (remarks of Bingham).

> "[W]hat does . . . [Section two] say? 'You have the power to do wrong, but if you exercise that power so as to exclude them you shall not have representation for it.'" CONG. GLOBE, 39th Cong., 1st Sess. 1279) (1866) (remarks of Fessenden).

> "[T]his amendment leaves the matter with the States just precisely as it is now; . . . . This amendment does not touch the question of suffrage at all; this 'amendment' simply proposes a penalty for denying to freemen the right of suffrage." CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866) (remarks of Wilson).

[249] *See* NELSON, *supra* note 18, at 53.

go in protecting rights. Moreover, contrary to Nelson's assertion that the Framers may have been primarily concerned in Section one about "well-rounded phraseology,"[250] it is apparent that Section one and Section two were a compromise borne of hard political bargaining.[251]

One consideration that limited the Framers of the Fourteenth Amendment was concern about what three-fourths of the states would ratify. Certainly, this was a consideration because the Framers said so repeatedly. Senator Howard, for example, explained the inclusion of Section two on behalf of the members of the Joint Committee responsible for crafting the Fourteenth Amendment, as follows, "[i]t was our opinion that three-fourths of the states . . . could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race."[252]

The fears of the Joint Committee were well founded. As historian David Donald explains, the idea of black suffrage was "political dynamite," and not just in the South.[253] Efforts in the North to extend the franchise to blacks were rejected in several elections in 1866 and 1867.[254] James Wilson grumbled during debates on the Fourteenth Amendment, "we know that impartial suffrage in the insurgent States would leave but little for posterity to quarrel over; but the fall elections lie between us and posterity."[255]

Another consideration was the need to hold the Republican congressional coalition of moderates and Radicals together.[256] Although many moderates

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[250] *Id.* at 52.

[251] MALTZ, *supra* note 22, at 79-120.

[252] *See* CONG. GLOBE, 39th Cong., 1st Sess. Senate Report No. 112 (June 8, 1866) at 7. The Report of the Joint Committee shows that Howard correctly reflected their view:

> It was doubtful in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, . . . [the Joint Committee proposed Section two]. This it was thought would leave the whole question with the people of each State holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise.

[253] *See* DAVID DONALD, SUMNER AND THE RIGHT OF MAN 202 (1970).

[254] *See* NELSON, *supra* note 18, at 125-26.

[255] CONG. GLOBE, 39th Cong., 1st Sess. 2948 (1866).

[256] *See* AVINS, *supra* note 68, at xii.

were not opposed to black suffrage in principle, they were adamantly opposed to surrendering state control over suffrage rights. [257] Whether or not moderates were a majority in the Republican coalition, they held the balance of power between the Radicals and the Democrats. Politically, the Republicans desperately needed to appear to be making progress on Reconstruction and were unable to garner the necessary two-thirds majority for the Fourteenth Amendment without the approval of moderates.[258] If Earl Maltz's detailed and persuasive account of political maneuvering on the Joint Committee is correct, it was a coalition of moderate Republicans and Democrats that sank a provision for black suffrage in an early draft of the Fourteenth Amendment and then provided the votes approving the final language in Section one.[259]

Section two appealed to moderates. Despite discouraging the enactment of racially discriminatory suffrage policies, Section two implicitly recognized state control over suffrage policies. Moreover, it discouraged racial discrimination at the ballot-box in a way that satisfied Republican moderates. In the North, where blacks were few, a state could withhold the franchise from blacks and suffer only minimal political losses. However, in the South, where blacks were many, a decision to withhold the franchise from blacks would bring dire political losses.[260]

Aside from the Fourteenth Amendment's opponents, the Amendment commonly was characterized as a compromise in which moderates had prevailed over the demands of Radical Republicans. This characterization corroborates Maltz's conclusion about the relative influence of moderate Republicans.[261]

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[257] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. app. 305 (1866) (remarks of Representative Miller). *See also* AVINS, *supra* note 68, at xii; MALTZ, *supra* note 22, at 118-20.

[258] *See* AVINS, *supra* note 68, at xii. According to Alexander Bickel, "the obvious conclusion to which the evidence. . . easily leads is that section 1 of the Fourteenth Amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the moderates and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimissegregation statutes, nor segregation." Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARVARD L. REV. 1, 58 (November 1955).

[259] *See* MALTZ, *supra* note 22, at 79-92.

[260] *See supra* note 247.

[261] *See* Harrison, *supra* note 17, at 1047; AVINS, *supra* note 68, at xiii; MALTZ, *supra* note 22, at 118. Senator Yates' comment in this regard was typical of Republican members of Congress: " If we do not meet the views of the Radicals on the one hand nor the views of the pro-slavery Democracy upon the other, we at all events have the medium, the moderation . . . . " CONG. GLOBE 39th Cong., 1st Sess. 3038 (1866). Senator Sherman's remarks

The case for Nelson's position on the original understanding of the Fourteenth Amendment, as it relates to voting, is no better if we look beyond the deliberations in Congress. The editorials on the amendment in Republican newspapers, for example, mirrored opinion in Congress.[262] Even the "radical leaning" National Anti-Slavery Standard acknowledged that the amendment had made no provision to protect black suffrage and blasted it as "unjust to the Negro and disgraceful to the nation."[263] As might be expected, moderate Republican papers, such as *Harpers Weekly*, printed editorials that praised the amendment, describing it as "entirely reasonable"[264] and declaring that "Congress has chosen . . . wisely to leave the regulation of suffrage to the State."[265] "Not to have done so," according to Harpers, "would have been widely regarded as a radical blow at this most sacred of states rights."[266]

Given the well-documented hostility to black suffrage in the North, prior to ratification of the Fourteenth Amendment, the reluctance of Congress to believe that three-fourths of the states could be counted on to approve an amendment surrendering control over suffrage and Nelson's admission that state legislators considering the Fourteenth Amendment constantly repeated the point that it did not secure a right to vote,[267] it is unlikely that the states ratifying the amendment understood it as prohibiting racially discriminatory access to the ballot-box. The evidence Nelson cites does little to advance his argument. He notes that Governor Morton (though obviously not a member of the state legislature) believed Congress had extensive power over suffrage.[268] But Morton's position, as Nelson concedes, was based on the Guarantee Clause[269] and not on

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are much the same: "And allow me to say that when we made our appeal to the people of the United States in the recent elections nothing gave us such strength as the moderation of the constitutional amendment." CONG. GLOBE, 39th Cong., 2nd Sess. 128 (1866).

[262] *See e.g.*, NATIONAL ANTI-SLAVERY STANDARD, May 26, 1866, at 2; *The Congressional Plan of Reorganization*, HARPER'S WEEKLY, May 12, 1866, at 290.

[263] NATIONAL ANTI-SLAVERY STANDARD, May 26, 1866, at 2.

[264] *The Congressional Plan of Reorganization*, *supra* note 262 at 290.

[265] *Id.* at 323.

[266] *Id.* at 290.

[267] *See supra* text accompanying note 242.

[268] *See* NELSON, *supra* note 18, at 132.

[269] *See* U.S. CONST. art. IV, Section 4. The Guarantee Clause states:

the Fourteenth Amendment.[270] Nelson also calls attention to a comment made by a member of the Oregon Legislature urging that, "if this measure does not in fact carry with it, it will surely bring in [the] future, universal suffrage."[271] This remark may be nothing more than an allusion to Section two's penalty for discriminatory suffrage policies. If, however, the legislator was indicating that he understood the amendment as prohibiting discriminatory voting regulations, it is worth keeping in mind that he was speaking against the Fourteenth Amendment and, like many opponents, was want to mischaracterize the dominant understanding of the amendment.[272]

In sum, the Fifteenth Amendment was probably understood in its most obvious sense, as necessary to forbid what the Fourteenth Amendment probably was understood not to forbid—racially discriminatory suffrage policies. More generally, of the two schools of thought identified by Nelson on voting rights—voting is not a privilege or immunity versus discrimination is forbidden—it is more probable that a constitution-amending majority embraced the former than the latter.[273] There is no reason to think that the no-discrimination camp took the position that, if voting rights are not to be protected from discrimination, no rights should be protected. Thus, even in the unlikely event that a slight majority of the Fourteenth Amendment's enactors were in the no discrimination camp, the only privileges and immunities the requisite extraordinary majority agreed to protect was some set of rights excluding voting rights. As I stated at the outset of my analysis of Nelson's position on voting, the evidence is virtually conclusive that the number of the enactors excluding voting rights from the definition of privileges or immunities was sizable enough to have their way. Nelson provides a case for a small degree of uncertainty respecting these conclusions, but not a case supporting the conclusion that a judge committed to originalism is faced with historical indeterminacy.

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened against domestic violence.)

Id.

[270] *See* U.S. CONST. amend. XIV; NELSON, *supra* note 18, at 132.

[271] *Id.* at 131.

[272] *See id.*

[273] *See id.* at 131, 135.

The truly determinative question for whether *Reynolds v. Sims*[274] and the "one person one vote" decisions of the Court can be grounded on the Privileges or Immunities Clause is whether judges must accept the enactors view of what rights are fundamental. I address this question in Part VII. For now, I want to buttress the contention that the "fundamental rights view" of the scope of privileges or immunities was widespread among those who gave us the Fourteenth Amendment.

2. THE PRIVILEGES OR IMMUNITIES CLAUSE AND RACIAL SEGREGATION

Although much less was said in Congress about the Fourteenth Amendment's implications for other "rights," as compared to political rights, and particularly to voting rights, the distinction between "conventional rights" and natural or fundamental rights came to the fore even when non-political rights were under discussion in Congress. Perhaps the most prominent example is the 1870's debate on the extent of national power to forbid racially segregated public schools, accommodations and conveyances.

It is true, as Nelson reports, that prior to 1870, segregation was a comparatively unimportant issue at the national level and thus, the members of Congress gave it scant attention.[275] Yet despite being barely visible on the national agenda before the 1870's, some Republicans in Congress had invoked the distinction between fundamental and nonfundamental rights to indicate that attending desegregated schools was not a "right" that the national government could protect. Recall, for example, James Wilson's insistence on the floor of the House, that the federal government could constitutionally protect only natural rights or civil rights and immunities and that these terms had a limited compass.[276] Civil rights and immunities do not mean, as Wilson explained, "that in all things civil, social [and] political, all citizens, without distinction of race or color shall be equal . . . . Nor do they mean that all citizens . . . children shall attend the same schools."[277] When Congress debated the imposition of fundamental conditions on the Southern States as preconditions to restoring their representation in Congress, it apparently did not even occur to Republicans that the Privileges or Immunities Clause would require desegregated schools. To

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[274] 377 U.S. 533 (1964).

[275] *See* NELSON, *supra* note 18, at 131, 135.

[276] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1256 (1866) (remarks of Wilson). *See also supra* note 228 and accompanying text.

[277] CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

the contrary, Senator Frelinghuysen, referring to the Fourteenth Amendment, said, "I do not think that . . . the constitutional amendment . . . touches that question, as to what school they [blacks and whites] shall be educated in."[278] Consider Senator Henderson's sentiments on the matter: "I desire that the Negroes shall have an equal right in the school moneys, but that the State may require them to be educated in different schools from the whites."[279] Indeed, if the Republicans foresaw constitutional implications for public schools, resulting from the enactment of the Fourteenth Amendment, the only concerns mentioned on the floor of the House and the Senate related to unequal and deficient funding of segregated schools for black children and to the practice of taxing blacks for the support of schools open to whites but not to blacks.[280] It is probable that many congressional Republicans, at the time the Fourteenth Amendment was proposed, thought the Fourteenth Amendment had no implications for segregated public education.

The only other form of racial segregation to receive much recorded comment from members of Congress prior to 1870 was segregation in public conveyances. While some Republicans objected to such segregation, the issue was divisive even among Republicans.[281] For example, in *West Chester and Pennsylvania Railroad v. Miles*,[282] Judge Agnew held that segregating railroad passengers was justified by the "natural legal and customary difference between the black and white races."[283] This view was championed by some Republicans but attacked by the Radical Republicans. Representative Lawrence, a Pennsylvania Republican, retorted to Agnew's detractors in the House, "I will say that every Republican paper in my district . . . indorsed [sic.] that opinion."[284]

During the protracted debate sparked in 1871, by Sumner's bill to have Congress forbid racial segregation in public schools, public conveyances and

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[278] CONG. GLOBE, 40th Cong., 2nd Sess. 2748 (1868).

[279] *Id.*

[280] *See e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. app. 219-20 (1866).

[281] *See* AVINS, *supra* note 68, at XV.

[282] 55 PA St. 209 (1867).

[283] CONG. GLOBE, 40th Cong., 2nd Sess. 1964 (1868) (remarks of Representative Woodward (citing West Chester & P. R. R. v. Miles, 55 P.A. St. 209 (1867))).

[284] CONG. GLOBE, 40th Cong., 2nd Sess. 1965 (1868).

accommodations, the distinction between conventional rights left to the states and fundamental or natural rights was invoked again and again by many Republicans, to say nothing of the Democrats.[285] It should be noted that Sumner had repeatedly introduced his bill beginning early in 1870 but the dominant Republicans on the Senate Judiciary Committee prevented it from coming to the floor for consideration on each occasion.[286] Although Sumner was able to bypass the Judiciary Committee by attaching his bill to a bill championed by President Grant,[287] the Congress, considering Sumner's bill, was not the same Congress that proposed the Fourteenth Amendment. What this Congress of the 1870s may have thought about the meaning of the Privileges or Immunities Clause is only important because it is relatively contemporaneous with the Congress proposing the Fourteenth Amendment in 1866 and because some who were in Congress in 1866 were still in Congress. Since it is the understanding of the Congress that proposed the Fourteenth Amendment (and the state legislatures that subsequently ratified it) that as a realistic matter constitutes the original understanding, I want to look briefly at the understanding of Republicans who voted for the Amendment and were still in Congress in the 1870's to evaluate their understanding of the Privileges or Immunities Clause as it relates to Sumner's bill.

One of these was Senator Lot Morrill, a Radical Republican from Maine. His critique of Sumner's claim that his desegration bill derived its constitutional authority from the Fourteenth Amendment should be quoted at length:

> What are the privileges and immunities of the citizens of the United States? I am not inquiring now what are the rights of persons in the States, but what are the privileges and immunities referred to in the Constitution . . . . Perhaps the general privileges of citizens of all the States were never better expressed, never more concisely or authoritatively stated than in the civil rights bill [of 1866] . . . . It declares that—"All citizens . . . shall have the same right . . . . The same right to do what? Not the same "accommodation, facilities, advantages and privileges," in the common schools, the churches, the benevolent institutions, in the theaters and places of amusement; not that but the [rights expressly enumerated in the bill]. So, when this phrase "privileges and immunities of

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[285] *See supra* text accompanying notes 228-294.

[286] *See* AVINS, *supra* note 68, at xxi, xxv.

[287] *See id.* at xxv. Grant wanted to remove the disqualification from holding office imposed on many former leaders of the Confederacy.

> the citizens of the United States" is used it should be understood that it does not mean all the rights that belong to man; it means only those common privileges which one community accords to another in civilized life. It is not the full extent of citizenship, or the rights and privileges of citizenship in a particular State, by any means; and that is the distinction.[288]

Senator Trumbull, another Republican who voted for the Fourteenth Amendment, also spoke in opposition to Sumner's bill:

> I said that going to school was not a civil right, and that so far as I know the colored people of this country had all the *civil rights* that the whites had, and it is a misnomer to call . . . [Sumner's bill] a civil rights bill . . . . I deny that a right . . . [created by the state] is, properly speaking, a civil right in any sense. It is right growing out of a privilege created by legislation. Schools do not exist naturally; they are artificial.[289]

Although Trumbull believed that there was a natural right to travel and thus, a citizen could not be excluded from public conveyances because of her race, he disputed the existence of a constitutionally protected right to desegregated conveyances.[290] Senator Sherman, a Radical Republican, concurred with the provisions in Sumner's bill barring segregated public accommodations and conveyances,[291] but justified his concurrence in terms of common law rights available to all citizens. As he explained, "[U]nder the common-law of England steamboats and railroads and all modes of travel, including hotels, are a part of the rights and immunities of the people . . . . [T]he common law of England . . . is a part of the immunity of every citizen of the United States."[292] Sherman's "theory" is not, however, that the Privileges or Immunities Clause protects "all rights." In fact, he endorsed the holding of *State v. McCann*,[293] in which the Supreme Court of Ohio found that racially segregated public

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[288] CONG. GLOBE, 42nd Cong., 2nd Sess. app. 3-4 (1872).

[289] *Id.* at 3190.

[290] *See id.* at 3191-92.

[291] *See id.* at 3192.

[292] *Id.*

[293] 21 Ohio St. 198 (1872).

schools did not necessarily offend the Fourteenth Amendment.[294]

Certainly, there were Republicans, such as Edmunds and Boutwell, who had voted for the Fourteenth Amendment and who expressed the view in the debates on Sumner's bill that the Privileges or Immunities Clause extended protection to all rights created by state law.[295] Moreover, it is not incorrect to conclude, as Nelson does, that at no time in the debate on Sumner's bill, a part of which ultimately became the Civil Rights Act of 1875, "did either the House or Senate express in unambiguous, institutional form its view on the meaning of the Fourteenth Amendment in reference to school or other forms of segregation."[296] But it is not correct to imply, as Nelson does, that the historical record is such that it is just as likely as not that the Congress proposing the Fourteenth Amendment meant to enact a definition of privileges or immunities that extended national power over segregated public schools.[297] And, it probably is not correct to imply as much about the historical record respecting state mandated segregation in public conveyances and accommodations.[298]

When the Fourteenth Amendment was proposed for ratification, Republicans did not have such a commanding majority that they could have afforded many defections and still have obtained approval of the amendment by the requisite two-thirds majority in each House.[299] Had Morrill, Trumbull or Wilson and a few of the Republicans sharing their view deserted the fold, the Fourteenth Amendment would have been imperiled. It does not matter that the Edmunds and Boutwell Republicans clung to a different definition of privileges or immunities than the Morrill and Trumbull Republicans. There is no indication, as I noted in connection with political rights, that Republicans of the Edmunds and Boutwell philosophy were taking an "all or nothing" position on rights protected by the Privileges or Immunities Clause. They would have thought the rights that the Morrill and Trumbull Republicans wanted to protect are protected, even though preferring to protect a larger category of rights. Since

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[294] *See* CONG. GLOBE 42nd Cong., 2nd Sess. 3193 (1872) (remarks of Senator Sherman) (citing State of Ohio v. McCann, 21 Ohio St. 198 (1872))).

[295] *See* CONG. GLOBE, 43rd Cong., 2nd Sess. 1870 (1875) (remarks of Senator Edmunds). *See also id.* at 1792-1793 (remarks of Senator Boutwell).

[296] NELSON, *supra* note 18, at 136.

[297] *See id.*

[298] *See id.* at 133-36.

[299] *See* AVINS, *supra* note 68, at xii.

the object of the originalist inquiry is to find the area of intent shared by the necessary extraordinary majority for constitution-making and the inclusion of desegregated public facilities in the definition of privileges or immunities seriously divided Republicans in the Congress voting to propose the Fourteenth Amendment, it is more unlikely than likely that the requisite extraordinary majority in Congress defined privileges or immunities to include a right to desegregated public facilities. This is especially true for desegregated public schools.

The likelihood that, in the 1860's, a majority of state legislators in three-fourths of the states thought they were ratifying a definition of rights to be protected by the national government that secured, or could secure, desegregated public facilities, certainly is no greater, and probably is less, than the likelihood that a constitution-amending majority of Congress proposed such an extension of the national government's power. Perry and Nelson would demur from this conclusion.[300] Nelson asserts that "[n]o Republican was prepared, as a matter of general principle, to defend as rational a distinction grounded in race."[301] It is clear from the context of this assertion that Nelson wants his readers to believe that there is evidence that Republicans in both Congress and state legislatures objected to racial discrimination as irrational.[302] However, he cites no evidence from state legislatures, but instead turns to statements made in Congress. For example, Nelson points to Lot Morrill's objection to racial discrimination.[303] Certainly, Morrill did not think that government or business establishments *ought* to engage in racial discrimination.[304] However, it is misleading to leave the impression that this objection influenced him to view the Fourteenth Amendment as a general prohibition of racial discrimination. Morrill, as I have indicated, left no doubt that he viewed the Fourteenth Amendment as providing the national government a constitutional rationale for protecting only a limited set of rights common to all citizens.[305] It is also misleading, and indeed inaccurate, to suggest that all, or even an overwhelming majority of, Republican lawmakers held a "modern" egalitarian view of race.

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[300] *See* PERRY, *supra* note 3, at 43; NELSON, *supra* note 18, at 124.

[301] NELSON, *supra* note 18, at 124.

[302] *See id.*

[303] *See id.* at 234 n.43.

[304] *See* CONG. GLOBE, 42nd Cong., 2nd Sess. app. 2 (1872).

[305] *See supra* text accompanying note 288.

Senator Henry Wilson, Sumner's Massachusetts colleague and a Radical Republican supporter of the Fourteenth Amendment, said, "I believe the African race inferior to the white race . . . . I do not believe in the equality of the Indian race with us . . . . but I believe . . . the inferior man and the superior man have *equal natural rights.*"[306]

Since there is little direct evidence about how state legislators ratifying the Fourteenth Amendment viewed the implications of the Privileges or Immunities Clause for racially segregated public facilities, scholars have been forced to rely on indirect evidence. Although much of this evidence indicates that the mid-nineteenth century American electorate was overwhelmingly opposed to the sort of egalitarian view of race espoused by radical abolitionist,[307] this part of the historical record usually receives short shrift from scholars in the school of thought on privileges or immunities preferred by Perry.[308] Michael Kent Curtis,[309] Howard Jay Graham[310] and Jacobus ten Broek,[311] for example, emphasized the influence of radical abolitionists and their egalitarian notions of race on the view of reconstruction lawmakers.[312] Most of the evidence, however, contradicts their emphasis. Historian C. Van Woodward[313] reports that during the Civil War, "the great majority of citizens in the North . . . abhorred any association with abolitionists . . . ."[314] Scholars who have studied the congressional careers of abolitionist leaders, such as Stevens and Sumner, have mostly concluded that their egalitarian views were not very influential when the Fourteenth Amendment was under consideration. Historian and biographer, F. Brodie,[315] writes that Steven's measures "were more voted against than voted

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[306] CONG. GLOBE, 36th Cong., 1st Sess. 1685-86 (1860) (emphasis added).

[307] *See supra* text accompanying notes 320-323.

[308] *See* PERRY, *supra* note 3, at 43.

[309] *See* CURTIS, *supra* note 88, at 45.

[310] *See* HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION (1968).

[311] *See* JACOBUS TEN BROEK, EQUAL UNDER LAW (1965).

[312] *See* CURTIS, *supra* note 88, at 45; GRAHAM, *supra* note 310 at 1; TEN BROEK, *supra* note 311 at 1.

[313] See C. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 73 (1960).

[314] *Id.*

[315] See F. BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 268 (1959).

for."[316] According to Sumner's biographer, Sumner was "detested even by many Republicans."[317] Senator Trumbull's fusillade against Sumner was not atypical: "[i]t has been over the idiosyncrasies, over the unreasonable propositions . . . of [Sumner] that freedom has been . . . established."[318] Even someone as sympathetic to Sumner's ideas as Senator Boutwell said of his colleague, "Sumner . . . was impractical . . . to a degree that is incomprehensible even to those who knew him."[319]

Many historians have documented the racist and segregationist sympathies of mid-nineteenth century Americans. Antipathy toward blacks was not confined to the South. As David Donald reports, "racism ran deep in the North . . . ."[320] Russel Nye underscores that "what lies beneath the politics of Reconstruction, so far as it affected the Negro, is the prevailing racist policy tacitly accepted by both parties and the general public."[321] Even Nelson admits that "[h]istorians who conclude that most Americans in 1866 favored segregated schools are probably correct in their assessment."[322]

The racist views undergirding segregation were by no means restricted to opinion on public schools. Alexander Bickel based his conclusion that, so far as its immediate effect, Section one of the Fourteenth Amendment was not meant to eradicate segregation on evidence demonstrating that continuance of the widespread practices of racial segregation was taken for granted by the many Republicans whose support for the language in Section one was crucial to its adoption.[323]

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[316] *See id.*

[317] DONALD, *supra* 253, at 248.

[318] *Id.* at 248.

[319] GEORGE BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS VOL. 2, 47 (1902).

[320] DONALD, *supra* note 253, at 202.

[321] R. Nye, *Comment on C. V. Woodward's Paper* in NEW FRONTIERS OF AMERICAN RECONSTRUCTION 148, 152 (Harold Hyman ed., 1966). *See also* PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 54 (1975); W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865-1867 285 (1963).

[322] NELSON, *supra* note 18, at 135.

[323] *See id.*

Nelson, however, charges that Bickel missed some evidence in the newspapers.[324] Even assuming that a few articles in newspapers could offset the mass of evidence confirming Bickel's conclusion, the newspaper evidence Nelson cites does not support the view that public opposition to racial segregation was widespread. Nelson notes that the editor of a New York paper objected to a racially segregated local public school.[325] Although Nelson mentions it in passing, somehow it escapes his attention that the significance of this incident, for discerning what most American's believed about segregation, is that the editor was upset with local voters for refusing "to provide funds for the education of black children except in a separate, overcrowded room."[326] Nelson also points to an 1866 article by a Connecticut editor arguing that blacks should receive "the benefit of the school tax which is now applied to the benefit of white children alone, although levied upon both white and black . . . . "[327] Aside from the fact that this editor is protesting a public policy that presumably mirrored public opinion better than his own perspective, the editor's statement is not even intended to condemn segregation. In common with a number of persons in Congress, the editor is opposed to taxing blacks for public education while providing no funds for education of black children.

That a majority of state legislators in three-fourths of the states shed the influence of their pervasively racist and segregationist environment to view the Fourteenth Amendment's Privileges or Immunities Clause as establishing a "modern" egalitarian philosophy of race would be incredible. It is more likely that in many states, and probably in most states, a majority of legislators held an opinion similar to Henry Wilson's.[328] Indeed, the notion that blacks were inferior but entitled to certain fundamental rights was not confined to members of Congress. Abraham Lincoln, for example, held this opinion. Nelson contends that Lincoln believed both that blacks were inferior to whites and that blacks were entitled to equal legal rights.[329] This is at odds, however, with Lincoln's own words:

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[324] *See id.* at 6-7; BICKEL, *supra* note 94, at 58-61.

[325] *See* NELSON, *supra* note 18 at 134.

[326] *Id.*

[327] *Id.*

[328] *See supra* text accompanying note 306.

[329] *See* NELSON, *supra* note 18, at 19-20.

> I am not, nor have ever been, in favor of bringing about in anyway the social and political equality of white and black races . . . . I am not nor have I ever been in favor of making voters or jurors of Negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the races living together on terms of social and political equality.[330]

Later, President Lincoln told a group of black citizens "even when you cease to be slaves . . . you are yet far removed from being placed on an equality with the white race . . . . "[331] Yet Lincoln also declared that "[t]here is no reason in the world why the Negro is not entitled to all the rights enumerated in the Declaration of Independence."[332] Referring to a black woman, Lincoln remarked, "[I]n some respects she certainly is not my equal; but in her *natural right* to eat the bread she earns . . . she is my equal, and the equal of all others."[333]

Not without reason has Henry Monaghan[334] concluded that mid-19th century Americans "opposed slavery and racial equality with equal intensity. They could logically believe that emancipation required that the freed man possess certain rights to personal security and property. Simultaneously, they could favor rank discrimination against blacks in political and social matters."[335]

Perry shrugs off the manifestations of racism in mid-nineteenth century America and has no difficulty concluding that the original meaning of the Privileges or Immunities Clause supports *Brown v. Board of Education*[336] and its progeny.[337] He uncritically accepts that the clause was intended to protect

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[330] THE LINCOLN- DOUGLAS DEBATES OF 1858 162 (Robert W. Johannsen ed, 1965).

[331] WOODWARD, *supra* note 313, at 81.

[332] Johannsen, *supra* note 330, at 19.

[333] THE COLLECTED WORKS OF ABRAHAM LINCOLN II 405 (Roy P. Basler ed., Rutgers University Press 1953) (emphasis added).

[334] Henry P. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.- C.L.L. REV. 117, 126 (1978).

[335] *Id.*

[336] 347 U.S. 483 (1954).

[337] *See id.*; PERRY, *supra* note 3, at 145.

all privileges or immunities citizens enjoy under state law from state action conferring these privileges or immunities on an arbitrary discriminatory basis. Thus, access to public schools, public parks and the like are public benefits, or privileges or immunities, that cannot be conferred to citizens in an arbitrary fashion.[338] Since the task of deciding what constitutes an arbitrary form of discrimination, according to Perry, should fall to the courts,[339] all that remains to validate *Brown* and its progeny, as originalist decisions, is to recognize that the arbitrary discrimination plausibly meant to be forbidden by the Privileges or Immunities Clause would include state action denying or diminishing a group's enjoyment of privileges or immunities "on the ground that the members of the group are inferior as human beings, to persons not members of the group, *if the group is defined explicitly or implicitly, in terms of a trait, like race, irrelevant to their status as human beings.*"[340]

Perry does not address, and apparently is not bothered by, the incongruity between his acknowledgement that public policy on race in mid-nineteenth-century America, more often than not, reflected an assumption that blacks were inferior to whites and his claim that the Privileges or Immunities Clause was intended to protect all public benefits and other privileges or immunities from the racist discrimination that sprang from this assumption.[341] His assertion that *Plessy v. Ferguson,*[342] the infamous Supreme Court decision upholding the constitutionality of a state law requiring separate but "equal accommodations" for blacks and whites, is "shameful"[343] no doubt represents the moral judgment of most Americans today. But the originalist inquiry is concerned with the political-moral assumptions that the enactors of a constitutional provision brought to bear in defining a provision's meaning and not in "modern" values. The historical record indicates, as we have seen, that one of the political-moral assumptions of many, if not most, of the enactors of the Fourteenth Amendment was that blacks are an inferior race to whites. The probable prevalence of this assumption casts doubt on Perry's claim that it is plausible that a constitution-amending majority of the Fourteenth Amendment's enactors thought they were

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[338] *See* PERRY, *supra* note 3, at 125.

[339] *See id.* at 155.

[340] *Id.* at 144 (emphasis in original). *See also id.* at 130.

[341] *Id.* at 145.

[342] 163 U.S. 537 (1896).

[343] *Id.*

protecting privileges and immunities from discrimination grounded on notions of racial inferiority. Republicans such as Henry Wilson and Trumbull did not embrace a political-moral philosophy that "rights" were an undifferentiated bundle, all deserving the same protection. Instead, they chose to believe only certain fundamental or civil rights could not be abridged. The evidence strongly suggests that these Republicans defined fundamental rights in a way that excluded a right to desegregated public schools. Whether or not this group was dominant, it is unlikely that it was so small that a constitution-amending majority existed without them.[344]

As Perry would have it, "the question whether segregated schools violate the [privileges or immunities] clause . . . is not to be referred to the past; it is a question for the present; in particular, it is a question for the court charged with determining whether such schools violate the clause."[345] This, of course, is grounded on the premise that informs Perry's opinion on voting: the Privileges or Immunities Clause was originally understood to safeguard *all rights*.[346] Thus, *Brown* is merely a "modern specification" of the original broad directive or principle represented by the Privileges or Immunities Clause. However, in truth, Perry does not heed his own counsel:

> [T]hat the ratifiers believed that a practice with which they were familiar did not violate a constitutional provision they were ratifying is some evidence of what directive the ratifiers understood the provision to communicate . . .; in particular it may suggest that the directive the ratifiers meant to issue does not have precisely the shape - for example, the breadth - we might otherwise have been inclined to conclude.[347]

The historical record of the ratifiers' opinion on public school segregation is powerful evidence that no constitution-amending majority defined the Privileges or Immunities Clause as Perry would define it. If a constitution-amending-majority agreed to protect only certain "fundamental" rights, then the question to be answered in determining *Brown's* legitimacy as an originalist decision, is, as with voting, whether modern judges must hew to the enactors' specific instances of such fundamental rights.

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[344] *See* Bickle, *supra* note 258, at 58-61.

[345] PERRY, *supra* note 3, at 43.

[346] *See supra* text accompanying 149-153.

[347] PERRY, *supra* note 3, at 43

At the conclusion of his study on the original meaning of Section one and segregation, Bickel attempts to build a case for the proposition that moderate and Radical Republicans may have hoped that the language of Section one was sufficiently elastic to permit reasonable further advances, including a prohibition on state mandated segregation.[348] Certainly, a few remarks made by Republicans in the 39th Congress can be read this way, [349] but not the great body of congressional commentary. As Bickel admits, "Section 1 became the subject of a stock generalization: it was dismissed as . . . 'constitutionalizing' the [1866] Civil Rights Act." [350] In light of this, Bickel further notes "that an explicit provision going further than the Civil Rights Act could not have been carried in the 39th Congress." [351] Nevertheless, Bickel insists that it is possible that congressional Republicans, in effect, may have intended to smuggle a constitutional principle with broad implications into the "elastic" language of Section one. [352]

Even ignoring the paucity of evidence for Bickel's hypothesis and thus, ignoring that the hypothesis is better characterized as a possible and not a probable intention of a constitution-amending majority, two additional difficulties attend this idea. As Bork has observed, "law is a public act. Secret reservations or intentions count for nothing."[353] Even Perry concedes that it is how the public understood a constitutional provision at the time of its enactment that counts as the provision's original meaning.[354] To put this another way, "when law makers use words, the law that results is what those words ordinarily mean,"[355] at the time the law is adopted. It is most unlikely that privileges or

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[348] *See* BICKEL, *supra* note 94, at 61.

[349] *See id.* at 61, 63.

[350] *Id.* at 58.

[351] *Id.* at 61.

[352] *See id.* at 61-63.

[353] BORK, *supra* note 1, at 144.

[354] *See* PERRY, *supra* note 3, at 32.

[355] BORK, *supra* note 1, at 144. This is not to deny that the formal power to propose and ratify an amendment to the Constitution was delegated by the people to Congress and the state legislatures, respectively. The point is that even if some enactors intended that a law's words mean something other than what the words ordinarily meant, this "subjective" meaning cannot be considered the law's meaning.

immunities was understood by the public to have the elasticity that Bickel would wish for these and the other words in Section one, since he admits that the words of Section one were not ordinarily represented in this way. No less troubling is the definition of this elastic principle for which he contends. How elastic was it? Did a constitution-amending majority define the principle with sufficient elasticity that it could be specified to reach segregated public accommodations? Bickel provides no answer to these questions[356] because, in all likelihood, there is no answer to provide.

Perry, too, uncritically accepts the Court's proclamation in *Loving v. Virginia*[357] that "[t]he . . . purpose of the Fourteenth Amendment was to eliminate *all official* state sources of invidious racial discrimination in the States."[358] A constitution-amending majority of Republicans probably intended no such purpose for the Privileges or Immunities Clause. If the Court must live with the enactors' definition of fundamental rights, *Loving*'s elimination of a state law, barring interracial marriage, probably cannot be legitimized using originalism.

3. THE SCOPE OF PRIVILEGES OR IMMUNITIES CONFERRED BY STATE LAW

An important question respecting state law and the Privileges or Immunities Clause remains to be addressed: what rights defined by state law did a constitution-amending majority of the Fourteenth Amendment's enactors intend to afford protection under the Privileges or Immunities Clause?

Although political rights, particularly the right to vote, and a right to desegregated public facilities, probably were not privileges or immunities, is it probable that the scope of fundamental rights was still broad enough to include most "rights" defined by state law?

Previously, I noted that virtually no one dissents from the contention that the Privileges or Immunities Clause was meant to protect the rights in the Civil

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[356] *See* BICKEL, *supra* note 94, at 58-65. It is not an answer to these questions to say that the enactors of the Privileges or Immunities Clause intended it to be "sufficiently elastic to permit reasonable further advances." To be sure, Bickel's words amount to an assertion that the Privileges or Immunities Clause was not meant to protect a fixed class of freedoms. (Incidentally, it should be noted that such an assertion is difficult to reconcile with the many statements in the 39th Congress that voting was not a privilege or immunity. See MALTZ, *supra* note 22, at 109.) But, even if such an assertion is true, "reasonable further advances" provides no meaningful guidance for deciding what "rights" should be added to those denoted in the Civil Rights Act of 1866. So far as answering the questions I have posed, the phrase "reasonable further advances" is vacuous rhetoric.

[357] 388 U.S. 1 (1967).

[358] PERRY, *supra* note 3, at 144 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

Rights Act of 1866.[359] Indeed, much of the impetus for the Fourteenth Amendment sprang from doubts about the constitutionality of the Civil Rights Act of 1866[360] and from concern that the Act was vulnerable to repeal by a simple majority vote of Congress. Congressman Garfield, for example, offered this rejoinder to a Democrat, who was nettling Republicans about the similarity between Section one of the amendment and the Civil Rights Act:

> The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife . . . .[361]

Statements such as Garfield's, which suggests a very close tie, or even an equivalency, between the Civil Rights Bill and the Fourteenth Amendment's Section one, are perhaps the most noticeable feature of the discussion in Congress that ensued introduction of the Amendment. To cite only two examples, Congressman Thayer said of the Amendment, "it is but incorporating in the Constitution of the United States the principle of the Civil Rights Bill . . . ."[362] The very next speaker in the House, Congressman Boyer repeated Thayer almost verbatim: "[t]he first section embodies the principles of the civil rights bill."[363] Professor Charles Fairman's conclusion, following careful review of these debates, typifies that of many other scholars: "Over and over . . . the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identified with those of the other."[364]

The evidence of opinion outside Congress confirms that it was commonly understood that Section one was meant to constitutionalize the Civil Rights Act.

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[359] *See supra* text accompanying notes 110-114.

[360] *See* AVINS, *supra* note 68, at 176. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866) (remarks of Representative Raymond).

[361] CONG. GLOBE, 39th Cong., 1st Sess. 2462. *See also id.* at 2459 (remarks of Representative Stevens); *Id.* at 2465 (remarks of Representative Thayer).

[362] *Id.* at 2465.

[363] *Id.* at 2467.

[364] Fairman, *supra* 93, at 44.

As Professor Horace Flack's[365] review of newspaper commentary contemporaneous to the consideration of the Amendment shows, newspaper editorials whether hostile or favorable repeatedly stated, in Flack's words, that the "first section was but a reenactment of . . . [the 1866 Civil Rights Bill]."[366] Flack concludes: "The press, with few, if any, exceptions, either held this view or uttered no opinion on it."[367]

Professor James Bond's excellent study of the debate on the Privileges or Immunities Clause in Illinois, Ohio and Pennsylvania, corroborates the pervasiveness of the understanding that the rights to be protected by Section one mirrored those protected by the Civil Rights Bill.[368] This was the message conveyed in speech after speech and in most newspapers. *The Highland Weekly News* in Ohio, for instance, reported a speech by a Republican office seeker asserting that, "[s]ection one simply repeats the declaration of the Civil Rights Bill."[369] Bond underscores that "When a stump speaker expanded on . . . [privileges or immunities], he generally listed the very rights enumerated in the Civil Rights Bill."[370] *The Dayton Daily Journal* reported one such speech: "[T]he first section of this amendment . . . [gives citizens] the rights, immunities, and privileges of Americans citizenship which are the Civil Rights—the right to sue and be sued, to be protected in their person and property, the right of locomotion—the right to go where they please and live where they please, and own property where they please . . . ."[371]

What is known of opinion in the state legislatures ratifying the Fourteenth Amendment unsurprisingly reflects this apparently common understanding. Speaking on the floor of the Indiana House, Representative Dunn replied to those arguing that the Civil Rights Act already protected rights to be protected by the Privileges or Immunities Clause in words echoing Garfield's: "Well, we propose to make those principles permanent by writing them in the fundamental

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[365] *See* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 148 (1908).

[366] *Id.*

[367] *Id.*

[368] *See* Bond, *supra* note 94, at 448.

[369] *Id.*

[370] *Id.*

[371] *Id.*

law."[372] In the Pennsylvania Legislature, Representative Day stated that the purpose of Section one was "to write in substance the civil rights bill."[373] These do not appear to be anomalous statements. Based on his study of the Pennsylvania Legislature's consideration of the Fourteenth Amendment, Bond concludes "proponents explained over and over again that § 1 wove the principles of the Civil Rights Bill into the Constitution."[374]

As far as privileges or immunities defined by state law, the principal rival to the idea that this consists of the rights enumerated in the Civil Rights Act of 1866 is the contention encountered earlier that privileges or immunities included "all rights" conferred by state law. Although my discussion of voting rights and desegregation/segregation indicates that the "all rights specified in state law" position did not command a constitution-amending majority, I want to explore, from a more general perspective, the evidence that has been marshaled by Perry's favorite scholars for this position to underscore just how feeble it is.

John Harrison, one of those upon whom Perry relies, argues that in addition to the rights specified in the Civil Rights Act of 1866, "the privileges or immunities of citizens consisted of [all] rights defined by state positive law."[375] These rights were to be protected against "unfair" discrimination. According to Harrison, the "positive law antidiscrimination reading of . . . [privileges or immunities] was very common, and . . . it was, probably the dominant view."[376] Yet, only a few pages earlier, Harrison conceded that "nineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither [of which] was thought to extend to political rights, such as voting or serving on juries . . . . Most Republicans agreed that neither civil rights nor privileges and immunities included political rights."[377] Without even pausing to address the inconsistency in his assertions, Harrison's argument moves directly from his concession that most Republicans thought political rights were not included within the compass of privileges or immunities to an assertion that all state positive law rights were

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[372] FLACK, *supra* note 365, at 175.

[373] Bond, *supra* note 94, at 462.

[374] *Id.* at 461.

[375] Harrison, *supra* note 17, at 1419.

[376] *Id.*

[377] *Id.* at 1417.

meant to be protected. Although Harrison is correct that, during the 1870's debates on congressional authority to prohibit segregation in public facilities, some members of Congress made statements suggesting that they considered the Privileges or Immunities Clause an anti-discrimination measure covering all rights conferred by a state's positive law,[378] this is far from establishing that a constitution-amending majority of the Senate and House proposing the Fourteenth Amendment believed this.[379] Given the historical record, it is difficult enough to build a credible case for Harrison's reading of privileges or immunities as the view of a simple majority of those proposing the Fourteenth Amendment, much less to maintain that it is probable that the extraordinary majority necessary to propose an amendment to the Constitution embraced this view.

Nelson shares Harrison's view of the original understanding of protected privileges and immunities defined by state law[380] and, like Harrison, cites statements from some members of Congress to vouch for this contention. Close scrutiny of these statements, however, reveals that the case for attributing the Nelson-Harrison-Perry view to a constitution-amending majority of the Fourteenth Amendment's enactors is problematic.[381]

Nelson states that "Senator Lyman Trumbull was one of the many Republicans who accepted this analysis of the Fourteenth Amendment not as a charter for federal protection of fundamental rights, but merely as a guarantee of equality."[382] After noting that Trumbull thought Section one of the Fourteenth Amendment secured the same rights as the Civil Rights Act of 1866, Nelson cites from Trumbull's defense of the Civil Rights Act such passages as it provides for "an equality among all classes of citizens" and requires that "[a state's] laws shall be impartial."[383] But consider more of the speech from which these passages are plucked: "The [Civil Rights] bill . . . simply declares that in *civil rights* there shall be an equality among all classes of citizens . . . . Each state . . . may grant or withhold such *civil rights* as it pleases; all that is

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[378] *Id.* at 1425-33.

[379] *See* discussion *infra* Parts VI. A., VI. A. 1., VI. A. 2.

[380] *See* NELSON, *supra* note 18, at 115.

[381] *See id.*; Harrison, *supra* note 17, at 115; PERRY, *supra* note 3, at 144-45.

[382] NELSON, *supra* note 18, at 115.

[383] *Id.* at 116.

required is that, *in this respect*, its laws shall be impartial."[384] Trumbull certainly did believe that civil rights must be conferred impartially. However, it is clear that, although Trumbull equated civil rights with privileges or immunities, he did not believe that civil rights encompassed all rights conferred by state law. Referring to the Thirteenth Amendment as the constitutional basis for extending federal protection to the rights in the Civil Rights Act of 1866, Trumbull stated, in the very speech from which Nelson drew the passages cited above, that "[s]ome have contended that it gives the power even to confer the right of suffrage. *I have not thought so*, because I have never thought suffrage any more necessary to the liberty of a freedman than of a non-voting white whether child or female."[385] This is not a theory of civil rights that supports Nelson's (or Harrison's) appraisal of the original compass of privileges or immunities.

Nelson also cites from Morrill a statement that, standing apart from its context, suggests that Morrill endorsed the idea that the Privileges or Immunities Clause was an anti-discrimination measure protecting each and every privilege or immunity defined by state law. In the part of the speech from which Nelson cites, Morrill said that, in his opinion, "[t]he republican guarantee is that all laws shall bear upon all like."[386] In light of Morrill's personal objections to racial discrimination, it is possible that, if he had had his way, the Privileges or Immunities Clause would have forbidden states from enacting or enforcing any policy discriminating on the basis of race.[387] Morrill was forthright, however, in admitting that this was not the meaning of the Privileges or Immunities Clause. In fact, the passage Nelson cites from Morrill was not Morrill's opinion of privileges or immunities. The passage is actually taken from a speech in which Morrill is advocating adult black male suffrage in the District of Columbia, where the Privileges or Immunities Clause was not applicable.[388] Morrill apparently believed the right to vote is recognized implicitly in the Thirteenth Amendment and belonged to free male citizens.[389] However,

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[384] CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (emphasis added).

[385] *Id.* (emphasis added).

[386] NELSON, *supra* note 18, at 116.

[387] *See* CONG. GLOBE, 42nd Cong., 2d Sess. app. 4 (1872) (remarks of Senator Morrill).

[388] *See* CONG. GLOBE 39th Cong., 2nd Sess. 40 (1866).

[389] *Id.*

whatever Morrill may have believed about voting, he appears not to have thought of the Privileges or Immunities Clause as forbidding all state action discriminating on the basis of race. Recall that, in the debates prompted by the Civil Rights Act of 1875, Morrill scolded Sumner for suggesting that the Privileges or Immunities Clause gave Congress the power to forbid segregation in facilities such as public schools.[390] To repeat Morrill's conclusion about the scope of the Privileges or Immunities Clause, "It is not the full extent of citizenship, or the rights and privileges of citizenship in a particular State."[391]

Nelson's attempt to add James Wilson to the list of those who advocate the position that all rights specified in state law are protected from unfair discrimination, is clearly at odds with Wilson's unequivocal exclusion of political rights and the right to attend a desegregated school from the compass of civil rights.[392] Likewise, to cite Steven's remark about a version of Section one that was never enacted,[393] without noting that Steven's was disappointed with the breadth of the final version of Section one, is not to tell the whole story.[394] It may well be, as Nelson suggests, that some or all of these persons believed that privileges and immunities were to be shielded from unfair discrimination, but their position cannot be reconciled with the further proposition that they meant to protect all rights defined by state law from such discrimination. Certainly, some members of Congress appear to have thought of the Privileges or Immunities Clause as providing protection against abridgement of any right created by state law. However, the case for a constitution-amending majority, having adopted such a position, is not to be found in Nelson's or Harrison's review of the evidence.

Those Republicans who would have restricted privileges and immunities to a set of fundamental rights clearly thought of the rights in the Civil Rights Act of 1866 as fundamental. When Trumbull, the author of the Civil Rights Act of 1866, opened debate on the 1866 Civil Rights Bill in the Senate, he said of the "colored race" that "they will be entitled to the rights of citizens. And what are they? The great fundamental rights set forth in this bill . . . ."[395] Like-

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[390] *See supra* text accompanying note 224.

[391] CONG. GLOBE 42nd Cong., 2nd Sess. app. 1 (1872).

[392] *See* NELSON, *supra* note 18, at 117.

[393] *See id.* at 116-17.

[394] *See supra* note 245 and accompanying text.

[395] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

wise, James Wilson described the class of rights protected by the Civil Rights Bill as limited to a set of "natural rights."[396] And, in Illinois, Ohio and Pennsylvania, Professor Bond points out that speakers and newspapers repeatedly recited the rights in the Civil Rights Bill as essential to protection of natural rights.[397] There is little in the historical record to suggest that the Civil Rights Act was deemed by a constitution-amending majority of its enactors to protect all rights defined by state law. Harrison tries to obscure this conclusion. He claims that the Civil Rights Act did not exhaust the rights protected by the Privileges or Immunities Clause and that Trumbull's explanation of the Civil Rights Act is evidence that Trumbull was among those endeavoring to protect all rights defined by a state's positive law.[398] In fact, in the very speech that Harrison cites, Trumbull excluded suffrage from the rights protected by the Civil Rights Bill.[399] Moreover, he then asked what rights are protected by the Civil Rights Bill as rights common to all citizens and answered that these are

> [t]he great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every free man.[400]

It is impossible to reconcile the claim that Trumbull saw civil rights and privileges or immunities as the equivalent of all rights defined by state law with his remarks read as a whole, and particularly with his unequivocal exclusion of suffrage and a right to attend a desegregated public school from the class of protected rights.[401]

The intent of Congress respecting the Civil Rights Act of 1866 was unmistakably clear in their action striking out a provision forbidding discrimination in civil rights or immunities.[402] Despite repeated assurances that "civil rights"

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[396] *See id.* at 1117.

[397] *See* Bond, *supra* note 94, at 446-49.

[398] *See* Harrison, *supra* note 17, at 1418.

[399] *See id.*

[400] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

[401] *See supra* text accompanying notes 289-290, 385.

[402] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1366-67 (1866) (remarks of Wilson)

was a limited category, confined to those rights specifically named in the bill, Congressman Bingham would not relent from his objection that civil rights might be mistakenly construed to "embrace every right that pertains to the citizen as such."[403] Precisely for the reason that reference to "civil rights" might be given "a latitudinarian construction"[404] and misconstrued as protecting all rights associated with citizenship in a state, the "civil rights" provision was expunged from the final version of the bill.[405]

Democrats outside Congress railed against the Civil Rights Act, calling it a "nigger equality bill" that would even give blacks the right to vote.[406] Bond notes that every time a detractor of the Act lodged such a charge "a Republican denied any such result was intended."[407] As one Republican paper explained, in words resembling Trumbull's, "[t]he immunities granted the freedman by this bill are only such as are indispensable to a condition of freedom—such as non-voting whites have always enjoyed—Freedom—civil rights—is all that this bill proposes to give the negro."[408]

If the question concerning the scope of privileges or immunities conferred by state law can be reduced to a choice between all "privileges and immunities" and the rights denoted in the Civil Rights Act of 1866, such a choice poses no dilemma for a judge committed to originalism. The choice, however, is not so simple. Recall that Trumbull included among the "great fundamental rights set forth" in the Civil Rights Act of 1866, "the right to go and come at pleasure."[409] Yet no such right is expressly "set forth" in the Act. Remember too *The Dayton Daily Journal*'s reference to a "right of locomotion-the right to go where they please and live where they please,"[410] as a right somehow protected by the Civil Right Act. Likewise, James Wilson thought that Blackstone's basic natural rights of Englishmen defined the ambit of civil rights and

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[403] *Id.* at 1291.

[404] *Id.* at 1366.

[405] *See id.* at 1367.

[406] *See* Bond, *supra* note 94, at 447.

[407] *Id.*

[408] *Id.* at 446.

[409] *See supra* text accompanying note 400.

[410] *See supra* text accompanying note 371.

included, in addition to the rights of personal security and personal property, the "right of personal liberty" or the right "of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct."[411] Wilson continued that each of these natural rights is embodied in the terms of the Civil Rights Act of 1866 or is "an incident necessary to complete defense and enjoyment of the specific right."[412]

We are met with a seeming contradiction. On the one hand, there are the reassurances that the Civil Rights Act protected no more than the rights it specifically stated. On the other hand, there is evidence suggesting that, as Bickel has put it, "able men . . . realized that each of the seemingly well-bounded [civil] rights . . . enumerated carried about it, like an upper atmosphere, an area in which its force was uncertain."[413] Bickel is confident that, at the very least, a right of free movement and a right to work at occupations of one's choice can be found in this upper atmosphere.[414]

It is certainly plausible that a constitution-amending majority of Republicans thought civil rights included a right of free movement. In addition to the evidence already cited, a "right to travel" or a right of "locomotion" was recognized in judicial explications of privileges and immunities preceding and contemporaneous with adoption of the Fourteenth Amendment.[415] The important *Corfield* opinion, for example, included in its list of fundamental rights the right of "a citizen of one state to pass-through; or to reside in any other state."[416] *Paul v. Virginia*,[417] decided by the Supreme Court in 1868, sounded a similar theme.[418] It declared, in words nearly identical to the language of Article IV of the Articles of Confederation, that the Privileges and Immunities Clause of the Constitution "gives . . . [the citizen of each state] the right of free ingress into other States, and egress from them."[419] So commonplace was

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[411] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

[412] *Id.* at 1118-19.

[413] BICKEL, *supra* note 94, at 56.

[414] *See id.*

[415] *See* Paul v. Virginia, 7 U.S. 168 (1868).

[416] Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa 1823) (No. 3,230) at 551-552.

[417] 75 U.S. 168 (1868).

[418] *See id.* at 180.

the idea that the right to travel was fundamental that no Reconstruction Republican appears to have contested assertions to this effect. Even Berger apparently is untroubled by this proposition, despite his insistence that the rights denoted in the Civil Rights Act of 1866 exhaust the privileges or immunities protected by the Fourteenth Amendment. [420]

If it is at least plausible that a constitution-amending majority of the enactors of the Civil Rights Act of 1866 understood the Act to protect a right to travel, the same must be true of the contention that the Act's enumerated rights were understood to have an upper atmosphere. This is not, however, an invitation to treat the Act as open-ended. The existence of an upper atmosphere attached to the specific rights in the Civil Rights Act is not a pretext for escaping the "gravitational field" of these specific rights. Wilson's willingness to protect rights "necessary to complete defense and enjoyment of . . . specific right[s]" [421] perhaps best captures the original understanding of the Civil Rights Act's upper atmosphere.

Whatever such "upper-atmospheric rights" might be beyond those identified by the enactors of the Civil Rights Act, it is likely that such rights are too bound up with, or dependent on, the Act's specific rights to provide an originalist shelter for many of the activist judicial decisions Perry seeks to defend. [422] Without undue strain, the upper atmosphere of the Civil Rights Act cannot be said, for example, to shelter the Court's abortion rights, voting rights or desegregation decisions.

The Supreme Court recently resuscitated the Privileges or Immunities Clause in *Saenz v. Roe*. [423] Despite having relegated the clause to such an inconsequential role that it had been relied on in only one previous decision, the Court made it the basis for striking down a California policy. [424] The policy terminated by *Saenz* limited the maximum welfare benefits payable to a family

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[419] *Id.*

[420] *See* BERGER, *supra* note 21, at 42, 84.

[421] CONG. GLOBE, 39th Cong., 1st Sess. 1118-1119 (1866).

[422] *See* PERRY, *supra* note 3, at 54-69.

[423] 119 S. Ct. 1518 (1999).

[424] *See* Colgate v. Harvey, 296 U.S. 404 (1935). The Privileges or Immunities Clause was relied on in *Colgate v. Harvey*. However, *Colgate*, was overruled five years later in *Madden v. Kentucky*, 309 U.S. 83 (1940). *See also* Saenz v. Roe, 119 S.Ct. 1518, 1526 (1999).

residing in California for less than twelve months to the amount payable to the family by the state where the family had resided prior to moving to California. In the opinion of the Court, this impermissibly penalized a right to travel protected by the Privileges or Immunities Clause.[425] More precisely, the Court found that California's policy offended one "aspect of the right to travel-the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state."[426] Apparently, not only is the right to travel a privilege or immunity, but so too is every benefit provided by a state a privilege or immunity.

As Justice Thomas observed, the Court's *Saenz* opinion gave little heed to historical evidence pertinent to determining the original meaning of the Privileges or Immunities Clause.[427] According to Justice Thomas' dissenting opinion, had the Court paid attention to the historical record, it would have found that "at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities' of citizens were fundamental rights, rather than every public benefit established by positive law."[428] The explanation of originalism and appraisal of historical evidence offered herein supports Justice Thomas' conclusion about the originally intended scope of privileges or immunities. Whether it supports Justice Thomas' conclusion that California's policy for apportioning welfare benefits is constitutionally permissible is another matter. It is true that the enactors of the Fourteenth Amendment did not indicate that welfare benefits are a fundamental right. But this does not lead, inexorably, to a conclusion that it is inconsistent with originalism to find that a policy, which awards state benefits on the basis of how long a person has been a resident, violates a privilege to travel or to become a citizen of another state. The originalist project only addresses the question of whether or not the right to travel is a privilege or immunity. If the right to travel is a privilege or immunity, what violates the privilege is not a question that original intention adjudication can answer.[429] Nevertheless, Justice Thomas' concern that *Saenz* could

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[425] *See Saenz*, 119 S.Ct. at 1526.

[426] *See id.*

[427] *Id.* at 1535, 1538 (Thomas, J., dissenting). Chief Justice Rehnquist joined Justice Thomas' dissenting opinion.

[428] *Id.* at 1538.

[429] This distinction is close to Perry's distinction between the originalist inquiry and specification, except that Perry conceives of specification in terms of specifying (or determining the meaning of) an original principle for a particular dispute and not in terms of specifying a particular privilege or immunity.

be read to support rights claims, divorced from the right to travel, which have no legitimate mooring in the Privileges or Immunities Clause is well warranted.[430]

B. PERRY'S PROBLEMATIC VERSION OF A "RIGHT TO HAPPINESS"

Although less often, as compared to the references to the Civil Rights Act of 1866, the advocates of the Fourteenth Amendment did refer occasionally to a right to pursue happiness. Perry calls attention to Senator Howard's recitation of the *Corfield* opinion which, among other fundamental liberties, included a right "*to pursue and obtain happiness and safety*, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole."[431] For those who might be inclined to discount Howard's remark in this regard as just rhetoric, Perry recommends a "refresher course in American history."[432] Specifically, he reminds us that the Declaration of Independence included, among unalienable rights, a right to "the pursuit of Happiness."[433]

For most Republican speakers who mentioned a right to pursue happiness, the connection of this "right" to the Privileges or Immunities Clause is more tenuous than the *Corfield* opinion indicates.[434] Nevertheless, Perry might have cited several references to such a right as evidence that, as a general matter, Republicans enacting the Fourteenth Amendment took seriously a right to pursue happiness. Senator Trumbull, for example, pointed to the need to protect "the great fundamental rights of life, liberty, and the pursuit of happiness, and the right to travel"[435] when he introduced the measure that became the Civil Rights Act of 1866. Likewise, in the House of Representatives, Windom re-

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[430] *See Saenz*, 119 S.Ct. at 1526, 1538 (Thomas. J., dissenting)

[431] PERRY, *supra* note 3, at 125 (emphasis in original).

[432] *Id.*

[433] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), which stated in pertinent part: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. . . ." *Id.*

[434] *See* Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa 1823) (No. 3,230) at 551.

[435] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

ferred to a freedom to pursue happiness,[436] as did James Wilson, at least obliquely, by citing the *Corfield* statement in this regard.[437] Representative Delano added his voice to this number, when he advocated adoption of an amendment to the Constitution that he had proposed "for the security of life, liberty, and property, and the rightful pursuit of happiness."[438] Significantly, so far as the historical record shows, no Republican dissented from these declarations of a right to pursue happiness.

Assuming that the scattered Republican references to a right to pursue happiness establish that it is plausible to count the pursuit of happiness as a Section one privilege or immunity, this cannot end our inquiry. We still must determine what was meant by this right to pursue happiness. Perry simply assumes that the pursuit of happiness was thought to be a freedom distinct from other privileges and immunities and that it was intended to secure "each and every freedom of a citizen to do, or to refrain from doing, as he or she wants."[439] There are two considerations that war against this assumption. First, many supporters of the Fourteenth Amendment stressed the limited character of the rights secured by Section one. In addition, many proponents, to fend off critics, denied that Section one radically altered federalism.

I want to emphasize, before elaborating on these considerations, that Republican references to a right to seek happiness are not necessarily contrary to the contention that the Privileges or Immunities Clause protected only fundamental freedoms. Indeed, the *Corfield* reference to a right to pursue happiness, which was recited by Howard and which Perry accords such great weight, was part of the *Corfield* opinion's definition of fundamental liberties.[440] Trumbull, as we have seen, also characterized the right to seek happiness as fundamental.[441]

Recall that the opponents of the Fourteenth Amendment repeatedly claimed that Section one was an open-ended invitation to treat the freedoms of blacks and whites as coextensive and the amendment's proponents repeatedly coun-

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[436] *See id.* at 1159.

[437] *See id.* at 1117.

[438] *Id.* at app. 159.

[439] PERRY, *supra* note 3, at 127.

[440] *See* Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa 1823) (No. 3,230) at 551-552.

[441] *See* CONG. GLOBE, 39th Cong., 1st Sess 475 (1866).

tered that this was not true.[442] In fact, proponents went to great lengths to emphasize that privileges or immunities was not open-ended, but protected only certain rights. Thus, instead of the open-ended right to seek happiness that Perry describes, it seems likely that many Republicans thought of the right to pursue happiness as tied to the exercise of a limited category of other fundamental or civil rights.[443]

Bond's observations buttress this assertion.[444] To counteract racist attacks on the amendment, Bond explains that Republicans in Illinois, Ohio and Pennsylvania commonly asserted that the Privileges or Immunities Clause protected only "those natural rights essential to the pursuit of happiness in a free society."[445] When Republicans in the states Bond studied were pressed to define the essential rights of a citizen, they invariably turned to the rights in the Civil Rights Act of 1866.[446] Congressional Republicans, or at least a significant number of them, also may have held this view of the right to seek happiness. After stating that citizens are "entitled to the great fundamental rights of life, liberty and the pursuit of happiness,"[447] Trumbull went on to catalogue the rights in his 1866 Civil Rights Bill.[448] As noted before, he said that the fundamental rights of citizens "are the *very rights* that are set forth in this bill."[449] Even Howard's incantation of the *Corfield* opinion's reference to "happiness" may not have been meant to carry the libertarian inference Perry ascribes to it.[450] Howard also cited, after all, the *Corfield* opinion's assertion that the "elective franchise" was a fundamental right,[451] but later denied that the right to vote was among the fundamental rights incident to citizenship or among the

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[442] *See supra* text accompanying notes 406-407.

[443] *See* PERRY, *supra* note 3, at 127.

[444] *See* Bond, *supra* note 94, at 442.

[445] *Id.*

[446] *See id.* at 446-47.

[447] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

[448] *See id.*

[449] *Id.* (emphasis added).

[450] *See* PERRY, *supra* note 3, at 140-42.

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

inalienable rights referred to in the Declaration of Independence.[452] Most Republican references to a freedom to pursue happiness are couched in ambiguous rhetoric that reveals little about what principle the speaker or author had in mind. However, Perry's definition of an open-ended freedom to do as one wants is less consistent with the Republican defense of Section one as a measure of limited scope than the alternative definition suggested above.

That the Fourteenth Amendment was meant to delegate to the national government the power to invalidate state laws, that interfere with the freedom to do, or to not do, whatever a citizen wants, is exceedingly difficult to reconcile with the chorus of Republicans denying that the Privileges or Immunities Clause would significantly alter federalism. As Maltz argues, Republicans rejected the defeated Confederate states' political philosophy of "state sovereignty" and the idea that a state could nullify federal law but not the idea of states' rights.[453] Even Radical Republicans declared their commitment to states' rights during Reconstruction. Radical abolitionist Wendell Philips, for example, said "I love State Rights; that doctrine is the cornerstone of individual liberty."[454] Statements reflecting this sentiment were a persistent refrain from the Republicans enacting the Fourteenth Amendment. After the Civil War, Senator James Grimes wanted to "go back to the original condition of things, and allow the States to take care of themselves."[455] H. J. Graham has stated succinctly the view of most scholars: "[n]o one reading the [congressional] debates carefully will question the Framers' devotion to federalism, even the extreme Radicals'."[456] In the states Bond studied, opinions mirrored those in Congress.[457] That is, Democrats attacked the amendment as an attempt "to revolutionize our system of government . . . from a federation of independent states . . . into a consolidated empire,"[458] and "proponents down-

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[452] *See id.*

[453] *See* MALTZ, *supra* note 22, at 29, 36.

[454] NATIONAL ANTI-SLAVERY STANDARD, May 15, 1865, p. 2.

[455] CONG. GLOBE, 39th Cong., 1st Sess. 2446 (1866).

[456] GRAHAM, *supra* note 310, at 312. "[R]adical leaders," Flack underscored, "were as aware as anyone of the attachment of a great majority of the people to the doctrine of States Rights." FLACK, *supra* note 365, at 68.

[457] *See id.*

[458] Bond, *supra* note 94, at 458 (quoting *The Quincy Daily Herald* (Ill.), Jan. 30, 1866 at 2, col. 1).

played the extent to which Congress could interfere with state authority."[459]

Moreover, proponents of the Fourteenth Amendment downplayed the impact of the Amendment on the North. Joseph James'[460] thorough review of the campaign waged by Republicans for ratification of the Fourteenth Amendment affirms this, as does Bond's study.[461] James concluded that "[t]he possibility of [the Amendment's] operation in the North was seldom alluded to and often denied."[462] It was the South's trammeling of basic civil rights that Republicans said was the impetus for both the Civil Rights Act of 1866 and Section one of the Fourteenth Amendment. As Bond has noted, "[t]he Black Codes had convinced a majority in Congress that white Southerners intended to reinstitute slavery by denying newly freed blacks the rights to contract, hold property and sue."[463]

Professor McAffee's[464] observation that, in the area of statutory interpretation, when there is no clear evidence of intent, "courts are thought to have a duty to make their decision cohere with what is already settled by the legal order,"[465] is helpful here. Originalists have a similar duty, given the definition of originalism, to reconcile their definition of a particular constitutional principle with settled constitutional doctrine, in the absence of clear evidence for discerning the principle's original meaning. If historical evidence supports, as it seems to, the conclusion that no constitution-amending majority of those approving the Fourteenth Amendment intended to radically alter federalism, then Perry's open-ended definition of the freedom to pursue happiness is decidedly less consistent with the doctrine of federalism than is a definition that limits the pursuit of happiness to the exercise of a bounded category of rights.

Perry is not asserting, of course, that freedom to pursue happiness was conceived as an absolute right.[466] He stresses that it is plausible that this right, like

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[459] *Id.*

[460] *See* JOSEPH JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 191 (1965).

[461] *See id. See also* Bond, *supra* note 94, at 458.

[462] JAMES, *supra* note 460, at 191.

[463] Bond, *supra* note 94, at 443.

[464] *See* Thomas McAffee, *Constitutional Interpretation - the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 294 (1986).

[465] *Id.*

[466] *See* PERRY, *supra* note 3, at 125, 133.

other privileges and immunities, was, as the *Corfield* opinion put it, "subject . . . to such restraints as the Government may justly prescribe for the general good of the whole."[467] However, in Perry's view, should a citizen challenge a restraint on her "freedom" to do, or refrain from doing, what she pleases, the decision respecting whether the restraint is a just one for the general good of the whole, resides ultimately with the federal courts.[468] This obviously does nothing to relieve the problem of a freedom that would fundamentally alter federalism. Putting this aside, there are two additional problems with Perry's view of this freedom and the appropriate mechanism for its enforcement. First, not only does Section 5 of the Fourteenth Amendment expressly give to Congress the power to enforce the Amendment,[469] but there is a considerable body of historical evidence supporting the conclusion that those who gave us the Fourteenth Amendment would not have shared the modern judicial activists faith in the federal courts.[470] As Earl Maltz so perceptively observes, "against the background of *Dred Scott [v. Sanford],*[471] it appears implausible to assume that the Framers intended the kind of general expansion of judicial authority envisioned by open-ended theorists."[472] Second, even if the courts are the appropriate institution for determining whether state action is "for the general good of the whole," Perry's recommendation that the courts rely on the "rational basis" test for this determination[473] would not go far in

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[467] PERRY, *supra* note 3, at 125, 133.

[468] *See id.* at 155.

[469] *See* U.S. CONST. amend. XIV, § 5.

[470] *See* Earl Maltz, *Some New Thoughts on an Old Problem - The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811, 819 (1983).

[471] 60 U.S. 393 (1856).

[472] Maltz, *supra* note 22, at 819. Maltz further observes that

> In some respects the [Fourteenth] Amendment is clearly anti-judicial in origin. First, the citizenship provisions of section 1 represented a direct attack on the *Dred Scott* decision. Second, one of the clearly enunciated purposes of section 1 was to establish firmly the constitutionality of the Civil Rights Act of 1866—to shield that law from judicial review. In light of these considerations, the case for the open-ended theory of intent hardly seems compelling.

Id.

[473] PERRY, *supra* note 3, at 154-55.

legitimizing the Supreme Court's most controversial activist decisions. The rational basis test has never been seen as a fountainhead of activism because it requires only that state action have a legitimate objective and that it is reasonable to conclude that the state action serves the state objective to some extent.[474]

C. PRIVILEGES OR IMMUNITIES IN THE BILL OF RIGHTS

According to Perry, the bellwether of scholarship establishing the plausibility of the proposition that the national Bill of Rights was shielded from hostile state action, is Michael Kent Curtis' *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*.[475] Curtis' argument in this work is, therefore, my primary focus in evaluating what a constitution-amending majority of the enactors of the Privileges or Immunities Clause intended respecting the Bill of Rights.[476] Before undertaking this evaluation, however, I want to emphasize that Curtis' argument is consistent with the contention that only fundamental rights were protected by the Privileges or Immunities Clause, as well as the contention that the enactors' competing definitions of the category of protected privileges or immunities overlapped.[477] While Curtis insists that the fundamental rights meant to be protected by the Privileges or Immunities Clause included *all* those in the Bill of Rights,[478] he does not maintain, as Justice Hugo Black did, that the Bill of Rights' protections exhaust the scope of the clause.[479] Curtis' argument, as we shall see, implicitly accepts the view that the Privileges or Immunities Clause was intended to protect the "freedoms" enumerated

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[474] *See, e.g.*, Grusendorf v. Oklahoma City, 816 F. 2d 539 (1987). Although Perry's version of this test (which he labels "the reasonableness directive") adds a requirement that judges assess the proportionality of the public benefits and the costs produced by a law, see PERRY, *supra* note 3, at 162, he recommends that a judge employing his reasonableness directive defer to legislative judgement(s). *See id.* at 178-179. If a deferential posture is pursued conscientiously, Perry's reasonableness directive will not serve as a rationale for judicial activism.

[475] *See* PERRY, *supra* note 3, at 127 (citing CURTIS, *supra* note 88, at 129).

[476] *See* CURTIS, *supra* note 88, at 129.

[477] *See id.*

[478] *See id.*

[479] *See id. See also* Adamson v alifornia, 332 U.S. 46, 68-92 (1946) (Black, J., dissenting)).

in the Civil Rights Act of 1866.[480]

The linchpin in Curtis' case is his contention that Republicans embraced certain "unorthodox" constitutional arguments advanced by radical abolitionist.[481] In particular, most Republicans accepted the tenets of abolitionist philosophy, holding that the Bill of Rights limited state governments even before the adoption of the Fourteenth Amendment and that it was the Privileges and Immunities Clause in Article IV of the Constitution that secured this limitation.[482] This, of course, meant that most Republicans in 1866 would have rejected the Court's decision in *Barron v. Baltimore*,[483] holding that the Bill of Rights constrained only the national government.[484] Because previous scholars investigating the subject failed to take into account the larger historical context of Republican constitutional theory, they found many Republican statements relevant to assessing the intentions of the Fourteenth Amendment's enactors for the Bill of Rights to be inscrutable.[485]

Raoul Berger, perhaps Curtis' fiercest critic, dismisses as utterly unfounded Curtis' contention that Republicans were influenced by radical abolitionist thought.[486] Contrary to the impression Berger leaves by generalizing Curtis' point,[487] however, Curtis does not urge that abolitionist ideology permeated the entire Republican reconstruction agenda. In fact, Curtis unmistakably concedes that Republicans did not embrace all abolitionist ideas.[488] Nevertheless, Curtis does maintain that Reconstruction era Republicans came to accept the radical abolitionist idea that the Bill of Rights stated fundamental and inalienable privileges and immunities protected by the Privileges and Immunities Clause of

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[480] *See* CURTIS, *supra* note 88, at 71-83.

[481] *See id.* at 6-7.

[482] *See id.* at 7.

[483] 32 U.S. 243 (1833).

[484] *See* CURTIS, *supra* note 88, at 7.

[485] *See id.* at 6.

[486] *See* BERGER, *supra* note 21, at 55.

[487] *See id.* at 55-66.

[488] *See* CURTIS, *supra* note 88, at 118.

Article IV.[489] For supporting evidence, Curtis depends heavily on statements made by Republicans in the Reconstruction Congresses. Although Curtis strains too hard to force some of these comments into the mold of his argument, a few statements do appear to fit Curtis' representation of them.[490] James Wilson, for example, expressed outrage that the slave states had, in his judgment, ignored the command of the Privileges and Immunities Clause in Article IV.[491] To illustrate this, he cited the South's suppression of the liberties enumerated in the First Amendment and declared that "[w]ith these rights no State may interfere."[492] Senator Wilson added, "I might enumerate many other constitutional rights of the citizen which slavery has disregarded and practically destroyed, but I have said enough to illustrate my proposition: that slavery . . . denies to the citizens of each State the privileges and immunities of citizens in the several States."[493]

It is also possible Senator Cowan, a conservative Republican, shared Senator Henry Wilson's judgment, that the Bill of Rights' freedoms could not be abridged by the states.[494] When Henry Wilson spoke for legislation to combat the Black Codes, Cowan replied:

> [t]he Constitution . . . makes provision by which the rights of no free man . . . can be infringed in so far as regards any of the great principles of English and American liberty; and if these things are done by . . . any of the Southern States, there is ample remedy now. Under the Fifth Amendment of the Constitution, no man can be deprived of rights without the ordinary process of law; and if he is, he has his remedy.[495]

A more unmistakable reference to the Bill of Rights is found in conservative Republican Hale's retort to Bingham's argument that a constitutional amend-

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[489] *Id.* at 41-56.

[490] *See id.*

[491] *See* CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

[492] *Id.*

[493] *Id. See also* CURTIS, *supra* note 88, at 49-50.

[494] *See* CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

[495] CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866). *See also* CURTIS, *supra* note 88, at 51.

ment was needed because some states, such as Oregon, were violating the Bill of Rights:[496] "If he claims that those provisions of the constitution or the laws of Oregon are inconsistent with the bill of rights contained in the Constitution of the United States, then I answer that . . . the courts may be appealed to vindicate the rights of the citizens, both under civil and criminal procedure."[497]

However, most of the statements made by Republicans, respecting Bill of Rights' freedoms, including most of those cited by Curtis, were complaints about the South's violation of only certain Bill of Rights liberties, rather than clear endorsements of the idea that all Bill of Rights freedoms were already privileges and immunities protected by Article IV.[498] Thus, scholars such as Fairman[499] and ten Broek[500] have concluded that the enactors of the Privileges or Immunities Clause meant the Clause to protect only certain Bill of Rights freedoms. This explains Curtis' effort to place Republican statements bearing on specific Bill of Rights' freedoms in the framework of abolitionist constitutional philosophy.[501] Viewed from the context of this philosophy, complaints about abridgements of specific Bill of Rights freedoms rested on a more general theory according protection from state action to all of the Bill of Rights.

Berger has underscored the weaknesses in Curtis' Article IV argument.[502] First, he notes that Article IV was adopted before the Bill of Rights and thus, the enactors of Article IV could not have thought of privileges and immunities as encompassing the Bill of Rights as such.[503] But this is less disastrous for Curtis' thesis than Berger seems to believe.[504] Curtis, after all, repeatedly em-

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[496] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866). *See also* CURTIS, *supra* note 88, at 71.

[497] CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866).

[498] These complaints commonly focused on denials of free speech, press, the right to keep arms and failure to accord "due" or fair process. *See* CURTIS, *supra* note 88, at 50-56. *See also* MALTZ, *supra* note 22, at 117.

[499] *See* Fairman, *supra* note 93, at 139.

[500] *See* TEN BROEK, *supra* note 311, at 126-27.

[501] *See* Curtis, *supra* note 88, at 129.

[502] *See* BERGER, *supra* note 21, at 88.

[503] *See id.*

[504] *See* CURTIS, *supra* note 88, at 129.

phasizes that Republicans held an "unorthodox" view of Article IV's Privileges and Immunities Clause.[505] Second, Berger points to Republican statements that are at odds with the unorthodox view that privileges and immunities included the Bill of Rights. [506] Radical Congressman Stevens, for example, in a speech defending the proposed Fourteenth Amendment, stated that "the Constitution limits only the action of Congress and is not a limitation of the states."[507] Likewise, Senator Trumbull, referring to judicial construction of the Privileges and Immunities Clause of Article IV, said that the court's opinions "relate *entirely* to the rights which a citizen in one State has on going into another State, and *not to the rights* of the citizen *belonging to the State.*"[508] Berger describes Republican views relating to this matter as "disparate" and, accordingly, finds "the legislative history invoked by Curtis inconclusive."[509] Certainly, Republicans did make disparate statements regarding this issue. Curtis, in fact, acknowledges that not every Republican accepted the "unorthodox" abolitionist perspective of the Privileges and Immunities Clause in Article IV.[510] Yet, this is of little consequence, according to Curtis, because even those Republicans, who did not accept the unorthodox view that the Bill of Rights' freedoms were all protected by the Constitution, still believed that the these freedoms *should be protected.*[511]

In light of the foregoing, the critical question is whether it is probable that Republicans adhering to the unorthodox view and those who believed the Constitution should be changed to protect the Bill of Rights added up to a constitution-amending majority. An affirmative answer to this question faces two difficult hurdles. The first of these is that when the Fourteenth Amendment was under consideration only two Republicans, Howard and Bingham, declared that they saw the Fourteenth Amendment's Privileges or Immunities Clause as shielding the Bill of Rights freedoms in their entirety. [512] It is true, as Curtis

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[505] *See* CURTIS, *supra* note 88, at 46.

[506] *See* BERGER, *supra* note 21, at 98.

[507] *Id.*

[508] *Id.* at 93 (emphasis in original).

[509] *Id.* at 99.

[510] *See* CURTIS, *supra* note 88, at 91.

[511] *See id.*

[512] There is little doubt that Howard deemed the first eight amendments to the Constitu-

observes, that no Republican contested these declarations.[513] But, while this is not without force, even Curtis appears bothered that so few Republicans drew a clear link between the Bill of Rights as an entity and Section one's Privileges or Immunities Clause.[514] In stark contrast, Republicans repeatedly and unequivocally stressed the link between Section one and the Civil Rights Act of 1866. Curtis' answer to this problem is that Republican references to the Civil Rights Act of 1866 should not be read as intended to leave out the Bill of Rights.[515] He maintains that the "general language" of the Civil Rights Act of 1866, specifically the phrase "laws and proceedings for security of person and property," was meant to subsume the Bill of Rights' freedoms.[516]

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tion privileges or immunities. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). He expressly stated this when he introduced the Fourteenth Amendment to the Senate. *See id.* Professor Fairman argues that Bingham's views on this matter is not so clear. Fairman notes, among other evidence, that Bingham's final speech defending the need for Section one before Congress approved the Fourteenth Amendment did not expressly mention the Bill of Rights. *See* Fairman, *supra* 93, at 51-54. Bingham, however, did point in this speech to "flagrant violations [by the states] of the guarantied [sic] privileges of citizens of the United States . . . . Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). Bingham expressly referred several times to "the bill of rights" in remarks defending the need for the Fourteenth Amendment. *See, e.g.*, CONG. GLOBE., 39th Cong., 1st Sess. 1089-91 (1866). However, Fairman argues that these were not references to the Constitution's first eight amendments but instead referred to the Comity Clause and to protection of life, liberty and property under the Due Process Clause of the Fifth Amendment. *See* Fairman, *supra* 93, at 33-34. This overlooks Bingham's unmistakable reference to the Bill of Rights lamenting that "in the United States courts the bill of rights under the articles of amendment to the Constitution has been denied." CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). Certainly, some of Bingham's remarks about the Fourteenth Amendment and the Bill of Rights are not models of clarity, but when read against his persistent argument that a chief reason for a constitutional amendment was to reverse *Barron* v. *Baltimore* and overcome the Court's unwillingness to apply the Bill of Rights against the states, there is little reason to doubt that he counted the freedoms in the Bill of Rights privileges or immunities. *See* Barron v. Baltimore, 32 U.S. 243 (1833); CONG. GLOBE, 39th Cong., 1st Sess 1089 (1866).

[513] *See* CURTIS, *supra* note 88, at 91.

[514] Curtis' emphasis on what Republicans did not say, testifies to this unease. *See id.* His attempt to portray the language of Civil Rights Act of 1866 as extending to the Bill of Rights also points to the lack of direct evidence. *See supra* text accompanying notes 413-29.

[515] *See* CURTIS, *supra* note 88, at 91.

[516] *See id.* at 72.

Of the Republicans to whom Curtis turns to validate this argument, Curtis is *probably* right that James Wilson saw the language of the Civil Rights Act as extending protection to the Bill of Rights.[517] Following his reassurances to fellow Republicans that the Civil Rights Act did not protect political rights or "social rights,"[518] Wilson said "in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy."[519] Although it is by no means so clear as Curtis insists, Representative Alfred Thayer also *may* have seen the Civil Rights Act this way.[520] Accused by Senator Kerr, a Democrat, of having "in effect [stated] that the first eleven amendments to the Constitution [are a source of authority for the 1866 Civil Rights Bill]," [521] as Curtis notes, Thayer did not dispute the accusation.[522] However, earlier Thayer had said that the Thirteenth Amendment was the constitutional basis for the Civil Rights Act.[523] Moreover, despite Kerr's accusation, Thayer did not refer to the Bill of Rights or the first eleven amendments as authority for the Civil Rights Act.[524] The closest that Thayer comes to this is a statement that, by implication, he found constitutional power for resting the Civil Rights Act on the Fifth Amendment's Due Process Clause.[525]

Likewise, Curtis' effort to portray Congressman Lawrence as corroborating his argument[526] is open to some doubt. Although as Curtis points out, Lawrence refers to the Fifth Amendment's Due Process Clause and inalienable

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[517] *See id.* at 74-75.

[518] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

[519] *Id.* at 1294. Since Wilson never unequivocally stated that he considered all the freedoms enumerated in the Bill of Rights fundamental, there is room for reasonable doubt as to whether he thought all Bill of Rights' freedoms should be protected.

[520] *See* CURTIS, *supra* note 88, at 79-80.

[521] CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866).

[522] *See* CURTIS, *supra* note 88, at 80.

[523] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

[524] *See id.*

[525] *See id.* Thayer repeatedly refers to the Civil Rights Act of 1866 as delineating the fundamental or natural rights of a citizen. *See id.*

[526] *See* CURTIS, *supra* note 88, at 77.

rights when discussing the constitutional authority for the Civil Rights Act,[527] Lawrence never refers to the Bill of Rights as such.[528] Moreover, even his reference to a right to life, liberty and property seems to have been calculated to build a general philosophical argument rather than to claim a specific amendment as authority for the Civil Rights Act. He, in fact, says that "[t]hese rights [life, liberty and property] are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions."[529] In Lawrence's view, security of life, liberty and property were absolute rights and the specific rights enumerated in the Civil Rights Act, such as the right to contract, were "necessary incidents of these absolute rights."[530] Curtis also places Trumbull among those Republicans who thought the language of the Civil Rights Act extended to the Bill of Rights.[531] For corroborating evidence, Curtis relies especially on Trumbull's remark that "[*e*]*ach state, so that it does not abridge the great fundamental rights belonging under the Constitution, to all citizens,* may grant or withhold such civil rights as it pleases."[532] Contrary to Curtis' attempt to characterize this as a reference to the Bill of Rights, however, Trumbull's allusion to the Constitution most probably was to the Thirteenth Amendment.[533] It was the Thirteenth Amendment, Trumbull had said earlier, that gave Congress authority to secure the rights in the Civil Rights Bill from state abridgement.[534] Perhaps Trumbull thought the Thirteenth Amendment also sheltered the Bill of Rights, but he never said so.[535] Instead, Trum-

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[527] *See id.*

[528] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1832-37 (1866).

[529] *Id.* at 1833.

[530] *Id.*

[531] *See* CURTIS, *supra* note 88, at 73.

[532] *Id.* (emphasis in original). *See also id.* at 117.

[533] *See id.* at 73. *See also* U.S. CONST. amend. XIII; CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). The Thirteenth Amendment states: Section I: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2: Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, §§ 1-2.

[534] *See* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

[535] *See id.*

bull listed in the Civil Rights Act certain fundamental rights, such as the right to contract, and did not even as mention the Bill of Rights nor any particular freedom specified in the Bill of Rights in conjunction with defending the Civil Rights Act of 1866.[536]

The second hurdle for Curtis' case is the near total absence of statements expressly equating the Bill of Rights with the Privileges or Immunities Clause when the Fourteenth Amendment was before the states, and particularly when it was before the state legislatures for ratification.[537] Bond's exacting review of the surviving record of statements concerning the Fourteenth Amendment in Illinois, Ohio and Pennsylvania, confirms this.[538] Bond concludes that "no one in these states ever claimed that the privileges and immunities clause incorporated the Bill of Rights."[539] Moreover, Bond shows that opponents of the Fourteenth Amendment tried repeatedly to frighten the public with the specter of blacks exercising rights under the Amendment that the opponents believed only whites should exercise.[540] "Yet they never asserted that it gave blacks all those rights listed in the Bill of Rights."[541]

According to Earl Maltz, "there are no inferences to be drawn from the failure of the opposition to discuss the incorporation theory."[542] Maltz concurs with Curtis that the incongruities between state law and the Bill of Rights did not involve "gut issues" that would have stirred debate.[543] To so dismiss the opposition's failure to mention the Bill of Rights is an effort to have the argument both ways. We are told that the Bill of Rights stated liberties, all of which were widely regarded by Republicans as *fundamental*, and then told that

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[536] *See id.* at 475, 1756 and 758-1761.

[537] *See* CURTIS, *supra* note 88, at 73.

[538] *See* Bond, *supra* note 94, at 464.

[539] *See id.* The context of this conclusion makes it clear that Bond is referring to the Privileges or Immunities Clause of the Fourteenth Amendment and not the Privileges and Immunities Clause of the Constitution's Fourth Article.

[540] *See id.* at 447.

[541] *Id.* at 465.

[542] MALTZ, *supra* note 22, at 116.

[543] *See id.* at 116-117. *Compare* CURTIS, *supra* note 88, at 105.

not all these liberties raised questions about "gut issues."[544] If Curtis is right that not all the Bill of Rights' freedoms were thought to be fundamentally important, this seems to lend more credibility to the theory of "selective incorporation"[545] of the Bill of Rights into the Privileges or Immunities Clause than to Curtis' theory of complete incorporation.

In any event, the failure of the Fourteenth Amendment's opposition to attempt to exploit a proposition that the amendment would shield the Bill of Rights from the states, cannot be discarded so easily. As Maltz concedes, opposition to the amendment was mounted on two fronts.[546] One focus was the erosion of federalism and the other was the pervasive fear of equal rights for blacks and whites.[547] If it was a common Republican understanding that the Privileges or Immunities Clause would *protect* all the rights in the Bill of Rights, the opposition's silence respecting the implications for federalism is enigmatic. Moreover, and contrary to Maltz's assertion on this matter,[548] shielding the Bill of Rights from state abridgement would have posed potentially contentious issues concerning the rights of blacks versus whites. Bond, for example, notes that the Sixth Amendment's right to a jury of one's peers was never seized on by the critics of the amendment to raise the fear that this might entitle blacks to a right to sit on juries.[549] Indeed, James Wilson had denied that the Civil Rights Act conferred this right to blacks. [550] Given the critics willingness to exploit fears of blacks exercising other rights,[551] this deserves an explanation.

Maltz also contends that the opposition's silence on the Bill of Rights may be explained by their realization that to oppose extending the Bill of Rights

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[544] *See* CURTIS, *supra* note 88, at 105.

[545] This is the theory that only certain Bill of Rights amendments were protected by the Fourteenth Amendment.

[546] *See* MALTZ, *supra* note 22, at 116.

[547] *See id.*

[548] *See id.*

[549] *See* Bond, *supra* note 94, 469.

[550] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

[551] *See* Bond, *supra* note 94, at 447.

would have put them at a serious political disadvantage.[552] This, however, renders the silence of the proponents of the amendment on the Bill of Rights all the more inexplicable. If critics of the amendment thought it politically disadvantageous to declare their opposition to protecting the Bill of Rights from state abridgement, proponents surely would have regarded explicit reference to the Bill of Rights politically advantageous. Yet, there are no such references at the state level.[553]

Curtis finds scattered statements in the historical record of the Fourteenth Amendment before the states that, in his judgment, are oblique references to the Bill of Rights.[554] He makes much, for example, of speeches proclaiming that the amendment would protect life, liberty and property.[555] Why these should be read as confirming his thesis and not as references to the Due Process Clause of the Fourteenth Amendment, Curtis does not bother to explain.[556] It is true that a few speeches before the Pennsylvania Legislature and an occasional newspaper article expressed concern about the South's treatment of particular Bill of Rights freedoms,[557] especially freedom of speech and the right to keep and bear arms. Whether most of these statements reflected an acceptance of an "unorthodox" theory that Article IV protected all the Bill of Rights, cannot be discerned. Likewise, Curtis insists that governors' "messages are fully consistent with an intent to apply the Bill of Rights to the states"[558] because these messages suggested that Section one was intended to protect the "rights of citizens."[559] But, as Curtis concedes, "[t]he messages are silent on what rights the governors thought were encompassed by . . . [this] phrase."[560] It would be more accurate to say that the governors' messages are not necessarily inconsistent with an intention to apply the Bill of Rights to the states. Still,

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[552] *See* MALTZ, *supra* note 22, at 116.

[553] *See id.* at 117.

[554] *See* CURTIS, *supra* note 88, at 131-53.

[555] *See id.* at 132, 135, 141, 143, 144, 146.

[556] *See id.*

[557] *See id.* at 148-49.

[558] *Id.* at 147.

[559] *See id.* at 146-47.

[560] *Id.* at 147.

neither the messages from governors, nor any of the statements made by Republicans in the states' legislatures, expressly refer to the Bill of Rights.

To summarize, there is some evidence that a constitution-amending majority of Congress may have intended that the Bill of Rights freedoms count as privileges or immunities, but the evidence for attributing this intention to three-fourths of state legislatures is notably scanty. While a presumption that the intention of Congress was accepted by state legislatures is not unreasonable,[561] such a presumption should be balanced against a countervailing presumption, defended earlier, that a broad reading of a constitutional provision is less likely to have received the imprimatur of a constitution-amending majority of enactors than a narrow reading.[562] Given that the case for attributing to a constitution-amending majority of Congress an intention to treat the Privileges or Immunities Clause as shielding amendments I through VIII is indeterminate (as likely as not) and that the case for attributing such an intention to three-fourths of the states' legislatures is weaker than the case for Congress, the likelihood that an intention to incorporate the Bill of Rights in its entirety survived the constitution-amending gauntlet appears at least somewhat improbable.

The case for a constitution-amending majority having intended to protect particular Bill of Rights freedoms (selective incorporation) faces similar difficulties to that faced by the total incorporation thesis. That is, the case is stronger for a constitution-amending majority of Congress having held such an intention than it is for a constitution-amending majority of state legislatures having held such an intention. However, the case that a constitution-amending majority of Congress counted the First, Second and Fourth Amendments as well as the Just Compensation and Due Process Clauses of the Fifth Amendment and the No Cruel and Unusual Punishment Clause of the Eighth Amendment fundamental rights shielded by the Privileges or Immunities Clause is somewhat stronger than the case for counting all of the Bill of Rights as protected.[563] Members of the 39th Congress repeatedly called attention to violations of the freedoms stated in these amendments when condemning the slave states' treatment of slaves and loyal whites.[564] Moreover, there was at least some sentiment explicitly expressed in the states for protecting particular Bill

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[561] *See* BICKEL, *supra* note 94, at 7.

[562] *See id.* at 8.

[563] *See* U.S. CONST. amend I; U.S. CONST. amend. II; U.S. CONST. amend. IV; U.S. CONST. amend. V; U.S. CONST. amend. VIII.

[564] *See* MALTZ, *supra* note 22, at 117. Procedural fairness, of course, is expressly provided for by the Due Process Clause in the Fourteenth Amendment.

of Rights freedoms.[565] Although it is a close call, the proposition that the requisite constitution-amending majority of Congress and state legislatures intended to protect certain Bill of Rights freedoms, probably can be characterized as indeterminate. It does not necessarily follow, however, that activist/progressive readings of these amendments are historically plausible.[566]

VII. SUMMARY AND CONCLUSIONS LEADING TO A PARTIAL INKBLOT

Perry advises that "[a] reading of the original meaning of a constitutional provision is plausible if, based on the available historical data, a person could reasonably speculate that the reading more likely than not captures the original meaning of the provision." [567] I think it is clear from my analysis of relevant historical data that Perry's sweeping and open-ended definition of privileges or immunities fails this test.[568] The number of enactors clinging to a more limited fundamental rights definition of privileges or immunities was large enough to render Perry's definition implausible.[569] Indeed, a fundamental rights definition of privileges or immunities probably had more adherents among the enactors than the broad definition Perry advocates. However, that the fundamental rights position commanded the assent of a constitution-amending majority is also open to question, even if it is not implausible. There may well have been enough enactors who wished to define privileges or immunities along the lines preferred by the Perry-Nelson-Harrison camp to blunt any claim that the fundamental rights position was held by a constitution-amending majority of Congress or state legislatures.[570] In sum, once we set aside any preconceptions we might have when reading the Privileges or Immunities Clause in the abstract, the historical record demonstrates that a constitution-amending majority of the clause's enactors intended that the Clause protect particular freedoms—those

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[565] *See* CURTIS, *supra* note 88, at 131-35.

[566] Maltz contends that the enactors of the Privileges or Immunities Clause "apparently regarded the first eight amendments as defining a relatively narrow, fixed set of rights." MALTZ, *supra* note 22, at 118.

[567] PERRY, *supra* note 3, at 56.

[568] *See id.*

[569] *See id.*

[570] *See id.*; NELSON, *supra* note 18 at 115; Harrison, *supra* note 17, at 1385.

shielded by the Civil Rights Act of 1866 and perhaps certain of the Bill of Rights freedoms. That much is plausible. That a constitution-amending majority agreed upon a general principle as the supporting rationale for protecting these particular freedoms is debatable.

Assuming arguendo that the fundamental rights definition of privileges or immunities was the position held by the requisite constitution-amending majority of enactors, the judiciary still is faced with a mysterious, or inscrutable, principle. I do not mean to argue by this assertion that just the outer boundary of the area of application under a fundamental rights principle is difficult to discern. That, of course, is true for many constitutional principles. Rather, I am arguing that in the case of an original "principle" of fundamental rights the rationale for even the core area of application is a mystery.

Recall that several members of the 39th Congress pointed to a distinction between fundamental or civil rights and so-called conventional rights. Yet, the principle on which this distinction rested was never explained with any clarity. Typically, efforts to explain it were limited to invoking abstract and abstruse rhetoric. Howard, for example, sought to contrast conventional rights and fundamental rights by describing fundamental rights as those "given us by nature" and as rights "conferred upon all men in virtue of their creation."[571] Yet, why a right to sue, denoted in the Civil Rights Act of 1866, was deemed fundamental, but not a right to marry a person of another race, is less than clear. Trumbull's explanation of fundamental and civil rights was similar to Howard's and just as unhelpful. Trumbull characterized civil rights as "natural rights," or as rights not created by the state. Thus, he opposed Sumner's desegregation bill because "[s]chools do not exist naturally; they are artificial."[572] On the other hand, Trumbull considered a "right to inherit, purchase, lease, sell, hold, and convey real and personal property" a fundamental or civil right, but did not explain why such property rights are not also "artificial," in that they do not exist, in any meaningful sense, apart from the state's willingness to treat them as rights. Nor is his distinction between civil and other rights rendered less opaque by Trumbull's representation of civil rights as "those general rights that belong to mankind everywhere"[573] or as "rights which belong to the individual as a citizen."[574] Perhaps his "general rights that belong to mankind

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[571] CONG. GLOBE, 39th Cong., 2nd Sess. 185 (1866).

[572] CONG. GLOBE, 42nd Cong., 2nd Sess. 3191 (1872).

[573] *Id.* at 3191.

[574] *Id.* at 3190.

everywhere" formulation was meant to refer to the rights necessary to preserve liberty when individuals became part of an "organized society" under a "civil government."[575] Trumbull spoke in such terms when trying to distinguish between "liberty" and "slavery" and explain his enumeration of particular rights in the Civil Rights Bill of 1866.[576] Yet the general principle, which compelled the inclusion of a right to "give evidence" or to "make and enforce a contract" and the exclusion of a right to sit on a jury or to vote, is impossible to fathom. Lot Morrill's description of privileges or immunities as "those common privileges which one community accords to another in civilized life" may bear some relation to Trumbull's notion that certain "rights belong to the individual as a citizen."[577] However, it is not less obscure. James Wilson's effort to define a principle underlying civil rights is also unavailing. Remember that he cited from Bouvier's Law Dictionary the idea that "civil rights are those that bear no relationship to the establishment, support or management of government."[578] Yet, why he insisted that suffrage bears no relationship in a republic to the "establishment, support or management of government" is anything but apparent.[579]

The foregoing should not be taken as lending credence to Perry's view of privileges or immunities.[580] That those enactors subscribing to a fundamental rights view of the Privileges or Immunities Clause could not delineate an understandable principle for defining fundamental rights is not a justification for ignoring the fact that, by invoking the idea of fundamental rights, they sought to limit the reach of the Privileges or Immunities Clause. Nor does it justify permitting a judge to make anything of fundamental rights that seems wise to her.

I said earlier that whether *Reynolds v. Sims* and its progeny or the modern Court's many desegregation decisions beginning with *Brown* can be supported by the Privileges or Immunities Clause, depends on whether the Court must accept the judgement of a constitution-amending majority of the enactors of the Fourteenth Amendment respecting the rights that should be considered funda-

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[575] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

[576] *See id.* at 474-75.

[577] CONG. GLOBE, 42nd Cong., 2nd Sess. app. 4 (1872).

[578] CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

[579] *See id.*

[580] *See* PERRY, *supra* note 3, at 179-89.

mental.[581] According to Perry, that the enactors did not consider voting or access to desegregated public accommodations privileges or immunities is not determinative. Given the breadth of his definition of the freedoms protected by the Privileges or Immunities Clause, all that is necessary to legitimize *Sims, Brown* and their respective progeny, as well as most other activist decisions, is for the Court to adopt a more modern specification or decision about what "privileges or immunities" means in the context of particular disputes.[582] Since specification presents a normative question to be answered in the present, the Court is not necessarily bound by the enactors' notions of how their principle (their definition of privileges or immunities) should be specified. Although I have argued that Perry's definition of the original category of privileges or immunities is too broad, a modern specification of the enactors' fundamental rights principle still might legitimize *Sims, Brown* and other progressive decisions of the modern Court. It might, if only "their" principle for defining fundamental rights was known. But, it is not known. I am not contending that judges are faced with definitions of fundamental rights that are somewhat vague but from which some abstract principle or principles can be derived. My contention is that, even if a constitution-amending majority of enactors subscribed to some of the abstruse rhetoric used to describe fundamental rights, there is no definition of fundamental rights that is not utterly inscrutable.

Bork's description of the Privileges or Immunities Clause as an inkblot is assuredly an exaggeration if Bork means to argue that nothing is known about the enactors' intentions.[583] Enough is known about the enactors' intentions respecting specific "freedoms" to conclude that a constitution-amending majority meant to protect the freedoms enumerated in the Civil Rights Act of 1866 and those few freedoms (such as the right to travel) commonly regarded by Republicans as appendages of the Act. And, perhaps it is not unreasonable to conclude that it is as likely as not that the Bill of Rights freedoms more prominently mentioned by the enactors—those in the first two amendments, the Fourth Amendment and in particular provisions of the Fifth and Eighth Amendments—were regarded by a constitution-amending majority of enactors as fundamental rights or privileges or immunities. Depending on the original meaning of these amendments, some "activist" decisions of the modern Court may be legitimized by the Privileges or Immunities Clause. However, it will

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[581] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

[582] *See* PERRY, *supra* note 3, at 179-89.

[583] *See* BORK, *supra* note 1, at 166.

be impossible for the Court to invoke an original principle to justify extending protection under the Privileges or Immunities Clause to "freedoms" in addition to the particular freedoms identified by a constitution-amending majority of the Fourteenth Amendment's enactors as privileges or immunities. The modern courts "reproductive freedoms" and "personal autonomy" decisions grounded on substantive due process (and not on the freedoms protected by the Civil Rights Act of 1866 or the provisions of the aforementioned amendments), for example, cannot be vindicated by resorting to an original principle defining privileges or immunities.[584]

Perry, of course, would differ. With respect to the Court's abortion rights declarations, for instance, he argues that *Roe* v. *Wade*[585] and other decisions from the bench, favoring a woman's decision to have an abortion, are consistent with protecting the freedoms safeguarded by the Privileges or Immunities Clause from discriminatory state action grounded on "arbitrary" judgements about the human worth of persons belonging to a group compared to persons not belonging to the group.[586] Thus, according to Perry, a judge faced with a challenge to legislation restricting the freedom to have an abortion "should ask if the law would have been enacted were its adverse effect visited equally on men."[587] Perry defends his position that this question must be and can be answered as though the difficulty in answering it is the vulnerable point of his abortion argument.[588] The difficulty attendant to answering Perry's "is there arbitrary discrimination" question is not, however, my reason for taking exception to his defense of the Court's "pro-abortion" decisions.

As Perry concedes, an antiabortion law "does not implicate . . . the Privileges or Immunities Clause . . . unless the legislation "abridges" a protected freedom . . . . "[589] Perry proceeds to his antidiscrimination query undaunted by this concession because he has no doubt that the freedom to have an abortion is within his broadly defined category of privileges or immunities.[590] His

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[584] *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986); Roe v. Wade, 410 U.S. 113 (1973).

[585] 410 U.S. 113 (1973).

[586] PERRY, *supra* note 3, at 179-89.

[587] *Id.* at 185.

[588] *See id.* at 187.

[589] *Id.* at 181.

[590] *See id.*

confidence is unjustified. As we have seen, it is unlikely that a constitution-amending majority of the Fourteenth Amendment's enactors subscribed to a definition of privileges or immunities of the breadth Perry defends. Nor can Perry's argument for a constitutionally protected right to an abortion be saved by asserting that a narrower category of fundamental rights might be specified to include freedoms that the enactors of the Privileges or Immunities Clause did not specify as fundamental but that many persons today would regard as fundamental. For this to be possible, something more than an incomprehensible principle for defining the category of fundamental freedoms constituting privileges or immunities would have to be identified and it would have to be plausible to conclude that a constitution-amending majority of enactors embraced this principle. No such principle exists. The definitions of fundamental freedoms (privileges or immunities) bequeathed us by the enactors of the Fourteenth Amendment are as varied as they are baffling.[591] It is in this sense that Bork is correct to describe the Privileges or Immunities Clause as an inkblot.

[591] What I have said about abortion is equally applicable to Perry's condemnation of the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to uphold Georgia's application of its statute criminalizing sodomy to homosexual sodomy. *See* PERRY, *supra* note 3, at 174-79. That is, (1)Perry deploys his antidiscrimination principle to argue for protecting a freedom that is not among the specific freedoms the enactors of the Privileges or Immunities Clause identified as fundamental. (2)No understandable principle for identifying "new" fundamental freedoms exists. *See id.*