A LOCKEAN ANALYSIS OF SECTION ONE OF THE FOURTEENTH AMENDMENT

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Despite—or perhaps because of—the great attention that scholars have devoted to it, the original meaning of Section One of the Fourteenth Amendment still remains a subject of intense debate.[1] While the Supreme Court has focused most

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1. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (arguing that the Fourteenth Amendment transformed the Bill of Rights); MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT (1999) (exploring contemporary arguments concerning the original intent of the Amendment's drafters); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994) (discussing the Amendment's application to issues such as homosexuality and race-based affirmative action); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990) (discussing historical materials concerning the framing of the Amendment); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) (analyzing the historical record surrounding ratification of the Amendment); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or*

closely on the Due Process and Equal Protection Clauses of the Amendment, a number of commentators recently have examined the much-neglected Privileges or Immunities Clause to gain insights into the intent of the drafters of Section One.[2] Despite these efforts, few have come up with a theory of Section One comprehensive enough to account for all three of these clauses and to delineate carefully the intended purpose of each. Often the roles ascribed to the clauses seem to overlap. For example, a substantive guarantee of fundamental rights is often attributed to both the Due Process and Privileges or Immunities Clauses and an anti-discrimination norm attributed to both the Privileges or Immunities and Equal Protection Clauses. Despite much effort, there remains a lack of agreement concerning the intended effects of these three clauses and their relation to one another.

One point of agreement, however, among many commentators studying the Amendment is that those responsible for its drafting and ratification were influenced strongly by natural law theories and that they aimed through the Amendment to guarantee citizens' freedom to exercise certain natural law rights.[3] Some have reached this conclusion

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Immunities of Citizens of the United States, 78 N.C. L. REV. 1071, 1148 (2000) ("Because the Supreme Court has breathed new life into the Privileges or Immunities Clause, it is natural for scholars and judges to give renewed attention to its meaning."); Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747 (2001) (noting the ongoing debate among scholars over the original meaning of the Fourteenth Amendment).

2. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1257-59 (1992) (discussing the view that the Privileges or Immunities Clause protected certain fundamental rights from State infringement); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that the Privileges or Immunities Clause affords to citizens equal rather than substantive protection); MALTZ, *supra* note 1, at 106 (observing that during the debates over the Fourteenth Amendment "the privileges and immunities provision was viewed as being the most significant in terms of the rights protected").

3. *See* MALTZ, *supra* note 1, at 4 ("[W]hile declining in influence in private law in the early nineteenth century, natural rights remained an important, recurrent theme in the development of judicially created public law."); NELSON, *supra* note 1, at 13 (during the nineteenth century "[i]deas about equality coexisted with ideas about rights derived from natural law or from the nature of republican society and with ideas about the importance of local self-rule"); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 41 (1986) ("The Republican reaction to the problems of Reconstruction also was molded by political philosophy. Republican congressmen accepted an eighteenth-century view of the relation of man to government. Government existed, as the Declaration of Independence asserted, to protect natural rights of man—inalienable rights to life, liberty, and the pursuit of happiness. Because of

after examining the influence of the antebellum writings of antislavery authors and their incorporation of natural law concepts.[4] Others point to the arguably more relevant evidence contained in the congressional debates on the proposed Amendment and its precursor, the Civil Rights Act of 1866. Whatever the source, however, it is fairly clear that natural law theory played some role in the framing of the Amendment.

As I have argued elsewhere,[5] a study of the natural law theories that were central to legal thought during the nineteenth century may lead to a greater understanding of the original meaning of the Fourteenth Amendment. In particular, this Article attempts to explain the three parts of Section One as an outgrowth of these theories, particularly those of John Locke. In studying Locke's *Second Treatise on Civil Government,* we see a strikingly similar partition contained in Locke's theory of the state as based on a compact among citizens. Locke's theory may be mapped onto the text of Section One of the Amendment in order to get some idea concerning the drafters' intent in utilizing the structure they chose. Although many commentators have puzzled over Section One's design,

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the nature of the social compact, all citizens shared their fundamental rights equally."); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 43 (2d ed. 1997) ("As the citations to Blackstone and Kent show, 'fundamental,' 'natural' rights had become words of received meaning. TenBroek himself states that 'the area of disagreement' about 'privileges and immunities was not large, since their natural rights foundation was generally accepted'; they were 'the natural rights of all men or such auxiliary rights as were necessary to secure and maintain those natural rights.'").

Professor Maltz has observed that the concepts underlying the Fourteenth Amendment were inculcated in the legal culture of the time:

> [O]ne must understand the legal culture in which the drafters operated. Critically important concepts such as slavery, civil rights, equal protection, due process, and privileges and immunities had all been extensively discussed in prior case-law and legal commentaries. Most of the key players on both sides of the debate were legally trained. Moreover, during the debates both supporters and opponents of civil rights measures made copious references to these standard legal sources in attempting to bolster their respective positions. The measures that ultimately emerged can therefore only be understood as an embodiment of preexisting legal concepts.

MALTZ, *supra* note 1, at xi. *See also id.* at 27-28 ("Even before the Freedmen's Bureau Bill and the Civil Rights Bill were introduced, one finds many mainstream Republicans expressing the belief that the Thirteenth Amendment guaranteed freedmen natural rights.").

4. *See, e.g.*, NELSON, *supra* note 1, at 23 ("Higher law arguments were used not only by opponents, but also by defenders of slavery.").

5. *See* Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681 (1997).

concluding that it was the result of poor or inartful drafting or that it was crafted in a haphazard way, analysis of the text in light of Locke's theories reveals a coherent structure that may have been apparent to those responsible for Section One's drafting and ratification. If this analysis is correct, it would explain the relatively sparse debate concerning the particular formulation that was enacted into law.

Following this line of reasoning, Part I first offers an overview of the history of the drafting of Section One. Notably, there was a lack of debate concerning that particular section when compared with the more controversial sections of the Amendment. The remainder of the Article examines the structure of Section One in light of the theory of the state as described by Locke. Part II briefly surveys Locke's influential theory of the state, including his model of government as based upon a compact among individuals emerging from a state of nature. Part III applies Locke's model to Section One of the Fourteenth Amendment, addressing each of the three clauses in turn. This Part first examines the Privileges or Immunities Clause of the Amendment, arguing that it was intended to provide a guarantee for certain fundamental capacities of citizenship thought to exist anterior to the formation of government—capacities flowing from either the absolute rights of individuals or the relative rights that arose as a result of their entering into a compact among themselves. Part III then considers the Due Process Clause of the Amendment, concluding that it most likely was intended to provide solely what today we might term a "procedural" guarantee, leaving the "substantive" work to the other two clauses. Finally, Part III considers the Equal Protection Clause, which the drafters and ratifiers most likely intended to provide a guarantee that the States would protect all citizens equally through the exercise of their police powers.

I. THE ORIGINS OF SECTION ONE

The historical materials concerning the drafting of Section One of the Fourteenth Amendment are somewhat sparse. The records of the Joint Committee on Reconstruction, responsible for drafting the Amendment, are not particularly detailed,[6] and

6. *See, e.g.*, NELSON, *supra* note 1, at 51 (noting that "[n]either the Joint

although there was extensive debate concerning civil rights and the rights of the newly-freed slaves, there was little debate in Congress concerning the meaning of Section One.[7] Nonetheless, a number of commentators have attempted to discern what they can from the limited historical documentation in an attempt to better understand the drafters' intent.

A. *The Thirteenth Amendment*

Ratification of the Fourteenth Amendment must be viewed in conjunction with other efforts by Congress to protect the rights of free blacks and others. Before consideration of the Fourteenth Amendment began, Congress had already passed the Thirteenth Amendment, which banned slavery and involuntary servitude in the United States and afforded Congress the power to enforce the prohibition through "appropriate legislation." Some evidently viewed this Amendment as granting to Congress the power to protect certain fundamental rights. Senator Sherman, for example, argued that the Amendment "secures to every man within the United States liberty in its broadest terms" and could form the basis for giving "the freedmen of the southern States ample protection in all their natural rights."[8] Sherman reasoned:

> [U]nless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power, by the express terms of this Amendment, to secure all these rights. . . . Therefore the power is expressly given to Congress to secure all their rights of freedom by appropriate legislation.[9]

Committee nor its members left any record of why they changed the language of their amendment"); *id.* at 53 ("All historians can do . . . is speculate. We can never know why the language of the two forerunners of the Fourteenth Amendment was changed, and, in any event, by early March 1866, both proposals had come to nought.").

7. *See, e.g.*, CURTIS, *supra* note 3, at 15-16 ("Distressingly, the issue that seems primary to us today, the meaning of section 1 of the amendment, received relatively little discussion. . . . Republicans were playing for the higher stakes of political power. And they took for granted much that we would like them to have discussed instead of to have assumed.").

8. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (statement of Sen. Sherman).

9. *Id.* Sherman further enumerated the "natural rights" he believed should be guaranteed to the freedmen:

> It seems to me that when we legislate on this subject we should secure to the freedmen of the southern States certain rights, naming them, defining

According to Sherman, Congress passed the Amendment to remedy a defect in the Privileges and Immunities Clause of Article IV that had "always been a part of [the] fundamental law" – i.e., the lack of a grant of power to Congress to "enforce" the guarantee under that provision:

> Although here was a guarantee that the citizen of one State should have the rights of a citizen in all the States, yet there was no express power conferred upon Congress to secure this right, and no law has ever yet been framed that secured the right of a citizen to travel wherever he chose within the limits of the United States. To avoid this very difficulty, that of a guarantee without a power to enforce it, this second section of the constitutional amendment was adopted, which does give to Congress in clear and express terms the right to secure, by appropriate legislation, to every person within the United States, liberty.[10]

Senator Sherman was not alone in his interpretation of the Amendment, however. For example, Senator Trumbull later expressed similar views:

> precisely what they should be. For instance, we could agree that every man should have the right to sue and be sued in any court of justice. No man can be said to be free within the language of the first clause until he has a right to sue and be sued, and to maintain his rights. So with the right to testify, an incident, an inevitable incident to liberty, without which liberty would be but a name. It seems to me even the exclusion of persons from testifying because they have been guilty of a crime is indefensible. I would receive the testimony of anything that could articulate; and sometimes objects without life are the most important elements of testimony. We should secure to these freedmen the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, the right to be educated, and to go and come at pleasure. These are among the natural rights of freemen.

Id. at 42. Senator Trumbull listed similar rights:

> [W]hen the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, to buy and sell when they please, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them.

Id. at 43.

10. *Id.* at 41. Numerous commentators examining such materials have pointed to the framers' focus on the Privileges and Immunities Clause of Article IV as a potential guarantee of citizens' fundamental rights. *See, e.g.*, CURTIS, *supra* note 3, at 47-48 ("In addition to believing that free blacks were citizens and that the due process clause had banned slavery in federal territories, leading Republicans in the Thirty-ninth Congress relied on a reading of the privileges and immunities clause that is unorthodox, at least by current standards. . . . Leading Republicans read the clause to protect fundamental rights of American citizens against hostile state action.").

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.
>
> Those laws that prevented the colored man from going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.[11]

Trumbull had "no doubt" that under the Amendment, Congress could "destroy all these discriminations in civil rights against the black man."[12] And he later stated that, under the Amendment, a "law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void."[13]

Other members of Congress, however, maintained that free blacks were already receiving equal civil rights in at least some of the States and that in these "appropriate legislation" was not necessary to further the purposes of the Thirteenth Amendment. For example, Senator Guthrie represented that in Kentucky, free blacks enjoyed the same civil rights as whites:

> They have all these rights—the right to sue and be sued, the right to contract and be contracted with, the same right to purchase and hold property and transmit it by will or

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11. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866). Trumbull continued:

> [E]ven some of the non-slaveholding States passed laws abridging the rights of the colored man which were restraints upon liberty. When slavery goes, all this system of legislation, devised in the interest of slavery and for the purpose of degrading the colored race, of keeping the negro in ignorance, of blotting out from his very soul the light of reason, if that were possible, that he might not think, but know only, like the ox, to labor, goes with it.

Id.

12. *Id.* Trumbull continued by enumerating certain fundamental rights that were implicated:

> If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so, and not only the power, but it becomes its duty to do so.

Id. See also id. at 340 (statement of Sen. Wilson) ("The Senator from Kentucky told us, and told us truly, that the old slave codes and laws went down with slavery, but not so think these gentlemen in several of the States.").

13. *Id.* at 475.

> descent, the same rights of marriage, as white people. There is some little modification in the existing laws which our friends in the Legislature are endeavoring to procure; but generally the free negroes have the same rights of person and property as white persons.[14]

Senator Davis echoed this view: "My honorable colleague gave a picture of what has always been the policy of Kentucky, and the laws of Kentucky, toward free negroes. With a few exceptions, they have all the civil rights that any white man has."[15]

Despite the expression of such sentiments, Congress eventually agreed that further changes in the Constitution were necessary to guarantee citizens' rights. In part, Congress was responding to the counter-argument that emancipation of the slave did not automatically confer upon him the rights of citizenship. Several members of Congress expressed this view. Senator Saulsbury, for example, stated:

> The [thirteenth] amendment itself was an amendment to abolish slavery. What is slavery? That is the subject-matter of the amendment. Slavery is a *status*, a condition; it is a state or situation where one man belongs to another and is subject to his absolute control. The slave can own no property of his own; he cannot work for himself; but he is subject to the command of his owner. Cannot that *status* or condition be abolished without attempting to confer on all former slaves all the civil or political rights that white people have? Certainly.[16]

Similarly, Senator Hendricks argued:

> This constitutional amendment broke asunder this private relation between the master and his slave, and the slave then, so far as the right of the master was concerned, became free; but did the slave, under the amendment, acquire any

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14. *Id.* at 335. Going on to argue that Kentucky "has been among the most liberal States in granting rights and privileges to her freedmen," Guthrie stated:

> I do not understand the [thirteenth] amendment of the Constitution abolishing slavery as some gentlemen do. I believe its effect is to work the complete freedom of every individual, and to break down every provision in the Constitution and laws of the United States and of the several States which prevents the enjoyment of that freedom.

Id.

15. *Id.* at 397. *But see id.* at 337 (statement of Sen. Pomeroy) (noting that because the Kentucky legislature had not yet changed the law that barred free blacks from testifying, "it cannot be true that the civil rights of persons of color in Kentucky are the same as the rights of white men").

16. CONG. GLOBE, 39th Cong., 1st Sess. 113 (1866).

> other right than to be free from the control of his master? The law of the State which authorized this relation is abrogated and annulled by this provision of the Federal Constitution, but no new rights are conferred upon the freedman.[17]

And Representative Thornton stated that "[t]here are persons who never enjoyed" all "the civil rights and immunities sought to be secured" by the Civil Rights Bill and "yet they have been regarded as freemen."[18]

As I have argued elsewhere,[19] there were legal authorities—particularly those that relied heavily upon Roman law—that opponents could cite in support of such views. These authorities indicated that emancipation did not automatically confer with it the fundamental rights of citizenship. There could, then, be an intermediate status between that of slave and that of citizen. The plausibility of such arguments necessitated further Amendment of the Constitution.

B. The Bingham Proposal

The dispute over the proper scope of the Thirteenth Amendment, however, was merely one part of a larger debate. Prior to ratification of the Amendment, there was much discussion in Congress concerning Reconstruction and the rights to be afforded free blacks. Indeed, even before the proposed Fourteenth Amendment was introduced in Congress, there had been proposals to safeguard the fundamental rights of citizens. One such proposal was made by Representative John Bingham of Ohio.[20]

Bingham expressed his view before the House that there already existed a guarantee of fundamental rights within the

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17. *Id.* at 318.

18. *Id.* at 1156. This position was disputed by congressional advocates of expanded rights. For example, Representative Cook stated in defense of the Civil Rights Bill:

> I do not believe that in this Government of ours there is any class of freemen who are not citizens. I do not believe that between the slave, who has no rights which white men are bound to respect, and a citizen there is any class of men provided for in the Constitution of the United States.

Id. at 1124.

19. *See* Smith, *supra* note 5, at 734-57, 792-97.

20. *See* NELSON, *supra* note 1, at 49 (noting that "the package before the Joint Committee on January 20 was an embryonic form of the Fourteenth Amendment"); CURTIS, *supra* note 3, at 57 (discussing the Bingham proposal).

Constitution that had been "utterly disregarded:"

> "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis 'of the United States') in the several States." This guarantee is of the privileges and immunities of citizens of the United States in, not of, the several States. This guarantee of your Constitution applies to every citizen of every State of the Union; there is not a guarantee more sacred, and none more vital in that great instrument.[21]

These remarks were consistent with Bingham's earlier statements that the "equal protection" and "due process" guarantees of the Constitution protected the fundamental rights of citizens,[22] as did the Privileges and Immunities Clause of Article IV.[23] Bingham's proposed solution was to add a mechanism for enforcement of the constitutional guarantee:

> I propose, with the help of this Congress and of the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union. And how? By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their equal personal rights; and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the Constitution of their common country, I desire to see the

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

22. In 1857, Bingham said:

> It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that *no person* shall be deprived of life, liberty, or property, without due process of law.

CONG. GLOBE, 34th Cong., 3rd Sess. app. 140 (1857). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866) (statement of Rep. Bingham) ("Sir, your Constitution declares that no person shall be deprived of life without due process of law; yet, in support of what I have just said on the necessity of an additional grant of power, allow me to remind the House of the fact that this highest right which pertains to man or citizen, life, has never yet been protected, and is not now protected, in any State of this Union by the statute law of the United States.").

23. *See* CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham) ("The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to 'all privileges and immunities of citizens in the several States.'... This guaranty of the Constitution of the United States is senseless and a mockery, if it does not limit State sovereignty and restrain each and every State from closing its territory and its courts of justice against citizens of the United States.").

> Federal judiciary clothed with the power to take cognizance of the question, and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every state.[24]

Such views were not anomalous. Other members of Congress also had pointed to the Privileges and Immunities Clause as a potential source for such a constitutional guarantee.[25]

Bingham's proposal to the Joint Committee on Reconstruction would have given Congress "power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property."[26] After being referred to a subcommittee, the Bingham proposal was re-crafted to read as follows: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property."[27] The Bingham proposal was reported out of the Joint Committee on Reconstruction in the following form:

> The Congress shall have power to make all laws which shall

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

25. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Sen. Wilson) ("We all know that for many years before the commencement of the gigantic rebellion now in progress the supporters of slavery enforced this disregard of the supremacy of the Constitution and of the privileges and immunities of the citizen by every power and influence known to the communities cursed by the presence of a slave."); CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Rep. Kasson) ("Let me say here that it is necessary to carry into effect one clause of the Constitution of the United States which has been disobeyed in nearly every slave State of the Union for some twenty-five or thirty years past. I refer to that clause of the Constitution which declares in section two of the fourth article that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."); *id.* at 237 (statement of Rep. Smith) ("The Constitution declares that every citizen of the United States shall have equal privileges in every other State. That principle was denied to the whole North by the South unless the man adhered to the sentiments of the South.").

In contrast, other members of Congress asserted that passage of the Thirteenth Amendment was inconsistent with notions of due process because it would deprive southerners of their slave property. *See, e.g.*, *id.* at 215 (statement of Rep. C.A. White) ("The right to service in slaves, then, is recognized as property. That right of property cannot be taken away from any person except by 'due process of law.' 'Due process of law,' as I before remarked, imports day in court and trial by jury.").

26. BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (1914).

27. *Id.* at 51.

> be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States and to all persons in the several States equal protection in the rights of life, liberty and property.[28]

This proposal met with opposition based on the perception that it would seriously erode the federal structure by authorizing Congress to pass legislation that was more properly within the province of the State legislatures. For example, Representative Rogers stated that the proposal was "dangerous to the liberties of the people and the foundations of this Government" because it was "the embodiment of centralization and the disfranchisement of the States of those sacred and immutable State rights which were reserved to them by the consent of our fathers in our organic law."[29] Representative Hale stated that it was "in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead."[30] And Representative Nicholson stated that "[t]he line of demarkation [sic] between State and Federal power, which has been already too much obscured by the great latitude of construction given of late to the several grants of power, is now to be entirely obliterated."[31]

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28. CONG. GLOBE, 39th Cong., 1st Sess. 806, 1034 (1866). *See also* CURTIS, *supra* note 3, at 62 (discussing proposal).

29. CONG. GLOBE, 39th Cong., 1st Sess. app. 133 (1866). Rogers elaborated:

> [W]hen the Constitution was framed and ratified, its makers did not intend to lodge in the Congress of the United States any power to override a State and settle by congressional legislation the rights, privileges, and immunities of citizens in the several states. That matter was left entirely for the courts, to enforce the privileges and immunities of the citizens under that clause of the organic law.

Id.

30. *Id.* at 1063. Hale continued: "I maintain that in this respect it is an utter departure from every principle ever dreamed by the men who framed our Constitution." *Id. See also id.* at 1064 (statement of Rep. Hale) ("Go through that section carefully [Article I, section 8] and you will find no general power granted to Congress to legislate upon matters of a municipal nature, or matters relating to the social or civil rights of citizens of the States, but everywhere it points most strictly and carefully to the legitimate objects for which the national Government was created. . . . [L]et me warn gentlemen that there are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States.").

31. *Id.* at 2080. Nicholson elaborated:

> That nicely adjusted balance is now, by this amendment, to be permanently overthrown.... The barriers erected by the Constitution to protect the States in the absolute control of their municipal affairs are

Indeed, modern commentators have noted that the proposal would have "create[d] a revolution in federalism."[32]

Nonetheless, Bingham defended his proposal, stating that it did not in reality alter any of the relations between the States and the federal government. He first observed that the language of the proposed Amendment was based on the Privileges and Immunities Clause of Article IV and the Due Process Clause of the Fifth Amendment. Accordingly, he argued that "the proposed Amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution."[33] Bingham referred to these guarantees as an "immortal bill of rights embodied in the Constitution."[34] Moreover, he made clear that the Amendment

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> now to be thrown down for the Federal Government to enter this wide domain, to roam at will, and bring prostrate at the feet of Federal power the most inestimable and most fondly cherished of all civil or political rights. . . . [T]his amendment will completely subvert our present system of Government, and is a long stride toward ultimate consolidation.

Id. See also id. at 1083 (statement of Rep. Davis) ("I am . . . especially opposed to any amendment which may prove subversive of the principles on which the Government is founded."). *But see id.* at 1088 (statement of Rep. Woodbridge) ("What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and not every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State. . . . It does not destroy the sovereignty of a State, if such a thing exists. It does not even affect its sovereign rights, but merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country.").

32. MALTZ, *supra* note 1, at 57. More fully, Maltz offers the following comment:

> The Bingham proposal was flawed in that it would create a revolution in federalism by granting the federal government plenary authority to perform the most basic function of government, a function previously reserved to the states—the protection of life, liberty, and property. . . . The same basic theme was reflected in all of the denunciations of Bingham's proposal.

Id.

33. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). Bingham justified his proposal as merely supplying "the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution." *Id.*

34. *Id.* Later, Bingham generically referenced the Privileges and Immunities Clause as a "bill of rights":

> Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and

did not change the fact that the care of the property, life, and liberty of the citizen lay with the State governments.[35] Other members of Congress made similar arguments in support of the proposed Amendment.[36]

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

Id. at 1089.

35. *See, e.g., id.* at 1292 (statement of Rep. Bingham) ("[T]he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoyed upon them as citizens of the United States by that oath and by that Constitution."); *id.* at 1293 (statement of Rep. Bingham) ("I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe.").

Bingham specifically stated that States would remain free to regulate the property rights of citizens: "As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States." *Id.* at 1089.

He further noted that decisions such as *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), had rendered the federal bill of rights inapplicable to the States and that therefore such an amendment as he proposed was necessary, but at the same time reaffirmed that "[t]he adoption of the proposed amendment will take from the States no rights that belong to the States." CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). He added that the purpose of the Amendment was to provide a means for enforcing such guarantees:

> Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States.

Id. at 1090-91. Despite these assurances, Bingham also claimed that the Amendment would confer upon Congress a general power to legislate "in regard to life and liberty and property," and he added the following cautionary disclaimer: "It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." *Id.* at 1094.

36. *See, e.g., id.* at 1054 (statement of Rep. Higby) ("I understand this joint

Nonetheless, members of Congress continued to object that the wording allowed for the potential exercise by Congress of the power to establish uniform legislation concerning the rights of person and property. Representative Hotchkiss, for example, expressed the general displeasure with such a provision:

> I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power. Congress already has the power to establish a uniform rule of naturalization and uniform laws upon the subject of bankruptcy. That is as far as I am willing that Congress shall go. The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority. It is not indulging in imagination to any great stretch to suppose that we may have a Congress here who would establish such rules in my State as I should be unwilling to be governed by.[37]

Although Hotchkiss was prepared "to provide against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy,"[38] he was not willing to adopt language that could be construed to give Congress such general legislative powers. In particular, Hotchkiss raised the specter of some future Congress in effect overriding the Amendment through mere legislation.[39]

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resolution, should it become part of the Constitution of the United States, will only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument. When we read this proposed amendment we will think it already embraced in the Constitution, but so scattered through different portions of it that it has no life or energy. But by condensing it, as we find it in this joint resolution, should it become a portion of the Constitution, it will then become operative and beneficial."); *id.* at 1057 (statement of Rep. Kelley) ("Mr. Speaker, I shall support this proposed amendment of the Constitution of the United States, not because I believe it to be absolutely needed, but because there are those, and some of them on this side of the House, who doubt that the powers to be imparted by it are already to be found in the Constitution. I believe them to have been there from the hour of its adoption. They preceded the amendments proposed by the first Congress, and their existence is, as I will show, proven by the action of that Congress which was largely composed of members of the Convention that framed the Constitution and of the several State conventions that ratified it.").

37. *Id.* at 1095.

38. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

39. Hotchkiss argued in favor of a simple prohibition of discrimination:

> Why not provide by an amendment to the Constitution that no State shall

C. *The Civil Rights Act*

Despite these concerns, Congress again took up the issue of guaranteeing the fundamental rights of citizens—this time through legislation in the form of the Civil Rights Act of 1866.[40] That Act provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any pervious condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, 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.[41]

> discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?

Id.

40. Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (2000)).

41. *Id.* §1, 14 Stat. at 27. Trumbull described the bill as follows:

> I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom.

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Trumbull cited the Declaration of Independence and the Privileges and Immunities Clause of Article IV in addition to the Thirteenth Amendment.

> And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights. The laws in the slaveholding States have made a distinction against persons of African descent on account of their color, whether free or slave. . . .
>
> When the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it. . . . The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.

Id. See also id. at 1757 (statement of Sen. Trumbull) ("To be a citizen of the United States carries with it some rights; and what are they? They are those inherent,

During debates on the bill, members of Congress identified the protected rights as "absolute rights" of citizens and as rights derivative from them. Representative Lawrence, for example, stated:

> Every citizen . . . has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.[42]

According to Representative Lawrence, all citizens were entitled to exercise certain "privileges and immunities"—namely, "fundamental civil rights" (in contradistinction to "political rights" and "those dependent on local law").[43] Similarly, Representative Thayer noted that the bill was designed to protect "the fundamental rights of citizenship; those rights which constitute the essence of freedom."[44] And Senator Trumbull stated that the "civil rights" referenced in the bill were the "fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in."[45]

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fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.").

42. *Id.* at 1833. *See also* CURTIS, *supra* note 3, at 116 ("Republicans suggested that the rights to make and enforce contracts, to sue, to be parties, to give evidence, to inherit, and the like were incidents of the absolute rights of individuals to 'personal liberty,' 'personal security,' and 'private property' embraced by article IV."). Representative Wilson similarly quoted from Chancellor Kent's *Commentaries* the following definition of the "absolute rights" to be guaranteed under the bill: "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable." CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

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

44. *Id.* at 1152. The "fundamental rights," Thayer continued, "are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law, as they are equal in the scales of eternal justice and in the eyes of God." *Id.*

45. *Id.* at 476. Representative Lawrence suggested a duty to protect the rights in question:

> There is in this country no such thing as "legislative omnipotence." When it is said in State constitutions that "all legislative power is vested in a Senate and House of Representatives," authority is not thereby conferred to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men. . . .

Finally, Representative Wilson gave a particularly thoughtful and lengthy exposition concerning the nature of the rights guaranteed under the bill. He stated that he understood "civil rights to be simply the absolute rights of individuals."[46] He quoted the following definition from *Bouvier's Law Dictionary*: "[c]ivil rights are those which have no relation to the establishment, support, or management of government."[47] This definition is consistent with an intention to guarantee those fundamental rights that were conceived of as existing anterior to the establishment of government, and Representative Wilson came to much the same conclusion: "[f]rom this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic."[48] In fact, Wilson was even more explicit in identifying the nature of these fundamental rights:

> Before our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family. No one surrendered a jot or title of these rights by consenting to the formation of the Government. . . . And these several departments of Government possess the power to enact, administer, and enforce the laws "necessary and proper" to secure these rights which existed anterior to the ordination of the Constitution.[49]

> This has been the common understanding in our whole history, and upon which governments have been created.

Id. at 1832-33.

46. *Id.* at 1117.

47. *Id.*

48. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Others contended, however, that the definition of "civil rights and immunities" was not clear:

> [The Bill] does not define the term "civil rights and immunities." What are such rights? One writer says civil rights are those which have no relation to the establishment, support, or management of the Government. Another says they are the rights of a citizen; rights due from one citizen to another, the privation of which is a *civil injury* for which redress may be sought in a *civil action*. Other authors define all these terms in different ways, and assign to them larger or narrower definitions according to their views. Who shall settle these questions? Who shall define these terms?

Id. at 1270-71 (statement of Rep. Kerr).

49. *Id.* at 1119. Representative Lawrence similarly described the absolute rights of citizens as follows:

> It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing

Wilson argued that the bill in fact "establish[ed] no new right" but rather "merely affirm[ed] existing law":

> We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.[50]

Wilson pointed in particular to the Privileges and Immunities

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> anterior to and independently of all laws and all constitutions.
>
> Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.

Id. at 1833. He then proceeded to enumerate certain of these rights and to outline the contours of the inherent rights of citizens:

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

Id.

50. *Id.* at 1117. Wilson gave the following definition of the term "immunities" as used in the bill:

> What is an immunity? Simply "freedom or exemption from obligation;" an immunity is "a right of exemption only," as "an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform." This is all that is intended by the word "immunities" as used in this bill. It merely secures to citizens of the United States equality in the exemptions of the law. A colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted. Whatever exemptions there may be shall apply to all citizens alike.

Id. Representative Raymond tied the status of citizenship to an entitlement to exercise rights under the laws and Constitution of the United States:

> Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. He has the right of free passage from one State to another, any law in any State to the contrary notwithstanding. He has a defined *status;* he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in the Federal courts; he has all those rights that tend to elevate him and educate him for still higher reaches in the process of elevation.

Id. at 1266. Representative Bingham came to a similar conclusion:

> I respectfully submit . . . that by all authority the term "civil rights" as used in this bill does include and embrace every right that pertains to the citizen as such. . . . I submit that the term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country.

Id. at 1291.

Clause of Article IV and its interpretation by Justice Bushrod Washington in *Corfield v. Coryell*[51] as the grounds for these rights,[52] concluding that if "the States would all practice the constitutional declaration" in that provision, "we might very well refrain from the enactment of this bill into a law."[53]

Nonetheless, members of Congress made clear that they did

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51. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

52. Representative Lawrence similarly pointed to the Privileges and Immunities Clause of Article IV, stating that it provided a guarantee of "fundamental" privileges and immunities: "This clause of the Constitution therefore recognizes but one kind of fundamental civil privileges equal for all citizens. No sophistry can change it, no logic destroy its force. There it stands, the palladium of equal fundamental civil rights for all citizens." CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866). Lawrence stated that such rights flowed from one's status as a citizen:

> As an alien may be deprived of all rights by law, and even excluded from the country, it is the act of naturalization, the condition of national citizenship, that confers on him the civil rights recognized by the Constitution. It is citizenship, therefore, that gives the title to these rights to all citizens. From the very nature of citizenship, the avowed purpose of the founders of our Government, and the interpretation put upon the Constitution, it must be clear that this bill creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen in every State, that equality of civil rights is the fundamental rule that pervades the Constitution and controls all State authority.

Id. Other members of Congress also cited *Corfield,* though not necessarily to the same effect. For example, Representative Kerr quoted at length from numerous cases considering the Privileges and Immunities Clause of Article IV, *id.* at 1269, including *Corfield,* 6 F. Cas. at 546, *Abbott v. Bayley,* 23 Mass. (6 Pick.) 89 (1927), *The Passenger Cases,* 48 U.S. (7 How.) 283 (1849), and *Prigg v. Pennsylvania,* 41 U.S. 539 (1842). Kerr cited these cases for the proposition that the privileges and immunities guaranteed were those that the *states* granted citizens: "Now, let it be remembered that in all these authorities it is assumed that the privileges and immunities referred to as attainable in the States are required to be attained, if at all, *according to the laws or constitutions of the States,* and never in *defiance* of them." CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866).

53. CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866). Wilson further stated: "If [the States] would recognize that 'general citizenship' (Story on the Constitution, volume two, page 604) which under this clause entitles every citizen to security and protection of personal rights, (Campbell vs. Morris, 3 Harris & McHenry, 535) we might safely withhold action." CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866). He also pointed to Blackstone's triumvirate of rights to personal security, personal liberty, and personal property as being the categories of rights guaranteed under the bill. *Id.*

But Representative Kerr argued that such a "general citizenship" would not include rights that were identical to those enumerated in the bill:

> Congress has the exclusive right to establish a uniform rule of naturalization for citizenship in the Union. It may confer what Mr. Story calls "a *general* citizenship," which would entitle the recipient of it to the protection of the General Government within the sphere of its constitutional power, and would confer certain fundamental rights, which I will not stop now to enumerate. But they are by no means identical with those attempted to be secured by this bill.

Id. at 1268.

not intend to "mak[e] a general criminal code for the States"[54] and that the bill would "in no manner interfere[] with the municipal regulations of any State which protects all alike in their rights of person and property."[55] For example, Senator

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54. *Id.* at 1120 (statement of Rep. Wilson). Representative Wilson later made the following remarks in response to objections to the Civil Rights Bill:

> The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the Government; that in the term are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. My friend is too sound a lawyer, is too well versed in the Constitution of his country, to indorse the proposition on calm and deliberate consideration. He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this bill can only relate to matters within the control of Congress.

Id. at 1294. Further, Wilson enumerated certain of the rights to be guaranteed under the bill:

> What are the great civil rights to which the first section of the bill refers? I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.

Id. Wilson cited *Prigg v. Pennsylvania*, 41 U.S. at 539, for the proposition that citizens were entitled to a remedy for violations of their constitutional rights, adding that "[t]here can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy." *Id.*

Earlier statements by members of Congress also indicated a desire that the States' power of regulation not be infringed. Representative Conkling, for example, made the following remarks regarding a proposed amendment dealing with representation in the House of Representatives:

> The second plan mentioned, the proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. It denies to the people of the several States the right to regulate their own affairs in their own way. It takes away a right which has been always supposed to inhere in the States and transfers it to the General Government. It meddles with a right reserved to the States when the Constitution was adopted, and to which they will long cling before they surrender it.

CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866).

55. CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866) (statement of Sen. Trumbull). Representative Shellabarger assured that the bill was not designed to regulate any of the fundamental rights to which it applied:

Trumbull, while recognizing the objection that the bill drew to the federal government powers that "properly belong" to the States, maintained that the bill would "have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race."[56]

Indeed, such statements were necessary in light of the objections of those who believed that through the bill Congress was attempting to "invade the States of this Union, and undertake to regulate the law applicable to their own citizens"[57] and that the bill "deprive[d] the State of its police power of government."[58] Senator Davis stated, for example,

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

Id. at 1293. Shellabarger indicated that the bill was designed to guarantee an equality of rights:

> It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races. . . . It is meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act. This is the whole of it.

Id. at 1293-94.

56. *Id.* at 476. *See also id.* at 600 (statement of Sen. Trumbull) ("[I]f the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky. . . . The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations."); *id.* at 1760-61 (statement of Sen. Trumbull) ("The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each 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; all that is required is that, in this respect, its laws shall be impartial. . . . This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.").

57. *Id.* at 363 (statement of Sen. Saulsbury).

58. *Id.* at 478 (statement of Sen. Saulsbury). Saulsbury in particular noted that the bill would deprive state courts of jurisdiction in numerous cases:

> Sir, there cannot be a case of chicken-stealing in any State of this Union where freed negroes are not allowed to testify that can, if this bill is to be operative and in force, be determined in the State courts. All such cases will be subject to be removed into the Federal courts.

Id. at 479. Senator Johnson protested along similar lines:

that the bill's design entailed "centralizing with a vengeance and by wholesale."[59] Representative Delano expressed his concern that the bill conferred new legislative powers upon Congress in derogation of the States:

> In my opinion, if we adopt the principle of this bill we declare in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers; you concentrate and consolidate here an extent of authority which will swallow

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> There exists in the States of the Union, and there must exist in every Government clothed with the power of governing well and of preserving the peace and harmony of society, a police power; there exists a power to legislate in relation to the prejudices of the people, a power not to legislate against their prejudices.

Id. at 505. Representative Rogers similarly warned of the significant expansion in federal power that would accompany passage of the bill:

> Now, sir, it cannot be pretended by any lawyer in this House, whatever his political opinions may be, who will base his integrity upon his professional experience, that there is any authority in the Congress of the United States to enter the domain of a State and interfere with its internal police, statutes, and domestic regulations. . . . [N]o bill has been offered in this House or in the other, the freedmen's bill not excluded, which proposes to give to Congress such dangerous powers over the liberties of the people as this bill under consideration, and if it can be constitutionally passed by the Congress of the United States, and is no infringement upon the reserved or undelegated powers of the States, then Congress has the right, not only to extend all the rights and privileges to colored men that are enjoyed by white men, but has the right to take away.

Id. at 1120. Interestingly, Rogers pointed to precedents decided under the Privileges and Immunities Clause of Article IV such as *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), as reaffirming the States' retained power to regulate fundamental rights of citizens:

> Uniformity of laws in the States is contemplated by the General Government in only two cases—on the subject of bankruptcies and naturalization. The legislative powers of Congress are particularly defined in the eighth section of the first article. Those powers do not interfere with or abridge the power of the States to make laws and regulations, the operation of which is confined to the State.

Id. at 1122 (citing *Campbell*).

59. CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866). Senator Davis continued:

> In relation to the citizens of a State, to their rights, privileges, and immunities, as they are to be claimed within that State now and forever, it proposes to do exactly what all these authorities say Congress cannot do, because they say in the most distinct terms that the citizens of each State, so far as their rights are limited by the boundary of that State, so far as their property and contracts are limited to that State, so far as penalties and punishments are limited to acts done within that State, are exclusively the subjects of State legislation, and Congress has no power whatever to legislate in relation to them.

Id.

> up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens.[60]

Representative Kerr echoed the similar concern that "[t]he right of the State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens, is denied."[61] Representative Latham argued that the constitutional structure barred such legislation "as the right to define and regulate the 'civil rights or immunities' of the inhabitants in the several States is not among 'the powers delegated to the United States by the Constitution nor prohibited by it to the States,' it is by the Tenth Amendment 'reserved to the States respectively or to the people.'"[62] Thus, he concluded that Congress had "no right under the Constitution to interfere with the internal policy of the several States so as to define and regulate the 'civil rights or immunities among the inhabitants' therein."[63] Senator Davis charged that "Congress by this bill [is] assuming precisely the power" to "establish a civil and penal code for all the States of the union"[64] and that

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60. *Id.* at app. 158.

61. *Id.* at 1270. Representative Kerr prefaced this remark with the claim that "[t]his bill . . . . asserts the right of the Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States, and to determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it." *Id.*

62. *Id.* at 1295.

63. *Id.* at 1295-96. Nonetheless, Representative Latham acknowledged:

> No one, I presume, doubts the power of Congress to place all the inhabitants of the United States upon an equal footing as to all matters within the legitimate scope of congressional legislation, and consequently Congress may provide that there shall be no discrimination on account of race, color, or previous condition of slavery in civil rights or immunities which may be constitutionally defined or regulated by Congress; or in other words, that all may stand upon an equal footing in the Federal courts.

Id. Latham also claimed that the bill was flatly inconsistent with the federal system:

> I consider this as one of a series of measures which have been introduced into this Congress, which, if adopted, would change not only the entire policy, but the very form of our Government, by a complete centralization of all power in the national Government, and as most dangerous to the liberties of the people and the reserved rights of the States.

Id. at 1296.

64. *Id.* at 1414. Davis explained:

> The principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union. I have assumed that gentlemen would not

the bill was "a greater stride toward the consolidation of all power by Congress than has ever before been taken or conceived."[65] He warned:

> Grant to Congress the principles and the amount of power embodied in this bill and it cannot be successfully denied that it does possess all that would be required to force upon the States their entire civil and criminal bodies of law.
>
> But the Constitution created no such a hydra-headed monster as a Congress with such enormous power would be.[66]

Finally, Senator Johnson concluded that the bill "strikes at all the reserved rights of the States."[67]

Further, members of Congress made clear that the bill, which guaranteed protection for "civil rights" by its very terms, did not extend protection to "political rights." As Senator Trumbull noted, the "bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights,

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> vote for such a proposition if it was made in the form of a proposed amendment to the Constitution. If they would not vote for such an addition to their powers in an amendment to the Constitution, how much more illegitimate and inexcusable is it for them to vote to assume that power under the Constitution as it exists.

Id.

65. CONG. GLOBE, 39th Cong., 1st Sess. 1415 (1866). Davis argued:

> [U]nder our Constitution and system of government both of these subjects, the regulation of the civil rights of the people of a State, and the laws by which they are subjected to penalties and punishment, belong exclusively to the government and people of each State, and . . . Congress has no authority or jurisdiction whatever over either of these general subjects of legislation.

Id. Davis went on to warn that "[I]f Congress has the power to regulate the subjects which this bill assumes to regulate, it is but the beginning of a new and most important era of its legislation." *Id.*

66. *Id.* at app. 183.

67. *Id.* at 1777. Senator Johnson explained:

> If there be anything that may be considered as true in the past in constitutional law, it is that over every one of these rights, or to speak more correctly, over every one of the subjects to which these rights are made to attach, the jurisdiction of the States was exclusive. . . . The result, therefore, of the three provisions in this section is, that contrary to State constitutions and State laws, it converts a man that is not a citizen of a State into a citizen of the State; it gives him all the rights that belong to a citizen of the State; and it provides that his punishment shall only be such as the State laws impose upon white citizens. Where is the authority to do that? If it exists, it is still more obvious that the result is an entire annihilation of the power of the States.

Id. See also id. at 1832 (statement of Rep. Lawrence) ("It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States.").

such rights as should appertain to every free man."[68] Indeed, there was an attempt to amend the bill to make even clearer that it was not intended to guarantee political rights, such as the right to vote, by adding after "civil rights" the caveat "except the right to vote in the States."[69] In response to this proposal, Senator Trumbull yet again stated: "I will only say in reference to that matter, that that is a political privilege, not a civil right. This bill relates to civil rights only, and I do not want to bring up the question of negro suffrage in the bill."[70] Senator Fessenden reiterated this position, observing that voting was not "such a very natural right that it must necessarily be conferred upon every free man,"[71] as did Senator Wilson, who noted that "[p]articipation in the Government is one thing; the right to be protected in life, liberty, and estate is another thing."[72] Representative Wilson repeated these points in the House,[73] as did Representative Thayer, who observed

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68. *Id.* at 476. Trumbull later stated:

> The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights. That is all there is to it.

Id. at 599. *See also id.* at 1757 (statement of Sen. Trumbull) ("[T]he granting of civil rights does not, and never did in this country, carry with it rights, or, more properly speaking, political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office."); *id.* at 1761 (statement of Sen. Trumbull) ("Some 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.").

69. *See id.* at 606 (proposal of Sen. Saulsbury).

70. CONG. GLOBE, 39th Cong., 1st Sess. 606 (1866).

71. *Id.* at 704.

72. *Id.* at 1255. Wilson stated: "I believe Congress is clothed with ample authority to secure the emancipated slaves in their civil rights and immunities. But I did not understand then, and I do not believe now, that it gives Congress the power to clothe these men with suffrage or to confer office upon them." *Id.*

73. Wilson discussed at length the nature of "civil rights" and the distinction between "civil rights" and the "political rights" not addressed by the bill:

> [The bill] provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities." What do these terms 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 the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities.

that "nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right."[74] Finally, Representative Lawrence similarly argued that the bill did not "affect any political right, as that of suffrage, the right to sit on juries, hold office, &c. This it leaves to the States, to be determined by each for itself."[75]

The bill passed Congress, but President Johnson vetoed it

Id. at 1117. *See also id.* at app. 156 (statement of Rep. Wilson) ("I do not believe it confers that right upon the emancipated people, nor upon any portion of the people of the United States, who are not under the laws of the several States qualified to act as jurors."); *id.* at 1162 (statement of Rep. Wilson) ("I move to add the following as a new section: ... That nothing in this act shall be so construed as to affect the laws of any State concerning the right of suffrage.... That section will not change my construction of the bill. I do not believe the term civil rights includes the right of suffrage. Some gentlemen seem to have some fear on that point."); *id.* at 1296 (statement of Rep. Wilson) ("Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right to suffrage was included in those rights. To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all those general terms and leaves the bill with the rights specified in the section. Therefore the amendment referred to by the gentleman is unnecessary.").

74. *Id.* at 1151. After quoting from the bill, Thayer stated:

> Now, sir, I will pay so high a compliment to the intelligence of the gentleman who addressed us yesterday, as to say that I do not think he can believe that this bill extends or alters, or can be construed to extend or alter, the laws regulating suffrage in any of the States....
>
> In the first place, the words themselves are "civil rights and immunities," not political privileges; and nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.
>
> Then, again, the matter is put beyond all doubt by the subsequent particular definition of the general language which has been just used; and when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated.

Id. See also id. at 1159 (statement of Rep. Windom) ("If there be any reasonable objection to the bill, it is that it does not go far enough. It assumes only to protect civil rights, and leaves the adjustment and protection of political rights to future legislation.... It does not, as I have already said, confer the privilege of voting, for that is a political right, and not included in the bill. It does not attempt to confer on the freedmen social privileges.").

75. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866). *Cf. id.* at 1291 (statement of Rep. Bingham) ("A distinction is taken, I know very well, in modern times, between civil and political rights. I submit with all respect that the term 'political rights' is only a limitation of the term 'civil rights,' and by general acceptation signifies that class of civil rights which are more directly exercised by the citizen in connection with the government of his country. If this be so, are not political rights all embraced in the term 'civil rights,' and must it not of necessity be so interpreted?").

partly on the ground that Congress lacked authority to enact such legislation.[76] Many members of Congress, who believed that the Thirteenth Amendment did not provide Congress with the power to pass the bill, expressed this view as well. For example, Senator Saulsbury stated that "when the constitutional Amendment was under consideration in this Chamber, there was no friend of the measure who claimed or avowed that such a power as this existed in Congress under it."[77] Saulsbury reasoned as follows:

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76. *See* MALTZ, *supra* note 1, at 70 ("As feared, Johnson vetoed the Civil Rights Bill on March 27. Further, his veto message left little room for compromise; rather than simply attacking the specifics of the bill, the message denied in broad terms congressional authority to protect the civil rights of freedmen."); CURTIS, *supra* note 3, at 58 ("On March 27, 1866, the president vetoed the Civil Rights bill. The veto was based in part on a claim that Congress lacked power to pass it."); CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866) (veto message).

77. CONG. GLOBE, 39th Cong., 1st Sess. 363 (1866). In response to the bill, Senator Saulsbury asked, discussing the history of the Amendment:

> What was the amendment? An amendment abolishing the *status* or condition of slavery, which is nothing but a *status* or condition which subjects one man to the control of another, and gives to that other the proceeds of the former's labor. Cannot that amendment be carried into effect, and the *status* of freedom established, without exercising such a power as this?

Id. He later stated of the Amendment:

> It does not of itself declare, and human ingenuity cannot torture it into meaning that the Congress of the United States shall invade the States and attempt to regulate property and personal rights within the States any further than refers simply and solely to the condition and *status* of slavery.... The States have simply said by adopting that amendment that the *status* or condition of slavery in this country shall not [sic] longer exist—the condition in which one man belongs to another, which gives to that other a right to appropriate the profits of his labor to his own use and to control his person. That is what it said; and it is said in reference to that, that you may by appropriate legislation exercise power; and it has not said that you may exercise power in reference to anything else. The attempt now under the power given, which relates simply and solely to one subject matter, the abolition of the *status* or condition of slavery, to confer civil rights which are wholly distinct and unconnected with the *status* or condition of slavery, is an attempt unwarranted by any method or process of sound reasoning.

Id. at 476. *See also id.* at 628 (statement of Rep. Marshall) ("Congress has power to enforce what? The abolition of slavery. This is not denied. Slavery is abolished throughout the entire land. If any man asserts the right to hold another in bondage as his slave, his chattel, and refuses to let him go free, Congress can by law, under this clause, provide by appropriate legislation for the punishment of the offender and the protection from slavery of the freedman."); *id.* at 1123 (statement of Rep. Rogers) ("I wait for an argument based upon constitutional grounds, showing our right to give Congress this awful power to enter into the jurisdiction of the States of this country, and to prostrate and destroy and break down those grand symbols and principles of liberty which lie at the foundation of our Government, and under which we have enjoyed peace and prosperity for more than seventy-five years, in the full protection of life, liberty, and property.");

> A man may be a free man and not possess the same civil rights as other men. . . . If you intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in your constitutional amendment, and provided that not only the *status* and condition of slavery should not exist, but that there should be no inequality in civil rights.[78]

Senator Cowan similarly stated that the Amendment "was not intended to overturn this Government and to revolutionize all the laws of the various States everywhere."[79] Representative Kerr outlined the limited objective of the Amendment:

> Slavery was a domestic relation, not a public relation. . . . The severance of that relation puts an end to slavery, and was the beneficent object of this amendment. But the regulation of the ordinary civil relations of the negro to the society in which he lives, by the enactment of laws of a local and merely municipal character to control his contracts, and bestow upon him civil privileges having no necessary connection with his personal freedom, are wholly unauthorized by any warrant in any part of the Constitution.[80]

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id. at 1268 (statement of Rep. Kerr) ("So far as the last amendment is concerned, I shall not take time now to discuss it at any length. I hold that it gives no power to Congress to enact any such law as this or any other law, except such only as is necessary to prevent the reestablishment of slavery."); *id.* at 1784 (statement of Sen. Cowan) ("This bill, pretending to be based upon that amendment of the Constitution, whose subject-matter was slaves, and which cannot be extended beyond that, proposes to legislate for a very large number of persons who were not slaves, and who were not within its purview or its operation. I mean this bill purports to give power to Congress to legislate in regard to free negroes and mulattoes. To my mind that is as clear and conclusive an objection to it upon the score of constitutionally as ever was made to a bill in the world.").

78. *Id.* at 477.

79. *Id.* at 499. Senator Cowan elaborated:

> That amendment, everybody knows and nobody dare deny, was simply made to liberate the negro slave from his master. That is all there is of it. . . . It was not intended to overturn this Government and to revolutionize all the laws of the various States everywhere. It was intended, in other words, and a lawyer would have so construed it, to give to the negro the privilege of the *habeas corpus*; that is, if anybody persisted in the face of the constitutional amendment holding him as a slave, that he should have an appropriate remedy to be delivered. That is all.

Id.

80. *Id.* at 623. Representative Kerr also said:.

> The anti-slavery amendment of the Constitution had one very simple object to accomplish when gentlemen on the other side of this House desired to secure its adoption; but now it is confidently appealed to as authority for this bill and almost every other radical and revolutionary measure advocated by the majority in this Congress. Those gentlemen often have strange visions of constitutional law, and it is not safe to judge from their opinions to-day what they will be to-morrow.

Representative Thornton observed that "[t]he sole object of that Amendment was to change the *status* of the slave to that of a freeman; and the only power conferred upon Congress by the second section of that Amendment is the power to enforce the freedom of those who have been thus emancipated."[81] Representative Latham similarly stated that in his opinion the bill went "far beyond anything contemplated or justified by [the Thirteenth] Amendment."[82] And Senator Davis reiterated his view that "Congress has no power whatever to pass this bill."[83]

Members of Congress also objected specifically that Congress had no power to make freed slaves citizens absent constitutional Amendment. Senator Johnson, for example, pointed to the Supreme Court's decision in the *Dred Scott* case[84] in support of this contention:

> If the Supreme Court decision [in *Dred Scott*] is a binding one and will be followed in the future, this law which we are now about to pass will be held of course to be of no avail, as far as it professes to define what citizenship is, because it gives the rights of citizenship to all persons without distinction of color, and of course embraces Africans or descendants of Africans.
>
> My own opinion, therefore, is that the object can only be safely and surely attained by an amendment of the Constitution, and I have tried in vain to form such a provision as would be free from objection.[85]

Representative Rogers, too, pointed to the Supreme Court's decision:

> I affirm, without the fear of successful contradiction, that by the decision of the highest court of the United States . . . that negroes in this country, whether free or slave, are not citizens or people of the United States within the meaning of

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Id. at 1271.

81. *Id.* at 1156. Thornton prefaced his observation by "insist[ing]. . . that the construction given to the constitutional amendment by gentlemen who advocate this bill is too broad, too latitudinarian." *Id.*

82. CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866). Latham acknowledged that "[s]ome legislation by Congress may become necessary under the second section of the amendment to the Constitution abolishing slavery" but argued that "the right of congressional interference attaches only by virtue of local obstruction to the great amendment." *Id.*

83. *Id.* at 1414. Davis challenged the bill's "friends . . . to read to the Senate the authority upon which they propose to pass the bill." *Id.*

84. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

85. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

> the words of the Constitution, and that therefore no law of Congress or any State can extend to the negro race, in the full sense of the term, the *status* of citizenship.[86]

Representative Latham contended that many courts—not just the Supreme Court—had come to the same conclusion:

> The courts have uniformly decided that negroes are not citizens under the Constitution. I know that gentlemen profess no respect for these decisions; appeal to the tribunal of party politics, and tell us the people have reversed them. I most respectfully submit, however, that while a legitimate appeal lies from Congress to the people upon questions of governmental policy, no such appeal lies from the Supreme Court upon questions of law. If we are dissatisfied with one decision of the court, and the matter is beyond the reach of ordinary legislation, our only legitimate remedy is to go back into court and reverse the decision there. . . . Believing, as I do, that the Constitution confers upon Congress no power to confer citizenship except upon naturalized foreigners, I believe such rights conferred by this act to be in violation of the Constitution, which is "the supreme law of the land."[87]

Finally, Representative Kerr observed that the citizenship question involved issues relating to the allocation of governmental powers between the federal and the State governments: "[i]t will hardly be claimed that this [the Privileges and Immunities Clause of Article IV] or any other provision gives Congress power to declare who shall be citizens of each State. Neither government can confer citizenship in the other."[88]

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86. *Id.* at 1120. Rogers explained:

> [T]he organic law, by its letter and spirit, and in view of the contemporaneous circumstances under which it was passed, fully vindicate the authority of this decision of the Supreme Court, declaring that no power within any State, much less in the Congress of the United States, can change the *status* of the negro. That cannot be done until the requisite amendment is made to the Constitution, until some such article has been carried into effect by two thirds of both Houses of Congress and three fourths of the States.

Id.

87. *Id.* at 1295.

88. *Id.* at 1268. *See also id.* at 497-98 (statement of Sen. Van Winkle) ("I think it needs a constitutional amendment to make these people citizens of the United States. . . . I must say that, in my opinion, notwithstanding the remarks made by the chairman of the Committee on the Judiciary yesterday, the mode in which it is proposed to effect this object is neither constitutional nor legal. I do not think that the clause that is proposed to be introduced into this bill, providing that persons of African descent are and shall be hereafter citizens of this country, is sufficient to

However, other members argued that Congress could, in fact, confer citizenship absent constitutional amendment or that citizenship was automatically conferred upon individuals at birth. For example, Senator Trumbull, while recognizing that there were differing views, stated that "persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress."[89] Similarly, Senator Morrill argued that "[e]verywhere where the principles of law have been recognized at all, birth by its inherent energy and force gives citizenship."[90] Senator Sherman argued that a slave "emancipated by the constitutional amendment is a citizen of the United States."[91] And Senator Yates concluded:

> The States had the power over the question of slavery in the States before the amendment to the Constitution; but by the amendment to the Constitution, in which the States have concurred, the freedman becomes a free man, entitled to the same rights and privileges as any other citizen of the United States.[92]

Members of the House expressed similar views.

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do it.").

89. *Id.* at 527. Senator Trumbull stated his own opinion as follows:

> The recent Attorney General gave it as his opinion that free persons of color were citizens at the time of the adoption of the Constitution, and are now. The Senator from Kentucky, who has based his argument and his hour's speech upon the supposition that negroes cannot be citizens because they were not citizens when the Constitution of the United States was adopted, has forgotten the history of the country.

Id. Trumbull went on to say:

> I have already said that in my opinion birth entitles a person to citizenship, that every free-born person in this land is, by virtue of being born here, a citizen of the United States, and that the bill now under consideration is but declaratory of what the law now is.

Id. at 600. He later reaffirmed that "[i]t was believed by myself and many others that all native-born persons since the abolition of slavery were citizens of the United States." *Id.* at 1756.

90. *Id.* at 570. Morrill reasoned that "this amendment, although it is a grand enunciation, although it is a lofty and sublime declaration, has no force or efficiency as an enactment. I hail it and accept it simply as a declaration." *Id.*

91. CONG. GLOBE, 39th Cong., 1st Sess. 744 (1866). Sherman argued that the bill "simply declared" this fact:

> The first section of the bill simply declared that a negro emancipated by the constitutional amendment is a citizen of the United States. I believe he was a citizen of the United States before if he was free; but to remove all ambiguity or doubt about it this provision was inserted in that bill, and I think wisely.

Id.

92. *Id.* at 1780.

Representative Wilson argued at length that the citizenship clause in the bill was "merely declaratory of what the law now is."[93] Representative Cook vigorously maintained "that the constitutional power of Congress to make any men or class of men citizens must be conceded."[94] Representative Thayer similarly concluded that "all persons born in the United States, and not subject to any foreign Power, are citizens of the United States" and that the bill was "but declaratory of the existing law."[95] Representative Broomall asked rhetorically: "What is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government?"[96] Representative Raymond argued that "the moment the disabilities imposed upon [slaves] by the condition of servitude were removed, that moment they became, by virtue of that act, citizens of the United States, and are to-day entitled to all the rights, privileges, and immunities of citizenship."[97] Representative Delano declared: "It needs no

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93. *Id.* at 1115.

94. *Id.* at 1124.

95. *Id.* at 1152. Thayer explained:

> According to my apprehension, every man born in the United States, and not owing allegiance to a foreign Power, is a citizen of the United States. It is a rule of universal law, adopted and maintained among all nations, that they who are born upon the soil are the citizens of the State.... So far as this declaration of the bill is concerned, it is but reiterating an existing and acknowledged principle of law.

Id.

96. *Id.* at 1262. Broomall pointed to established principles of law for his conclusion:

> The first provision of the bill declares that all persons born in the United States and not subject to any foreign Power are citizens of the United States. As a positive enactment this would hardly seem necessary. Even as a declaration of existing law, a proposition that at most can only be said to embrace the true meaning of the word "citizen" would seem to find its more appropriate place in the elementary treatises upon law rather than upon the statute-books.

Id.

97. *Id.* at 1266. Raymond explained that the citizenship provision was necessary due to the mass of contrary authority:

> It is not worth while, indeed I have no desire, to conceal the fact that the special object of that substitute, as indeed the special object of the bill, is to introduce into American citizenship the four million persons just emancipated from a condition of slavery. I do not know that any bill is necessary for that purpose.... But we all of us know that this point has been doubted, has been denied in courts, in legislative halls, and in the executive department of the Government. It has been asserted repeatedly, and decisions are on our records to that effect, that they are not citizens because they are of the African race.

Id.

law, in my estimation, to make citizens of these emancipated people. They are citizens by law now; and our enactment can only declare the rights and privileges in this respect which already belong to them."[98] Even Representative Bingham, who expressed concerns regarding the bill's constitutionality, stated: "I find no fault with the introductory clause, which is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen."[99] Representative Shellabarger, seemingly ignoring contrary views, stated: "I do not understand that there is now any serious doubt anywhere as to our power to admit by law to the rights of American citizenship entire classes of races who were born and continue to reside in our territory or in territory we acquire."[100] Finally, Representative Lawrence argued that the citizenship "clause is unnecessary, but nevertheless proper, since it is only declaratory of what is the law without it. . . . There is, then, a national citizenship. And citizenship implies certain rights which are to be protected, and imposes the duty of the allegiance and obedience to the laws."[101]

However, even members of Congress who supported the goals of the bill questioned congressional power to issue such legislation.[102] Most importantly, Representative Bingham

98. CONG. GLOBE, 39th Cong., 1st Sess. app. 156 (1866).

99. *Id.* at 1291.

100. *Id.* at 1293. Shellabarger continued: "There can, therefore, be no doubt as to our right to enact that part of this section which confers citizenship upon all our native people." *Id.*

101. *Id.* at 1832.

102. *See* NELSON, *supra* note 1, at 48 ("Although the legislation was ultimately enacted as the Civil Rights Act of 1866, the enactment occurred only after long debate. Its proponents found constitutional sanction for the legislation in the newly adopted Thirteenth Amendment, which, they claimed, not only freed the slaves but gave Congress power to legislate on their behalf as well. Democrats and occasional Republicans like John A. Bingham questioned the reach of the new Amendment, however, and President Andrew Johnson vetoed the proposed act, in part, he contended, because the Constitution entrusted the protection of civil rights to the states."); CURTIS, *supra* note 3, at 81 ("Democrats were not convinced [by the arguments in support of the constitutionality of the Civil Rights Bill]. In addition to making frequent and blatant appeals to racism, most insisted that Congress has no power to pass the Civil Rights bill. Republicans relied on the Thirteenth Amendment, the privileges and immunities clause of article IV, section 2, and the Bill of Rights, but most Democrats denied that any of these provisions supplied the power needed." (footnotes omitted)). *But see* CURTIS, *supra* note 3, at 80 ("John Bingham was one of only a handful of Republicans who thought

objected to the bill on the grounds that the Constitution did not grant Congress the power to enforce the rights that it contained:

> I feel that I am justified in saying, in view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States. . . . The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised.[103]

Other members of Congress questioned congressional authority to guarantee fundamental rights more generally. For example, Representative Shellabarger concluded:

> I have no difficulty in regard to the constitutionality of the second section of this bill, provided we have the power to enact the first section. My mind, I frankly state, has not reached satisfactorily the conclusion that there is not doubt as to whether we have power to enact the first section of this bill; and if we have not power to pass the first section, then we cannot enact the second.[104]

Congress lacked power to pass the Civil Rights Bill.").

103. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

104. *Id.* at 1293. Representative Delano similarly stated:

> I do not see how we can sustain the principles of this bill. I said in the outset that I wanted to see the provisions of this bill adopted or enforced upon the South, and it was with this thought before me that I introduced, at an early day of the session, an amendment to the Constitution requiring each State to provide for the security of life, liberty, and property, and the rightful pursuit of happiness, and giving to Congress power to enforce these rights where the States withheld them. That, in my estimation, is a better theory of proceeding on this subject than the one introduced by my colleague, which proposes to vest that power in Congress at once; because I want Congress to exercise no more power over the local legislation of the States than is absolutely necessary, and I would not allow it to go in the first instance to secure these rights, but allow it to go only when the States refuse to apply and give such security under the fundamental law of the nation.

Id. at app. 158-59. Senator Johnson reasoned as follows:

> Standing, therefore, as well upon the nature of the Government itself, as a Government of enumerated powers specially delegated, as upon the

Such arguments were echoed by President Johnson in explaining his veto of the measure.[105]

Nonetheless, other members asserted that Congress did have such authority under the Thirteenth Amendment. Senator Trumbull, for example, stated:

> The question will arise, has Congress authority to pass such a bill? Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority.[106]

Trumbull cited both the Thirteenth Amendment prohibition against slavery and the guarantee of the Privileges and Immunities Clause of Article IV in support of his argument, reasoning that "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other

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> express provision that everything not granted was to be considered as remaining with the States unless the Constitution contained some particular prohibition of any power before belonging to the States, what doubt can there be that if a State possessed the power to declare who should be here citizens before the Constitution was adopted that power remains now as absolute and as conclusive as it was when the Constitution was adopted? The bill, therefore, changes the whole theory of government.

Id. at 1776.

105. Stating that "[t]he power to confer the right of State citizenship is just as exclusively with the several States as the power to confer the right of Federal citizenship is with Congress," President Johnson discussed the questionable power of Congress to confer citizenship under the bill:

> The right of Federal citizenship thus to be conferred on the several excepted races before mentioned is now, for the first time, proposed to be given by law. If, as is claimed by many, all persons who are native-born, already are, by virtue of the Constitution, citizens of the United States, the passage of the pending bill cannot be necessary to make them such. If, on the other hand, such persons are not citizens, as may be assumed from the proposed legislation to make them such, the grave question presents itself, whether, when eleven of the thirty-six States are unrepresented in Congress, at this time it is sound policy to make our entire colored population and all other excepted classes citizens of the United States?

Id. at 1679 (veto message). He also referenced the concern that the measure would interfere with the States' power of regulation:

> They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative power in the national Government.

Id. at 1681.

106. *Id.* at 474.

citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution is prohibited."[107] Along the same lines, Senator Howard concluded that the "intention" of the Amendment was to make slaves into freemen.[108] Senator Lane stated similarly that slaves were "free by the constitutional Amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States. It is made your especial duty by the Second Section of that Amendment, by appropriate legislation, to carry out that emancipation."[109] Representative Wilson queried:

> Who will say that the means provided by this second section of the bill are not appropriate for the enforcement of the power delegated to Congress by the second section of the amendment abolishing slavery, which I have quoted? The end is legitimate, because it is defined by the Constitution itself.[110]

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107. Trumbull explained the relevance of the Privileges and Immunities Clause as follows:

> We may, perhaps, arrive at a more correct definition of the term "citizen of the United States" by referring to that clause of the Constitution which I have already quoted, and which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." What rights are secured to the citizens of each State under that provision? Such fundamental rights as belong to every free person. . . . This clause of the Constitution . . . "secures and protects personal rights" and gives to every person who is a citizen of one State the same rights to hold property, the same personal rights, that the citizen of that State has.

Id. (citing Campbell v. Morris, 3 H. & McH. 535 (Md. 1797); Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230); Abbott v. Bayley, 23 Mass. (6 Pick.) 89 (1927)).

108. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866). Howard elaborated:

> I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights—and those are some of the civil rights which I have just enumerated—there is to be hereafter no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else.

Id.

109. *Id.* at 602. Lane asked: "What are the objects sought to be accomplished by this bill?" *Id.* He answered: "That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freemen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment." *Id.*

110. *Id.* at 1118. Wilson continued:

> The end is the maintenance of freedom to the citizen. What means more appropriate could be selected than that which punishes a man by commonly inflicted punishments through the ordinary channels of the law and the courts for depriving the citizen of those rights which, while

Finally, Senator Stewart stated:

> Although I am a strong advocate for local government, and extremely anxious that these matters should be attended to by the States as early as practicable, still I believe that it was the intention of those who amended the Constitution, as plainly indicated by that amendment, to give the power to the General Government to pass any necessary law to secure to the freedmen personal liberty.[111]

Members of Congress also pointed to constitutional provisions in addition to the Thirteenth Amendment as support for congressional authority to enact the bill. For example, Representative Thayer identified the Naturalization and Due Process Clauses as additional sources of congressional power:

> If I am asked from whence the power is derived to pass this bill, I reply that I derive it, in the first place, from the second section of the late Amendment to the Constitution. I say, further, that so far as regards the power to declare the freedmen citizens is concerned, it may be clearly derived (if it be not inherent in the very frame of every Government) from that clause of the Constitution which gives the express power to Congress to pass laws for naturalization. And I might say, also, that in my judgment sufficient power is found, by implication at least, in that clause of the

> he enjoys them, are his sure defense against efforts to reduce him to slavery? A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction to slavery. This settles the appropriateness of this measure, and that settles its constitutionality.

Id.

111. *Id.* at 1785. *See also id.* at 603 (statement of Rep. Wilson) ("The measure is called for because these reconstructed legislatures, in defiance of the rights of the freedmen and the will of the nation embodied in the amendment to the Constitution, have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days. The needs of more than four million colored men imperatively call for its enactment. The Constitution authorizes and the national will demands it."); *id.* at 1124 (statement of Rep. Cook) ("The first section [of the Thirteenth Amendment] would have prohibited the mere fact of chattel slavery as it existed. When Congress was clothed with power to enforce that provision by appropriate legislation, it meant two things. It meant, first, that Congress shall have power to secure the rights of freemen to those men who had been slaves. It meant, secondly, that Congress should be the judge of what is necessary for the purpose of securing to them those rights."). *But cf. id.* at 600 (statement of Sen. Guthrie) ("[W]ith slavery fell the laws of all the States providing for slavery—every one of them. I do not see what benefit can arise from repealing them by this bill, because if they are not repealed by the Constitution as amended, this bill could not repeal them. . . . Believing that all the laws authorizing slavery have fallen, I have advised the people of Kentucky, and I would advise all the States, to put these Africans upon the same footing that the whites are in relation to civil rights.").

> Constitution which guaranties to all citizens of the United States their right to life, liberty, and property.[112]

Representative Broomall similarly pointed to the General Welfare and Privileges and Immunities Clauses as possible sources of congressional authority:

> If the Government has not the power, by appropriate legislation, to protect its citizens within as well as without its jurisdiction, I would like to know what the eighth section of the first article of the Constitution means when it empowers Congress to provide for the general welfare of the United States, and when it empowers Congress to pass all laws necessary for that purpose. Does it not pertain to the "general welfare" that "the citizens of each State," in the language of the second section of the fourth article of that instrument, "shall be entitled to all privileges and immunities of citizens in the several States?[113]

He also pointed more generally to the nature of the government established in the United States as a source of congressional power: "[T]hrowing aside the letter of the Constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments."[114] Representative Hart similarly relied upon the Guarantee Clause and various other provisions:

> The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall "establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty;" a government whose "citizens shall be entitled to all privileges and immunities of other citizens;" . . . where "the right of the people to be secure in their persons, houses, papers, and

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112. *Id.* at 1152. Specifically, with respect to the Thirteenth Amendment, Thayer stated: "The amendment to the Constitution gave liberty to all; and in giving liberty it gave also a complete exemption from the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the object of this bill forever to remove." *Id.* Moreover, Thayer specifically indicated that in his view the Amendment provided for congressional authority to enact legislation to guarantee fundamental rights:

> [B]y virtue of the second section of the amendment of the Constitution Congress has express power to pass laws which will guaranty and insure these great rights and immunities of citizenship to those who, by the act of emancipation and the amendment of the Constitution, were made freemen, and who in becoming freemen became citizens.

Id.

113. *Id.* at 1263.

114. CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866).

> effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law." Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily.[115]

Representative Lawrence pointed more broadly to Article IV, Section 2 and presumably its Privileges and Immunities Clause:

> I maintain that Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property, and the means essential to that end, by penal enactments to enforce the observance of the provisions of the Constitution, article four, section two, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State. Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in national citizenship. The Constitution declares these civil rights to be inherent in every citizen, and Congress has power to enforce the declaration.[116]

Like Representative Hart, however, he relied upon the Guarantee Clause of Article IV:

> A State which denies to half its citizens not only all political, but their essential civil rights, recognized and confirmed by the national Constitution and described in this bill, has ceased to be republican in form, and the Constitution has made it the duty of Congress to "guaranty" such form of government. This, it may do by law in this form. (Constitution, article four, section four.)[117]

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115. *Id.* at 1629.

116. *Id.* at 1835.

117. *Id.* at 1836. Lawrence elaborated:

> The whole question of the power of Congress to enact this bill is resolved into this: when the Constitution recognizes and secures rights which are denied by State laws, may Congress declare it a crime to execute or enforce unconstitutional laws, to deprive a citizen of a constitutional right? There is no solitary right which the Constitution sanctifies, the invasion of which may not be declared criminal, or be otherwise enforced....

Id. Representative Buckland similarly reasoned:

> [I]t is the duty of the Government to provide for its future safety, and insist upon such measures as will secure to every American citizen the natural rights of life, liberty, and property, in all States. . . . If the Constitution of the United States does not now confer upon the national Government the power to provide against such outrages upon the rights of American citizens, which I think it does, then I say it is the duty of Congress and the President to insist upon such an amendment as will

After fairly extensive debate, the bill was passed over President Johnson's veto.[118] This debate, however, set the stage for further action to guarantee the fundamental rights of citizenship through constitutional Amendment.

D. *The Owen Proposal and Bingham Revisions*

The Joint Committee's work on a proposed Amendment continued. After the debates concerning congressional authority to pass the Civil Rights Act, members of Congress desired to provide a constitutional guarantee for the fundamental rights that had been the subject of the Act.[119] As commentators such as Professors Maltz and Nelson have observed, Section One of the Fourteenth Amendment has its origins in a proposal for a new amendment by Robert Owen.[120] Among other provisions relating to reconstruction, the proposal included provisions that would guarantee civil rights to the newly-freed black citizens. Specifically, the Owen proposal included the following language: "No discrimination shall be made by any state, nor by the United States, as to the

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confer that power.

Id. at 1627.

118. *See id.* at 1861.

119. For example, Raoul Berger concluded after reviewing the historical record:

> The "privileges or immunities" clause was the central provision of the Amendment's § 1, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866, which, all are agreed, it was the purpose of the Amendment to embody and protect. The objectives of the Act were quite limited. The framers intended to confer on the freedmen the auxiliary rights that would protect their "life, liberty, and property"—no more. For the framers those words did not have the sprawling connotations later given them by the Court but, instead, restricted aims that were expressed in the Act. The legislative history of the Amendment frequently refers to "fundamental rights," "life, liberty, and property."

BERGER, *supra* note 3, at 3. *See also id.* at 129 ("Considerable impetus to the Fourteenth Amendment was given by Bingham's insistence that there was no constitutional authority for the Civil Rights Bill and that an amendment was required."); CURTIS, *supra* note 3, at 86 ("Several congressmen observed that the amendment would eliminate any question about the power of Congress to pass the Civil Rights bill. Others considered the amendment a reiteration of the Civil Rights bill. Several other congressmen suggested that the Constitution already effectively contained the provisions of the amendment." (footnotes omitted)). *But see id.* at 217 ("The hypothesis that the amendment was exactly the same as the Civil Rights bill and that the bill only provided for equality in certain rights under state law is simply refuted by the evidence that Republicans thought the amendment protected absolute rights to freedom of speech, to assemble, to bear arms, and to due process that states could not abridge.").

120. *See* MALTZ, *supra* note 1, at 79-82 (discussing the Owen proposal); NELSON, *supra* note 1, at 54-55 (same).

civil rights of persons because of race, color, or previous condition of servitude."[121]

Representative Bingham proposed adding the following language to Owen's proposed amendment: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[122] This added language was defeated.[123] Bingham, however, was not deterred and made another proposed revision, which resulted in the language now found in Section One: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."[124]

Although this revision faced initial opposition, as Professor Maltz has observed, "[t]he positions of the various committee members changed with almost dizzying speed," with the Committee finally approving the section by a vote of ten to two.[125] The changes, Maltz has concluded, are not readily explained:

> [The] voting pattern appears at first to be totally inexplicable. In the space of four days, three roll-call votes were taken on seemingly identical issues—whether Bingham's new section would be proposed in addition to the original Owen plan. Of those who participated in all three votes, every Republican except Bingham voted both for and against the proposal at least once.[126]

Unfortunately for historians attempting to learn more concerning the drafters' intent, no record of the Committee's debates exists, and "extensive investigation of private correspondence by a legion of historians has unearthed only the most fragmentary evidence on the issue."[127] Thus, the reasoning behind subsequent changes in the Amendment's language is not laid out in detail in the historical record. Maltz,

121. KENDRICK, *supra* note 26, at 85.
122. *Id.*
123. *Id.*
124. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).
125. MALTZ, *supra* note 1, at 87.
126. *Id.*
127. *Id.* at 81.

however, concludes that political considerations drove the change in the votes and that the Bingham proposal (because it received support from the moderate and conservative elements of the committee) was viewed as being more moderate than the Owen proposal.[128] Other hypothesized explanations for the changes include an intent to prohibit nonracial discriminations or an intent to "protect some rights absolutely" instead of merely securing an equality of rights.[129]

Scholarly debate over the drafting of the Amendment includes frequent criticism of Representative Bingham and the quality of his draftsmanship. For example, Bingham has been described as a "muddled thinker,"[130] a "confused thinker,"[131] and an individual who did not have "exact knowledge or clear conceptions" and did not use "accurate language."[132] Other

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128. *See id.* at 92, 94 ("[T]he choice to replace the original Owen wording--which would have simply prohibited any racial discrimination by states in civil rights—seemed plainly a move to placate moderates.").

129. NELSON, *supra* note 1, at 56. Professor Nelson came to the following conclusions after researching the committee records:

> [T]he committee introduced further uncertainty when it substituted the current due process and equal protection clauses for the earlier clause providing "equal protection in the rights of life, liberty, and property." The reasons for this change, which took place behind closed doors, are not apparent. Neither the records of the Joint Committee's deliberations nor the papers of its members provide any explanation of why the change was made. Perhaps the committee made its change for purely rhetorical reasons. Or its purpose may have had substantive import. An obvious possibility is that the committee decided to introduce the concept of due process into section one in order to guarantee that, in regard to fundamental personal rights, state law would be procedurally fair as well as substantively equal.

Id. at 57.

130. MALTZ, *supra* note 1, at 114 ("Bingham . . . is often described as a muddled thinker with no clear conception of what rights would be constitutionalized by his own proposals."). *But see id.* at 115 ("[T]he disparagement of Bingham's thought processes is considerably overstated. Although his speeches were often pompous and flowery, they enunciated clearly a consistent theme: The comity clause guarantees certain rights to all American citizens, but the prewar Constitution left Congress powerless to enforce those rights.").

131. BERGER, *supra* note 3, at 112. *See also id.* at 164 ("Bingham was a muddled thinker, given to the florid, windy rhetoric of a stump orator, liberally interspersed with invocations to the Deity, not to the careful articulation of a lawyer who addresses himself to great issues." (footnotes omitted)).

132. Charles Fairman, *Reconstruction and Reunion: 1864-88*, *in* 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 462 (1971). *See also* Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2290-91 (1999) (book review) ("A great constitutionalist, a James Madison, does not leave loose language and ill thought-out enforcement structures for his posterity. John Bingham left us with both, and the result is that for 130 years now the U.S. Supreme Court has done that which it ought not to have done and it has left undone that which it ought to have done.");

commentators have concluded that "Bingham . . . spoke with clarity on some occasions, although not in the debates on the Fourteenth Amendment itself."[133] Thus, a number of commentators have hypothesized that any confusion concerning the meaning of Section One may be due to its draftsmen.

E. Congressional Debate

The subsequent congressional debate concerning the proposed amendment, however, does give some insight into the intent of its framers.[134] As a number of commentators have observed, the provisions comprising Section One were not as extensively debated as were some of the more controversial provisions in the subsequent sections.[135] Extensive debate, however, may not have been necessary given the prior debates on the Civil Rights Bill and the Freedmen's Bureau Bill. Nonetheless, there were still members who stated that they did not fully understand particular aspects of the Amendment, such as its guarantee of "privileges or immunities of citizens."[136]

However, other statements during the debates evidence a greater understanding of the provisions of Section One. For example, members of Congress indicated that the Amendment was designed to "give to a citizen of the United States the

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but cf. id. at 2290 ("A Bingham defender might respond that only a vague and opaque text, with no structural features, could have been ratified in 1868.").

133. NELSON, *supra* note 1, at 129. However, Professor Nelson has also observed that "[m]any of the framers and ratifiers of the Fourteenth Amendment were lawyers, and a few of them took seriously the task of legal draftsmanship, which would determine the future impact of their efforts." *Id.* at 145.

134. *See* CURTIS, *supra* note 3, at 58.

135. *See* MALTZ, *supra* note 1, at 93 ("Section One was not considered by either supporters or opponents of the Fourteenth Amendment to be the most significant feature of the Joint Committee proposal."); CURTIS, *supra* note 3, at 89 ("There was no extended discussion of section 1 in the Senate after Howard spoke."); Curtis, *supra* note 1, at 1088.

136. Senator Johnson, for example, said:

> I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it is quite objectionable to provide that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," simply because I do not understand what will be the effect of that.

CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

natural rights which necessarily pertain to citizenship."[137] They also indicated that it was designed to provide Congress the power to enforce constitutional guarantees of civil rights. For example, Representative Stevens commented that the Amendment "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all."[138] Representative Bingham stated that the Amendment would supply a "want" in the Constitution:

> It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[139]

Senator Howard stated that "[t]he great object of the first section of this Amendment" was "to restrain the power of the States and compel them at all times to respect th[e] great fundamental guaranties" embodied in the Constitution.[140] He

137. *Id.* at 1088 (statement of Rep. Woodbridge).

138. *Id.* at 2459. Stevens elaborated as follows:

> The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws. I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.

Id.

139. *Id.* at 2542.

140. *Id.* at 2766. Howard reasoned as follows:

> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction

stated that the Amendment:

> 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, and to all persons who may happen to be within their jurisdiction. It 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. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.[141]

Along the same lines, Senator Howe observed:

> [I]t is known to the wide world now that but for the authority which has been exerted on the part of the United States most of these communities which now seek the right to participate in our legislation would have denied to a large portion of their respective populations the plainest and most necessary rights of citizenship.[142]

Members of Congress repeatedly declared that the Amendment was also necessary to address a more specific problem: ensuring the constitutionality of the Civil Rights Act. For example, Representative Raymond concluded that the

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> contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Id. at 2765.

141. *Id.* at 2766.

142. CONG. GLOBE, 39th Cong., 1st Sess. app. 219 (1866). Howe asked:

> Do you find in any of these communities seeking to participate in the legislation of the United States an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws? Yes, Mr. President, I am sorry to say, we do find just such an appetite, and it is necessary to amend your Constitution in this year of our Lord in order to prevent the gratification of that diseased appetite.

Id. Howe specified certain of the fundamental rights to be guaranteed:

> The right to hold land when they had bought it and paid for it would have been denied them; the right to collect their wages by the processes of the law when they had earned their wages; the right to appear in the courts as suitors for any wrong done them or any right denied them; the right to give testimony in any court, even when the facts might be within their knowledge—all these rights would have been denied in most if not all of these communities but for the fact, for which I have once before rendered and now again render thanks to the President of the United States, that he sat his face against these provisions or most of them, and said he would not tolerate them nor allow them to be sanctioned in any one of these communities.

Id.

Amendment would allow Congress to secure to citizens "the enjoyment of certain rights" enumerated in the Act:

> [T]he civil rights bill . . . contained a provision by which the Government of the United States undertook to secure to them and to all other citizens the enjoyment of certain rights, and to provide for their violation certain remedies within State jurisdiction, where it seemed to me Congress under the existing Constitution had not the right so to act. . . . But now it comes before us in the form of an amendment to the Constitution, which proposes to give Congress the power to attain this precise result. I shall vote for that amendment cheerfully, because I think Congress should have that power.[143]

Similarly, Representative Finck commented regarding the proposed Section One "that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional."[144] Finally, Senator Howard stated that the

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143. *Id.* at 2512-13. Raymond had doubted the constitutionality of the Civil Rights Act:

> I did not vote for the bill when it was first passed, and when it came back to us from the President with his objections I voted against it. And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it.

Id. at 2502.

144. *Id.* at 2461. *Cf. id.* at 2467 (statement of Rep. Boyer) ("The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race."). Senator Doolittle also indicated that the likely purpose behind the Amendment was to ensure the constitutionality of the Civil Rights Act:

> As I understand, a member from Ohio, Mr. Bingham, who in a very able speech in the House maintained that the civil rights bill was without any authority in the Constitution, brought forward a proposition in the House of Representatives to amend the Constitution so as to enable Congress to declare the civil rights of all persons, and that constitutional amendment, Mr. Bingham being himself one of the committee of fifteen, was referred by the House to that committee, and from the committee it has been reported. I say I have a right to infer that it was because Mr. Bingham and others of the House of Representatives and other persons upon the committee had doubts, at least, as to the constitutionality of the civil rights bill that this proposition to amend the Constitution now appears to give it validity and force. It is not an imputation upon any one.

Id. at 2896. Other members of Congress, however, did not believe that the Amendment was proposed in order to ensure the constitutionality of the bill. For example, Senator Fessenden expressed the following view:

> [W]hatever may have been Mr. Bingham's motives in bringing it forward, he brought it forward some time before the civil rights bill was considered at all and had it referred to the committee, and it was

Civil Rights Bill had been designed to guarantee certain fundamental rights that were already embodied in the Constitution and that the Amendment would merely remove controversy surrounding the bill:

> [Congress] desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen . . . who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.[145]

As Senator Howard's comments suggest, members of Congress also indicated that they wanted to ensure that the guarantees of the Civil Rights Act would not be repealed by a future Congress. Representative Garfield stated, for example:

> [W]e propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.[146]

Representative Spalding agreed: "I insist that something of this sort should go into the Constitution, where it shall require not only the action of the Senate and the House of Representatives,

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> discussed in the committee long before the civil rights bill was passed. . . . [D]uring all the discussion in the committee that I heard nothing was ever said about the civil rights bill in connection with that. It was placed on entirely different grounds.

Id. Senator Henderson similarly stated his view that Congress had the power to pass the bill without any Amendment to the Constitution:

> Whatever may be said against these measures [the Civil Rights Bill and Freedmen's Bureau Bill], and much has been said, their sole object was to break down in the seceded States the system of oppression to which I have alluded. Their only effect was, after feeding the starving white and black, to give the right to hold real and personal estate to the negro, to enable him to sue and be sued in courts, to let him be confronted by his witnesses, to have the process of the courts for his protection, and to enjoy in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself. It was simply to carry out that provision of the Constitution which confers upon the citizens of each State the privileges and immunities of citizens in the several States. These measures did not pretend to confer upon the negro the suffrage. . . .
>
> The President saw fit to veto these measures, supposing them to be unconstitutional. I never doubted the power of Congress to pass them.

Id. at 3034-35.

145. *Id.* at 2896.

146. *Id.* at 2462.

but the action of the State Legislatures to erase it."[147] Similarly, Representative Eliot stated:

> I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.[148]

And Representative Broomall commented that the Amendment would provide a measure of insurance: "[i]f we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people."[149]

Congress also added language to Section One declaring individuals born in the United States to be citizens. This was particularly important given the dispute over citizenship that had arisen in the context of the Civil Rights Act. For example, Senator Howard observed:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. . . . It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country.[150]

Similarly, Senator Johnson commented:

> Who is a citizen of the United States is an open question. The decision of the courts and the doctrine of the commentators

147. *Id.* at 2509.

148. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

149. *Id.* at 2498. Broomall elaborated:

> We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. . . . It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman from Ohio [Mr. Bingham] may answer this question. He says the act is unconstitutional. Now, I have the highest respect for his opinions as a lawyer, and for his integrity as a man, and while I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.

Id.

150. *Id.* at 2890.

> is, that every man who is a citizen of a State becomes *ipso facto* a citizen of the United States; but there is no definition as to how citizenship can exist in the United States except through the medium of a citizenship in a State. Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision.[151]

In the House, Representative Stevens observed:

> [T]he first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States.[152]

Finally, Senator Henderson stated that in his opinion the section would "leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government."[153] According to Henderson, "the remaining provisions" of the section "merely secure the rights that attach to citizenship in all free governments."[154]

Much as they had during debate over the Civil Rights Bill, members of Congress pointed to the Privileges and Immunities

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151. *Id.* at 2893.

152. *Id.* at 3148.

153. *Id.* at 3031.

154. *Id.* Representative Defrees similarly argued that the section was unexceptionable:

> Section one indisputably fixes the character of those who are entitled to be regarded as citizens of the United States or citizens of the several States . . . and places all persons upon an equality, regardless of their condition or color, so far as equal protection of the law is concerned. Certainly none can take exceptions to the provisions of this section.

Id. at app. 227. Senator Davis also pointed to the general principles governing citizenship:

> The real and only object of the first provision of this section, which the Senate has added to it, is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. Except for the negro there is no occasion for it, as all persons of every other race born in the United States, and subject to their jurisdiction, by the operation and effect of the Constitution are citizens. This principle has never been controverted.

Id. at app. 240.

Clause of Article IV as an important source for determining the nature of the rights guaranteed under the proposed amendment. For example, Senator Poland concluded:

> The clause of the first proposed amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[155]

Similarly, Senator Howard, in introducing the proposed amendment, cited the Article IV clause as a source for understanding the terms "privileges" and "immunities" as used in the Amendment, and he quoted at length from Justice Washington's discussion of the clause in *Corfield v. Coryell.*[156]

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155. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866). Poland reasoned:

> [T]he radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter....
>
> ...
>
> It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States . . . .

Id.

156. *See id.* at 2765 (quoting Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)). Senator Howard stated:

> With a view to prevent... confusion and disorder, and to put the citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States.

CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Howard identified the guarantees of personal rights in the first eight amendments to the Constitution as "privileges" of citizens as well:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the

Senator Davis even went so far as to say that the new Privileges or Immunities Clause was "unnecessary, because that matter is provided for in Article four, section two of the Constitution."[157]

The concerns about invading the States' power to regulate their citizens' fundamental rights reemerged again in debate over the Amendment. Opponents of the Amendment declared that such a measure impermissibly increased federal power at the expense of the States. Representative Rogers put matters starkly:

> [T]he first section of this programme of disunion is the most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.[158]

Such claims were rejected, however. Representative Bingham, for example, responded as follows:

> [The] amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.[159]

In addition to making clear that the States' power of

> consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

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

157. CONG. GLOBE, 39th Cong., 1st Sess. app. 240 (1866). Davis added:

> It is also unnecessary, because every State constitution contains such a provision, and the rights which it is intended to secure are regarded by all as a most important portion of American liberty, and there is no danger of the removal of the defenses which the States have thrown around them.

Id.

158. *Id.* at 2538.

159. *Id.* at 2542.

regulation would not be abridged under the Amendment, members of Congress outlined other limitations on its scope. For example, they repeated their intent to guarantee only civil rights—not political rights. While some opponents claimed that the Amendment would extend to convey political rights such as the right to vote,[160] such contentions were quickly refuted. Senator Howard explained that political rights such as the right to vote stemmed from "positive local law" and were not as such "fundamental rights lying at the basis of all society."[161] Senator Henderson similarly stated that the right to hold office was "conventional" as distinct from the "absolute or inalienable rights" of life, liberty and property.[162]

While certain themes that had been part of the debate over the Civil Rights Bill were echoed in the context of the proposed amendment, debate was limited. The lack of debate over

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160. *See, e.g., id.* at 2538 (statement of Rep. Rogers) ("Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. . . . The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege.").

161. *Id.* at 2766. Senator Howard elaborated as follows:

> The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.

Id. Elsewhere he stated:

> We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States.

Id. at 3039. *See also id.* at 2542 (statement of Rep. Bingham) ("To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.").

162. CONG. GLOBE, 39th Cong., 1st Sess. 3036 (1866). Henderson offered this reasoning:

> And again, punishment means to take away life, liberty, or property. These are absolute or inalienable rights. To take them away is an injury to the person. It is what we call punishment. They ought never to be taken away without due process of law. Office is the creature of Government. It is true it may be called a right. The right is not absolute but conventional. The Government created it and the Government can take it away.

Id.

Section One may not be due to any perceived lack of importance. Rather, the lack of debate may be due in part to the shared background and understanding of the provisions in Section One as being rooted in widely-accepted principles concerning the fundamental rights that citizens were entitled to exercise in all free governments. The switch in the votes in the Joint Committee similarly may be due to shared understandings concerning the language's pedigree. Far from being the result of a political compromise or the work of a sloppy draftsman, Section One may in reality exhibit a structure firmly rooted in theories of political government that were well known to members of Congress and those responsible for ratifying Section One. In particular, the ideas and structure reflected in that section may be traceable to the well-known works of John Locke.[163]

II. LOCKE'S MODEL OF THE STATE

Locke's influential model of the state posited that society was based upon a theoretical compact among its members who, before entering into such a compact, existed in a hypothetical state of nature.[164] According to Locke, it was necessary to begin

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163. A second possibility is that there indeed was considerable debate over the meaning of Section One, but that debate may have occurred primarily within committee and was not preserved or memorialized for the benefit of future generations. A third possibility is that debate was memorialized but in sources that have not yet been analyzed extensively by historians, such as newspapers and journals of the time, the personal papers of the participants in the debates, and the debates in the States over ratification of the proposed Amendment.

164. According to Locke:

> Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*. The only way whereby any one devests himself of his Natural Liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330-31 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke similarly stated:

> And thus every Man, by consenting with others to make One Body Politick under One Government, puts himself under an Obligation to every One of that Society, to submit to the determination of the *majority*, and to be concluded by it; or else this *original Compact*, whereby he with others incorporates into *One Society*, would signifie nothing, and be no Compact, if he be left free, and under no other ties, than he was in before in the State of Nature.

Id. at 332.

with an analysis of the state of nature in order to understand the nature of political society:

> To understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.[165]

Thus, in the state of nature there was an equality among all men because each was free to act as he saw fit. Nonetheless, men were still "governed" in the state of nature by certain principles of natural law because "[t]he *State of Nature* has a Law of Nature to govern it, which obliges every one."[166]

Locke attempted to explain the progression of man from the state of nature to the state of society under which individuals established a government to promulgate rules by which they would live. He observed that in the state of nature, although individuals exercised "Dominion and Controul" over their own actions, which would be surrendered by entering into a compact and subjecting themselves to some external force, the surrender was worthwhile given the superior protection of property afforded in a state of society:

> [T]he Enjoyment of [such Dominion and Controul] is very uncertain, and constantly exposed to the Invasion of others. . . . The enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit this Condition, which however free, is full of fears and continual dangers.[167]

Locke used the term "property" in a particularly broad sense that may be somewhat unnatural to modern readers. By property, he meant individuals' "Lives, Liberties and Estates,"[168] which were vulnerable in a state of nature where

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165. *Id.* at 269.

166. *Id.* at 271.

167. *Id.* at 350; *see also id.* at 282 ("To avoid this State of War (wherein there is no appeal but to Heaven, and wherein every the least difference is apt to end, where there is no Authority to decide between the Contenders) is One great *reason of Mens putting themselves into Society,* and quitting the State of Nature.").

168. *Id.* at 350. Blackstone made a similar distinction in his *Commentaries. See* 1 WILLIAM BLACKSTONE, COMMENTARIES *122 ("[T]he rights of the people of England . . . may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property . .

the power of one individual might be freely exercised to infringe upon the rights of another.

Accordingly, individuals agreed to surrender certain powers to a central authority in exchange for a greater degree of protection for their lives, liberties and property. In particular, Locke observed that individuals surrendered the power of self-preservation "to be regulated by Laws made by the Society," which acted to confine the liberty they could exercise in the state of nature only so far as "the rest of that Society shall require . . . ."[169] Moreover, individuals surrendered completely the "*[p]ower of punishing* . . . to assist the Executive Power of the Society, as the Law thereof shall require."[170] Thus, in exchange for greater protection in the state of society, individuals gave up some portion of their natural liberty and agreed to subject themselves to those regulations society chose to apply to all members in general. Locke expressly contrasted this state of men in society with that of slaves, who are "not capable of any property, are subject to the absolute dominion and arbitrary power of their masters [and] . . . cannot in that state be considered as any part of civil society, the chief end whereof is the preservation of property."[171]

. .").

169. LOCKE, *supra* note 164, at 352.

170. *Id.* at 353.

171. *Id.* at 322-23. *See generally* Smith, *supra* note 5. Similar discussion occasionally occurred in Congress before ratification of the Fourteenth Amendment and passage of the Civil Rights Bill. For example, during a Senate debate in 1850, Senator Winthrop read into the record a portion of *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144 (1838), to illuminate the distinctions found in Roman law between citizens and free men—a distinction in status intermediate between slavery and full citizenship. *See* CONG. GLOBE, 31st Cong., 1st Sess. app. 1655 (1850).

Such considerations were in the forefront of the congressional debate over protecting recently-emancipated former slaves. Representative Hale, for example, in debates over the Fourteenth Amendment noted the inconsistency of Bill of Rights protections with the existence of slavery:

> [T]he gentleman says there is, and there has been from first to last, a violation of the provisions of this bill of rights by the very existence of slavery itself; that the institution of slavery itself has existed in defiance of the provisions of the bill of rights; that all the anomalies and all the enormities that have grown out of that institution have been equally in violation of it. I concede there is much force in that reasoning. Slavery was an anomaly under the Constitution; under the strict language of the Constitution I cannot see how it ever could have been claimed to exist. But nobody doubts that it did exist; that it existed when the Constitution was made; that the Constitution was made with knowledge of its existence, in full contemplation of it. And the most marked evidence of the full weight and appreciation given to that subject by the framers of

Despite the transition that occurred through formation of the social compact, Locke insisted that natural law remained binding on those exercising governmental power:

> [T]he Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others. The *Rules* that they make for other Mens Actions, must, as well as their own and other Mens Actions, be comformable to the Law of Nature, i.e. to the Will of God, of which that is a Declaration, and the *fundamental Law of Nature* being *the preservation of Mankind,* no Humane Sanction can be good, or valid against it.[172]

Thus, certain concepts arising during the debates over the Fourteenth Amendment can be found in Locke's writings. At the outset, the contrast drawn by Locke between slaves and men as they existed in society mirrors the contrast between the newly-freed slaves and the rest of society that was the focus of the debates. Similarly, the recognition of certain fundamental rights associated with citizenship is found in both Locke and in the debates. Naturally arising from the description of such rights is a distinction between the fundamental rights of citizenship and purely political rights—rights of participation in the government. Such a distinction was prominent in the debates over the Amendment. Finally, the recognition of the government's role in regulating the exercise of the fundamental rights of citizenship is found in both Locke and in the congressional debates.

III. SECTION ONE OF THE FOURTEENTH AMENDMENT

Given such parallels, applying Locke's model of the state in interpreting Section One of the Fourteenth Amendment may lead to new insights. According to Locke, the state of nature out of which commonwealths emerged was characterized by three essential "defects" or "imperfections:" (1) the absence of a known and established standard of right and wrong; (2) the lack of a known and indifferent judge; and (3) the absence of power to back and support judgments and give them due

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> the Constitution is the great care with which they dissevered the national Government from all connection with the institution of slavery, except in the two or three instances where they were forced into it, and then they only mentioned it by a circumlocution.

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

172. LOCKE, *supra* note 164, at 358.

execution.[173] In examining the three clauses of Section One, we find that they closely track this division. The three provisions enacted in Section One are essentially remedies to these defects found in the state of nature. First, the Privileges or Immunities Clause provides certain substantive guarantees to citizens entering into a compact to form society, thereby establishing a known standard of right and wrong. Second, the Due Process Clause ensures the adjudication of disputes through a known and indifferent judge. Finally, the Equal Protection Clause arguably constitutes a guarantee that such judgments will be given due execution backed by the power of the State.[174]

Drafters and ratifiers schooled in Locke's theories would find the language of Section One familiar and natural. Section One tracks exactly in order the three defects identified by Locke. For each of these three defects it provides a remedy and guarantee at a high level of generality so that every citizen may be assured that the bargain entered into under the social compact is honored by the States. The well-established pedigree of this formulation in the theories of writers such as Locke may explain the sparseness of debate over the language found in Section One. Little debate would be necessary where the drafters shared a common background and understanding of the underpinnings of the text.

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173. *Id.* at 351.

174. This division does not necessarily track the separation of powers in the three branches of government. *See, e.g.*, PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 1, at 119 ("As a *textual* matter—that is, reading the words of the text in the sense in which we would likely use them—the privileges or immunities clause is a limitation both on *legislation* and on *administration* . . . ."); *id.* at 120 ("As a *contextual* matter, the equal protection clause was meant to prohibit principally racially discriminatory administration . . . . It is possible, too, that the equal protection clause was meant to govern discriminatory legislation as well as discriminatory administration."); *id.* at 121 ("As a *textual* matter, the due process clause is a limitation on *adjudication* . . . . The clause also speaks to the legislative branch of state government to the extent the legislature wants to prescribe rules for the investigation, prosecution, or adjudication of cases.").

A. Privileges and Immunities

> *[I]n the state of Nature . . . [t]here wants an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them.*
>
> —John Locke[175]

> *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.*
>
> —U.S. Constitution, Amend. XIV, § 1

In describing the state of nature, Locke observed that "[t]he great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, is *the Preservation of their Property*."[176] The three defects in the state of nature precluded the preservation of property, driving men into agreements with each other to remedy the defects by forming societies in which property might be protected. The first of these defects identified by Locke was the lack of a "Standard of Right and Wrong"—in other words, settled rules existing prior to disputes concerning property rights that might be used to govern the outcome. Locke clearly identified these principles as being associated with the law of nature, noting that they were "plain and intelligible to all rational Creatures."[177] Yet, in the state of nature, while individuals might recognize such precepts, they would not "allow of it as a Law binding to them in the application of it to their particular Cases" if it might disadvantage them.[178] This defect existed in the state of nature because each individual was in effect "Judge and Executioner of the Law of Nature" and would not be impartial in his own case.[179]

The defect, however, was remedied when individuals in a state of nature came together to form a social compact.[180] At

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175. LOCKE, *supra* note 164, at 351.
176. *Id.* at 350-51.
177. *Id.* at 351.
178. *Id.*
179. *Id.*
180. Members of Congress at the time had described the Constitution as such a compact. Representative Wood, for example, stated:

> It must be taken as conceded that the Constitution is a compact and a covenant. . . . The States and the people of those States in their sovereign capacity are the parties, and must be held answerable for any breach of

this time, the members of society—its citizens—became entitled to exercise certain fundamental rights. These fundamental rights of citizens belonged only to those who agreed to this social compact. Consequently, non-citizens would not be entitled to exercise such rights. This principle arguably explains the limitation of the Privileges or Immunities Clause to "citizens" of the United States. Non-citizens would not be parties to the social compact, and thus would not be entitled to exercise the privileges and immunities of citizens.

As numerous commentators have observed, during the period in which the Fourteenth Amendment was ratified, this distinction between the rights of citizens and those of non-citizens was a well-established aspect of American law. Citizens typically possessed rights greater than those afforded aliens.[181] Thus, it is not surprising that Section One reserved the guarantee of "privileges" and "immunities" to citizens specifically, since only citizens were parties to the social compact from which such fundamental rights flowed.

Along the same lines, this interpretation explains the common belief at the time of ratification that political rights such as the right to vote were not guaranteed under Section One.[182] Political rights—rights of participation in the functions

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> good faith in not observing the terms of the contract, or in attempting to change them in any particular which destroys or alters essential and material portions.

CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864). *See also* CONG. GLOBE, 38th Cong., 2d Sess. 155 (1865) (statement of Rep. Davis) ("[T]hose who framed the Constitution entered into a solemn compact and covenant.").

181. *See* NELSON, *supra* note 1, at 52 ("All persons, both aliens and citizens, possessed certain basic rights, including the rights to bodily integrity, to protection of reputation, and to enjoyment of the fruits of their labor. Citizens, however, possessed additional rights. Political rights, such as the right to vote and hold office, were the most important of these, but they were not the only added rights: citizens also possessed the right to serve on juries, the right to serve in the militia, the right to obtain a passport, and in some states the right to own real property."). *But see* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 1, at 122 ("As a *textual* matter, there is an interesting difference between, on the same side, the privileges or immunities clause and, on the other, the equal protection clause and the due process clause: Whereas the latter two clauses speak of 'persons', the former clause speaks of 'citizens'—'citizens of the United States'. . . . But the language of the clause does not preclude the possibility that the clause was not meant to be limited *to* citizens.").

182. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) ("[T]he first section of the proposed amendment does not give . . . the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured."); BERGER, *supra* note 3, at 86 ("Commentators are widely agreed that suffrage was excluded from the reach of the Fourteenth Amendment."); NELSON, *supra* note 1, at 125-26 ("The statement most frequently

of government, such as the right to vote—could exist only *after* the establishment of the government. The right to vote, for example, was described by Senator Cowan as "purely conventional."[183] Senator Willey similarly observed that is was not a "natural" or "original" right:

> The right of suffrage, as I understand it, is not a natural right, or, to speak more correctly, it is not an original right. It does not necessarily belong to every member of the community alike. . . . . This right is not universal anywhere upon the face of the earth; it is not universal anywhere in the United States.[184]

And Representative Wilson concurred:

> I do not claim that the right of suffrage is a natural right to which every person subject to human government is entitled. It is not a natural right, for where natural rights alone obtain there is no right of suffrage. But this state of things can only exist in the absence of properly adjusted civil government. The right of suffrage is a political right, and is

made in debates on the Fourteenth Amendment is that it did not, in and of itself, confer upon blacks or anyone else the right to vote. . . . Some congressmen did assert that the Fourteenth Amendment affected only civil and not political rights, of which the right to vote was one. For them suffrage was merely 'a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government.'"); PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 1, at 141 ("Because the folks who gave us the Fourteenth Amendment did not believe that the right to vote, much less the right to appear on a ballot, was a privilege, a freedom, of a person simply qua citizen—women who were citizens could not vote—they did not think that the privileges or immunities clause protected the right."). *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 383 (1866) (statement of Rep. Farnsworth) ("Mr. Speaker, it is said, and I suppose said truly—and it is a disgrace that we are obliged to admit it—that a constitutional amendment declaring that no State shall debar any portion of its citizens from the exercise of the elective franchise on account of color or race could not now receive the assent of the Legislatures of three fourths of the States of this Union. I fear that this is true."); *id.* at app. 95 (statement of Sen. Williams) ("All the impassioned declamation and all the vehement assertions of the honorable Senator do not change or affect the evidence before our eyes that the people of these United States are not prepared to surrender to Congress the absolute right to determine as to the qualifications of voters in the respective States, or to adopt the proposition that all persons, without distinction of race or color, shall enjoy political rights and privileges equal to those now possessed by the white people of the country.").

183. CONG. GLOBE, 38th Cong., 1st Sess. 2140 (1864). Cowan elaborated: "[I]t is seen even here, where the right of suffrage is more nearly universal than anywhere else, it is confined to a comparatively small class of the citizens, and it turns out to be a delegated instead of a natural right, and is purely conventional." *Id.*

184. *Id.* at 2141.

> the attendant of civil government.[185]

Thus, rights of political participation could not be "privileges" or "immunities" of citizens, which were conceived of as existing anterior to the establishment of the government.[186] This conceptualization similarly appeared in numerous cases under the Privileges and Immunities Clause of Article IV prior to ratification of the Fourteenth Amendment.[187]

Moreover, the substantive guarantee against "abridgment" of the privileges and immunities of citizens is also consistent with this interpretation. Since citizens' entitlement to exercise fundamental rights flowing from the social compact was conceived of as existing anterior to the establishment of

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185. CONG. GLOBE, 39th Cong., 1st Sess. 173 (1866). *But see id.* app. 58 (1866) (statement of Rep. Julian) ("What we want, what the nation needs for its own salvation, is a constitutional amendment, or a law of Congress, which shall *guaranty* the ballot to the freedman of the South. This is not simply his equal political right as a citizen, but his natural right as a man. As I have argued on another occasion, a voice in the Government which deals with property, liberty, and life, is not a 'privilege,' but a *right*, and as natural, as indefeasible as the right to life itself.").

186. *See supra* notes 47-49 and accompanying text.

187. *See generally* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV Section 2: Precursor of Section One of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997). Some early statements by courts and congressmen indicated, however, that political rights were also covered by the clause. Justice Washington in *Corfield v. Coryell* listed the right to vote as one of the "privileges and immunities" under Article IV. 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). Representative Rogers built on this foundation:

> I defy any man upon the other side of the House to name to me any right of the citizen which is not included in the words "life, liberty, property, privileges, and immunities," unless it should be the right of suffrage; and that has been decided by the circuit court of the United States in Corfield vs. Coryell . . . to be included in the words "privileges and immunities;" that "privileges and immunities" are so broad as even to include the right of suffrage.

CONG. GLOBE, 39th Cong., 1st Sess. app. 135 (1866). *But see* CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham) ("Between myself and gentlemen there is a perfect agreement in this, that the several States may determine who, amongst the citizens of the United States resident within their respective limits, may exercise the elective franchise."); CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (statement of Rep. Bingham) ("I say that he would be a very bold man who, at this time, would venture to aver that nobody is a citizen of the United States who has not the right to vote. I say further, there never has been a time since the existence of this Republic, when a majority of the citizens of the United States had the right to vote."); *id.* at app. 156 (statement of Rep. Bingham) ("[P]olitical privileges, among which is the privilege of the elective franchise, belong exclusively and necessarily, under every form of government beneath the sun where it is exercised, to the acting majority, and whenever it accords with the popular sentiment and will, and not before, they may be extended to either black citizens of the United States or any other class of citizens of the United States now excluded from the elective franchise.").

government, the subsequently established government was not free to abridge citizens' rights. Rather, government could only prescribe the mode or manner in which such fundamental rights could be exercised. Thus, use of the term "abridgment" and its connotation of a substantive guarantee is consistent with Locke's social compact theory.

Nonetheless, an equality-based or nondiscrimination guarantee also flows from the textual language.[188] As many commentators have recognized, a substantive guarantee of absolute rights implies an equality of rights because all citizens enjoy the same substantive guarantee. As I have argued elsewhere, however, an equality-based guarantee concerning regulation also flows from the text. One of the privileges and immunities of citizens was understood to be a guarantee of equality in regulation of the fundamental rights of citizens. While this equality was not understood to be absolute, and would take into account, for example, differences in regulation based on age, there was an understanding that there would be some form of equality in regulation. Thus, both a substantive and equality-based or nondiscrimination guarantee concerning the fundamental rights of citizens, and an equality-based but not a substantive guarantee concerning the regulations governing the mode and manner of exercise of these fundamental rights can consistently flow from the text.[189] Some commentators, while recognizing the historical evidence supporting both a substantive and equality-based guarantee, have nonetheless concluded that it is impossible to determine which reading of the text was intended.[190] The interpretation

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188. Students of the history of the Amendment have observed that there is support for both substantive and equality-based aspects of the Amendment in contemporaneous statements by its drafters. For example, Professor Nelson observed in his comprehensive review of the history of the Amendment:

> The Fourteenth Amendment thus had at least two possible meanings as it emerged from the congressional and state ratification debates. It could be read as guaranteeing either equal rights or absolute rights. Although there was an interpretation of the second approach that, in effect, conflated it with the first, that interpretation had not been advanced by the amendment's proponents with enough frequency for the courts to be confident of its soundness. As a result, the amendment first came into the courts with more than one possible meaning.

NELSON, *supra* note 1, at 151.

189. *See generally* Smith, *supra* note 5.

190. Professor Nelson, for example, ultimately concluded:

> Only one historical conclusion can therefore be drawn: namely, that

offered here, however, shows that both aspects were intended (to some extent), a conclusion that flows from the constitutional text. Yet, the practical import of this interpretation admittedly places greater emphasis on the equality-based guarantee because the substantive guarantee would only come into play where there was a complete deprivation of a fundamental right.

Finally, having established the nature of the protection afforded under the clause, one must determine its scope. In order to determine what constitute the "privileges" and "immunities" referenced in Section One, one must resort to the legal texts and judicial opinions of the day enumerating the fundamental rights thought to be inherent in the concept of citizenship—those rights existing anterior to the existence of government that flowed from the social compact established among the citizenry.[191] Elsewhere, I have attempted to outline certain of these rights.[192] The most widely-cited enumeration of such rights at the time of the Fourteenth Amendment's adoption, however, appeared in Justice Bushrod Washington's opinion in *Corfield v. Coryell*.[193] Justice Washington listed the right to hold property and the right to enforce one's legal rights in the courts as among the fundamental rights guaranteed under the Privileges and Immunities Clause of Article IV.[194] These sorts of rights fit the model described by members of Congress because they were prototypical capacities of citizenship conceived of as existing anterior to the establishment of government. Indeed, many commentators have pointed to Senator Howard's recitation of *Corfield* in

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> Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well. Historical analysis of the framing and ratification of the Fourteenth Amendment cannot, by itself, resolve the dilemma created by the conflicting commitments of those who participated in the process. Judges and lawyers wishing to be guided only by the original intention cannot know whether to construe the amendment as a guarantor of absolute rights.

NELSON, *supra* note 1, at 123.

191. *Cf.* Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICH. L. REV. 525, 532 (1999) (observing that in *United States v. Cruikshank*, 92 U.S. 542 (1875), the Supreme Court "strongly reaffirmed the principle that the Fourteenth Amendment prevents states from interfering with pre-existing fundamental rights").

192. *See* Smith, *supra* note 187; Smith, *supra* note 5.

193. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

194. *Id.*

introducing the Fourteenth Amendment as evidence of the opinion's relevance.[195] Senator Trumbull similarly cited *Corfield* in support of the Civil Rights Bill and its enumeration of certain "fundamental" rights of citizenship "set forth in the first section of th[e] bill."[196]

At any rate, an understanding of the clause as being based on such theories points judges in the right direction when confronted with claims invoking the clause. While many

195. *See, e.g.*, NELSON, *supra* note 1, at 123-24 (noting that Howard "did quote extensively from *Corfield v. Coryell*, where Justice Washington had found the enumeration of rights 'tedious,' even though he had proceeded to enumerate some of them"); *see also* BERGER, *supra* note 3, at 31 (arguing that the terms "privileges" and "immunities" were "construed 'confiningly' by Justice Bushrod Washington on circuit, in *Corfield v. Coryell*, as comprising 'fundamental' rights such as freedom of movement, freedom from discriminatory taxes and impositions, ownership of property, access to the courts").

196. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866). Trumbull noted that Justice Washington in *Corfield* included the right to vote as among the fundamental privileges and immunities of citizens cited in Article IV, which the Civil Rights Bill had omitted:

> This judge goes further than the bill under consideration, and he lays it down as his opinion that under this clause of the Constitution, securing to the citizen of each State all privileges and immunities of citizens of the several States of the United States, a person who is a citizen in one State and goes to another is even entitled to the elective franchise; but at all events he is entitled to the great fundamental rights of life, liberty, and the pursuit of happiness, and the right to travel, to go where he pleases. This is a right which belongs to the citizen of each State.
>
> . . . In my judgment, persons of African descent, born in the United States, are as much citizens as white persons who are born in the country. I know that in the slaveholding States a different opinion has obtained. The people of those States have not regarded the colored race as citizens, and on that principle many of their laws making discriminations between the whites and the colored people are based; but it is competent for Congress to declare, under the Constitution of the United States, who are citizens. If there were any question about it, it would be settled by the passage of a law declaring all persons born in the United States to be citizens thereof. That this bill proposes to do. Then they will be entitled to the rights of citizens. And what are they? The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman.

Id. at 475. He continued:

> So sir, I take it that it is competent for Congress to declare these persons to be citizens. They being now free and citizens of the United States, as citizens they are entitled, as I have undertaken to show, to the great fundamental rights belonging to free citizens, and we have a right to protect them in the enjoyment of them.

Id. Trumbull's reliance on *Corfield* as enumerating rights guaranteed under the Civil Rights Bill further supports the bill's important link to the Privileges or Immunities Clause of Section One, as does his conclusion that the rights enumerated in the bill are the fundamental rights of citizens.

commentators have concluded that identifying these fundamental rights is extremely difficult, if not impossible,[197] there are historical materials to which legal scholars and judges may turn in undertaking such a task.[198] When confronted with questions concerning the applicability of the clause, one must analyze the legal sources, including judicial opinions and other recognized authorities (such as works by Locke and other natural law theorists where there is no more directly-applicable source), to determine what specifically were considered "privileges" and "immunities" of citizens, keeping in mind the general meaning attributed to those terms—that "privileges" and "immunities" were those fundamental rights conceived of as existing anterior to the formation of government.

While different conclusions may be drawn by commentators examining the historical record with respect to specific fundamental rights, the historical materials, including the congressional debates and sources referenced in those debates, are consistent with an interpretation of the Privileges or Immunities Clause that views the clause as supplying a remedy to the first defect of the state of nature identified by Locke in his *Second Treatise on Government*. By supplying such a remedy, the framers ensured that all citizens would be guaranteed the fundamental rights thought to be inherent in that status.

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197. *See* NELSON, *supra* note 1, at 123 ("History also fails to provide a definitive answer to another question. If an interpreter, by some means other than recourse to original intention, concludes that section one guarantees fundamental rights absolutely, he must next determine what fundamental rights the section protects. Unfortunately the history of the Fourteenth Amendment's adoption will give him little guidance in identifying these rights."); PERRY, WE THE PEOPLE, *supra* note 1, at 82 (observing that "the inquiry is difficult; indeed, one may fairly wonder whether the inquiry isn't largely futile"); Calabresi, *supra* note 132, at 2275 ("I think Professor Amar's historical research supports [the] conclusion [that some of the clauses of Section One are normatively indeterminate and thus open to quite different interpretations], especially insofar as he concludes that the Privileges or Immunities Clause of the Fourteenth Amendment, as originally understood, protected and still protects unenumerated rights from abridgment by the states.").

198. *Cf.* Akhil Reed Amar, *An(other) Afterword on the Bill of Rights*, 87 GEO. L.J. 2347, 2354 (1999) ("[E]ven the search for 'nontextual' constitutional rights can gain some rigor and constraint by considering legal texts that may be outside the four corners of our Constitution, but are inside the four corners of our democracy and our legal tradition.").

B. Due Process

> *In the State of Nature there wants a known and indifferent Judge, with Authority to determine all differences according to the established Law.*
>
> —John Locke[199]

> *No state shall . . . deprive any person of life, liberty, or property, without due process of law.*
>
> —U.S. Constitution, Amend. XIV, § 1

The second defect in the state of nature identified by Locke is the lack of a known and indifferent judge who may resolve disputes "according to the established Law."[200] This defect arises because individuals are naturally "partial to themselves," do not act in an impartial manner "in their own Cases," and are not particularly concerned with cases that do not involve them.[201]

The Due Process Clause of Section One remedies this second defect by ensuring that individuals are not deprived of their property without "due process of law." That phrase had a long pedigree by the time the Fourteenth Amendment was ratified. Inherent in the phrase was a notion that individuals' rights could not be disturbed other than under established law and after the employment of well-established judicial procedures. Thus, the terminology of the Due Process Clause closely tracks Locke's description of the second defect found in the state of nature.

This interpretation of the Due Process Clause, however, is inconsistent with notions of "substantive due process." The clause was intended to remedy a theoretical defect in the state of nature—established and known procedures that would be employed before individuals' property rights were disturbed. Consequently, this interpretation of the clause is more consistent with the views of those commentators who have concluded that the clause was not intended to have any "substantive" content.[202] Rather, any substantive guarantee of

199. LOCKE, *supra* note 164, at 351.

200. *Id.*

201. *Id.*

202. *See, e.g.*, BERGER, *supra* note 3, at 221 ("Whether one can determine 'precisely' what due process meant, however, is not nearly so important as the fact that one thing quite plainly *it did not mean*, in either 1789 or 1866; it did not

fundamental rights flows from the other provisions of Section One and is limited. As outlined above, for example, the privileges and immunities guarantee is limited to those privileges and immunities deemed "fundamental." It does not extend to political rights, and more generally the underlying theory and historical evidence indicate that it only extends to those capacities of citizenship conceived of as existing anterior to the establishment of government.

The fact that the Due Process Clause applies more generally to all "persons" reinforces this conclusion. Under Locke's theory of government, the fundamental rights of citizenship could only be exercised by those who were parties to the social compact—its citizens. Individuals who were not citizens, such as aliens, might still have certain rights. After all, they likely were parties to other social compacts in their home countries and enjoyed certain rights flowing therefrom. Thus, there may indeed at times be conflicts among the rights of citizens and aliens that would need to be resolved by an impartial and indifferent judge. Accordingly, the Due Process Clause applies more generally to all persons. Nonetheless, aliens were not parties to the social compact and are not addressed under the Privileges or Immunities Clause, which describes a substantive guarantee of fundamental rights flowing from membership in society.

Therefore, Locke's model of the state of nature and its defects once again closely tracks the language of Section One and is consistent with the theory that the section represents a remedy of the defects identified by Locke. The second clause remedies the second defect—the absence of a known and indifferent judge—by guaranteeing due process of law.

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comprehend judicial power to override legislation on substantive or policy grounds."); *id.* at 223 ("Whether due process and 'law of the land' were identical in English law need not detain us; for present purposes it may suffice that both related to *judicial procedures* preliminary to the described forfeitures."); *id.* at 227 ("The lawyers who framed the Fourteenth Amendment undoubtedly were familiar with this association of due process with judicial procedure, and a departure from this all but universal connotation must be based on more than bare conjecture; the rule is that it must be proved.").

C. Equal Protection

> *In the State of Nature there often wants Power to back and support the Sentence when right, and to give it due Execution.*
>
> —John Locke[203]

> *No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.*
>
> —U.S. Constitution, Amend. XIV, § 1

The final defect of the state of nature Locke identified was the inability to enforce judgments and to give them "due execution." This defect existed because there was always the potential ability of those who caused injustice to utilize "force to make good their Injustice."[204] Others would be reluctant to confront such injustice because of the danger associated with such confrontation, which would make such actions "frequently destructive, to those who attempt it."[205]

This third defect in the state of nature was remedied by the third clause of Section One. A number of commentators have argued that the equal protection guarantee was based on natural law concepts[206] or ideas espoused by antislavery writers,[207] and guaranteed a right to "equal" protection by the government.[208] Such a guarantee is fairly consistent with interpreting the clause as embodying an assurance that both citizens' rights and the judgments of the courts would be enforced by the government as stated by Locke. Again, the wider application of the Equal Protection Clause to all persons,

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203. LOCKE, *supra* note 164, at 351.

204. *Id.* at 351.

205. *Id.*

206. *See* CURTIS, *supra* note 3, at 157 ("The concept of equal protection was rooted in Republican ideas about natural law."); BERGER, *supra* note 3, at 202 ("[T]he concept of 'equal protection' had its roots in the Civil Rights Bill and was conceived to be limited to the enumerated rights."); *id.* at 206 ("'Equal protection of the laws' expressed the central object of the framers: to prevent *statutory* discrimination with respect to the rights enumerated in the Civil Rights Act.").

207. *See* NELSON, *supra* note 1, at 18-19 ("According to opponents of slavery, the factor that distinguished slaves from freemen was that slaves were not protected by the law: a slave, for example, could not sue when his master assaulted or otherwise committed a trespass against him. Thus they were convinced that once 'impartial legal protection' was extended to blacks, slavery would disappear.").

208. *See, e.g.*, PERRY, WE THE PEOPLE, *supra* note 1, at 54-55; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1386, 1448-50 (1992) (observing that "[i]t is likely that the clause also governs the content of protective laws").

much like the Due Process Clause, is consistent with the social compact theory found in Locke's writings. While the rights of aliens would be subject to the protection of the government, they would not be entitled to exercise certain fundamental capacities of citizenship flowing from the social compact, which could only be exercised by the members of society—its citizens. Thus, all three of the provisions found in Section One closely track the model described in Locke's *Second Treatise on Government,* which explains many of the unique features of the text as well as widely-held beliefs among members of Congress concerning its meaning.

IV. REGULATION OF FUNDAMENTAL RIGHTS

Not only do Locke's writings provide us with insights concerning the types of rights guaranteed under Section One as well as its structure, but they also give us some insight into the nature of the guarantee afforded under those provisions. As discussed above, the drafters of the Fourteenth Amendment repeatedly stated that they did not intend to supplant the criminal and civil codes of the States.[209] Rather, the States were

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209. Having canvassed the debates over the Amendment, Professor Maltz reaches the following conclusion:

> [O]nly two nominal Republicans—Johnson supporters Edgar Cowan of Pennsylvania and Charles E. Phelps of Maryland—argued that the Joint Committee's tripartite formulation of section One intruded unduly on states' rights. None of the Republicans who had voiced federalism-based concerns regarding Bingham's initial proposal—Conkling, Hale, congressmen Davis and Hotchkiss, and Senator Stewart—expressed similar objections to the committee's version of section one (although Hale would later claim that he had made such objections).

MALTZ, *supra* note 1, at 94. *See also id.* at 157 ("[C]onservative Republicans were even more concerned with maintaining constraints on the scope of federal power generally. They vigorously opposed measures that explicitly provided Congress with sweeping authority over matters that had hitherto been the exclusive province of the state governments or that implicitly suggested that the Constitution was an open-ended grant of power to the federal government to deal with matters that might appear to be of national concern. This opposition forced the alteration of the Civil Rights Act of 1866, section one of the Fourteenth Amendment, and the Fifteenth Amendment."); NELSON, *supra* note 1, at 114 ("Far more troublesome to the Republican proponents of the Fourteenth Amendment was the . . . Democratic claim about its substance: that it would give Congress power to legislate about matters previously reserved to the states and thereby result in a consolidation of power and the destruction of the federal system as Americans had known it. . . . Proponents of the Fourteenth Amendment made it clear that they did not intend such vast power for Congress. Most Republican supporters of the Amendment, like the Democratic opponents, feared centralized power and did not want to see state and local power substantially curtailed."); *id.* at 174-75 ("[T]he constant refrain in the legislative history that section one would

to remain free to regulate the mode or manner in which the fundamental rights of the citizenry could be exercised as long as they did so pursuant to some notion of the common good.[210] As Professor Nelson has observed, "proponents of the Fourteenth Amendment conceded that rights derived from higher law or from the nature of citizenship in a republic were not absolute but were subject to reasonable regulation by

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not undermine state lawmaking power dictated the further conclusion that the section would override only arbitrary or unreasonable state laws; the contrary conclusion—that section one would override reasonable laws—would have given Congress and the federal courts plenary power to supplant the states."); CURTIS, *supra* note 3, at 41 ("Although Republicans rejected the notion that states could invade the fundamental rights of citizens, they still wanted to preserve the states. They did not want the federal government to supplant them altogether or usurp their basic functions."); Calabresi, *supra* note 132, at 2292 (observing that the drafters "did not think they were constitutionalizing a code of criminal procedure that encompassed an exclusionary rule or *Miranda* warnings").

210. Other commentators have observed that the drafters stated clearly that the States' power of regulation would not be infringed by the Amendment. *See, e.g.*, NELSON, *supra* note 1, at 9-10 ("Republican proponents of the amendment agreed with the Democrats about the importance of preserving local autonomy. This agreement rendered it necessary for the Republicans to explain why the Fourteenth Amendment would not deprive the states of their legislative power. The explanation they most commonly offered was that the Amendment did not remove fundamental individual rights from the sphere of state control; states would still retain power to regulate rights or perhaps even to cease recognizing them. The object of the Amendment, in this view, was the limited one of outlawing arbitrary and unreasonable lawmaking on the part of states. Supporters of the Amendment patiently explained that it would have no effect in states, like those in the North, that did not have arbitrary or unreasonable laws."); Calabresi, *supra* note 132, at 2297 ("While the framers of the Fourteenth Amendment meant to protect unenumerated and enumerated rights, they also recognized a broad police power in the states to regulate reasonably for the public health and safety, as even the *Slaughter-House* dissenters acknowledge."); McAffee, *supra* note 1, at 788 ("A central motivation of those who drafted and ratified the Fourteenth Amendment was to combine federal empowerment to protect the civil rights of the freedmen with a structure that did not altogether shift the basic power to regulate these rights away from the states."). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 174 (1866) (statement of Rep. Wilson) ("Civil Governments were not instituted for the purpose of depriving men of their natural rights, but rather for the better protection of these rights. What were natural rights before, now become civil rights, and each possessor of them is entitled to an equal participation in the employment of the means established for their defense, except so far as the good of the whole may require some limitations on this general rule. But whatever limitations be adopted must always be just and impartial."); *id.* at 1293 (statement of Rep. Shellabarger) ("[I]f this section did in fact assume to confer or define or regulate these civil rights which are named . . . then it would . . . be an assumption of the reserved rights of the States . . . . Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall . . . be without distinction based on race.").

For an argument that the text of the Amendment expressly recognizes this power of regulation, see Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 TEXAS REV. L. & POL. 225 (1999).

government, including the states."[211] That is why, for example, Congress rejected the original Bingham proposal in favor of a revised version that was less susceptible to an interpretation that would afford it the power to enact uniform regulations governing citizens' rights of life, liberty and property.[212] Nonetheless, commentators such as Professor Nelson have noted a tension between the "absolute rights" interpretation of the Amendment, under which the Amendment is viewed as providing a substantive guarantee for certain fundamental rights, and the repeated insistence by the Amendment's drafters that it not prescribe regulation of those fundamental rights by the States.[213]

As I have argued elsewhere, this intent to preserve and acknowledge the State governments' inherent powers of regulation is recognized and provided for within the text of Section One. The framers' choice of the terms "privileges" and "immunities," as opposed to the term "rights," which was incorporated into early drafts of Section One, shows an intent to guarantee only those fundamental rights existing anterior to the establishment of government and to make clear that Congress was not free to prescribe any particular mode or manner in which such fundamental rights might be

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211. NELSON, *supra* note 1, at 82. Nelson continues: "This concession became necessary in order to prevent section one of the amendment from being construed to give the federal government plenary jurisdiction over all subjects of law." *Id.* Professor Nelson, however, has also indicated that in his view concepts concerning what constituted "reasonable" regulation were not well-developed at the time:

> The fact is that no one in 1866 was engaging in precise doctrinal analysis of what the concept of reasonableness might mean. Although the dichotomy between interpreting section one as a guarantee of absolute rights subject to reasonable regulation or understanding it merely as a guarantee of equality would soon become central in litigation in both the federal and the state courts, the distinction was only beginning to emerge in 1866.

Id. at 122-23.

212. *See supra* notes 29-39 and accompanying text.

213. *See* NELSON, *supra* note 1, at 150 ("Th[e] absolute rights interpretation involved the Republican proponents of the amendment in a serious difficulty, however, because congressional assumption of plenary legislative jurisdiction over basic rights threatened to deprive state legislatures of their authority over the rights. Republicans protested, of course, that they did not intend the Fourteenth Amendment to have this effect, and a few tried to explain why it would not. They urged that, although section one would prohibit states from impairing the enjoyment of fundamental rights, states would remain free to regulate those rights for the public good in a reasonable fashion.").

exercised.[214] The use of the term "rights" in prior versions of the proposed amendment, which more clearly prohibited unequal regulation, was permissible, whereas inclusion of the term in the final version, which more clearly contained a substantive guarantee in addition to a prohibition against unequal regulation, would be inconsistent with congressional intent. Thus, the shift to the "privileges" and "immunities" terminology is understandable in the context of a shift from an equality-based guarantee to a guarantee that was also substantive in character.

In Locke's writings we find the same concepts. Locke made clear that the government could only exercise its delegated powers in a way that remedied the three defects in the state of nature that he identified. Locke further described this as a limitation under which the government could enact only those measures that advanced the "common good:"

> [T]hough Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of the Society, or *Legislative* constituted by them, *can never be suppos'd to extend farther than the common good;* but is obliged to secure every ones Property by providing against those three defects above-mentioned, that made the State of Nature so unsafe and uneasie.[215]

214. *See generally* Smith, *supra* note 5; Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment,* 47 AM. U. L. REV. 351, 407-17 (1997); Douglas G. Smith, *Reconstruction or Reaffirmation?: Review of "The Bill of Rights: Creation and Reconstruction,"* 8 GEO. MASON L. REV. 167, 186-98 (1999). Other commentators, however, have concluded that the terms "rights," "privileges," and "immunities" were used interchangeably. *See, e.g.,* CURTIS, *supra* note 3, at 64-65 ("Both in his prototype and in his final version of the Fourteenth Amendment, Bingham used the words *privileges* and *immunities* as a shorthand description of fundamental or constitutional rights. Use of the words in this way had a long and distinguished heritage. Blackstone's *Commentaries on the Laws of England,* published in the colonies on the eve of the Revolution, had divided the rights and liberties of Englishmen into those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights. . . . The words *rights, liberties, privileges,* and *immunities,* seem to have been used interchangeably."); *cf.* Curtis, *supra* note 1, at 1096 (observing that "[a]t the time of the Revolution, Americans again seem to have used the words interchangeably").

215. LOCKE, *supra* note 164, at 353.

Moreover, he specifically linked this constraint with the government's role in remedying the defects found in the state of nature:

> [W]hoever has the Legislative or Supream Power of any Common-wealth, is bound to govern by establish'd *standing Laws,* promulgated and known to the People, and not by Extemporary Decrees; by *indifferent* and upright *Judges,* who are to decide Controversies by those Laws; And to imploy the force of the Community at home, *only in the Execution of such Laws,* or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other *end,* but the *Peace, Safety,* and *publick good* of the People.[216]

Thus, the three provisions in Section One, which mirror the three defects identified by Locke and provide remedies for them, must be interpreted consistently with the full theory as espounded by Locke. In sum, the legislature remains free to exercise its governmental powers as long as it does so in a manner that is not inconsistent with those three provisions.

Elsewhere, Locke elaborated upon the natural constraints on the power of the government. In particular, he identified four constraints on governmental power exercised for the "common good:" (1) the government cannot exercise arbitrary power over the lives and fortunes of the people; (2) it must exercise its powers only by promulgated standing laws designed for the good of the people and through known and authorized judges; (3) it cannot take property without the owner's consent; and (4) it cannot transfer the power of making laws to another.[217]

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216. *Id. See also id.* at 357 (observing that government power "is *limited to the publick good* of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects."); *id.* at 284 ("*Freedom of Men under Government,* is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man. As *Freedom of Nature* is to be under no other restraint but the Law of Nature.").

217. *See id.* at 357-63. Some commentators have contended that the terms "arbitrary" and "unreasonable" as applied to legislation are "broad concepts that can mean almost anything." NELSON, *supra* note 1, at 10. Nonetheless, by resorting to contemporaneous historical materials, these terms can be given sufficient content. *See* PERRY, WE THE PEOPLE, *supra* note 1, at 75-76 ("[T]here is ample evidence in the historical record that [the framers of the Fourteenth Amendment] were pervasively concerned about, and meant to forbid, 'arbitrary' as distinct from 'reasonable' exercises by a state of its 'police power.' . . . In particular, Republican proponents of the Fourteenth Amendment explained that although

According to Locke, it was not possible under the law of nature for man to subject himself to such arbitrary power since "a Man, not having the Power of his own Life, *cannot,* by Compact, or his own Consent, *enslave himself* to any One, nor put himself under the Absolute, Arbitrary Power of another. . ."[218]

Finally, this distinction made by Locke and other natural law theorists between fundamental rights and the regulations prescribing the mode or manner in which such fundamental rights were to be exercised was described in even more widely-disseminated materials. One finds, for example, a similar discussion in Blackstone's *Commentaries.* Citing natural law theorists such as Pufendorf and Locke, among others, Blackstone described a distinction between the "natural law" and "municipal law," which consisted of "rule[s] of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[219] Thus, this distinction was disseminated widely among legal texts that were frequently cited by nineteenth-century commentators (and members of Congress) as authoritative.

V. CONCLUSION

This Article has attempted to offer a coherent theory of Section One in light of John Locke's theory of the state. While

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section one was not meant to prevent the states from regulating protected privileges or immunities, states could do so only 'for the public good in a reasonable fashion.'").

218. LOCKE, *supra* note 164, at 284.

219. 1 WILLIAM BLACKSTONE, COMMENTARIES *44. Blackstone also described the "absolute" and "relative" rights of persons that constituted the fundamental rights that ultimately were the subject of Section One of the Amendment: "The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other." *Id.* at *119. However, he described the "relative" rights as existing only after the establishment of states and societies:

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence, it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration.

Id. at *120.

there is little direct evidence to which one can point showing that Locke's ideas, and specifically his views concerning the defects inherent in the state of nature, were a primary source for those drafting the Fourteenth Amendment, many commentators have recognized that such natural law theories were central to legal thought during the nineteenth century and, indeed, important in the thinking of the framers of the Amendment. Moreover, the theory presented here provides coherence to what is sometimes criticized as a poorly-drafted provision that was not much considered before its implementation in our nation's Constitution. In sum, the structure found in Locke's writings is strikingly similar to the structure found in the Amendment. The language of Section One fits readily with an interpretation that views the section as remedying the three defects in the state of nature identified by Locke. Moreover, Locke's theories explain certain unique features of the text as well as certain commonly-held beliefs among members of Congress concerning its meaning. Locke's framework thus provides a potential foundation for interpreting the Fourteenth Amendment. Nonetheless, further study and research can only serve to provide greater insight into the original meaning ascribed to Section One.