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Dobbs v. Jackson Women's Health Organization: Revisiting the Fourteenth Amendment, Due Process of Law, and American Citizenship

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INTRODUCTION

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.
>
> Abraham Lincoln [1]

On March 19, 2018, the State of Mississippi enacted a law prohibiting abortions after fifteen weeks.[2] Doctors performing abortions in violation of the Act shall have their medical license suspended or revoked and may be subject to additional civil fines.[3] Jackson Women's Health Organization and a doctor brought suit the day the law went into effect, claiming Mississippi's law was unconstitutional under the United States Constitution.[4] The United States District Court for the Southern District of Mississippi agreed and granted summary judgment in favor of the plaintiffs.[5] The District Court concluded that the law was unconstitutional under the Supreme Court's 1973 *Roe v. Wade*[6] and 1992 *Planned Parenthood v. Casey* [7] decisions.[8] In those decisions, the Supreme Court of the United States held that states may not ban a woman's right to abortion before viability.[9]

In accordance with *Roe* and *Casey*, the District Court analyzed whether

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1. Abraham Lincoln, President of the United States of America, *First Inaugural Address* (Mar. 4, 1861), *quoted in* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 997 (1992) (Scalia, J., dissenting).

2. *See generally* MISS. CODE. ANN. § 41-41-191. The statute also contained some exceptions not relevant to this discussion, including exemptions for medical emergency or severe abnormality. MISS. CODE. ANN. § 41-41-191(4)(b).

3. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018).

4. *Id.*

5. *Id.* at 543.

6. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

7. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

8. *Currier*, 349 F. Supp. 3d at 542.

9. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 271 (5th Cir. 2019).

> *Casey* "reaffirm[ed]" *Roe*'s "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."
>
> *Id.*

Mississippi's law regulated pre-viability abortions or prohibited them.[10] Viability varies case by case but averages between twenty-three and twenty-four weeks.[11] Therefore, viability is not possible at the fifteen-week mark.[12] Thus, Mississippi's law went beyond permissible regulation and would in fact ban some abortions prior to viability.[13]

On appeal to the United States Court of Appeals for the Fifth Circuit, Mississippi argued that the state's interest in protecting the life of the unborn justified its restrictions.[14] Affirming the District Court, the Fifth Circuit answered that the state's interest in regulating abortion may be considered, but states may not ban pre-viability abortions because it conflicts with the Court's holding that the Constitution protects a woman's right to abortion.[15]

Mississippi appealed the decision to the United States Supreme Court.[16] In *Dobbs v. Jackson Women's Health Organization*, a 6-3 decision, the Court reversed the Fifth Circuit and overturned *Roe* and *Casey.*[17] The Court concluded that the Constitution does not confer a right to abortion and therefore does not prohibit Mississippi from banning abortions.[18]

The *Dobbs* decision has predictably created a whirlwind of controversy far and wide, both in the legal arena and across the states.[19] Due to a leaked initial draft in early May 2022, the *Dobbs* opinion generated enormous controversy before the Court issued the opinion in late June 2022.[20] The Supreme Court went on lockdown with gates blocking access to the Court's premises.[21] The justices were "doxxed" as their home addresses were shared

10. *Currier,* 349 F. Supp. 3d at 539.

11. *Id.* at 539–40.

12. *Id.*

13. *Id.*

14. *Dobbs*, 945 F.3d at 272.

15. *Id.* at 272–73. The Fifth Circuit's opinion was joined by a concurring opinion from Judge James C. Ho criticizing the District Court Judge's conduct in failing to fully adjudicate the matter and disparaging pro-lifers as having an unreasonable basis in defending the legislation. *Id.* at 278 (Ho, J., concurring).

16. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

17. *Id.* at 2242.

18. *Id.*

19. *See* Joseph Clark, *Protesters Take to the Streets Denouncing Dobbs Ruling Overturning Roe,* WASH. TIMES (June 25, 2022), https://www.washingtontimes.com/news/2022/jun/25/protesters-take-street-denounce-supreme-court-dobb/.

20. *See* Ellie Silverman et. al, *Crowds Protest at Supreme Court After Leak of Roe Opinion Draft*, WASH. POST (May 3, 2022, 9:45 PM), https://www.washingtonpost.com/dc-md-va/2022/05/03/protests-roe-v-wade-supreme-court/.

21. *See* Lawrence Hurley*, As Abortion Ruling Nears, U.S. Supreme Court Erects Barricades to the Public*, REUTERS, https://www.reuters.com/legal/government/abortion-ruling-nears-us-supreme-court-erects-barricades-public-2022-06-17/ (last updated June 17, 2022, 10:10 AM).

on social media.[22] For weeks, protestors marched and carried signs in front of the personal residences of the six Republican-appointed justices.[23] An individual with a gun and a plan to kill one of the justices was stopped near the Justice's home.[24] The Court's issuance of the opinion in late June did not halt the protests.[25] Justices were harassed well into the summer.[26]

This article argues in support of *Dobbs* and against the *Roe* and *Casey* precedents.[27] *Roe*'s central holding was that the Constitution prohibits states from banning abortion prior to viability.[28] *Roe* built upon the Court's 1965 *Griswold v. Connecticut* decision, in which the Court held that the Constitution contains a "right to privacy" and that right prohibits states from banning contraception for married couples.[29] *Casey* affirmed *Roe* with some modification.[30]

The Court's abortion precedents cite to the Constitution, but this involves quite a few judicial leaps.[31] The Court's "right to privacy" is not found in the Constitution's text.[32] The Court discovered it in the zones or penumbras of the Bill of Rights.[33] Yet, the Bill of Rights applies only against the federal

22. *See* Jessica L. Hardcastle, *SCOTUS Judges 'Doxxed' After Overturning Roe v Wade*, THE REGISTER (July 13, 2022, 6:28 PM), https://www.theregister.com/2022/07/13/supremes_doxed_post_roe/.

23. One such group is "Ruth Sent Us." Thomas Phippen, *Pro-Choice Activist Group Pushing Protests at Justices' Homes Returns from 'Permanent' TikTok Ban*, FOX NEWS (May 20, 2022, 5:54 PM), https://www.foxnews.com/politics/pro-choice-activist-group-ruth-sent-us-protests-tiktok-permanent-ban.

24. Jessie O'Neill, *Brett Kavanaugh's Accused Would Be Assassin Asked 911 Operator for 'Psychiatric Help',* N.Y. POST (June 11, 2022, 12:14 AM), https://nypost.com/2022/06/11/brett-kavanaughs-accused-would-be-assassin-nicholas-roske-called-police-for-psychiatric-help/. Politics also played a role in deciding whether to enforce laws prohibiting protesting in front of justices' homes. *See* Tyler Olson, *Grassley: DOJ Needs 'Robust Response' to Protests at Justices' Homes after Action on Parents Last Year*, FOX NEWS (May 11, 2022, 5:40 PM), https://www.foxnews.com/politics/grassley-justice-department-garland-protests-justices-homes.

25. *See* Ellie Silverman et al., *Protests Erupt in D.C., Around the Country as Roe v. Wade Falls*, WASH. POST, https://www.washingtonpost.com/dc-md-va/2022/06/24/supreme-court-abortion-protests-roe/ (last updated June 24, 2022, 10:10 PM).

26. A group "Shutdown DC" allegedly pays up to $200 dollars for tips on specified justices' whereabouts. *See* Alex Nitzberg, *Leftists Offer Up $200 Reward for Tips Revealing the Whereabouts of Supreme Court Justices Alito, Thomas, Kavanaugh, Gorsuch, Barrett, and Roberts*, BLAZE MEDIA (July 8, 2022), https://www.theblaze.com/news/payment-tips-supreme-court-justices. Protesters also considered expanding protests and harassment to the justices' children. *See* Arjun Singh, *Pro-Abortion Group 'Ruth Sent Us' Suggests Targeting Amy Coney Barrett's Children*, YAHOO! NEWS (June 10, 2022), https://news.yahoo.com/pro-choice-group-ruth-sent-174411398.html.

27. *See infra* Part VI.

28. *See infra* Part VI.B.

29. Griswold v. Connecticut, 381 U.S. 479 (1965); *see also infra* Part VI.A.

30. *See infra* Part VI.C.

31. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

32. *See infra* Part VI.A.

33. *Id.*

government.[34] Enter the Fourteenth Amendment.[35] The Fourteenth Amendment's text does not incorporate the Bill of Rights against the states.[36] Overlooking the absence of supporting text, the Supreme Court held that the Fourteenth Amendment's "liberty" language within its Due Process Clause incorporates these rights and zones and penumbras thereof as "fundamental guarantees."[37] The Court's vehicle for incorporation is known today as "substantive due process," which usually takes the form of an expanded definition of "liberty" as including a variety of fundamental guarantees.[38] Once the Court deems an issue as one involving a fundamental guarantee, the government must demonstrate that its regulation serves a compelling need and is narrowly tailored to meet that need.[39]

Stacking these cases together in constitutional form, the Supreme Court's 1973 *Roe* decision and 1992 *Casey* decision held that the Fourteenth Amendment and substantive due process prohibit states from banning abortion.[40] *Dobbs* overturned these precedents.[41] To evaluate *Dobbs*, *Roe*, and *Casey*, one must evaluate the Fourteenth Amendment and substantive due process.[42] Neither abortion nor privacy are in the text, so one must look at the historical context. If the Fourteenth Amendment or its Due Process Clause clearly prohibit states from banning abortion or permit the Court discretion to update constitutional norms to account for abortion, this should be abundantly apparent in its foundation. If not, this, too, should be abundantly clear.

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34. *See generally* Barron v. Balt., 32 U.S. (7 Pet.) 243, 247–48 (1833) (holding that amendments made to the United States Constitution apply only to the federal government).

35. The Fourteenth Amendment was one of three post-War Reconstruction amendments. U.S. CONST. amend. XIV. The Thirteenth Amendment abolished slavery and the Fifteenth Amendment secured the right to vote free of race discrimination. U.S. CONST. amends. XIII, XV.

36. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949).

37. *See infra* Parts V, VI.

38. *See infra* Part V (judicial transformation of the Fourteenth Amendment). Perhaps the easiest way to define substantive due process is to distinguish it from procedural due process. The latter states that the Constitution's Due Process Clause requires that certain procedures, namely arrest, detention, and a trial following established norms, take place before the government's deprivation of life, liberty, or property. *See*, *e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). Substantive due process, to the contrary, evaluates the substance or merits of government action, not only for procedure, but also whether the action is arbitrary, illegitimate, or otherwise unreasonable. Reno v. Flores, 507 U.S. 292, 302 (1993).

39. This test is referred to as heightened or strict scrutiny. Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Commc'n Comm'n, 518 U.S. 727, 740–41 (1996). "Rational basis" is the test the Court uses to evaluate a challenged governmental action that does not involve a fundamental right. The legislation must have some rational basis to a legitimate state interest. Fed. Commc'n Comm'n. v. Beach Comm'n, Inc., 508 U.S. 307, 313–14 (1993).

40. Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

41. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

42. *See id.* at 2247; *see also Casey*, 505 U.S. at 846.

Accordingly, I begin the Article by revisiting the background of the Fourteenth Amendment and its defining role in American citizenship.[43] This article examines the Amendment seed and root to illustrate just how wrongly decided the *Roe v. Wade* decision was.[44] Citizens of the states can, of course, have a personal view on abortion and support legislation permitting or banning abortion. One cannot, however, make a good-faith defense of the Supreme Court's decisions taking this from the states and the people on constitutional grounds.

This article brings out a concise history of the capacities and anti-discrimination background of Reconstruction legislation, including the Civil Rights Act (CRA) of 1866 and the Fourteenth Amendment.[45] The goal of Reconstruction was specific: a post-slavery effort designed to bring African Americans into the fold of American citizenship—to enjoy the privileges and immunities of American citizens.[46] The focused effort was to eradicate state-based disabilities and to ensure that freed slaves and free blacks enjoyed the same capacities and anti-discrimination in civil rights or citizenship rights that whites enjoyed.[47] The effort was not to pierce state police powers or local municipal codes on matters not related to state-based race discrimination in civil rights.[48]

As background for the Fourteenth Amendment, Part I recounts the antebellum struggle over the Constitution's commands, abolition, and the infamous *Dred Scott* decision.[49] Part II introduces Reconstruction with an examination of the Thirteenth Amendment and the Civil Rights Act of 1866 in detail.[50] In this part, the article identifies the state-based discrimination facing free blacks and freed slaves and the congressional remedy thereto.[51] Part III discusses the Fourteenth Amendment: its initial draft and revision into adopted form.[52] Part IV examines the Fourteenth Amendment's scope: its "due process of law" and "privileges or immunities" language, and its role as a constitutional basis for securing permanence for civil rights legislation.[53] Part V discusses the judicial transformation of the Fourteenth Amendment into a platform for modern-day jurisprudence.[54] Part VI applies the above

43. *See infra* Part I.
44. *See infra* Part VI.
45. *See infra* Parts II–IV.
46. *Id.*
47. *Id.*
48. *Id.*
49. *See infra* Part I.
50. *See infra* Part II.
51. *Id.*
52. *See infra* Part III.
53. *See infra* Part IV.
54. *See infra* Part V.

survey to *Roe*, *Casey*, and *Dobbs* to illustrate the stark mismatch between the Fourteenth Amendment and judicial regulation of state abortion laws.[55]

I. SLAVERY AND THE PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENS

The Thirteenth and Fourteenth Amendments were an opportunity to reform the Constitution on the issue of slavery. Before examining these changes and the Fourteenth Amendment in detail, we set the stage by briefly outlining the antebellum period and the controversies leading up to the Civil War.

A. The Constitution and the Privileges and Immunities Clause

The United States Constitution was also a product of reform.[56] Before the Framers framed the Constitution, the Articles of Confederation loosely knit the states together.[57] Relevant to this discussion, Article IV of the Articles provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.[58]

The Articles' promises of amity and mutual friendship were insufficient.[59] In the Constitutional Convention, the states came together to form a more perfect union with stronger congressional powers.[60] The

55. *See infra* Part VI.

56. Thomas H. Burrell, *Privileges and Immunities and the Journey from the Articles of Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 WHITTIER L. REV. 199, 238 (2014) [hereinafter Burrell, *Journey*].

57. *Id.* at 229.

58. Articles of Confederation of 1781, art. IV, para. 1.

59. *See* Burrell, *Journey*, *supra* note 56, at 224, 230.

60. *Id.* at 230.

Constitution gave Congress several powers over trade, national defense, and other areas where the individual states were incompetent.[61] Federalists argued in favor of the Constitution.[62] Congress's powers were enumerated; States remained sovereign over other aspects of life, liberty, and property.[63] But Anti-Federalists expressed grave concern that the federal government would become a tyrant through its discretionary powers granted in the Necessary and Proper Clause, among others.[64] Anti-Federalists and several ratifying states demanded a Bill of Rights to reinforce enumeration theory and provide a wall against federal encroachment.[65]

During the Constitutional Convention, the Framers added a vestige of Article IV of the Articles to the Constitution with the Privileges and Immunities Clause: "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[66] The Clause was added as an afterthought and did not receive much attention during the Convention.[67] In the first part of the American Republic, the Clause sat as command without express congressional enforcement.[68] Enumeration was of primal importance and deterred Congress from adding basic national citizenship rights to its naturalization powers or to the Privileges and Immunities Clause.[69]

Lack of congressional enforcement, however, did not prevent the Clause's use.[70] Courts and non-state citizens used the Clause against restrictions favoring state citizens.[71] Courts held that citizens of the states were not aliens in other states and should not suffer common alienage disabilities such as discriminatory taxes or inability to use the court system or to own and inherit land.[72] Beyond this basic set of common citizenship

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61. *See generally* William Hutchinson, Editorial Note, *Vices of the Political System of the United States, in* 9 THE PAPERS OF JAMES MADISON 345 (Hutchinson et al. eds., 1962); Burrell, *Journey*, *supra* note 56, at 235.

62. *See generally* THE FEDERALIST PAPERS (James Madison, Alexander Hamilton, and John Jay).

63. THE FEDERALIST PAPERS No. 45 (James Madison).

64. *See generally* 1 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 39 (1981) (reproducing Anti-Federalists' publications); U.S. CONST. art. I, § 8, cl.18 (Necessary and Proper Clause).

65. *See* Thomas H. Burrell, *The Bill of Rights Before the Civil War: State Sovereignty, Strict Construction, and the Presumption of Constitutionality*, 14 CHARLESTON L. REV. 31, 34–41 (2020) [hereinafter Burrell, *Bill of Rights Before the Civil War*].

66. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 135, 173–74, 187, 443 (1966); Burrell, *Journey*, *supra* note 56 at 239.

67. Most of these concerns went into other areas of the Constitution, for example Article I's Interstate Commerce Clause, U.S. CONST. art I, § 8, cl. 3; Burrell, *Journey*, *supra* note 56, at 238–40.

68. Burrell, *Journey*, *supra* note 56, at 239–40.

69. *Id.* at 241–42.

70. *Id.* at 250–51.

71. *Id.* at 273.

72. Judge Jeremiah T. Chase of the Maryland General Court held that the terms "privileges" and "immunities" include, among other things, the right to own and enjoy property as well as personal rights.

guarantees, states were free to favor state citizenship over non-state citizenship.[73] Early cases converged to characterize the Constitution's Privileges and Immunities Clause as a provision against certain categories of discrimination on a state-by-state basis.[74] For these select categories, a state had to extend the same privileges to citizens of other states that it provided to its citizens.[75]

B. Privileges and Immunities and Fugitive Slaves

The Privileges and Immunities Clause shadowed and occasionally intersected with a much larger problem.[76] The Framers had debated but were unable to put an end to the institution of slavery at the time of the Constitutional Convention.[77] Because slavery was integrated into the southern economy, the southern states would not agree to the Union on terms that threatened the institution.[78] The Convention yielded, and the slavery dispute between the North and South receded only to resurface in major antebellum strife and eventually a civil war.[79]

During the first half of the nineteenth century, the massive weight of race relations tested the Constitution's boundaries and infirmities.[80] For most of the antebellum period, a weak Congress and strong notions of state sovereignty fueled the clashing forces of abolition and slavery.[81] As the nation progressed along its fractures and demographic challenges, escalating race and slavery conflicts challenged federalism reservations preventing Congress from legislating on citizenship rights.[82]

Campbell v. Morris, 3 H. & McH. 535, 554 (Md. Gen. Ct. 1797). In *Ward v. Morris & Nicholson*, then Chief Judge Chase explained:

> The privilege or capacity of taking, holding, conveying, and transmitting lands, lying within any of the United States, is by the general government conferred on, and secured to all the citizens of any of the United States, in the same manner as a citizen of the state where the land lies could take, hold, convey, and transmit the same.

Ward v. Morris & Nicholson, 4 H. & McH. 330, 341 (Md. Gen. Ct. 1799). *See also* Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (explaining in dicta that privileges and immunities include many attributes fundamental to citizenship).

73. Burrell, *Journey*, *supra* note 56, at 266–67.
74. *Id.* at 254–55.
75. *Id.*
76. *See id.* at 277.
77. FARRAND, *supra* note 66, at 364 (addressing the issue of slavery in contest between Constitution and confederation of states).
78. *Id.*
79. *See infra* Part II.
80. *See infra* Parts I.C–D (abolition and *Dred Scott*).
81. *Id.*
82. *Id.*

While Congress's power to act was vigorously debated and kept on a tight leash by enumeration theory, this did not stop the courts and litigants from adjudicating disputes through miscellaneous constitutional provisions.[83] As the years went by, the Privileges and Immunities Clause received more action and bore the weight of interstate harmony, far beyond the commercial anti-discrimination language of the Articles of Confederation.[84]

The malleable Clause became a tool for both sides of the slavery debate.[85] Courts and slaveholder litigants attempted to use the Privileges and Immunities Clause to protect property rights.[86] For example, slaveholders invoked the Clause to challenge northern confiscation and emancipation efforts while owners traveled with slaves through non-slave states.[87] Slaveholders also cited the Clause when attempting to capture fugitive slaves in non-slave states.[88]

Understanding enforcement of Article IV's Privileges and Immunities Clause is aided by examining Article IV's Fugitive Slave Clause.[89] As with the Privileges and Immunities Clause, the Framers did not grant Congress express enforcement power to accompany the Fugitive Slave Clause.[90] Within a few years of the Constitution's ratification, Congress nonetheless

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83. Burrell, *Journey, supra* note 56, at 277.

84. During this era, the Privileges and Immunities Clause was repurposed in divisive disputes concerning the Missouri Compromise and the southern seaman acts. WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 122–25, 132–40, 164–66 (1977); EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY 15–16 (2007); Michael Schoeppner, *Peculiar Quarantines: The Seaman Acts and Regulatory Authority in the Antebellum South*, 31 L. & HIST. REV. 559, 577, 581–82 (2013) (citing an 1824 case involving the Privileges and Immunities Clause and the seaman acts).

85. Burrell, *Journey, supra* note 56, at 277.

86. Groves v. Slaughter, 40 U.S. 449, 515–16 (1841) (Baldwin, J., concurring) (Justice Baldwin argued that the Fifth Amendment and the Privileges and Immunities Clause protect slaveowners' rights from state legislation).

87. Commonwealth v. Aves, 35 Mass. 193, 217 (Mass. 1836) (emancipation of temporary resident's slaves in non-slave state); Wiley v. Parmer, 14 Ala. 627, 631 (Ala. 1848) (state's double tax on nonresidents' slaves, without any justification other than non-residency, violated the Clause); Lemmon v. People, 20 N.Y. 562, 614–15 (N.Y. 1860) (state's emancipation of traveling slaveholders' slaves).

88. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 645–46 (1842) (Wayne, J., concurring) (Fugitive Slave Clause reinforces Privileges and Immunities Clause to protect citizens' property in all the states). The Framers' brief discussion of the Clause in the Convention mentioned protecting slaveholders' rights. FARRAND, *supra* note 66, at 443.

89.

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

90. Burrell, *Journey, supra* note 56, at 277–78.

enforced the Fugitive Slave Clause with the Fugitive Slave Act of 1793.[91]

The growing dispute on fugitive slaves came to a head in *Prigg v. Pennsylvania*.[92] In that case, Pennsylvania indicted Edward Prigg for recapturing and returning a slave to Maryland in violation of Pennsylvania law.[93] Pennsylvania's law prohibiting slave recapture conflicted with the federal Fugitive Slave Act, which parties challenged as unconstitutional.[94] The matter made its way through the courts.[95] The United States Supreme Court struck down the Pennsylvania law due to its conflict with supreme federal law.[96] Comparing the Fugitive Slave Clause with the Privileges and Immunities Clause, the Justices suggested that Congress was able to enforce both constitutional provisions.[97] For Justice Story, Congress was able to enforce constitutional commands because without such enforcement, the right or provision, here the Fugitive Slave Clause, would be empty.[98] This is so even if the Constitution did not expressly enumerate fugitive slave enforcement as a granted power.[99] As Justice Story explained:

> But it has been argued, that [Congress's Fugitive Slave Act] is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore, it is void. Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties, can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore,* [by its own force] however defective may be their operation; nay, even although, in a practical sense, they may become a nullity, from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true

91. Fugitive Slave Act of 1793 ch. 7, 1 Stat. 302; *see also* Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 164 (2004).

92. *See generally Prigg*, 41 U.S. 539 (granting authority to the federal government to regulate slave capture).

93. *Id.*

94. *Id*. at 558.

95. *Id.* at 539.

96. *Id.* at 625–26.

97. *Prigg*, 41 U.S. at 615 (Congress enforces the Fugitive Slave Clause); *id*. at 628–29 (Taney, C.J., concurring) (Taney's concurrence comparing the Fugitive Slave Clause and the Privileges and Immunities Clause); Kaczorowski, *supra* note 91, at 184 n.125.

98. *Prigg*, 41 U.S. at 614.

99. *Id.* at 618–19.

> interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights, and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed, that Congress could, constitutionally, by its legislation, exercise powers, or enact laws, beyond the powers delegated to it by the constitution; but it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.[100]

Chief Justice Taney, Justice Thompson, and Justice Daniel agreed with Justice Story as to congressional enforcement but concluded that states, too, could legislate on the issue—that Congress's powers were not exclusive.[101]

C. Abolitionist Activism

In an opposite manner to slaveholders' use of the Privileges and Immunities Clause, abolitionists, too, invoked the Privileges and Immunities Clause—but here to challenge local restrictions affecting free blacks and slaves in slaveholding states.[102] The Privileges and Immunities Clause was the preferred tool for abolitionist theory because it was one of the few clauses in the Constitution that gave reformers leverage against state law.[103]

In this era, several northern states began to recognize free blacks as citizens of their state, and thus it was argued that they enjoy interstate citizenship rights via the Clause.[104] Comity among the states for free blacks would not do in southern states.[105] As the abolition controversy became more volatile, southern states would not allow free blacks to move about freely or

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100. *Id.* (providing several instances where Congress gave life to constitutional commands).

101. *Id.* at 628–29 (Taney, C.J., concurring); *id.* at 635 (Thompson, J., concurring); *id.* at 652 (Daniel, J., concurring).

102. Whether blacks were citizens of the United States was a contentious issue before the *Dred Scott* decision. LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 49–55 (5th ed. 1961); Pendleton v. State, 6 Ark. 509, 511–12 (1846) (examining question of citizenship and free blacks' eligibility for Privileges and Immunities Clause).

103. *See generally* U.S. CONST. art. I, § 10 (Article I, Section 10 provided a list of restrictions against the states, but those prohibitions were not helpful to abolitionists.).

104. LITWACK, *supra* note 102, at 35, 37–38, 51; HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875 94–95 (1st ed. 1982).

105. WIECEK, *supra* note 84, at 128–29 (Denmark Vesey plot); HYMAN & WIECEK, *supra* note 104 at 79, 91.

advocate for abolition because it directly or indirectly challenged the slave system and promoted insurrection.[106]

But growing national and international commerce presented a challenge to such restrictions.[107] Free blacks from the North and abroad worked aboard merchant ships.[108] When those merchant ships traded in the South, free movement and association of blacks while the ship was at port presented a threat to southern security.[109] Southern states passed "seaman laws" temporarily jailing free blacks when the ship was in port.[110]

Challenging these laws, abolitionists argued that the Privileges and Immunities Clause required that free blacks, as citizens of their home state, should enjoy the privileges and immunities of citizens in the several states.[111] According to this argument, southern states had to bestow upon free blacks the privileges and immunities of citizenship as the white citizens of the respective state enjoy.[112]

Abolitionists also leveraged the Privileges and Immunities Clause as part of a larger constitutional effort to attack slavery. For example, Joel Tiffany, a popular abolitionist, asserted that all persons—including slaves and free blacks—enjoy the privileges and immunities of citizenship in the several states, which includes the Declaration of Independence, the Bill of Rights, and Due Process of Law.[113] The Fifth Amendment's Due Process Clause prohibited depriving persons of liberty but by due process of law.[114] Under this theory, enslavement without judicial process violated due process of law.[115] Accordingly, if a court had not ruled a man a slave, he must go free. States had no right to deprive persons or slaves of their liberty without due

106. WIECEK, *supra* note 84, at 128–29 (Denmark Vesey plot); HYMAN & WIECEK, *supra* note 104 at 79, 91.

107. WIECEK, *supra* note 84, at 132–34.

108. *Id.* at 132.

109. *Id.*

110. *Id.* at 132–40, 173; Schoeppner, *supra* note at 84, at 581–82.

111. WIECEK, *supra* note 84, at 123, 140 (collecting arguments and providing background for effort).

112. In the antebellum period, Northerners called upon Congress to enforce the Privileges and Immunities Clause by legislating against southern seamen acts. *Id.* at 123, 140.

113. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT 93–97 (1849). The U.S. Bill of Rights was designed as a restriction on the federal government in favor of the states. Burrell, *Bill of Rights Before the Civil War, supra* note 65, at 68 (strict construction and the Ninth and Tenth Amendments). Abolitionists, however, were looking to restrain the states as well. WIECEK, *supra* note 84, at 256–75 (radical constitutionalism reinterpreting the Fifth Amendment and the Declaration of Independence).

114. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

115. WIECEK, *supra* note 84, at 18, 189–90 (collecting pamphlets and abolitionists' arguments); Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. OF LEGAL ANALYSIS 165, 177–81 (2011).

process of law.[116] Citing *Prigg*, Tiffany also argued that rights found in the Bill of Rights were guarantees of the Constitution and that all guarantees of the Constitution could be enforced by Congress.[117]

D. The Supreme Court's Dred Scott v. Sandford Decision

One of the final chapters of the antebellum period was an infamous court case on the status of a slave, Dred Scott, who temporarily resided in a free state before returning to a slave state.[118] In the 1830's, Scott had been brought by his owners to Illinois, a free state, and to the Wisconsin Territory, a free territory by the Missouri Compromise.[119] Scott was then taken back to Missouri, a slave state.[120]

Many years later, Scott, with the help of abolitionists, sued for his freedom, arguing that his time in free states and territories made him free and slavery did not reattach upon his return to Missouri.[121] During the litigation, the family transferred their interest to John Sanford, a resident of New York.[122] The case made its way through the Missouri state courts.[123] The Missouri Supreme Court ruled that Scott was still a slave.[124]

Scott later brought a federal suit, which ultimately reached the United States Supreme Court.[125] One of the central questions before the Court was whether the federal courts had subject-matter jurisdiction based on the diversity of the parties.[126] Scott was from Missouri and Sanford was now a citizen of New York.[127] Chief Justice Taney held for the majority that the Court did not have jurisdiction because Scott was not a "citizen" for purposes of the Constitution's diversity jurisdiction.[128] Chief Justice Taney wrote for

116. TIFFANY, *supra* note 113, at 120–23 ("person" includes slaves); *see also id.* at 95–97, 105–06.
117. *Id.* at 92–97, 99–100 (citing Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)).
118. Scott v. Sandford, 60 U.S. (19 How.) 393, 431–32 (1857).
119. *Id.* at 431; *see also id.* at 493 (Campbell, J., concurring).
120. *Id.* at 431.
121. HYMAN & WIECEK, *supra* note 104, at 172–90; *Scott*, 60 U.S. at 452–53.
122. Sometimes spelled *"Sandford." See Missouri State Archives: Missouri's Dred Scott Case, 1846–1857*, MO. DIGIT. HERITAGE, https://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp (last visited Feb. 22, 2023).
123. Scott v. Emerson, 15 Mo. 576, 582 (1852).
124. *Id.* at 586–87.
125. *Scott*, 60 U.S. at 400.
126. *Id.* at 401–02; U.S. CONST. art III, § 2.
127. *Scott*, 60 U.S. at 400.
128. *Id.* at 406, 427.

> Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

Id.

the majority:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.
>
> . . .
>
> We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.[129]

Rejecting abolitionist theory, Taney held that a state's grant of rights to free blacks did not make them citizens for purposes of the United States Constitution's guarantees, nor did it entitle them to Article IV's privileges and immunities of citizens in the several states.[130] Taney separated state privileges from United States privileges:

> In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United

129. *Id.* at 403–05; *see also id*. at 453–54.
130. *Scott*, 60 U.S. at 405.

> States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States.[131]

Refusing Scott United States citizenship and the privileges and immunities of such citizenship, the majority dismissed Scott's suit for lack of jurisdiction.[132]

The *Dred Scott* decision was divisive and furthered the rift between the North and South. The Court's ruling on citizenship and the Privileges and Immunities Clause provided an essential constitutional background for Reconstruction. As we see from this brief discussion on antebellum race relations, both the Privileges and Immunities Clause and the Due Process Clause were used by slaveowners and abolitionists. It is fitting that both clauses would play a vital role in the post-Civil War amendments amending the Constitution to address American citizenship and the Court's *Dred Scott* decision.

II. THE THIRTEENTH AMENDMENT AND CONGRESS'S POWER TO ENFORCE THE CONSTITUTION'S COMMANDS

Antebellum racial turmoil progressed into the American Civil War, resulting in over 600,000 lost lives.[133] Following the end of the War, Congress began reconstructing the South.[134] Reconstruction would take several congressional acts and three amendments to the United States Constitution.[135]

A. The Thirteenth Amendment and Congressional Enforcement

In light of the recent past, Reconstruction centered upon securing national citizenship rights for free blacks and those freed from slavery. In 1863, President Lincoln had provided for partial emancipation in his Emancipation

131. *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (distinguishing state and national citizenship); Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 600 (2019) (identifying distinctions between national and state privileges and immunities in antebellum treaties and the Missouri Compromise).

132. *Scott*, 60 U.S. at 427, 453–54. On a positive note, Scott and his family were manumitted in 1857.

133. Jennie Cohen, *Civil War Deadlier than Previously Thought?*, HIST., https://www.history.com/news/civil-war-deadlier-than-previously-thought (last updated Aug. 31, 2018).

134. David Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 383 (2008).

135. *See id.*

Proclamation.[136] Congress had also attempted to abolish slavery in the Wade-Davis Bill, which failed to receive President Lincoln's approval.[137] Both acts faced constitutional challenges claiming that abolishing slavery was beyond the respective federal powers.[138]

Accordingly, Congress sought in 1864 to amend the Constitution to abolish slavery in all the states. The Judiciary Committee assembled several proposals and selected the language from the Northwest Ordinance of 1787[139] as a model.[140] The Amendment was sent to the states in February 1865 and ratified in December 1865.[141] Section 1 provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 provides: "Congress shall have power to enforce this article by appropriate legislation."[142]

Remedying the problem of lack of congressional power or possible repeal later, the Thirteenth Amendment abolished slavery and authorized, beyond any doubt, congressional enforcement of that prohibition.[143]

With *Dred Scott* in mind, many congressmen saw the elimination and reversal of slavery as equivalent to securing citizenship.[144] Prior to the War, abolitionists had attempted unsuccessfully to secure citizenship rights for free blacks and slaves.[145] Reflecting upon the difficulty of achieving national citizenship ends before the War, Senator John Sherman of Ohio emphasized that "to avoid this very difficulty" of providing a constitutional guarantee or command without congressional enforcement—what happened with Article IV's Privileges and Immunities Clause in the courts—the Thirteenth Amendment, Section 2, expressly provided congressional enforcement power

136. *The Emancipation Proclamation,* NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation (last visited Jan. 28, 2022).

137. The Wade-Davis Bill was Congress's attempt at stringent Reconstruction and readmission criteria contra President Lincoln's lenient policy. Wade-Davis Bill, H.R. 244, 38th Cong. (1864) (as vetoed by President Abraham Lincoln).

138. David Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1147–49, 1158, 1173–76, 1217 (2006).

139. The Northwest Ordinance, 1 Stat. 50 (1787).

140. CONG. GLOBE, 38th Cong., 1st Sess. 1313, 1488–89 (1864).

141. *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/13th-amendment (last visited Feb. 22, 2023).

142. U.S. CONST. amend. XIII.

143. CONG. GLOBE, 38th Cong., 1st Sess. 1313–14 (1864).

144. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

145. *See supra* Parts I.C–D (abolitionist activism and *Dred Scott*).

to enforce Section 1's prohibition.[146] The Thirteenth Amendment ensured "not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation."[147] Sherman further explained:

> The reason why this power was given [in Section 2] is also drawn from the history of [Article IV's Privileges and Immunities Clause]. By [Article IV's Privileges and Immunities Clause] . . . a man [of whatever color] who was recognized as a citizen of one State had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States; but the trouble was in enforcing this constitutional provision. . . . This constitutional provision was in effect a dead letter to [Samuel Hoar advocating against seaman acts on behalf of free blacks]. The reason was that there was no provision in the Constitution by which Congress could enforce this right. 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 [Thirteenth 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.[148]

Section 2 was a critical addition to Congress's granted or enumerated powers. Senator Lyman Trumbull, a Republican lawyer from Illinois who had served as a justice of the Illinois Supreme Court, opined that Congress could pass "necessary and proper" laws affording civil rights without Section 2.[149] Nonetheless, Trumbull intended to put Congress's power to enforce "beyond cavil and dispute."[150] Trumbull explained in 1864 when he reported the Thirteenth Amendment out of the Judiciary Committee that the Amendment would shore up this uncertainty by empowering Congress to free

146. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865); *see supra* Part I.B (discussing *Prigg* and the need for congressional enforcement); U.S. CONST. amend. XIII.

147. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

148. *Id.*

149. *Id.* at 43.

150. *Id.*

slaves and abolish slavery in the states.[151] Trumbull, reflecting on that intent, stated:

> The second clause of that amendment was inserted for . . . the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free. It was inserted expressly for the purpose of conferring upon Congress authority by appropriate legislation to carry the first section into effect. What is the first section? It declares that throughout the United States and all places within their jurisdiction [neither] slavery nor involuntary servitude shall exist; and then the second section declares that Congress shall have authority by appropriate legislation to carry this provision into effect. What that "appropriate legislation" is, is for Congress to determine, and nobody else. . . .
>
> I reported from the Judiciary Committee the second section of the Constitutional amendment for the very purpose of conferring upon Congress authority to see that the first section was carried out in good faith, and for none other; and I hold that under that second section Congress will have the authority, when the constitutional amendment is adopted, not only to pass the bill of [Senator Wilson] from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights. . . . And, sir, when 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. . . . These are rights which the first clause of the constitutional amendment meant to secure to all; and to prevent the very cavil which the Senator from Delaware suggests to-day, that Congress would not have the power to secure them, the second section of the amendment was added.
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> There were some persons who thought it was unnecessary to add the second clause. It was said by some that wherever a power was conferred upon Congress there was also conferred authority to pass the necessary laws to carry that power into effect under the general

151. CONG. GLOBE, 38th Cong., 1st Sess. 1313–14 (1864); *cf.* CONG. GLOBE, 38th Cong., 1st Sess. 1419–23 (1864).

> clause in the Constitution of the United States which declares that Congress shall have authority to pass all laws necessary and proper for carrying into execution any of the powers conferred by the Constitution. I think Congress would have had the power, even without the second clause, to pass all laws necessary to give effect to the provision making all persons free; but it was intended to put it beyond cavil and dispute, and that was the object of the second clause, and I cannot conceive how any other construction be put upon it.[152]

Repairing a perceived defect, the Thirteenth Amendment's prohibition would not be a command without power in Congress to enforce it.[153] Senator Sumner, the 39th Congress's most radical Republican, commented that Section 1 provided the principle of liberty, and Section 2 authorized Congress to enforce it in minute detail.[154] To this end, Sumner stated: "Give us first the general principle as we have it in the constitutional amendment; then give us legislation just as extensive or as minute as the occasion requires. Let it be 'line upon line and precept upon precept,' so long as any such outrage can be shown."[155]

B. Southern States Enact Black Codes Denying Citizenship Rights

The end of the War and the Thirteenth Amendment's ratification allowed for far-reaching reform. Trumbull and other Republicans sought a suite of protections to raise free blacks and former slaves from their former condition to American citizenship.[156] Slave codes were the opposite of citizenship rights and imposed disabilities in contrast to the essential privileges citizens enjoyed because they were citizens.[157] Slaves and free blacks, for example, could not fully sue or be sued, did not enjoy full privileges to testify in court (where a white person was a party), and could not own property.[158] Many states prevented free blacks from traveling and immigrating to the state.[159] To this end, Judge Stone of the Alabama Supreme Court wrote:

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152. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

153. *See supra* Part I.B (discussing *Prigg*).

154. CONG. GLOBE, 39th Cong., 2d Sess. 1619 (1867) (Sen. Sumner commenting in support of legislation preventing the sale of children into slavery; Sen. Poland felt it was not necessary because it was covered by the CRA and those affected had other remedies).

155. *Id.*

156. John Frank & Robert Munro, *The Original Understanding of "Equal Protection of the Laws*," 1972 WASH. U. LAW Q. 421, 444–46 (1972).

157. *Id.*

158. *Id.*

159. *See infra* note 332 (Oregon's laws denying immigration and capacity to sue were criticized when it was seeking admission to the United States).

> The *status* of a slave, under our laws, is one of entire abnegation of civil capacity. He can neither make nor receive a binding promise. He has no authority to own any thing of value, nor can he convey a valuable thing to another. Hence, he cannot, of himself, give a consideration, "Valuable in the law," which consideration is necessary to uphold an executory promise; and indeed, "any person who sells to, or buys or *receives* from any slave, any article or commodity of any kind or description, [other than vinous or spirituous liquors,] without the consent of the master, owner, or overseer of such slave, verbally or in writing, expressing the articles," &c., is guilty of a misdemeanor.[160]

Responding poorly to post-War economic conditions, southern states frustrated the transition to employment contracts with state laws known as "black codes." Senator Henderson commented:

> The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave.[161]

In the eyes of northern authorities, black codes, while acknowledging employment over slavery, flouted the slavery ban by enacting laws with terms quite like the slave codes before the ban.[162] The 39th Congress observed that under Mississippi law, if a "laborer" quit the service of his employer, without cause or consent, before the expiration of his term of service, he forfeited wages for that year.[163] If a laborer left work without the consent of the employer, the employer could recapture and take the laborer back to

160. Martin v. Reed, 37 Ala. 198, 199–200 (Ala. 1861) (emphasis added); CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866); *see generally* The Civil Rights Cases, 109 U.S. 3, 22 (1883) (discussing attributes of slavery).

161. CONG. GLOBE, 39th Cong., 1st Sess. 3034 (1866).

162. DONALD NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868 72–98 (1979) (examining relationship between Bureau and state black codes); *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873) (identifying post-War black codes retaining a system of oppression of former slaves). Slave states may have considered black codes as permissible forms of gradual emancipation, a notion that enjoyed support before the Thirteenth Amendment. WIECEK, *supra* note 84, at 89–90, 151–54; 3 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1861–1895 57–66 (1901).

163. Cong. Globe, 39th Cong., 1st Sess. 39 (1865) (summarizing Mississippi's law); *see also* JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 115 (1901); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877 198–200 (1988).

service.[164] Any civil officer or person who arrested and carried back a person quitting their term of service was awarded five dollars and ten cents a mile, set off from the wages of the employee.[165] Further refusal to work could mean jail for the laborer.[166] Mississippi made it illegal, with steep fines, to persuade a freed slave to leave his "employment" or to offer him work outside of the jurisdiction.[167] Aiding a runaway laborer was a misdemeanor.[168] Other laws prohibited or restricted travel to certain areas at certain times of the day.[169] Violations might result in vagrancy charges and being sold off to a high bidder for a duration.[170] Representative Lawrence examined Mississippi's vagrancy law and stated:

> [U]nder [Mississippi's vagrancy law] freed slaves are rapidly being reenslaved. No negro is allowed to buy, rent, or lease any real estate; all minors of any value are taken from their parents and bound out to planters; and every freedman who does not contract for a year's labor is taken up as a vagrant.[171]

In Louisiana, a proposed law declared that Freedmen not in the military were not permitted to carry firearms or other weapons without permission.[172]

C. Congress Responds with the Civil Rights Act of 1866

For many Republicans, civil rights were essential to freedom and citizenship, and this meant congressionally negating southern slave codes and black codes.[173] The framers of the Thirteenth Amendment put an end to slavery with Section 1 of the Thirteenth Amendment.[174] But they also wanted authority in Section 2 to legislate for the privileges and immunities of citizenship for newly freed slaves, to counteract southern laws.[175]

As promised,[176] Trumbull introduced the CRA of 1866 as intended

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164. CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865).
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* (summarizing Mississippi's law).
169. CONG. GLOBE, 39th Cong., 1st Sess. 516 (1866).
170. *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865) (summarizing Louisiana's pending law); Peter Joseph Hamilton, *The Reconstruction Period, in* 16 THE HISTORY OF NORTH AMERICA 131–34 (Francis Thorpe ed., 1905).
171. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).
172. *Id.* at 516–17.
173. *See supra* Part II.A.
174. *See id*.
175. *See id.*
176. Trumbull had indicated earlier that he would sponsor such legislation. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865) (referencing future legislation).

enforcement legislation under Section 2 of the Thirteenth Amendment.[177] At the same time, Trumbull introduced an amendment to the Freedmen's Bureau Bill (FBB) covering nearly the same protections.[178] An early draft of Section 1 of the CRA took aim at rebel states' black codes. It provided:

> [T]hat all persons of African descent shall be citizens of the United States, and . . . there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right 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.[179]

Section 1 of the CRA covered the general principle of civil rights necessary for citizenship, and the remaining sections provided the machinery to carry it out.[180] The CRA was the answer to antebellum failures and a counter to *Dred Scott*. It declared that African Americans were citizens and enjoyed the privileges of American citizenship.[181] State laws to the contrary would conflict with Congress's supreme powers.[182] Trumbull explained that the CRA would fulfill the Declaration of Independence's principles and

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177. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Senator Sherman:

> [The Thirteenth Amendment] is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless 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. To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms. Therefore the power is expressly given to Congress to secure all their rights of freedom by appropriate legislation.

CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

178. CONG. GLOBE, 39th Cong., 1st Sess. 209–10 (1866) (introducing FBB). Several amendments were added. *Id.* at 1292.

179. *Id.* at 474. The first presentation of the CRA did not have the citizenship clause. *Id.* at 211.

180. *Id*. at 474.

181. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

182. *Id.*

protect the privileges and immunities of freedmen.[183] It was a congressional definition of fundamental privileges and immunities represented by, or improving upon, the antebellum court decisions under Article IV's Privileges and Immunities Clause.[184] But more importantly, it extended this set of rights to African Americans. Trumbull, aiming to remedy state-based discrimination, commented:

> Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. 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.[185]

Trumbull, in the same passage, explained that:

> 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.[186]

Trumbull summarized several state slave and black codes he aimed to congressionally nullify (or believed that the CRA in its initial form would nullify), including restrictions preventing freedmen from travel, from teaching the Gospels, and laws prohibiting freedmen from reading, writing, and owning firearms.[187] To this end, Trumbull explained that:

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183. *Id.* at 474–76 (describing the CRA as "life, liberty, and the pursuit of happiness" as well as consistent with judicial constructions of the Privileges and Immunities Clause).

184. *Id.*; *see also id.* at 599–600 (reasoning that Congress could protect fundamental rights of life, liberty, and property for "citizens of the United States," which the courts had attempted to do before the Thirteenth Amendment).

185. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

186. *Id.* at 475.

187. *Id.* at 474–75; CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871) (Bingham referring to Congress's ability to prevent an antebellum Georgia law that criminalized teaching reading and writing). Black codes prohibited colored persons from traveling to the state or residing in that state without a pass, or in one case, from freely preaching the Gospel or forming black congregations. CONG. GLOBE, 39th Cong., 1st Sess. 474; Frank & Munro, *supra* note 156, at 444–46; WIECEK, *supra* note 84, at 172–77

> [The Thirteenth Amendment can] destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. If we believe a Freedmen's Bureau necessary, if we believe an act punishing any man who deprives a colored person of any civil rights on account of his color necessary—if that is one means to secure his freedom, we have the constitutional right to adopt it. 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 the duty to do so.[188]

Importantly, Congress's definition of citizenship rights would not depend upon state citizenship and state definitions with racial qualifications, which was the problem for abolitionists before the War.[189] Trumbull's congressional definition of civil rights—privileges and immunities—would also not depend on courts' discretion to define or fail to define citizenship or citizenship rights.[190]

The CRA followed the momentum of the War and the end of slavery.[191] It stood for the principle that African Americans were now American citizens and enjoyed the rights of citizens in the states.[192] Yet change was specific and limited. The 39th Congress did not intend for Congress to enter the states and interfere with federalism beyond this point. Establishing citizenship was the lead domino. The 39th Congress's end goal for equality before the law followed suit with little expected additional intervention.[193] Trumbull posited that the CRA was declaratory of citizenship in that it did not interfere with state police powers but ensured capacities for blacks to enjoy civil rights and

(southern states banned abolitionist mail and advocacy, including black preachers, due to threat of insurrection).

188. CONG. GLOBE, 39th Cong., 1st Sess. 322–23 (1866).

189. *See supra* Part I.

190. *Id*. Though, there will be judicial review of the appropriateness of the legislation with Section 1 of the Thirteenth Amendment. *See infra* Part II.D.

191. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

192. *See generally id.*

193. *Id.*

the protection of state law as whites enjoy.[194] The anti-discrimination component of the CRA was merely the combined effort of removing slavery and establishing citizenship for blacks.[195] States should, on their own accord, establish and protect civil rights and extend existing protection of the law for the security of persons and property to African Americans, now citizens.[196] And if they did not, then Congress is permitted to enact corrective legislation.[197]

Senator Stewart agreed, adding that the bill will have no effect in a state such as Georgia that has removed its black codes disabling freedmen from the covered rights:

> [T]here is no law or custom in force in Georgia under the color of which a crime against this bill can be committed; and if all the southern States will follow this noble example, this civil rights bill, which strikes at peonage another form of slavery, will be simply a nullity, because it will not exist.[198]

Representative James Wilson of Iowa, too, stated that "[i]f the States would all observe the rights of our citizens, there would be no need of this [CRA]."[199]

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194. *Id.* at 600 (CRA declaratory of citizenship status); *id*. at 1756 (Senator Trumbull describing the Act as declaratory in a criticism of the President's veto). In the House, Rep. Lawrence observed that the CRA's citizenship language was declaratory of what the law was without it. The legislation focused on anti-discrimination and did not reach into the states to regulate civil rights beyond anti-discrimination. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866); *see also id.* at 1295, 1775–77 (debates on declaratory nature of the Act).

195. Rep. Thayer described the bill as "declaratory of existing law." *Id*. at 1152. Rep. Broomall also referred to the CRA as declaratory of the definition of "citizen" that should be all along. *Id*. at 1262.

196. *Id*. at 322–23.

197. Trumbull, in reference to objections to the proposed FBB amendments:

> If the people in the rebellious States can be made to understand that it is the fixed and determined policy of the Government that the colored people shall be protected in their civil rights, they themselves will adopt the necessary measures to protect them; and that will dispense with the Freedmen's Bureau and all other Federal legislation for their protection. The design of these bills is not, as the Senator from Indiana would have us believe, to consolidate all power in the Federal Government, or to interfere with the domestic regulations of any of the States, except so far as to carry out a constitutional provision which is the supreme law of the land. If the States will not do it, then it is incumbent on Congress to do it. But if the States will do it, the Freedmen's Bureau will be removed, and the authority proposed to be given by the other bill [the CRA] will have no operation.

CONG. GLOBE, 39th Cong., 1st Sess. 322–23 (1866); *see also id.* at 600 (CRA will have no effect if states do their duty and do not discriminate against citizens); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 49 (1978) [hereinafter Benedict, *Preserving Federalism*].

198. CONG. GLOBE, 39th Cong., 1st Sess. 1785 (1866).

199. *Id.* at 1117 (citing Privileges and Immunities Clause).

Trumbull pointed out that if a man violates a law where blacks are entitled to protection, for example the power to sue and be sued, there is no need for federal intervention because he has rights and remedies through state law.[200] Representative Shellabarger echoed that the CRA left the reserved municipal or police powers to the states to regulate life, liberty, and property.[201] The CRA will not take from the states its proper role to regulate matters like underlying contract law, criminal law, or property law.[202] In this vein, Shellabarger stated:

> Now, Mr. Speaker, if this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, 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 in slavery.[203]

The 39th Congress did not intend to reverse the principle of limited national government.[204] Congress's focus was on ending slavery, improving race relations, and thwarting retaliation against loyalists within the rebel states.[205] When the 39th Congress spoke of equality and citizenship rights, it

200. *Id.* at 1758 (if a crime is committed against a colored man in a state where the laws provide the same remedy as whites enjoy, the CRA will have no effect); *id.* at 1761 (law does not interfere with municipal institutions which protect all in rights of person and property; law will have no effect in most states of the Union); *see also* Benedict, *Preserving Federalism*, *supra* note 197, at 49. Senator Cowan agreed with Trumbull that freedmen ought to have the right to make contracts, the right to enforce those contracts, to own property, and protect that right in court. CONG. GLOBE, 39th Cong., 1st Sess. 1781 (1866). Cowan pointed out that judges might not construe "as is enjoyed by white citizens" faithfully, but would instead interfere with state contracting or criminal laws or state laws that disabled married women, minors, or others from contracting. *Id.* at 1781–82. Representative Wilson explained earlier that the language "to full and equal benefit of laws . . . as is enjoyed by white persons" was actually his effort to limit coverage to prevent, as some feared, extension of certain enumerated protections to women and children. *Id.* at App. 157.

201. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).

202. *Id.*

203. *Id.* In a speech on the admission of Nebraska in the Second Session of the 39th Congress, Bingham distinguished universal law (e.g., right to live in the state, own property, and bring suit in court) from issues such as voting. CONG. GLOBE, 39th Cong., 2d Sess. 452–53 (1867). In debates on the Reconstruction Acts, Bingham opined that the former rebel states were still states and in charge of their own marriage and contract laws. *Id.* at 1083.

204. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

205. Loyal soldiers returning to their homes and white Unionists faced similar retaliation and unjust disabilities. HYMAN & WIECEK, *supra* note 104, at 325; CONG. GLOBE, 39th Cong., 1st Sess. 1090–91, 1093 (1866) (life, liberty, and property; enforcement of bill of rights and privileges and immunities to

was against a backdrop of slavery and state black codes.[206] More specifically, it was against the backdrop of *Dred Scott*, in which the Court ruled that blacks were not citizens and did not enjoy the privileges and immunities of citizens.[207] Senator Trumbull, in a dialogue with Senator McDougall, stated that:

> 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.
>
> . . .
>
> With this bill passed into a law and efficiently executed we shall have secured freedom in fact and equality in civil rights to all persons in the United States . . . . It may be assailed as drawing to the Federal Government powers that properly belong to "States;" but I apprehend, rightly considered, it is not obnoxious to that objection. It will 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.[208]

McDougall: "I beg leave to ask the Senator how he interprets the terms "civil rights" in the bill."[209]

Trumbull:

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address slavery and rebel banishment and confiscation statutes); *id.* at 1263, 1265 (loyalists driven from their homes and their lands confiscated); *id.* at 1617 (barbarous outrages against the freedom of speech and protection of life, liberty, and property of loyalists in the South); *id.* at 1834 (military had to intervene in state legal action to protect freedmen and thwart state legal action against Union soldiers operating in their military capacity).

206. CONG. GLOBE, 39th Cong., 1st Sess. 339–41 (1866) (elevating freedmen to citizenship).

207. *See supra* Part I.D (discussing the *Dred Scott* opinion).

208. CONG. GLOBE, 39th Cong., 1st Sess. 475–76 (1866).

209. *Id*. at 476.

> The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, 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.[210]

With citizenship becoming the default for free blacks and newly freed slaves, Trumbull defined "civil rights" by quoting Privilege and Immunities Clause case law.[211] As we saw above, the framers of the Thirteenth Amendment, especially Trumbull, sought to congressionally enforce the principles of the Clause[212] to correct the underlying problem: the respective state-based disabilities of slave and black codes.[213] Seeking to obviate the Court's *Dred Scott* holding, Trumbull noted that the proposed CRA would provide protection for all citizens and thus would give citizenship rights a life in the states.[214]

Several members were concerned that the CRA would extend more broadly than Trumbull intended.[215] Given the language "no discrimination in civil rights and immunities," Senator McDougall asked whether the bill would go farther than protecting life, liberty, and the protection of the courts.[216] For example, would the bill cover political and voting rights, which had historically been limited to adult white males in the several states?[217] Trumbull responded that "[t]his bill has nothing to do with the political rights or the *status* of parties. It is confined exclusively to their civil rights, such

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210. *Id*.

211. *Id.* at 474, 600.

212. *See supra* note 152 and accompanying text (comments and reflections on the purpose behind the Thirteenth Amendment's congressional enforcement provision).

213. Trumbull identified the meaning of state "custom" and the phrase "under color of law":

> These words "under color of law" were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.

CONG. GLOBE, 39th Cong., 1st Sess. 1758–59 (1866).

214. *Id.* at 476.

215. *See id.*

216. *Id.*

217. *Id.* (Sen. McDougall describing the civil right-political right distinction); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (Rep. Lawrence distinguishing political and civil rights).

rights as should appertain to every free man."[218] Trumbull further 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.[219]

Representative Wilson also equated the CRA with enforcing life, liberty, and property; the Bill of Rights; and the fundamental natural rights which belong to all men.[220] Wilson did not have major concerns with the general language "civil rights and immunities" in the CRA's first draft:

> What do these terms [civil rights and immunities] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they so be 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.[221]

In support of the CRA, Representative Thayer explained that freedmen were denied the enjoyment of these "fundamental rights of citizenship," for example the capacity to "purchas[e] a home," and suffered under laws "impair[ing] their ability to make contracts for labor."[222] Adding insult to injury, vagrancy black codes punished freedmen for the reasons of not having employment or a home.[223] Thayer, too, would find that the Thirteenth Amendment authorized laws reversing such conditions. Thayer commented:

> What kind of freedom is that under which a man may be deprived of the right of going at his own volition from one place to another; may

218. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

219. *Id*. at 599–600.

220. *Id.* at 1115–19, 1294–95 (criticizing Bingham's fear that general language would override specific language and defending the CRA as enforcement of due process of law and the enjoyment of life, liberty, and property); *see also id*. at 1291–92, 1294 (Bingham also equated the civil rights bill, which he opposed and sought to have amended, as enforcement of life, liberty, and property in the states. Bingham supported the principle, but he believed that an amendment to the Constitution was necessary to do so.).

221. *Id.* at 1117.

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

223. *Id.* at 1160; *see also supra* note 171 and accompanying text (Mississippi's vagrancy provision).

> be deprived of the ability to make a contract; may be deprived of the ability to sell or convey real or personal estate; may be deprived of the liberty to engage in the ordinary pursuits of civilized life; may be deprived of the right to be a party or a witness in a court of justice; or may be subjected to pains and penalties which are not inflicted upon other citizens?[224]

As Thayer recognized, elevating blacks to citizenship in the CRA's enumerated rights meant abolishing two standards of justice.[225] The most severe injustice corrected by the CRA was giving all equal access to the court system and due process of law.[226] The CRA provided protection of the law in the form of use of courts and ability to testify equally with whites.[227] If you do not have equal access to the courts, you cannot protect personal security or property.[228]

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224. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

225. *Id.*

226. *Id.* at 1832–33 (Lawrence criticizing southern laws for restrictions on black testimony); *id*. at 1758–59; HYMAN & WIECEK, *supra* note 104, at 328; *see generally* NIEMAN, *supra* note 162 (analyzing Bureau's interaction with state laws concerning black testimony). Rep. Kasson advocated for due process of law and equal protection:

> Second. The right to bring and defend suits in all the courts of said State, and give testimony therein, according to the usual course of the law, shall be enjoyed on equal terms by all persons resident therein, irrespective of race or color; and all forfeitures, penalties, and liabilities under any law, in any criminal or other proceeding, for the punishment of any crime or misdemeanor, shall be applied to and shall bear upon all persons equally, without any distinction of race or color.
>
> Third. The right to acquire, hold, and dispose of property, real, personal, and mixed shall, in said State, be enjoyed on equal terms by all naturalized citizens and by all persons native-born, without distinction of race or color.

CONG. GLOBE, 39th Cong., 1st Sess. 508 (1866). Senator Morton observed in a post-ratification comment:

> [B]y refusing colored people the right to testify in her courts in any case, civil or criminal, to which a white person is a party, [the state allows a great injustice.] A white man may enter a colored congregation and shoot the minister in the pulpit, and if there are no white witnesses he cannot be prosecuted.

CONG. GLOBE, 41st Cong., 3d Sess. 1253 (1871) (discussing right to testify in Kentucky).

227. *Id.*

228. CONG. GLOBE, 39th Cong., 1st Sess. App.157–59 (1866) (Rep. Wilson debating with Rep. Delano the need for black testimony to enjoy protection of the law and life, liberty, and property); *see also* discussion *supra* Part II.B (slave codes limited access to courts); *supra* note 200 (normal legal process available once right to sue and be sued secured); *supra* note 210 (access to the courts to protect personal security and personal property); *infra* notes 333–40, 349 (access to the courts and due process of law).

D. Challenges to the CRA: Ambiguity and Mismatch with Section 2 of the Thirteenth Amendment

The primary criticism of the CRA was its mismatch with Section 1 of the Thirteenth Amendment.[229] The Thirteenth Amendment abolished slavery and gave Congress authority to enforce that prohibition.[230] The CRA's foray into American citizenship went far beyond prohibiting slavery. Many in Congress agreed that it was not "appropriate" legislation.[231] The Amendment said nothing of establishing citizenship and citizenship rights—laws of a different magnitude. To a reasonable onlooker, the Thirteenth Amendment's negative prohibition did not authorize Congress to address citizenship rights.[232] Nonetheless, Trumbull authored the CRA with the belief that it was enforcement legislation of the Thirteenth Amendment.[233] For Trumbull, the civil rights listed in the proposed CRA removed "badges" of slavery and permitted free employment.[234] Mississippi's black codes, for example, were considered the old slave codes reenacted with minor modification.[235] Congressional enforcement of anti-slavery meant quashing such laws, with Representative Cook of Illinois arguing:

> When Congress was clothed with power to enforce that provision by appropriate legislation, it meant two things. It meant, first, that

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229. CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866).

230. U.S. CONST. amend. XIII, § 1.

231. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

232. *Id.* at 1784 (Senator Cowan finding the CRA beyond the plain language of Section 1 abolishing slavery). Cowan would support enforcement protecting liberty—the ability to move from one place to another, such as habeas corpus and anti-kidnapping legislation. Cowan remarked that Section 1 of the Thirteenth Amendment speaks for itself and Section 2 was not necessary. *Id*.

233. *See* discussion *supra* Parts II.A–B.

234. *See supra* note 185 and accompanying text (Trumbull's speech describing CRA's objective to correct a "badge" of servitude). Further, Justice Bradley wrote:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens.

The Civil Rights Cases, 109 U.S. 3, 22 (1883).

235. *See supra* notes 163–71 for a discussion of state black codes in the South.

> 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. Congress must judge as to what legislation is appropriate and necessary to secure to these men the rights of free men . . . .[236]

Others sharply criticized congressional efforts to extend Section 1 of the Thirteenth Amendment to the CRA. The passage of the Thirteenth Amendment ended slavery, but the text did not itself clearly provide a means for Congress to create and protect citizenship rights for newly freed slaves.[237] Could Congress correct all these remnants of slavery under Section 2? This question troubled supporters of the Thirteenth Amendment throughout Reconstruction. Representative Marshall stated:

> 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. But Congress has acquired not a particle of additional power other than this by virtue of this amendment.
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> . . .
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> The power which one man claims to the service of another—the power to hold him in subjection to his will, and to sell him as property—that was slavery as understood at the time this section was ingrafted in the Constitution.
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> Now, sir, under this second section, unquestionably if there is any attempt to reduce these men again to this kind of slavery, if any master refuses to allow his former slave to go at large, to leave his plantation, his county or State, to have perfect right of locomotion, then it is within the power of the Federal Government, under this clause, to interpose, and to provide by law for a punishment for such an attempt. But, sir, does that empower this Government to correct

236. CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866); *see id.* at 1152 (Mr. Thayer also explained that the CRA provided freedom, which Congress was authorized to enact under Section 2 of the Thirteenth Amendment); *see also id.* 1159 (Section 2 of the Thirteenth Amendment provided clear grounds for CRA as congressional enforcement of Section 1's prohibition against slavery).

237. U.S. CONST. amend. XIII, § 1.

> or interfere with legislation in regard to different classes in the same State, or different peoples in this government? Unquestionably not.[238]

Criticizing the mismatch (referred to as "torture") between Section 1 of the Thirteenth Amendment and the CRA, Senator Saulsbury proclaimed that if the 38th Congress had selected the language "there shall be no discrimination in civil rights or immunities among the inhabitants of any State . . . on account of race, color, or previous condition of slavery, but the inhabitants of every race and color . . . shall have the same [CRA's enumerated rights] . . . ." as Section 1 of the Thirteenth Amendment, then Congress's definition and implementation of that language in the CRA, with its procedure and penalties, would be appropriate enforcement legislation and constitutional.[239] Because the actual text of Section 1 contained no such language and in fact, contained much different language, the CRA was not "appropriate" legislation under the Thirteenth Amendment.[240]

A second major criticism of the CRA was its potential ambiguity. Despite numerous explanations limiting the CRA's scope to fundamental civil rights enumerated in Section 1, several were still concerned about ambiguity. Recognizing that the CRA's general language was liable to manipulation, Representative Kerr chimed in, criticizing the CRA:

> There shall be no discrimination in civil rights or immunities among citizens of the *United States* in any State or Territory, on account of race, color, or previous conditions of slavery.
>
> But it 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 [de]privation of which is a *civil injury* for which redress may be sought by a *civil action*. Other authorities 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? Their definition here by gentlemen on this floor is one thing; their definition after this bill shall have become a law will be quite another thing. The anti-slavery

238. CONG. GLOBE, 39th Cong., 1st Sess. 628 (1866) (opposing amendments to the Freedmen's Bureau Bill).

239. *Id.* at 476–77 (1866); *see also id.* at 113 (1865) (Senator Saulsbury contrasted "slavery" with the broad aims of civil and political rights. "Appropriate" enforcement legislation was confined to the subject matter of Section 1, prohibiting slavery).

240. *See id.* at 476 (1866).

> 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.[241]

On March 8, Representative Bingham, a Republican lawyer from Ohio and principal drafter of Section 1 of the Fourteenth Amendment, moved to strike the phrase "there shall be no discrimination in civil rights or immunities among citizens" in Section 1 as too broad.[242] He considered this language obligatory on the courts even though the language was enumerated below in the remainder of Section 1.[243]

Supporters of the CRA did not mind Bingham's motion to strike the prefatory language because Section 1's operational text was enumerated and stood without the "no discrimination in civil rights or immunities" general language.[244] As amended without the general language, Congress approved

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241. *Id.* at 1270–71 (alteration in original).

242. CONG. GLOBE, 39th Cong., 1st. Sess. 1266, 1271–72, 1290–91 (1866). Senator Sherman identified a similar complaint with Senator Wilson's December 1865 proposal for Congress to nullify all southern codes that made a distinction based on race. Sherman complained that the protection ought to be more specific and definite, which generated the CRA of 1866 the following month:

> I do not wish it to be left to the uncertain and ambiguous language of this bill. I think that the rights which we desire to secure to the freedmen of the South should be distinctly specified. The bill provides that all laws, statutes, acts, ordinances, rules, and regulations, of any description whatsoever, heretofore in force or held valid in any of the States . . . whereby or wherein any inequality of civil rights and immunities among the inhabitants of said States is recognized, authorized, established, or maintained, by reason or in consequence of any distinctions or differences of color, race, or descent, or by reason or in consequence of a previous condition or status of slavery or involuntary servitude of such inhabitants, be, and are hereby declared null and void, &c.
>
> . . .
>
> I have said that the language of this bill is not sufficiently definite and distinct to inform the people of the United States of precisely the character of rights intended to be secured by it to the freedmen of the southern States.

Id. at 41–42 (1865).

243. *Id.* at 1294–96 (1866) (Bingham also objected to penal enforcement of the Act against state officials who were following the laws of their state. Bingham's amendment to strike out the penal language and put in its place a civil cause of action would alleviate some of the concerns about Section 2. Rep. Wilson supported penal enforcement as more effective because civil protection would depend on the affected individuals' personal resources to protect civil rights by civil action); *see also id.* at 1836 (Lawrence noting two methods of enforcement).

244. *See id.* at. 476 (indicating that the latter enumeration was the definition of the general phrase "civil rights and immunities"). Further, Mr. Thayer stated:

the Civil Rights Act of 1866 over President Johnson's veto:

> 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 previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[245]

III. THE FOURTEENTH AMENDMENT AND CONGRESSIONAL ENFORCEMENT OF AMERICAN CITIZENSHIP

A. Bingham's Initial Draft

While the CRA was working its way through the system, Congress was debating many other provisions and amendments to the Constitution to join the Thirteenth Amendment. In late February 1866, Bingham opened debate on the initial form of what would eventually become Section 1 of the Fourteenth Amendment:

> Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the

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> Why should not these fundamental rights and immunities which are common to the humblest citizen of every free State, be extended to these citizens? Why should they be deprived of the right to make and enforce contracts, of the right to sue, of the right to be parties and give evidence in courts of justice, of the right to inherit, purchase, lease, hold, and convey real and personal property? And why should they not have full and equal benefit of all laws and proceedings for the security of person and property?

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

245. An Act to Protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication, ch. 31, § 1, 14 Stat. 27 (Apr. 9, 1866) (Civil Rights Act of 1866) (Congress's additional revisions to the Act are beyond the scope of this discussion).

> several States equal protection in the rights of life, liberty, and property.[246]

Bingham emphasized that his proposal would protect the spirit of the Bill of Rights and the enforcement of the "injunctions and prohibitions," which, by oath, the states owed to the people.[247] Bingham referred to the proposed amendment as "simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the Bill of Rights as it stands in the Constitution today. It 'hath that extent– no more.'"[248] The initial form was a composite of the Privileges and Immunities Clause, the Due Process Clause, and the Constitution's congressional enforcement language allowing Congress to make all necessary and proper laws.[249] Bingham interchanged "privileges and immunities" with the Bill and "life, liberty, and property."[250] Bingham stated:

> 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 immunities of citizens of the United States 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 before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose 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

246. CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866).

247. *Id.* at 1090 (referring to a quote from Daniel Webster).

248. *Id.* at 1088.

249. *Id.* at 1033–34 (offering proposed amendment for debate; citing the need for congressional enforcement of the Privileges and Immunities Clause and the Due Process Clause); *id.* at 1089–91 (Bingham citing both the Privileges and Immunities Clause and the Due Process Clause); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1054 (1866) (Higby identifying the sources of the provisions of the initial draft and suggesting that if these provisions had been enforced before, the Civil War may have been avoided); *id.* at. 2542 (Bingham introducing the Amendment post-revision); *see generally* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS 1865–1867 60–61 (1914) (Bingham suggesting a revision to proposed language to expressly follow the Privileges and Immunities Clause and the Due Process of Law Clause).

250. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

> shall be entitled in the several States to all the immunities of a citizen of the United States?
>
> What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property: we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.[251]

Bingham viewed his proposal's privileges and immunities language as congressional "enforcement of the second section of the fourth article of the Constitution," the Privileges and Immunities Clause.[252] Because states did not have the right to deny any of these privileges and immunities to citizens, the states should not object to a "constitutional amendment [giving] power by congressional enactment to enforce this provision" of the Constitution.[253] Bingham also cited the Fifth Amendment's "Due Process" and its "life, liberty, and property" language.[254] As explained below, when Bingham and 39th Congress used the phrase "protect life, liberty, and property," whether calling it "privileges and immunities" or the "Bill of Rights" or both, the primary object was to ensure that the fundamental guarantees of citizenship were secured for former slaves and free blacks.[255] Ordinary state law would remain unaffected as long as citizenship capacities were extended to blacks.[256]

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251. *Id.*
252. *Id.*
253. *Id.*
254. Bingham sought to expand Congress's granted powers to protect life, liberty, and property (Due Process Clause). Bingham stated:

> 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. And if to-morrow, sir, your President, because of his supposed fidelity, and I might add of his real fidelity to his duty, in so far as I understand his position, crossed the line of your exclusive jurisdiction in this District into the State of Maryland, into the county of Charles, and were to be there set upon by the whole body of the community and murdered, for no fault of his, but simply because of his supposed fidelity to his duty, your Government is powerless by law to avenge his death in any of your civil tribunals of justice. And this results from the accepted construction that this Government has not the power by law to enforce in the States this guarantee of life.

Id. at 429.
255. *See infra* Part IV.
256. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (Hale expressing concern over excesses with "equal protection . . . in the rights of life, liberty, and property"); *id.* at 1089 (Bingham addressing Hale's

B. Objections to Bingham's Draft: States' Rights and Rebel Democrats

It is surprising to us today, but Bingham considered the elements of his proposal noncontroversial as the Privileges and Immunities Clause and the Due Process Clause were already in the Constitution.[257] As we saw above, many believed that Congress could protect civil rights as part of existing constitutional powers to enforce citizenship guarantees.[258]

Contrary to Bingham's perception of triviality, members objected to the potential scope of Congress's powers in the initial draft as too open ended and a violation of states' rights.[259] There was not so much concern over the draft's privileges and immunities language, rather the concern was with the "equal protection in the rights of life, liberty, and property" language.[260] It was an awkward way of ensuring "due process of law" and potentially authorized Congress to interfere with state laws regardless of whether they violated civil rights or not. What would not be covered by such an open congressional power? What if the Republicans lost their majority, what would become of the power in the hands of the rebel Democrats?

Challenging Bingham, Representative Hale expressed concern for the states and their main body of civil and criminal legislation.[261] Hale commented that Bingham's proposal was actually a radical departure from the status quo, stating:

> What is the effect of the amendment which the committee on reconstruction propose[s] for the sanction of this House and the States of the Union? I submit that it is 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. I maintain that in this respect it is an utter

concern that his proposed amendment would not impair state and local regulation of the class of married women); *id.* at 1094 (Bingham again responding to Hale that the amendment protecting life, liberty, and property would grant power to Congress to ensure 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 1291 (Bingham, objecting to certain language in the initial draft of the CRA, remarked that scarcely a state in the union does not make some distinctions on the basis of race; a broad congressional policy penalizing states for making such discriminations would be oppressive and overreaching).

257. *See supra* Part III.A.

258. *See supra* Part II.A.

259. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

260. *See id.*

261. *Id.*

> departure from every principle ever dreamed of by the men who framed our Constitution.[262]

Hale was interrupted by Representative Stevens who asked if the proposed amendment was limited to areas where states discriminated and fostered inequality among classes or would it also reach impartial and equal state law.[263] Hale responded that it goes much further; it proposes a departure from the entire theory of federal and state relations—giving the federal government an enormous power.[264] Hale believed that Bingham's language went well beyond lifting disabilities and protecting capacities as whites enjoy.[265] Contrary to being a provision simply aimed at inequality and discrimination, the proposed amendment "is a grant of the fullest and most ample power to Congress to make all laws 'necessary and proper to secure to all persons in the several States protection in the rights of life, liberty, and property,' with the simple proviso that such protection shall be equal."[266]

Hale distinguished the initial form from a situation in which Congress corrects unequal state legislation:

> It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.[267]

Hale predicted that the proposed amendment would invade the states and state regulations because it required "equal protection in the rights of life, liberty, and property" within the states, as all states made some distinction that could run afoul of this congressional power.[268] Every state, for example, distinguished between the property rights of married and unmarried women.[269]

Radical Republicans did not mind so much Congress's power now, when the Republicans were in charge.[270] But when the former slave states and rebel Democrats were able to vote again, and perhaps regain a majority in

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262. *Id.*
263. *Id.*
264. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).
265. *Id.*
266. *Id.*; *see also id.* at 1087 (remarks by Davis criticizing open-ended grant for Congress to legislate for equal protection in life, liberty, and property in the form of original legislation).
267. *Id.* at 1063–64.
268. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).
269. *Id.*; *id.* at 1082 (Senator Stewart making similar complaints against Bingham's proposal).
270. *See infra* Part III.B.

Congress, this potential power to legislate in Congress could undo all their efforts. The 39th Congress needed to secure their anti-discrimination and civil rights protection in the Constitution.

Continuing the debate on Bingham's proposal, Representative Giles Hotchkiss recommended that Bingham consider anti-discrimination language, placing the protection in the Constitution beyond the "caprice of Congress."[271] Hotchkiss was comfortable with Bingham's first sentence on privileges and immunities.[272] Joining Hale, Hotchkiss's concern was that later Congresses might enact general, uniform laws directly affecting the people under the authority: "Congress shall . . . make all laws . . . [ensuring] all persons . . . equal protection in the rights of life, liberty, and property."[273] Hotchkiss was apprehensive about political majorities in Congress,[274] observing that once the Republican monopoly in Congress was lifted, a faction of rebels and Democrats, and their northern sympathizers, might gain control of future Congresses, undo legislative civil rights advances, and, by Bingham's amendment as initially proposed, freely establish uniform laws for life, liberty, and property hostile to Reconstruction and Republican ideals.[275]

Hotchkiss's fear that future Congresses would include the South, and that a Congress broadly empowered to create uniform law might exercise that power contrary to mainstream Republican ideals was well received.[276] Moments before Hotchkiss obtained the floor, Bingham had shared the same concern.[277] For those seeking to amend Bingham's proposed amendment, there should be more specific constitutional language permanently protecting Republican ideals that was not subject to congressional manipulation by future Congresses.[278] Thereafter, if Bingham wanted to go further with congressional enforcement of this language, Hotchkiss would support him.[279] Hotchkiss stated:

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

272. *Id.*; *see id.* at 1033–34 ("Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States . . . .").

273. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866); *see supra* note 246 and accompanying text (Bingham's initial draft language).

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

275. *Id.*; Hamilton, *supra* note 170, at 170–71 (commenting on the Republican monopoly and the likelihood that rebels and Democrats would rejoin Congress and threaten Republican legislation).

276. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

277. *Id.* at 1094 (expressing the fear that rebels will undo protections in the southern states and retaliate against freedmen and loyalists by excluding them from protection of law).

278. *See id.* at 1095.

279. *Id*.

> As I understand it, [Bingham's] object in offering this resolution and proposing this amendment is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it to-day; but as I do not regard it as permanently securing those rights, I shall vote to postpone its consideration until there can be a further conference between the friends of the measure, and we can devise some means whereby we shall secure those rights beyond a question.
>
> 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. Should the power of this Government, as the gentleman from Ohio [Bingham] fears, pass into the hands of the rebels, I do not want rebel laws to govern and be uniform throughout this Union.[280]

Bingham interrupted Hotchkiss, interjecting that the proposed initial draft was in the form of the existing Constitution and would not transfer the laws of one state to another but would merely enforce the privileges and immunities of United States citizens in all the states.[281] Hotchkiss continued:

> The first part of this amendment [privileges and immunities language], to which the gentleman alludes, is precisely like the present Constitution; it confers no additional powers. It is the latter clause wherein Congress is given the power to establish these uniform laws throughout the United States. Now, if the gentlemen's object is, as I have no doubt it is, to provide against a discrimination to the injury or exclusion of any class of citizens in any State from

280. *Id.* To the extent that one suggests that Hotchkiss was against congressional powers, the 39th Congress did not agree. At all times, the Joint Committee of Fifteen intended to expand congressional enforcement powers. *See infra* Part III.C.

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

> the privileges which other classes enjoy, the right should be incorporated into the Constitution. It should be a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress, and not upon two thirds of Congress and three fourths of the States.
>
> Now, I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.
>
> But now, when we [Republicans] have the power in this Government, the power in this Congress, and the power in the States to make the constitution what we desire it to be, I want to secure those rights against accidents, against the accidental majority of Congress. Suppose that we should have here the influx of rebels which the gentleman predicts; suppose a hundred rebels should come here from the rebel States. Then add to them their northern sympathizers, and a reasonable percentage of deserters from our side, and what would become of this legislation? And what benefit would the black man or the white man derive from it? Place these guarantees in the Constitution in such a way that they cannot be stripped from us by any accident, and I will go with the gentleman.
>
> . . . Why not provide by an amendment to the Constitution that no State shall 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?[282]

Hotchkiss's concern was the "caprice of Congress" in the hands of rebels and Democrats to enact uniform laws ensuring "equal protection in the rights of life, liberty, and property."[283] Hotchkiss suggested that if the proposed affirmative language were changed to less broad or to anti-discrimination language that was more direct and precluded congressional discretion to "wipe [protections] out" or to form a uniform constitutional command hostile

282. *Id.*
283. *Id*.

to Reconstruction ideals, he would support it.[284] Further, Hotchkiss would support congressional enforcement of the narrower command.[285]

Hale and Hotchkiss were not alone in their resistance to Bingham's initial draft.[286] Strong criticisms against Bingham's proposal prompted Congress to postpone the amendment while the Joint Committee of Fifteen reconsidered the effort.[287] Meanwhile, Congress continued with the CRA.

During its postponement, Representative Delano, in a speech on the CRA, suggested altering Bingham's proposed amendment to a form wherein Congress exercises not uniform laws in the first instance but remedial powers when the state fails its duty.[288] In the beginning of his speech, Delano proclaimed that the rebel States should adopt the CRA's principles on their own accord:

> If they omit or refuse to do so, then Congress should enforce upon them these measures, provided we have the power to do so conferred by the Constitution. But if this power has not been granted, then the fundamental law should be amended so as to enable Congress to protect and secure the rights of all her citizens in any and in every State where unjust, unequal, and discriminating legislation calls for the increase of the powers of the General Government.[289]

Delano continued:

> 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

284. *Id.*
285. *Id.*
286. *See infra* Part III.C.
287. *See id.*
288. CONG. GLOBE, 39th Cong., 1st Sess. App. 159 (1866).
289. *Id.* at 156.

> to go only when the States refuse to apply and give such security under the fundamental law of the nation. . . .
>
> [I]f we do anything upon this subject at all, we had better do it by taking up the amendment to the Constitution offered by my colleague, [Mr. Bingham,] now postponed till April, modifying it in the form I have suggested, and making it the fundamental law, and then proceeding to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land.[290]

Delano's suggestion accords with the broader model of Reconstruction, which was to let states exercise their sovereign rights of life, liberty, and property but congressionally intervene to correct partial and unequal legislation if the states violate civil rights on account of race, color, or previous condition of servitude.[291] Reconstruction was not about destroying federalism or states' rights—it was about extending American citizenship to blacks. States should protect civil rights, but if they do not, then Congress can intervene through enforcement legislation.[292] Bingham seemed to concur

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290. *Id.* at 158–59.

291. *See supra* Part II.C (discussing the limited reach of CRA and how the CRA was argued to have no effect on state laws where blacks were not denied civil rights). For a contrast between Congress's plenary powers over, for example, interstate commerce and Congress's corrective legislation under Section 5, Justice Bradley observed:

> In these cases [of interstate commerce, coining money, establishing post offices, and declaring war, for example] Congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

The Civil Rights Cases, 109 U.S. 3, 18–19 (1833) (distinguishing corrective legislation under Section 5 from the states' general regulation of life, liberty, and property in municipal legislation); *see also id.* at 13.

292. *See supra* Part II.C; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1278–80 (1866) (Members recognizing states' rights over voting but discussing effort to limit representation for states that deny voting to African Americans). Fessenden stated:

> By this proposition we say simply this: "If in the exercise of the power that you have under the Constitution you make an inequality of rights, then you are to suffer such and such consequences." . . . We do not deny, nobody can deny that the power may be thus exercised. What we say by this amendment is, "If you attempt to exercise it in this wrongful way, you create an inequality of rights, and if you do create an inequality of rights"—not we, but you—"if you undertake to do it under the power which exists in the Constitution, then the consequence follows that you are punished by a loss of representation."

with Delano, as Bingham's proposed amendment would empower Congress to compel officers' obedience and oath to the Bill and Constitution, but states would remain in charge of life, liberty, and property.[293]

C. The Joint Committee's Revisions to Bingham's Draft

The Joint Committee took up the Fourteenth Amendment again in late April 1866. By this time, both the FBB and the CRA had been vetoed by President Johnson.[294] Congress failed to override Johnson's veto of the FBB but succeeded in overturning Johnson's veto of the CRA on April 9, 1866.[295] The CRA was vetoed for, among other reasons, the lack of any constitutional "no State shall" or similar language prohibiting discrimination and thereby authorizing the legislation.[296] A few weeks after the veto, Rep. Thaddeus

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Id. at 1279. Fessenden expressed the desire that protections not be left to a mere majority of Congress because they could be repealed later:

> You settle a question to-day by an act of Congress, which excites great feeling, great animosity, and which divides the people of this country and you may possibly carry it into effect; to-morrow Congress changes its character, or there is another Congress, and your act is repealed, and these men are put back to where they were before.
>
> What I want to do, then, for the benefit of the race of whom the honorable Senator talks so much, is to give them the protection of the Constitution, not leave them to an act of Congress which may be passed to-day and repealed to-morrow, and they be left to be the sport and foot-ball of fortune and of caprice and tyranny, but to place them under a safeguard which shall stand as long as the Constitution itself stands, and requires more than the mere action of a majority of Congress to repeal.

Id. at 1280.

293. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

> I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.

Id.; *see also id.* at 1090; CONG. GLOBE, 42d Cong., 1st Sess. App. 85 (1871).

294. CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (FBB veto message); *id.* at 1679 (CRA veto message).

295. *See supra* note 245 and accompanying text. The supplementary FBB was enacted in the summer of 1866 over another presidential veto. An Act to Continue in Force and to Amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees," and for Other Purposes, ch. 200, 14 Stat. 173 (July 16, 1866).

296. President Johnson:

> [T]here are . . . Federal restraints, as for instance, in the State power of legislation over contracts, there is a Federal limitation that no State shall pass a law impairing the obligations of contracts; and as to crimes, that no State shall pass an *ex post facto* law; and as to money, that no State shall make anything but gold and silver a legal tender. But where can we find a Federal prohibition against the power of any State to discriminate[?]

Stevens introduced the five-part form of the revised amendment to the Committee on April 21, 1866.[297] The Committee's first draft of Section 1 was Stevens's proposal: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[298] Section 5's congressional enforcement language was identical to the Fourteenth Amendment's adopted language.[299] Bingham attempted to amend Stevens's version of Section 1 by adding "equal protection of the laws" language and a prohibition against taking private property without just compensation.[300] The motion was rejected.[301] Next, Bingham attempted to add a new Section 5 with language identical to the adopted language for Section 1, which was affirmed.[302] Section 6 remained the congressional enforcement provision identical to the adopted Section 5.[303] On April 25, 1866, Senator George H. Williams of Oregon moved to strike Bingham's Section 5, which was agreed to.[304] Bingham sought to have his now-deleted Section 5 introduced as a separate amendment, which was rejected.[305] On April 28, 1866, Bingham moved to strike Stevens's Section 1 and replace it with his rejected language (adopted Section 1), which was agreed to.[306] The back and forth between Stevens's version and Bingham's version suggests some equivalence. At all times, the Committee kept congressional enforcement language.[307]

In its revised form, as amended by the Senate in final debates:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866).

297. KENDRICK, *supra* note 249, at 83–84.

298. *Id.* at 83.

299. *Id.* at 83–84.

300. *Id.* at 85.

301. *Id.*

302. KENDRICK, *supra* note 249, at 87. The proposed language did not have the Citizenship Clause, which was added by the Senate in the final edits before Congress's final vote. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

303. KENDRICK, *supra* note 249, at 91.

304. *Id.* at 98.

305. *Id.* at 99.

306. *Id.* at 106.

307. *See supra* Part III.C.

> . . .
>
> Section 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.[308]

Introducing the Joint Committee's amended version in the form "no State shall . . ." to the House in late April, Bingham said:

> The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years . . . . There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? 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.[309]

For Bingham, the language "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" combined with Section 5 created an express prohibition upon every State of the Union, which may be enforced under laws of Congress.[310] "The power to enforce this provision by law is as full as any other grant of power to Congress. It is, 'the Congress shall have power, by appropriate legislation,' to enforce this and every other provision of this article."[311]

We saw above that the CRA was criticized as unconstitutional and incongruent with the Thirteenth Amendment's prohibition of slavery in Section 1.[312] Senator Saulsbury, for example, had stated earlier in the year before the Fourteenth Amendment's adoption that if the 38th Congress had selected the language "there shall be no discrimination in civil rights or immunities among the inhabitants of any State . . . on account of race, color, or previous condition of slavery, but the inhabitants of every race and color . . . shall have the same [CRA's enumerated rights]" as Section 1 of the

308. U.S. CONST. amend. XIV.

309. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866); *see also id.* at 2765–66, 2768 (introducing to the Senate Congress's new powers of congressional enforcement).

310. CONG. GLOBE, 42d Cong., 1st Sess. App. 81–85 (1871).

311. *Id.* at 83.

312. *Supra* Part II.D.

Thirteenth Amendment, then Congress's definition and implementation of that language in the CRA, with its procedure and penalties, would be appropriate enforcement legislation and constitutional.[313] However, the Thirteenth Amendment contained no such language.[314] Filling this void, the Fourteenth Amendment, in providing, among other provisions, that states shall not deny the privileges or immunities of citizens of the United States,[315] carried out Saulsbury's directions and provided appropriate authority for civil rights legislation.[316]

Following the Joint Committee's changes, the Senate added a subsequent amendment that those born subject to United States jurisdiction are citizens.[317] With these revisions, the Amendment was off to the states for ratification. Upon ratification, this declaration of American citizenship would be in the Constitution beyond repeal. Reinforcing the CRA's citizenship language, which had been challenged as unconstitutional,[318] this guarantee abolished *Dred Scott*'s holding that blacks were not citizens, did not enjoy the privileges and immunities of citizens of the United States, and could not sue in federal courts.[319] With citizenship in the Constitution, the remainder of Section 1's "no State shall" language authorized congressional enforcement of citizenship rights.[320] Paralleling Section 2 of the Thirteenth Amendment, Section 5 specifically gave Congress a constitutional basis for civil rights legislation.[321]

IV. THE FOURTEENTH AMENDMENT ON CIVIL RIGHTS

A. Privileges and/or Immunities and Due Process of Law

In the debates, the 39th Congress often supported the Fourteenth Amendment's Privileges or Immunities Clause with its construction of Article IV's Privileges and Immunities Clause.[322] Many people were upset

313. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).
314. U.S. CONST. amend. XIII.
315. U.S. CONST. amend. XIV.
316. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).
317. *Id.* at 2890. There is a lively discussion on citizenship in the Senate's final revisions. This is a necessary read for the birthright citizenship argument.
318. *Id.* at 504; *see also id.* at 1776 (Sen. Johnson challenging Congress's ability in the CRA to make blacks citizens in light of *Dred Scott*; an amendment to the Constitution was required).
319. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–05 (1857).
320. U.S. CONST. amend. XIV.
321. U.S. CONST. amends. XIV, XIII.
322. CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1088–1094 (1866) (Bingham explaining the need for congressional enforcement of privileges and immunities guarantees because of the antebellum difficulties with courts and the Constitution); *id.* at 2539 (Rep. Farnsworth repeating the oft-expressed position that most of Section 1 was already in the Constitution except for the Equal Protection Clause). Bingham stated:

with the antebellum judicial interpretation of the Clause.[323] As we saw above, with the seaman acts and *Dred Scott*, the antebellum debate on citizenship for free blacks was controversial.[324] Blacks could not freely immigrate among the states and faced civil disabilities.[325] Blacks were not considered citizens of the United States and did not enjoy the privileges and immunities of citizenship.[326] Accordingly, Congress wanted power to safeguard a basic meaning of national citizenship in the several states.[327] Bingham identified congressional enforcement of privileges and immunities as an alternative to, or improvement upon, antebellum judicial enforcement of Article IV's Privileges and Immunities Clause.[328] To this end, Bingham stated:

> [Consider] the words of the Constitution itself: "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.[329]

Representative Bingham had the past practices of Oregon in mind when considering the language of Section 1 and the need to provide constitutional authority for civil rights enforcement.[330] Oregon's admission to the Union sparked an antebellum debate in 1859 regarding Oregon's treatment of free blacks.[331] Under an Oregon constitutional provision:

> Sir, the words of the Constitution that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States' include, among other privileges, the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property.

Id. at 2542.

323. *See supra* Parts I.B–D.

324. *See id.*

325. *See supra* Part II.B (slave and black codes).

326. *See supra* note 84 (noting the antebellum controversy over Missouri's restrictions on black immigration and the assertion that this violated the Privileges and Immunities Clause); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–05 (1857).

327. CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (Trumbull explaining his references to judicial decisions on the "privileges and immunities of citizens in the several states" and "citizens of the United States" as establishing fundamental rights of citizenship including life, liberty, and property, which, after the Thirteenth Amendment was ratified, were available for Congress to secure for all persons, including former slaves and free blacks).

328. *Id.* at 1089.

329. *Id.* at 158.

330. *Id.* at 1065, 1090.

331. CONG. GLOBE, 35th Cong., 2d Sess. 980 (1859).

> No free negro or mulatto, not residing in this State at the time of the adoption of this constitution, shall ever come, reside, or be, within this State, or hold any real estate, or make any contract, or MAINTAIN ANY SUIT *therein*. And the Legislative Assembly shall provide by *penal* law for the removal by public officers of all such free negroes and mulattoes, and for their effectual exclusion from the State, and for the *punishment* of persons who shall bring them into the State, or employ or *harbor* them therein.[332]

Concluding that Oregon had violated the Privileges and Immunities Clause, the Due Process Clause, and the law of nature, Bingham advocated against Oregon's admission.[333]

Bingham found particularly oppressive the prohibition precluding free blacks from accessing the courts to vindicate rights and receive remedies for violations of the law.[334] For the right to sue and be sued was part of the protection the state provided to persons.[335] How could a person enjoy due process of law and protection of their person and property if they do not have access to the courts? Accordingly, Bingham stated:

> I say that a State which, in its fundamental law, denies to any person, or to a large class of persons, a hearing in her courts of justice, ought to be treated as an outlaw, unworthy of a place in the sisterhood of the Republic. A suit is the legal demand of one's right, and the denial of this right by the judgment of the American Congress is to be sanctioned as law [admitting Oregon]! But, sir, I maintain that the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; and therefore I hold this section for their exclusion from that State and its courts, to be an infraction of that wise and essential provision of the national Constitution to which I before referred, to wit: 'The citizens of each

332. *Id.*

333. *Id.* at 984 (defining the Privilege and Immunities Clause with an ellipsis to mean "Privileges and Immunities of citizens of the United States Citizens," which would ultimately be the language Bingham and the Joint Committee selected for the Fourteenth Amendment).

334. *Id.*; *see also id.* at 980 (representative finding that Oregon's provision, especially the inability to sue in court, denied rights of citizenship and violated the Privileges and Immunities Clause).

335. *See generally* CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

> State shall be entitled to all privileges and immunities of citizens in the several states.'[336]

Bingham continued:

> I cannot consent to mutilate and destroy that great instrument, the Constitution of my country, by supporting a bill which, on its face, gives effect to a State constitution which denies to citizens of the United States the right of a fair trial in the courts of justice for the enforcement of a right or the redress of a wrong. . . .
>
> This provision, sir, which denies a fair trial in the courts of justice, excludes the same class of our fellow-citizens, native born, forever from the territory of that State. This is not only a violation of that provision of the Constitution of the United States to which I before referred, which secures to the citizens of each State the privileges and immunities of citizens in every State of the Union; but it is, I maintain, a flagrant violation of the law of nature, as recognized by every civilized nation on the globe.[337]

Bingham's 1859 commentary is identical to what we observe in 1866 in reference to *Dred Scott*, black codes, and slave codes.[338] Bingham equated privileges and immunities with principles of life, liberty, and property and due process of law—access to the courts to protect personal security and property.[339] Blacks were denied the benefit of basic citizenship laws.[340]

Joining Bingham, a few advocates in 39th Congress occasionally referenced Congress securing the principles of the Bill of Rights in light of slavery, black codes, and retaliation against loyal whites.[341] Until this time,

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336. *Id.* (emphasis in original removed); *see also id.* at 984–85 (protection of life, liberty, and property and access to the courts were privileges of and fundamental rights of citizenship); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 453–54 (1857) (holding that blacks were not citizens and did not have the privileges and immunities of citizens to sue and be sued).

337. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

338. *See supra* Parts II.A–D (due process and life, liberty, and property arguments supporting CRA's civil rights and immunities to sue and testify as fully as whites enjoy).

339. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (Bingham and Hale debating whether antebellum courts had the power to extend the Fifth Amendment's principle in the states to give all persons the right to bring a suit of law to vindicate a right or redress a wrong); *id.* at 1082 (Senator Stewart observing that the "privileges and immunities" language of Bingham's initial proposal addressed states' refusal to allow free blacks' immigration but was also available under the Privileges and Immunities Clause and did not need a new amendment).

340. *Dred Scott*, 60 U.S. (19 How.) at 587–88.

341. CONG. GLOBE, 39th Cong., 1st Sess. 1089–94 (1866) (Bingham proclaiming that the proposed amendment was all that was needed to enforce life, liberty, and property and the Bill of Rights and that such a grant of power would have been given to Congress long before except for the institution of slavery); *id.* at 1291–92 (Bingham defending the proposed amendment as empowering Congress to enforce the Bill

the Bill had been the symbol of anti-slavery and citizenship rights. Before the War, abolitionists often invoked the Bill of Rights, especially the Fifth Amendment's life, liberty, and property language, along with the Privileges and Immunities Clause in the cause against slavery.[342] Enslavement without judicial process was argued to be a violation of due process of law, and the Privileges and Immunities Clause allowed this to be used against state law.[343]

We also observe references to the Bill of Rights and life, liberty, and property underlying the CRA's effort to protect fundamental civil rights for free blacks and freedmen, especially the right to sue and testify in court.[344] Representative Wilson defined civil rights by referring to William Blackstone's eighteenth-century treatise and the right to enjoy personal security, liberty, and property.[345] While finding that the language "civil rights and immunities" refers to the protection of security, liberty, and property, Wilson exempted political and social rights such as voting, sitting on juries, and school desegregation as not included in the terms "civil rights."[346]

For Wilson, the CRA matched the "life, liberty, and property" that

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in the states); *id.* at 2765–67 (1866) (overlapping privileges and immunities and the Bill of Rights in terms of congressional enforcement); *see also* CONG. GLOBE, 42d Cong., 1st Sess. App. 84–85 (1871) (Bingham describing congressional enforcement of privileges and immunities to include congressional enforcement of Bill of Rights to remedy antebellum outrages associated with slavery); CONG. GLOBE, 38th Cong., 1st Sess. 1202–03 (1864) (slavery denies the privileges and immunities of citizens, which include free speech and free exercise of religion, among others); CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (finding Due Process of Law a privilege and immunity applicable to all persons while debating emancipation in the District of Columbia).

342. The Due Process Clause was expressly associated with prohibiting slavery in the 1860 Republican Party Platform:

> That the normal condition of all the territory of the United States is that of freedom: That, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that "no persons should be deprived of life, liberty or property without due process of law," it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.

Gerhard Peters & John Woolley, *Republican Party Platforms: Republican Party Platform of 1860*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1860 (last visited Feb. 22, 2023).

343. *See supra* notes 113–17 (abolitionist theory of Joel Tiffany); *see also supra* notes 333–40 (Bingham finding due process of law a principle within "privileges and immunities" in the antebellum effort to establish citizenship rights).

344. *See supra* Parts II.C–D (life, liberty, and property equivalent to the CRA and fundamental law, especially the right to sue and be sued); *see also* Kaczorowski, *supra* note 91, at 213, 216–17.

345. CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866). Wilson analyzed the issue of civil rights and privileges and immunities with a discussion of Justice Washington's *Corfield v. Coryell* opinion and Article IV's Privileges and Immunities Clause. *See also supra* note 72 (early case law on privileges and immunities protecting certain capacities in the states).

346. *See supra* note 221 and accompanying text.

Bingham intended to protect with his postponed Fourteenth Amendment.[347] The Amendment meant enforcing fully the capacities enumerated in the CRA.[348] Accordingly, Wilson stated:

> I find in the bill of rights which the gentleman [Bingham] 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 [CRA] relates, having nothing to do with the subjects submitted to the control of the several states [previously named, desegregated jury services, school attendance, and voting].[349]

Wilson explained that the CRA enforced the principles of the Due Process of Law:

> Now, if a State intervenes and deprives him, without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions? . . . The power is with us to provide the necessary protective remedies.[350]

It is not that Wilson and others thought that the CRA incorporated the Bill of

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347. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

348. *Id*.

349. *Id.*; *see also id.* at 1152 (the "sole purpose of the bill is to secure . . . the fundamental rights of citizenship . . . which are common to all citizens . . . which secure life, liberty, and property"); *id.* at 1155 (CRA defended as enforcement of the Constitution's provision on "life, liberty, and property" [Fifth Amendment]).

350. *Id.* at 1294; *see also supra* note 160 and accompanying text (status of a slave); *see supra* note 177 (quoting Senator Sherman: "[t]o say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms"); *see supra* notes 200, 213 (normal judicial process available once right to sue and be sued is established); *supra* notes 222–28 (access to courts and due process of law). Rep. James Garfield commented that the FBB (also applicable to the CRA) enforced the personal liberty and guarantee of life, liberty, and property for freedmen who would no longer be under mobs of local legislation.

> If our Constitution does not now afford all the powers necessary to that end, we must ask the people to add them. We must give full force and effect to the provision that "no citizen shall be deprived of life, liberty, or property without due process of law." We must make it as true in fact as it is in law, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." We must make American citizenship the shield that protects every citizen, on every foot of our soil. The bill now before the House is one of the means for reaching this desirable result.

CONG. GLOBE, 39th Cong., 1st Sess. App. 67 (1866).

Rights, but that the enumerated content of the legislation itself enforced the principle of life, liberty, or property for newly freed slaves and free blacks.[351] The end of slavery was the enforcement of the Bill of Rights.[352] Bingham agreed that the CRA was the enforcement of the reserved powers over life, liberty, and property, but he wanted an amendment to the Constitution providing that authority.[353]

Congress's motive and intent did not change when discussing the CRA or the proposed Fourteenth Amendment.[354] As we see from this discussion, the CRA and Fourteenth Amendment overlap not only temporally but also in substance.[355] This makes sense as the Fourteenth Amendment was needed to fill in the gap between the Thirteenth Amendment's prohibition and the civil rights protected by the CRA.[356] One can find the same supporting debates on enforcing the ideals of "privileges and immunities" under either the CRA or the proposed amendment.[357] The 39th Congress described both efforts as establishing citizenship and enforcement of citizenship rights through anti-discrimination; both were also described as protecting fundamental law and life, liberty, and property.[358]

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351. *Id.* at 1295.

352. WIECEK, *supra* note 84, at 172–77 (First Amendment associated with abolitionist activism and southern responses against threats of insurrection); *id*. at 272 (citing abolitionists' arguments that slavery violated many rights in the Bill of Rights including jury trial, cruel and unusual punishment, takings, and First Amendment liberties); *see supra* notes 340–42 (citations associating Bill of Rights with Due Process of Law and anti-slavery). Rep. Thorton identified that members were defending the CRA as enforcement of the Fifth Amendment (life, liberty, and property) but took issue with this argument. CONG. GLOBE, 39th Cong., 1st Sess. 1156–57 (1866).

353. CONG. GLOBE, 39th Cong., 1st Sess. 1291, 1292 (1866).

354. *See supra* Parts II, III.

355. *See id*.

356. *See infra* notes 375–76 and accompanying text.

357. *See supra* Parts II, III.

358. *See supra* notes 333–49. The 39th Congress's use of "privileges" or "immunities" language in Section 1 and enumerated "civil rights" and "immunities" in the CRA was appropriate for several reasons. The terms "privileges" and "immunities" trace back to medieval England and colonial times. Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 8–10 (2011) [hereinafter Burrell, *Privileges and Immunities*]. The concept of "privileges and immunities of Englishmen" had significant meaning for colonists before the Revolution. *Id*. Parts IV–V. "Privileges" and "immunities" were historically legislative terms as examples of royal or national legislation. *Id*. Parts II–III. Royal charters to individuals and entities were by their nature implicitly excluding nonmembers, nongrantees, or aliens by limiting the conferred privilege or immunity to individuals or members of the entity or territory receiving the charter. *See id.* When one became a member of that entity or territory, he or she received the privileges and immunities thereof. Their alienage or nonmembership disability was lifted, and, all else equal, they were within the monopoly of privileges and immunities of that entity or territory. *See id*. Similar to aliens and nonmembers in relation to the privileges and immunities of chartered territories or entities, slaves were not considered citizens or beneficiaries of general state law on civil rights. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857). At the least, slaves and free blacks before Reconstruction did not enjoy the "privileges and immunities" of national citizenship in the several states. *Id.* at 403–05. Slaves could not contract, could not own land, could not sue or be sued as others could, among many other restrictions. *See supra*

What is at issue is American citizenship, whether in terms of privileges and immunities or civil rights and immunities.[359] Congress intended to abrogate the *Dred Scott* decision and, by creating a federal citizenship floor on civil rights, bypass, if necessary, the nuances of state citizenship and state citizenship rights.[360] National citizenship capacities and anti-discrimination in civil rights covered those rights that were fundamental to citizenship.[361] Time and time again, the 39th Congress recognized that the CRA listed the main components of "civil rights or immunities" or "privileges or immunities" of citizens, which Congress can now protect and enforce.[362] The CRA reversed slave and black codes by establishing citizenship and prohibiting the states from discriminating against and depriving African Americans of these civil rights and capacities.[363]

The goal under both the CRA and the Amendment was securing civil rights for blacks as whites enjoy.[364] Declaring that blacks were citizens and enjoyed civil rights was only half the battle. They also needed to ensure that Congress could enforce these principles. The Due Process and Equal Protection of Law Clauses reinforced the CRA's principles by protecting

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Part II.B. Many states, both in the North and South, imposed similar restrictions on free blacks. *See* Ryan Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 508 (2013). The CRA's enumerated civil rights were the types of privileges and immunities that the king would have secured for subjects overseas or granted to aliens when he made them denizens or subjects, especially the capacity to sue and be sued or to own and inherit property. *See* Burrell*, Privileges and Immunities*, *supra*, Part III; *see also* Abbott v. Bayley, 23 Mass. (1 Pick.) 89, 92–93 (1827) (describing the privileges and immunities that extend to citizenship, including the right to sue and be sued and to enjoy and hold real estate).

359. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (Shellabarger explaining that the CRA's enumerated protections were on par with the right to petition as prime examples of rights of person and property, fulfilling the protection of American citizenship).

360. *See supra* notes 129–31 and accompanying text. This would be one difference between the courts' construction of Article IV's Privileges and Immunities Clause as a guarantee on a state-by-state basis and Section 1's Privileges or Immunities Clause.

361. *See supra* Part II. Representative Shellabarger, in a post-ratification debate, commented:

> [W]hen the United States inserted into its Constitution that which was not in it before, that the people of this country, born or naturalized therein, are citizens of the United States and of the States also in which they reside, and that Congress shall have power to enforce by appropriate legislation the requirement that their privileges and immunities as citizens should not be abridged, it was done for a purpose, and that purpose was that the United States thereby were authorized to directly protect and defend throughout the United States those privileges and immunities which are in their nature "fundamental"—and I use my words cautiously when I say "in their nature fundamental"—and which inhere and belong of right to the citizenship of all free Governments. The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship.

CONG. GLOBE, 42d Cong., 1st Sess. App. 69 (Mar. 28, 1871).

362. *See supra* Part II; *supra* notes 249–56 (Bingham's amendment grounded in the Constitution).

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

364. *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

equal standards of justice, the same benefits and burdens of law.[365] According to Representative Stevens:

> 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. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men.[366]

Senator Howard stated:

> This [amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield it throws over the white man.[367]

B. Section 1 as Constitutional Reinforcement of the CRA

In Part II.D above, we observed the constitutional objection many had to the CRA as enforcement legislation of the Thirteenth Amendment.[368]

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365. The CRA: provided ". . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other . . . ." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. The CRA's companion bill, FBB, provided:

> [A]nd to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offence, than are prescribed for white persons committing like acts or offences . . . .

CONG. GLOBE, 39th Cong., 1st Sess. 209–10, 318, 654, 1292 (1866).

366. *Id.* at 2459.

367. *Id.* at 2766.

368. *See supra* Part II.D.

Representative Rogers of New Jersey expressed the position shared by many that Congress did not have the authority to pass the CRA, which is why Congress was considering the Fourteenth Amendment to provide such authority. Rogers said:

> If the bill to protect all persons in the United States in their civil rights and furnish the means of their vindication, which has just passed the Senate by almost the entire vote of the Republican party be constitutional, what, I ask, is the use of this proposed [fourteenth] amendment? What is the use of authorizing Congress to do more than Congress has already done. . .in passing a bill to guaranty civil rights and immunities to the people of the United States without distinction of race or color? If it is necessary now to amend the Constitution of the United States in the manner in which the learned gentleman who reported this amendment proclaims, then the vote of the Senate of the United States in passing that bill guarantying civil rights to all without regard to race or color was an attempt to project legislation that was manifestly unconstitutional, and which this proposed amendment is to make legal.[369]

This criticism is well founded. An amendment prohibiting slavery did just that. Strictly construed, the Thirteenth Amendment did not provide authority for Congress to legislate citizenship rights, and up until this time, citizenship rights were clearly within state authority.[370] Rogers in early March of 1866, explained:

> 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.
>
> Why, sir, the proposed [fourteenth] amendment of the Constitution which has just been discussed in this House and postponed till April next, was offered by the learned gentleman from Ohio [Representative Bingham] for the very purpose of avoiding the difficulty which we are now meeting in the attempt to pass this bill now under consideration. Because the [initial draft of the] amendment which he reported from the committee of fifteen was

369. CONG. GLOBE, 39th Cong., 1st Sess. App. 133 (1866); *see also supra* notes 238–39 and accompanying text.

370. *See supra* Part I.A (formation of Constitution and Privileges and Immunities Clause).

> intended to confer upon Congress the power "to make laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the right of life, liberty, and property." There is no protection or law provided for in that constitutional amendment which Congress is authorized to pass by virtue of that constitutional amendment that is not contained in this proposed act of Congress which is now before us.[371]

Rogers appreciated that the proposed amendment offered by Bingham was the precise kind of constitutional text needed to support the CRA, not Section 1 of the Thirteenth Amendment.[372] Section 2 of the Thirteenth Amendment was limited to attempts to reinstate slavery as that term was commonly known.[373] If Congress could extend anti-slavery by such unreasonable extensions to cover common citizenship rights, then Congress's power under the Thirteenth Amendment was potentially unlimited.[374]

Congress passed the CRA of 1866 in March of 1866, but President Johnson vetoed it in the same month.[375] Congress overrode the President's veto, but constitutional legitimacy remained a cloud over the CRA until the Fourteenth Amendment's ratification and the CRA's reenactment under that authority.[376] Because Section 1's central purpose was to provide constitutional authority for and permanence of Congress's civil rights legislation, its language follows the CRA closely.[377]

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371. CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866).

372. *Id.*

373. *Id.* at 1156.

374. *Id.* (Rep. Thorton remarking that if one could extend the prohibition of "slavery" to cover the CRA, then Congress's authority was "unlimited except by the passions or caprice of those who may assume to exercise it").

375. *Id.* at 1679–81 (Veto Message).

376. An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, ch. 114, § 18, 16 Stat. 140 (May 31, 1870) (reenacting the CRA after ratification). The President also vetoed the FBB, but Congress failed to override the president's veto in February 1866. CONG. GLOBE, 39th Cong., 1st Sess. 943 (1866).

377. Bingham introduced his proposal for a new amendment at the beginning of the 39th Congress on December 6, 1865. CONG. GLOBE, 39th Cong., 1st Sess. 14, 158, 429 (1866). Trumbull gave notice of his proposal on December 13, 1865, and introduced the CRA to the 39th Congress shortly thereafter. *See supra* note 152 and accompanying text; CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866). Thus, one might take issue with the claim that Bingham's initial proposal was designed for the purpose of constitutionalizing the CRA specifically. However, because the FBB and CRA were the first pushes for civil rights and were vetoed for constitutional concerns, Bingham's proposed amendment took on the purpose of providing constitutional authority for civil rights legislation. *Id*. at 1292 (Bingham advocating that his amendment was necessary for the CRA to be constitutional).

CRA of 1866	**Section 1 of the Fourteenth Amendment**
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;	All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.
[*There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery*][378] and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,[379]	No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;[380] . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
[C]itizens . . . shall have the same right . . . to sue, be parties, and give evidence . . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by	[N]or 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. . . . The Congress shall have power to enforce, by appropriate legislation, the

378. Removed in final draft. *See supra* notes 242, 245.

379. Section 1 of the CRA's initial form resembles the "no State shall" command-congressional enforcement form of Section 1 and Section 5 of the Fourteenth Amendment. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; U.S. CONST. Amend. XIV, §§ 1, 5. The CRA's initial language "no discrimination in civil rights or immunities," which was rejected for overbreadth, is the command; the remainder of the Section and Act is the definition and machinery to enforce it. *See supra* Parts II.C–D. Legislation beginning with a broad "whereas" clause also fits the model. *See infra* note 595 (example of contemporaneous legislation citing constitutional authority in the whereas clause followed by the operational text).

380. Recall that Stevens's first proposal before the Joint Committee was "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." KENDRICK, *supra* note 249, at 83.

> white citizens,[381] 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.[382]
>
> provisions of this article.[383]

The Fourteenth Amendment gave Congress the constitutional power to enact legislation like the CRA beyond all doubt. This was the sentiment during the debates and during the presentation of the Joint Committee's final draft language to Congress.[384] The equivalence of privileges and immunities, civil rights and immunities, and the CRA's enumerated capacities was expressly affirmed in the debates leading up to the historic vote approving the Fourteenth Amendment.[385] The leading members of the 39th Congress acknowledged that Section 1 was equivalent to the CRA in more general terms and that the CRA was already law, but also that the Amendment would secure its principles in the Constitution beyond simple majorities in future congresses, which might include rebels and Democrats.[386]

Representative Thaddeus Stevens, leading Radical Republican and member of the Joint Committee, introduced the final language of the Amendment to the Senate on May 8, 1866.[387] Stevens said:

> This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this. . . . Believing, then, that this is the best proposition that can be made effectual, I accept it.[388]

Stevens was disappointed that Congress failed to secure more radical proposals, such as providing freed slaves with forty acres and securing

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381. Wilson claimed that he added this sentence to prevent the unintentional extension of civil rights to women and children if local laws did not so extend them. CONG. GLOBE, 39th Cong., 1st Sess. App. 157 (1866); *see supra* note 200.

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

383. U.S. CONST. amend. XIV, §§ 1, 5.

384. After the states ratified the Amendment, the CRA was reenacted in enforcement legislation. *See supra* note 376; CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

385. *See supra* Part IV.B.

386. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

387. *Id*.

388. *Id.*

political enfranchisement for all males notwithstanding race.[389] Stevens continued:

> 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 all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedman. Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.[390]

To Stevens and others alarmed by the discussion of readmitting the southern states to Congress, Section 1 was another way of stating the CRA more generally, but Section 1 in its "no State shall" form could not be repealed but by the measure for amending the Constitution.[391] Stevens

389. *Id.*

390. *Id.*

391. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). The threat of repeal or reversal of civil rights is one of the primary reasons why the 39th Congress wanted the language in the Constitution and

commented that Section 2, establishing the basis of representation, was the Amendment's most important section as it strong-armed enfranchisement for African Americans.[392]

Representative Garfield expressed regret that the Committee was not able to secure suffrage guarantees.[393] Garfield addressed the point on Section 1's overlap with the CRA by referring to Stevens's point on constitutional permanence.[394] Garfield observed that the Civil Rights Bill is currently:

> [A] part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that [Democratic] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, 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.[395]

Representative Thayer considered Section 1 uncontroversial as it was a provision everyone understood to be appropriate.[396] Thayer followed others, including Trumbull, when stating that the CRA was declaratory of citizenship rights.[397] Previously, Thayer had emphasized that "[t]here is nothing in this bill . . . that is not already in the Constitution . . . ."[398] "The bill, after extending these fundamental immunities of citizenship to all classes of people in the United States, simply provides means for the enforcement of these rights or immunities" in the courts.[399] Thayer commented on the Fourteenth Amendment:

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why the initial draft was revised into its "no State shall" form. *See supra* Part III.A (members identifying the possibility that reform under the "Congress shall . . . make all laws" form would result in hostile legislation when introducing the initial draft of the Amendment to Congress).

392. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Senator Henderson also believed that Section 2 was the most important provision as all else fell in line if African Americans have the right to vote. *Id.* at 3035.

393. *Id*. at 2462.

394. *Id.*

395. *Id.*

396. CONG. GLOBE, 39th Cong., 1st Sess. 2464 (1866) ("With regard to the first section of the proposed amendment to the Constitution, I cannot conceive that any loyal man can hold any other view upon that subject than that which is indicated in the proposed amendment."); *see also id.* at 2468 (quoting section 1) ("[t]here is not a man in Montgomery or Lehigh county that will not say those provisions ought to be in the Constitution if they are not already there").

397. *See supra* notes 192–203 and accompanying text.

398. CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866).

399. *Id*.

> I approve of the proposition of the gentleman from Ohio [Bingham] in which he offers to put this protection substantially into the Constitution of the United States, though, according to my best judgment, it is not necessary to do so . . . .[400]

For Thayer, Section 1 was equivalent to the CRA which was equivalent to the principles found in state bills of rights.[401] Hitherto, white citizens enjoyed the benefits of citizenship in the states, now that benefit extended to all citizens, including blacks:

> [The Amendment] simply brings into the Constitution what is found in the bill of rights of every State of the Union. As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, and that, not as the gentleman from Ohio [Mr. Finck] suggested, because in the estimation of this House that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House, [Mr. Garfield,] that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States.[402]

Similarly, Representative Boyer shared:

> The first section [of the amendment] 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. It is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions.[403]

Representative Broomall proclaimed that all who voted for the CRA will vote for the Amendment in this form, and the reason we need to vote for the Amendment is because of the constitutional problems with and vulnerability of the law to mere majorities.[404] Broomall explained:

> We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own

400. *Id.*
401. *Id.* Thayer may be referring to state versions of the Due Process Clause.
402. *Id*. at 2465.
403. CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866).
404. *Id.* at 2498.

> jurisdiction. Who will deny the necessity of this? No one. The fact that all who will vote for the pending measure . . . voted for this proposition in another shape, in the civil rights bill, shows that it will meet the favor of the House. 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. . . . 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.
>
> I know that the unrepentant Democracy of this body voted against the civil rights bill upon the allegation that it was unconstitutional. And I rather expect to see them exhibit their usual consistency by voting against making it constitutional upon the ground that it is so already.
>
> That measure, however, will meet with no opposition from those on whom the country depends for its safety, because if it is not necessary it is at least harmless. If 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.[405]

Supporting the Amendment, Representative Raymond traced the history of several provisions and described Section 1's genesis.[406] The proposed amendment was initially suggested in a form to secure the "absolute equality of civil rights in every State of the Union."[407] Then it came in the form of the CRA to "exercise precisely the powers which [the proposed Fourteenth] amendment was intended to confer, and to provide for enforcing against State tribunals the prohibition against unequal legislation."[408]

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405. *Id.*
406. *Id.* at 2512–13.
407. *Id.* at 2502.
408. CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866).

Raymond equating the CRA and Section 1:

> [The CRA] came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer . . . . I regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it, because they voted for the amendment by which that power was to be conferred.

> It was the remedy provided [by the CRA], one feature of which was giving power to the judiciary of the United States to imprison officers of the State courts for enforcing State laws [in violation of protected civil rights],[409] which I did not think Congress had the right to do; it was this exercise of a power which I did not think that Congress under the Constitution possessed which constituted the reason why I voted against the bill, ...
>
> 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.[410]

Representative Eliot concurred with supporters:

> I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection the laws, then, in my judgment, such power should be distinctly conferred. 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.[411]

Joining Eliot, Representative Latham read Section 1 as preventing discrimination in civil rights as distinguished from political rights and observed that the Civil Rights Bill "covers exactly the same ground as this amendment."[412]

The 39th Congress promoted the Fourteenth Amendment as constitutional authority for and permanence of CRA's capacities and anti-discrimination at every intersection.[413] The change from "Congress shall . . .

Id.

409. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27.

410. CONG. GLOBE, 39th Cong., 1st Sess. 2512–13 (1866) (Raymond, responding to Wilson, reiterated that the Amendment was the CRA in constitutional form but gave Congress power to "attain this precise result").

411. *Id*. at 2511 (commenting with Stevens that the provision for suffrage and basis of representation was a compromise).

412. *Id.* at 2883.

413. CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866) (discourse between Senators Howard, Fessenden, and Doolittle on the equivalence between the Civil Rights Act and the Amendment).

make all laws . . .” to “no State shall” was not about removing Congress from the equation.[414] The Joint Committee never entertained any form of enforcement besides congressional enforcement.[415] “Beyond cavil and dispute” congressional enforcement was the mainstay of Reconstruction precisely “to avoid this difficulty” of erroneous judicial interpretation and Congress’s inability to legislate.[416]

Rather, the change from Bingham’s initial draft to the “no State shall” form addressed the scope and posture of Congress’s role. The 39th Congress did not want Congress to have plenary authority to legislate equal life, liberty,

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Fessenden’s comment that he could not recall any discussion in the Joint Committee associating the Amendment with the CRA has been identified to separate the two. *Id*. Fessenden was the chair of the Committee, but the Journal shows that he was absent from several key votes due to chronic illness. KENDRICK, *supra* note 249, at 81–107. In any event, Senator Howard was also on the Committee and clarified the Amendment’s role in constitutionalizing the CRA’s principles. CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

> We 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 as the Senator from Wisconsin, 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.

Id.

414. *See supra* note 309 and accompanying text (Bingham’s introduction of the revised Amendment); CONG. GLOBE, 42d Cong., 1st Sess. App. 81–85 (1871) (describing the change from “Congress shall . . . make all laws . . .” to “no State shall” and reaffirming Congress’s enforcement power).

415. *See supra* Part III.C. In *Ex Parte Virginia,* Justice Strong held:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[,] Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. . . . Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State, as was said in Commonwealth of Kentucky v. Dennison, 24 How. 66 [emphasis added].

Ex Parte Virginia, 100 U.S. 339, 345–46, 347 (1880).

The additional grant of power to Congress Bingham sought was an expansion of Article I, Section 8’s enumerated powers. CONG. GLOBE, 39th Cong., 1st Sess. 1093–94 (1866). Bingham envisioned penal enactments aimed at state officers who violated their oaths to obey the Constitution and laws of the states with respect to freed slaves and loyal whites. *Id*. at 1093–94. This is different from a bill of rights which is typically enforced in the courts. *Id.* at 1093 (“A grant of power, according to all construction, is a very different thing from a bill of rights.”).

416. *See supra* Part II.A (Senators Sherman and Trumbull discussing the reason for adding Section 2 of the Thirteenth Amendment); *see supra* Part I.D (discussing *Dred Scott* case).

and property in the states without any federalism limitations.[417] What would such a power become in the hands of rebels and Democrats? The 39th Congress limited federal intervention to corrective powers, and they wanted this in the Constitution beyond repeal. The 39th Congress viewed protected "privileges" and "immunities" as synonymous with universal rights. Due Process of Law and Equal Protection of Law represented access to the courts and equal standards of justice for all persons—principles first secured in FBB and the CRA.[418]

The framers revised the Amendment to prevent interference with and fortify states' rights for all those matters of general regulation not related to the primary objective of securing American citizenship and civil rights for blacks.[419] State privileges and immunities stood apart from the fundamental character of national privileges and immunities as either local privileges (voting for example) or the underlying substantive regulation applicable to all classes (criminal, property, and contract regulation).[420] Political and social rights were left to states both in creation, regulation, and enforcement.[421] In these non-fundamental areas, states were permitted to maintain distinctions on the basis of race as they did for gender and age. [422]

In one of the last statements on the Fourteenth Amendment before the

417. *See supra* note 291 (corrective nature of Reconstruction); The Civil Rights Cases, 109 U.S. 3, 18 (1833).

418. *See* discussion *supra* Parts II, III.A; *see supra* Part IV.A (access to courts and due process of law); *see supra* notes 364–67 and accompanying text.

419. *See supra* Part III.B (objections to the proposed amendment in its initial form on grounds of states' rights and lack of permanency).

420. *See supra* note 210 (civil rights enumerated); *supra* notes 206–28 (CRA's limited scope). The distinction between national and state privileges and immunities was the subject of the controversial *Slaughter-House Cases and* holding in *Dred Scott.* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857). In the *Slaughter-House Cases*, Justice Miller examined the nascent amendment in the backdrop of *Dred Scott*'s holding that slaves and free blacks were not citizens and did not enjoy the privileges and immunities of United States citizens. *The Slaughter-House Cases*, 83 U.S. at 72–73, 75. Many commentators deride the *Slaughter-House* Court for severely limiting protection to a few national privileges but failing to reach state privileges where the problem arose. This criticism fails to appreciate the Court's holdings. Because Miller had concluded that plaintiffs' claims involved only state issues not protected by the Amendment, Miller did not feel obligated to describe more fully the privileges protected by the Reconstruction Amendments—that would be Congress's job. *Id.* at 77–81. Perhaps the reason that he discussed the matter in any detail was to fend off the voluble dissenting opinions.

421. *See supra* notes 221, 344–46.

> 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.

CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

422. *See supra* note 200 (Representative Wilson explained that CRA's language "to full and equal benefit of laws . . . as is enjoyed by white persons" was to limit coverage).

Senate vote, Senator Poland provided a brief history of Reconstruction to date:

> 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."
>
> But the 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. The great social and political change in the southern States wrought by the amendment of the Constitution abolishing slavery and by the overthrow of the late rebellion render it eminently proper and necessary that Congress shall be invested with the power to enforce this provision throughout the country and compel its observance.
>
> Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment:
>
> > Nor shall any state deprive any persons of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.
>
> It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of independence and in all the provisions of the Constitution. Notwithstanding this we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intent to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. 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, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.[423]

These concluding statements summarize Reconstruction and capture the 39th Congress's convictions. The Senate, with the citizenship language added, approved the final draft.[424] The House agreed, and the Fourteenth Amendment was off to the states for ratification.[425] The irregular ratification process, a topic worthy of its own discussion, was completed in 1868.[426]

V. JUDICIAL TRANSFORMATION OF THE FOURTEENTH AMENDMENT

With the above survey, we appreciate the landscape view of what the Fourteenth Amendment was and was not. The Amendment provided citizenship for African Americans and constitutional authority to congressionally enforce the privileges and immunities of that citizenship with legislation like the CRA. Congressionally protected civil rights include basic capacities and anti-discrimination in rights such as the ability to own land, to inherit, to contract, to give evidence, and to sue and be sued the same as white citizens.[427] For most, the CRA was all that was needed. It provided the fundamental components of citizenship.[428] And the Amendment authorized civil rights legislation like it beyond any doubt.

Beyond civil rights, states were sovereign. The Amendment was not a vehicle for political or social rights.[429] The effort to secure political rights for African Americans was bitterly fought for in 1866 but failed to secure a majority.[430] Accomplishing what they could, the Joint Committee addressed political rights via Section 2 of the Amendment, which imposed a consequence in basis of representation for those states discriminating on the basis of race in voting.[431] Social rights such as desegregated public accommodations were on the horizon but were not part of the CRA or the

423. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).
424. *Id.* at 3042.
425. *Id.* at 3149.
426. Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 563 (2002); *see also* THORPE, *supra* note 162, at 300–21; Hamilton, *supra* note 170, at 184–85 (five prerequisites of the Reconstruction Acts, including black suffrage and the adoption of the Amendment).
427. *See supra* Part II.
428. *See id.*
429. *See supra* Part IV.
430. *See supra* note 389.
431. U.S. CONST. amend. XIV, § 2.

Fourteenth Amendment.[432]

The 39th Congress had placed reform in the hands of Congress and protected federalism. Shifting to the courts, the Judiciary struggled with the language and varied far from the text and meaning.[433] Through expansive interpretations of Section 1, the courts not only supplanted Congress's role but also tossed the Amendment's limitations.[434] With a change in membership, the Supreme Court began its journey into substantive due process.[435] As generations of new judges came to the Bench, the original understanding was lost. A vast array of state action having nothing to do with slavery, race relations, or the Civil War became subject to judicial scrutiny and revision.

The turn of the twentieth century only enlarged the distance between the 39th Congress and judicial implementation of the Amendment.[436] In *Meyer v. Nebraska*, the Nebraska statute at issue restricted schools from teaching young students in any language other than English.[437] Foreign languages could be taught only after the pupil had successfully passed the eighth grade.[438] An instructor of the Zion Evangelical Lutheran Congregation had been found guilty of teaching the German language to students who had not yet passed the eighth grade.[439] Plaintiffs in error challenged the law under a broad "liberty" reading of the Fourteenth Amendment's Due Process Clause.[440] Nebraska justified its law as a valid exercise of police power by stating that the statute's purpose was to prevent foreigners teaching their young children in a foreign language, which might produce anti-American beliefs.[441] The Nebraska Supreme Court affirmed the conviction.[442]

On appeal to the United States Supreme Court, plaintiffs in error claimed the law was "an unwarranted restriction arbitrarily interfer[ing] with the rights of citizens."[443] They also argued the law prevented nonforeigners from

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432. *See supra* note 421.

433. Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony*, 43 GONZ. L. REV. 77, at 128 (2007). The controversies of Reconstruction Congress spilled into the courts. Majority opinions held to the anti-slavery and race-relations context. *Id.* Initial dissenting and nonmajority opinions favored far-reaching views of the Amendment. *Id.* at 130.

434. *Id*. at 138.

435. *Id.* at 147–48.

436. *E.g.*, Lochner v. New York, 198 U.S. 45 (1905).

437. Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

438. *Id.* at 396–97.

439. *Id.*

440. *Id.* at 392. The Equal Protection Clause was also cited. *Id.* at 393.

441. *Meyer,* 262 U.S. at 397–98.

442. *Id.* at 397.

443. *Id.* at 398.

the benefit of being taught foreign language at an early age.[444]

The Supreme Court sided against Nebraska.[445] Justice McReynolds for the majority noted the absence of a definition of "due process of law" but provided a string-cite to several cases.[446] McReynolds concluded that the Due Process Clause's liberty language gave instructors and parents the right to teach children as they saw fit:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[447]

For Justice McReynolds, the Amendment was an opportunity to rework state law. McReynolds inflated "liberty" to such a degree that any state action became subject to the Court's scrutiny as a possible deprivation in violation of the Clause.[448] Losing touch with the anti-discrimination and civil capacity component of Reconstruction, the Court substituted reform aimed at congressionally securing citizenship for blacks as whites enjoy with a judicially derived prohibition against "arbitrary" "interfere[nce]" with court-designated rights—two very different things.[449] Also lost on the Court was the remainder of the Clause "liberty. . .without due process of law."[450] The true purpose of the Clause was to prevent deprivation without law, that is

444. *Id*.
445. *Id.* at 402.
446. *Meyer,* 262 U.S. at 399.
447. *Id.* at 399–400 (citation omitted).
448. *See id.*
449. *See id.*
450. The full clause from the Fourteenth Amendment reads, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1.

executive action in violation of the law or without legal basis.[451]

By these changes, the Court fundamentally transformed the meaning of the constitutional provision, placing the Court's discretion to discover new protections under the term "liberty" above the people's legislative powers. McReynolds added more definition to the Court's emerging "rational basis" test.[452] Representative of modern jurisprudence, the Court declared that it will "supervis[e]" state action for arbitrariness and reasonableness, which translates to a *judicial* determination of whether the state has a rational basis and legitimate interest.[453] The constitutional focus became what the state's reasons for the challenged legislation or act are and whether they are reasonable.

Applying this test, the Court concluded that Nebraska's statute violated its interpretation of the Fourteenth Amendment as it served no reasonable relation to any valid state competency.[454] The Court reasoned that teaching young children foreign languages was not harmful but was honorable and served public welfare.[455]

Justices Holmes and Sutherland dissented in *Meyer v. Nebraska*.[456] Holmes countered that the Constitution did not prohibit Nebraska from regulating educational subject matter.[457] Teaching young children and citizens of the United States to speak a common tongue was a lawful and proper aim of the state.[458]

In *Pierce v. Society of Sisters*, the Supreme Court in 1925 considered whether Oregon's statute requiring that all children of a certain age attend public schools violated the Fourteenth Amendment. [459] The plaintiffs, two proprietors of private schools, claimed the law diminished the value of their business and thus their property.[460] Society of Sisters was a private Roman Catholic corporation with an orphanage and a school system.[461] The second

451. The language originates from a monarchy where the all-powerful king and his royal assortment enforce the king's will against a weaker parliamentary system. Burrell, *Bill of Rights Before the Civil War*, *supra* note 65, at 36–37 (citing commentary why the Bill of Rights was not needed in America with its self-government); *see generally* THOMAS BURRELL, MAGNA CARTA AND DUE PROCESS OF LAW: THE ROAD TO AMERICAN JUDICIAL ACTIVISM (2016).

452. *See Meyer*, 262 U.S. at 399–400.

453. *See id.*; s*ee supra* note 39 (describing rational basis review).

454. *Meyer*, 262 U.S. at 403.

455. *Id.* at 400.

456. Holmes's dissent is found in a companion case, *Bartels.* Bartels v. Iowa, 262 U.S. 404, 412 (1923).

457. *Id.* at 412.

458. *Id*.

459. Pierce v. Soc'y of Sisters*,* 268 U.S. 510, 529–30 (1925).

460. *Id*. at 532–33.

461. *Id*. at 531–32.

plaintiff was Hill Military Academy, a private military school for boys.[462] The lower court claimed that the right to conduct schools was a property interest and that parents enjoyed the liberty to send their children to a school of their choosing.[463] Justice McReynolds, for the Court, agreed with plaintiffs.[464] Under *Meyer v. Nebraska*, the Oregon law unreasonably interfered with the liberty of parents in the upbringing of children.[465] McReynolds added that he believed the legislation had no reasonable relation to any "purpose within the competency of the State."[466]

Pierce and *Meyer* are important "liberty" and "substantive due process" precedents for the Supreme Court's hegemony.[467] These two cases are relied upon numerous times for landmark opinions. We could extend the discussion of *Pierce* and *Meyer* to judicial incorporation of the Bill of Rights against the states.[468] We could also elaborate upon former Chief Justice Earl Warren's revolutionary domination over criminal law.[469] Both cases provided precedent for future judicial activism in *Griswold v. Connecticut*[470] and *Roe v. Wade*[471] among many others. With cases like *Meyer* and *Pierce* ratcheting precedent upon precedent, the Supreme Court, through self-enforcing

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462. *Id*. at 532–33.
463. *Id*. at 533–34.
464. *Pierce*, 268 U.S. at 534–35.
465. *Id*.
466. *Id*. at 535.
467. *See* discussion *infra* Part VI; *see also* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J, dissenting):

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints[.]

Harlan also quoted and cited *Meyer* and *Pierce* among others. Meyer v. Nebraska, 262 U.S. 390 (1923); *Pierce*, 268 U.S. 510.

468. *See, e.g*., Gitlow v. New York, 268 U.S. 652, 666 (1925).

> For present purposes, we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Id. (citing *Meyer*, 262 U.S. 390).

469. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 307 (2d ed. 1997); *see generally* FRED GRAHAM, THE SELF-INFLICTED WOUND (1970).

470. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

471. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

interpretations of Section 1, transformed the Framers' cherished vision of self-government. State sovereignty and constitutional federalism, preserved by the 39th Congress, were whittled away.

VI. THE SUPREME COURT'S CREATION OF A RIGHT TO PRIVACY

A. Griswold v. Connecticut: The Supreme Court's Right to Privacy

In 1965, several states prohibited the use of contraception for married couples. In *Griswold v. Connecticut*, Justice Douglas wrote for the majority that such laws violate the "right to privacy."[472] We see from the above survey of the Amendment's text and context that the Fourteenth Amendment does not contain a right to privacy. The phrase "right to privacy" is not found elsewhere in the Constitution or in the Bill of Rights. Furthermore, "privacy" in the nature of intimate relations among couples is the extreme opposite of anything in the Constitution, which gives the federal government power where individual states are incompetent.[473]

Citing *Meyer v. Nebraska* and *Pierce v. Society of Sisters* for support, Justice Douglas and the majority derived privacy from "zones" and "penumbras" of "fundamental constitutional guarantees" found in Section 1's Due Process Clause, which, through "liberty," incorporates rights found in the Bill of Rights.[474] The Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[475] Thus, state action in violation of guarantees found in the Bill, its zones and penumbras, or in violation of privacy in general violates the Fourteenth Amendment.[476]

Other members of the *Griswold* majority expanded upon this discussion.[477] Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, concurred in the opinion:

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed

472. *Griswold*, 381 U.S. at 486.

473. *See* discussion *supra* Part I.A.

474. *Griswold*, 381 U.S. at 482–85; *see also* Poe v. Ullman, 367 U.S. 497, 515–16 (1961) (Douglas, J., dissenting) (rejecting majority's "nonjusticiability"; would find Due Process's "liberty" includes the Bill of Rights); *id.* at 540–41 (Harlan, J., dissenting) (Due Process is a broader concept than procedural fairness. . . . "[T]he guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"); *see supra* note 468 and accompanying text.

475. *Griswold*, 381 U.S. at 484.

476. *Id.*

477. *See id.* at 491–92 (Goldberg, J., concurring).

> because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment, and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people."[478]

Goldberg recognized that the Bill of Rights was originally a restriction upon federal powers but asserted:

> the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.[479]

Goldberg's view of the Fourteenth Amendment is extremely simplified. Certainly, establishing citizenship and universal citizenship rights can be characterized as ensuring "fundamental personal liberties," but substituting these characterizations as the operative text is to invert cause and effect. Moreover, Goldberg, as others before him, placed the Court in the role of Congress. As explained above, the Fourteenth Amendment is loosely associated with the Bill of Rights.[480] Bingham often, and others occasionally, cited the Bill in the form of congressional protection of "life, liberty, and property."[481] When legislators of the 39th Congress discussed liberties in the form of civil rights for blacks, it was against a backdrop of slave codes and black codes denying capacity to, for example, read, write, congregate in worship, contract, own property, testify, etc.[482] Through Reconstruction, Blacks were citizens and enjoyed the same civil rights as whites enjoy.[483] The effort was to share existing state law, not to rewrite general state law.[484] The CRA protected life, liberty, and property, due process of law, and privileges

478. *Id*.

479. *Id.* at 493. Goldberg, too, relied upon Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

480. *See generally supra* Parts III–IV.

481. *See* discussion *supra* Part III.

482. *See* discussion *supra* Parts II.B–C.

483. *See* discussion *supra* Parts II–III.

484. *See id.*

and immunities of citizens.[485] And Section 1 constitutionalized such legislation.[486] If a state did not deny civil rights or discriminate in the administration of justice, there was no need for the CRA or similar legislation.[487]

Citing the Ninth Amendment as implied authority for federal judicial action *against* the states is an exact inversion of its intended purpose. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[488] The Ninth Amendment goes hand in hand with the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[489] Together, both provide that although the Bill of Rights only enumerates some guarantees, this does not authorize the federal government to trample other rights retained by the people and the states.[490] In other words, the federal government does not have open-ended discretion; it must legislate and operate within its enumerated ends, leaving other regulations of life, liberty, and property to the states and the people.[491] To reinforce this founding principle, the Bill of Rights provides a list of restrictions against the federal government, but these rights in the Bill are not the only rights reserved to the states and the people. For the Court to work the Ninth Amendment into its incorporation doctrine is to invite the federal Judiciary to stand in place of the States and the people in the regulation of life, liberty, and property. The Ninth Amendment incorporated against the states gives the *Court* free reign to discover and protect the states and the people from themselves and self-government.[492]

Resembling Goldberg's opinion, Justice Harlan, concurring in *Griswold*, believed that the majority's incorporation doctrine was an excessive restriction upon Due Process's true scope.[493] For Harlan, "Due Process" included the fundamental "concept of ordered liberty" and did not need to be tethered to the Bill of Rights or any zones or penumbras thereof.[494]

Justice Black, dissenting in *Griswold v. Connecticut*, was critical of the

485. *See supra* Part IV.A (access to courts and due process of law, collecting cites).
486. U.S. CONST. amend. XIV, § 1.
487. *See* discussion *supra* Parts II–IV.
488. U.S. CONST. amend. IX.
489. U.S. CONST. amend. X.
490. Burrell, *Bill of Rights Before the Civil War*, *supra* note 65, Part F.
491. THE FEDERALIST PAPERS No. 45 (James Madison).
492. Burrell, *Bill of Rights Before the Civil War*, *see supra* note 65, at 116–17.
493. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).
494. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

Court's "natural justice" basis[495] for striking down laws:

> The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.[496]

For Black, "the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them."[497] Black denied the notion that the Court should "keep the Constitution in tune with the times," as this was provided for by Article V's amendment process.[498]

Justice Black astutely observed the Warren Court's use of "catchphrases" to extend the Fourteenth Amendment's Due Process Clause against state law:

> A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus, it has been said that this Court can forbid state action which "shocks the conscience," sufficiently to "shock itself into the protective arms of the Constitution." It has been urged that States may not run counter to the "decencies of civilized conduct," or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," or to "the community's sense of fair play and

495. Burrell, *Bill of Rights Before the Civil War*, *supra* note 65, Part H (examining the dispute between Justices Chase and Iredell in Calder v. Bull 3 U.S. 386 (1798)).

496. *Griswold*, 381 U.S. at 511–12 (Black, J., dissenting).

497. *Id.* at 513.

498. *Id.* at 522.

> decency." It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts." States, under this philosophy, cannot act in conflict with "deeply rooted feelings of the community," or with "fundamental notions of fairness and justice,". . . ("rights . . . basic to our free society"); ("fundamental principles of liberty and justice"); ("arbitrary restraint of . . . liberties"); ("denial of fundamental fairness, shocking to the universal sense of justice"); ("intolerable and unjustifiable"). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate."[499]

Justice Black did not win this battle. Judicial legislation in the form of adjectives and catchphrases, often italicized for emphasis, permeates modern American jurisprudence.[500]

B. Roe v. Wade: The Court's Right to Abortion

Griswold, like *Meyer* before it, provided a Swiss-Army-knife precedent for subsequent Supreme Court cases. In *Roe v. Wade*, plaintiffs attacked a Texas anti-abortion statute as conflicting with the personal "liberty" found in the Due Process Clause and the "Bill of Rights or its penumbras."[501] Texas had outlawed abortion since 1854.[502] The majority held—over a century after the Fourteenth Amendment's ratification—that due process of law and *Griswold*'s "right to privacy" prohibited states from banning abortion.[503] Justice Blackmun in *Roe* wrote:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the

499. *Id.* at 511 n.4 (citations omitted).

500. Justice Stewart also dissented as he did not find a right to privacy in the Constitution and would require that that right be explicit or more explicit than the majority's "penumbras and zones" approach. *Id.* at 530 (Stewart, J., dissenting).

501. Roe v. Wade, 410 U.S. 113, 129 (1973).

502. *Id.* at 119.

503. *Id*. at 153.

> pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[504]

Deflecting the argument that life begins at conception, the *Roe* majority went through Texas's reasons for banning abortion but concluded that they were more appropriate to late term abortions.[505] Accordingly, the *Roe* majority permitted the states to regulate abortion in the case of the health of the pregnant woman or to protect the fetus as it approaches term.[506] The *Roe* majority's holding:

> 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in

504. *Id.*
505. *Id.* at 150, 154, 159–60.
506. *Roe,* 410 U.S. at 162–63.

> appropriate medical judgment, for the preservation of the life or health of the mother.
>
> 2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.[507]

The *Roe v. Wade* Court clearly exercised a legislative function. The holding is even written in the form of a statute.[508]

C. Planned Parenthood v. Casey: Reaffirming Roe

The Supreme Court revisited the issue of state abortion laws in its 1992 *Planned Parenthood of Southeastern Pa. v. Casey* decision.[509] Justice O'Connor wrote the Court's plurality opinion, joined by only two justices.[510] *Casey* modified *Roe* to provide for the "undue burden" standard, a form of intermediate scrutiny of state law.[511] The Court held that while the state may regulate abortion in some cases, the state may not impose an undue burden on a woman's right to abortion before viability.[512]

Affirming *Roe*, O'Connor justified an expansive view of substantive due process by noting the *ipse dixit* of prior precedents saying so:

> The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.
>
> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most

507. *Id.* at 164–65; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022) (opinion of Alito, J.) (observing *Roe*'s statute-like holding).

508. Justice Rehnquist, dissenting in *Roe*, called the majority opinion judicial legislation. *Roe,* 410 U.S. at 174 (Rehnquist, J., dissenting).

509. Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992).

510. *Id.* at 843.

511. *Id*. at 846, 876.

512. *Id.* at 874–79.

> specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause).[513]

Formalizing the Supreme Court's seemingly unlimited discretion under "Due Process" and "liberty," O'Connor quoted Justice Harlan for the point that:

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[514]

O'Connor described substantive due process as an exercise of "reasoned

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513. *Id.* at 847–48 (citations omitted). O'Connor followed Harlan's dissent in *Poe. See* Poe v. Ullman*,* 367 U.S. 497, 541 (1961) (Harlan, J., dissenting); *Casey*, 505 U.S. at 847. Harlan also engaged in circular reasoning as a basis for broad definitions of liberty and substantive due process:

> Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.

Poe, 367 U.S. at 541 (Harlan, J., dissenting). The framers of the Amendment rejected the language "equal enjoyment of life, liberty, and property." *See supra* Part III.

514. *Casey*, 505 U.S. at 848 (O'Connor, J., quoting Justice Harlan's dissent in *Poe*, 367 U.S. at 543); *see supra* Part V (discussing Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

judgment."[515] Again, quoting Harlan, "reasoned judgment" was an unwritten balance found in the phrase "Due Process" based on societal needs and the liberty of the individual.[516]

Justice Scalia, dissenting in *Casey*, criticized the majority's reliance on "reasoned judgment" to interpret "liberty."[517] Mirroring Justice Black's criticism of the Warren Court's adjective revolution, Scalia wrote:

> The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told [in the majority opinion], inheres in "liberty" because it is among "a person's most basic decisions" it involves a "most intimate and personal choic[e]," it is "central to personal dignity and autonomy," it "originate[s] within the zone of conscience and belief," it is "too intimate and personal" for state interference, it reflects "intimate views" of a "deep, personal character," it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," and it concerns a particularly "'important decisio[n.]'" But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority) has held are *not* entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are

515. *Casey*, 505 U.S. at 849.
516. *Id.* at 849–50 (quoting Harlan, J.'s dissent in *Poe,* 367 U.S. at 542).
517. *Id.* at 982–83 (Scalia, J., dissenting).

> proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection.[518]

Scalia commented on popular contempt of judicial action when judicial action is based on personal values in place of a legal judgment:

> The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours.* Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.[519]

Scalia's dissent would eventually find the light of day but not until after his death.

D. Dobbs v. Jackson Women's Health Organization: Resurrecting Separation of Powers

Many of the controversial landmark decisions of the Warren Court era became accepted norms despite their lack of constitutional legitimacy. But the Court's intervention in the abortion issue was not such an opinion. In *Dobbs v. Jackson Women's Health Organization*, a 6-3 majority of the Court finally overturned *Roe* and *Casey*.[520] The United States Constitution does not

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518. *Id.* at 983–84 (citations omitted) (Scalia, J., dissenting). For this observation, *see* LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958 70 (1958).

> [J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary, they wrap up their veto in a protective veil of adjectives such as "arbitrary," "artificial," "normal," "reasonable," "inherent," "fundamental," or "essential," whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences," which are all that, in fact, lie behind the decision.

Id. (quoted in Griswold v. Connecticut, 381 U.S. 479, 513 n.5 (1965) (Black, J, dissenting)).

519. *Casey*, 505 U.S. at 1001 (Scalia, J., dissenting).

520. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284–85 (2022) (opinion of Alito, J.).

confer a right to abortion.[521] Justice Alito for the majority rejected *Roe* and *Casey*'s Fourteenth Amendment Due Process jurisprudence as applied to abortion, but saved the theory of substantive due process:

> We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[522]

Alito noted that the Court's substantive due process doctrine falls into two main lines of cases.[523] The first is that the Fourteenth Amendment's Due Process of Law language incorporates the rights found in the Bill of Rights, allowing courts to apply them against the states.[524] The second is a catchall "liberty" interest for fundamental rights.[525] In both cases, the Court asks whether the right at issue is "deeply rooted" or is essential to a scheme of "ordered liberty."[526] Abortion, however, did not fit either line.[527] Justice Alito observed that abortion had, in fact, been a criminal law for most of written time.[528] Three-fourths of the states criminalized abortion to some degree at the time of the Fourteenth Amendment.[529] At the time *Roe* was decided, most states criminalized abortion in most situations.[530]

Three justices dissented in *Dobbs*: Justices Breyer, Sotomayor, and Kagan.[531] They would have held that the right to abortion is part of a woman's equality and autonomy.[532] Breyer, for the dissent, articulated that *Roe* and *Casey* struck a balance between the state's interest and a woman's interest.[533] Breyer confessed that the right to abortion, along with many other

521. *Id.* at 2247, 2284 (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992) for the point that the "Court has . . . been 'reluctant' to recognize rights that are not mentioned in the Constitution").
522. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 701, 721 (1997)).
523. *Id.* at 2246.
524. *Id.*
525. *Dobbs*, 142 S. Ct. at 2246 (Alito, J., majority opinion).
526. *Id.* at 2244, 2246, 2260.
527. *Id.* at 2245–46.
528. *Id.* at 2248.
529. *Id.* at 2252–53.
530. *Dobbs*, 142 S. Ct. at 2253, 2256, 2260.
531. *Id.* at 2317 (Breyer, J., dissenting).
532. *Id.*
533. *Id.*

Court-made rights, cannot satisfy the Court's "deeply rooted" test.[534] The dissent defended the principle that it is for the Court to update the Constitution to keep it in tune with the times, noting specifically the different place in society a woman has now as compared with in 1868.[535]

In *Dobbs*, a division bell exists between the majority and the dissent as to whether overturning *Roe* affects the Court's other decisions such as *Griswold*,[536] *Loving*,[537] *Lawrence*,[538] and *Obergefell.*[539] The *Dobbs* dissent leveraged past accomplishments by asserting that protecting abortion is a liberty interest, and *Roe* is correct just as all these other decisions were correct.[540] By undoing *Roe*, the Court threatens similar opinions that were neither "deeply rooted" nor serving "ordered liberty."[541] The *Dobbs* majority distinguished these opinions from abortion on differing degrees of fundamentalness, noting that *Roe* involves the destruction of "potential life" not present in the other protected liberty interests.[542]

Justice Thomas, concurring in *Dobbs*, would strike out the "oxymoron" substantive due process and reconsider each of these cases relying upon it.[543] Thomas would limit due process to a requirement for process before deprivation of life, liberty, or property, i.e., procedural due process, not substantive.[544] Thomas's opinion against "extraconstitutional value preferences" stands out for its logic and consistency.[545] The Fourteenth Amendment was not meant to reach these landmark "liberty" protections either.[546] *Roe* just happens to be worse. Justice Thomas observed in his *June Medical Services LLC v. Russo* dissent that the Supreme Court has "created the right to abortion out of whole cloth, without a shred of support from the Constitution's text.[547] Our abortion precedents are grievously wrong and should be overruled."[548] Thomas continued:

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534. *Id.* at 2319.
535. *Dobbs*, 142 S. Ct. at 2325.
536. Griswold v. Connecticut, 381 U.S. 479 (1965).
537. Loving v. Virginia, 388 U.S. 1 (1967).
538. Lawrence v. Texas, 539 U.S. 558 (2003).
539. Obergefell v. Hodges, 576 U.S. 644 (2015).
540. *Dobbs*, 142 S. Ct. at 2331–32.
541. *Id.* at 2319, 2332 (Breyer, J., dissenting).
542. *Id*. at 2242, 2257, 2260, 2277, 2280 (majority opinion) (collecting cases but distinguishing the liberty interest of other cases from abortion which involves the destruction of life, an "unborn human being"); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 951–52 (Rehnquist, C.J., dissenting).
543. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring). Justice Thomas might invite the same error under the title of Privileges or Immunities, permitting a judicial doctrine of substantive privileges or immunities. *Id.* at 2302.
544. *Id.* at 2301–02; *see supra* note 38 (procedural due process).
545. *Dobbs*, 142 S. Ct. at 2302.
546. *Id.* at 2302–03.
547. June Med. Servs., LLC v. Russo, 140 S. Ct. 2103, 2142 (2020) (Thomas, J., dissenting).
548. *Id.* at 2142.

> [T]oday's decision is wrong for a far simpler reason: The Constitution does not constrain the States' ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the "legal fiction" of substantive due process. As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone.
>
> The Court first conceived a free-floating constitutional right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In that case, the Court declared unconstitutional a state law prohibiting the use of contraceptives, finding that it violated a married couple's "right of privacy." The Court explained that this right could be found in the "penumbras" of *five* different Amendments to the Constitution—the First, Third, Fourth, Fifth, and Ninth. Rather than explain what free speech or the quartering of troops had to do with contraception, the Court simply declared that these rights had created "zones of privacy" with their "penumbras," which were "formed by emanations from those guarantees that help give them life and substance." This reasoning is as mystifying as it is baseless.[549]

The question before the *Dobbs* Court was whether the Constitution prohibits states from banning abortion.[550] It does not, and the Supreme Court finally correctly overturned *Roe* and *Casey*—returning the issue to the people and their elected representatives.[551]

CONCLUSION

If any one term could capture Reconstruction, it was "American citizenship." Securing American citizenship meant overturning the infamous *Dred Scott* decision and the vicissitudes of state citizenship for blacks.[552] In *Dred Scott*, the Supreme Court denied Scott citizenship and, thus, the ability to sue Sanford in federal court for his freedom.[553] For the 39th Congress, the antebellum courts had failed in the enforcement of citizenship privileges and immunities; it was time for the people to intervene.[554]

A short recap illustrates Reconstruction's accomplishments. President Lincoln and the Civil War Congress attempted to end slavery through their

549. *Id.* at 2149 (citations omitted).
550. *Dobbs*, 142 S. Ct. at 2244.
551. *Id.* at 2242–43, 2284–85.
552. *See supra* Part II.C.
553. *See supra* Part I.D.
554. *See supra* Parts II–III.

respective federal powers.[555] Both efforts were widely challenged on constitutional grounds. To correct this deficiency, the 38th Congress secured the Thirteenth Amendment, which prohibited slavery and gave Congress the power to enforce that prohibition.[556]

Several in the 39th Congress believed that the Thirteenth Amendment authorized a broader set of principles than merely anti-slavery.[557] Accordingly, Congress enacted the CRA to establish citizenship and citizenship rights for blacks.[558] The CRA faced major constitutional scrutiny and a presidential veto.[559] Congress proposed, and the states ratified the Fourteenth Amendment. The Fourteenth Amendment provided a constitutional basis for, and permanent anchoring of, the CRA's citizenship principles.[560] In its final form, the Amendment put American citizenship in the Constitution and constitutionalized anti-discrimination in privileges and immunities central to citizenship, leaving state regulation of municipal rights and immunities with the state.[561] Among various members of the 39th Congress, these civil capacities were described as safeguarding citizenship rights, fundamental law, or occasionally the principles of life, liberty, and property—the Bill of Rights.[562] Political rights and social rights, however, were not covered by the Act or the Amendment.[563]

Failing to secure meaningful political rights in the Fourteenth Amendment, radical Republicans took advantage of their momentum and congressional monopoly to extend reform. An amending majority of both Congress and the states eventually agreed that voting was necessary for full enjoyment of citizenship.[564] Hence, the 40th Congress secured political rights for African Americans with the Fifteenth Amendment, which was ratified by the states in 1870.[565]

Among the members of the Reconstruction Congress, there were proponents who supported desegregating schools and public accommodations.[566] Failing to effectuate these desires, this was not covered

555. *See supra* Part II.A.
556. *See id.*
557. *See id.*
558. *See supra* Part II.C.
559. *See supra* Part II.D.
560. *See supra* Part III.
561. U.S. CONST. amend. XIV.
562. *See supra* Parts II.C–D (federalism protections behind Reconstruction legislation); *see supra* Parts IV.A–B (identifying the relationship between the CRA, Section 1, and the Bill of Rights).
563. *See supra* Parts III, IV.
564. This is especially so when taxation of African American citizens comes into play, given the deeply held attachment to taxation and representation.
565. U.S. CONST. amend. XV.
566. An Act to Protect All Citizens in Their Civil and Legal Rights, ch. 114, §§ 1, 2, 4, 18 Stat. 335. (March 1, 1875) (Civil Rights Act of 1875). The 43rd Congress was partially successful at desegregation

by the Thirteenth, Fourteenth, or Fifteenth Amendments.[567] Following the progression of reform outlined above, one might expect a sixteenth amendment to cover these social rights.[568] But that did not occur.

This ends the constitutional component of Reconstruction. Shortly after the Fifteenth Amendment, Reconstruction stalled as the Radical Republicans lost their monopoly in Congress.[569] Nonetheless, the motivation for reform remained. Where did it go? The courts. The Supreme Court became a source of constitutional reform, giving birth to its own "sixteenth amendment," a fill-in-the-blank decree permitting perpetual judicial discovery of "fundamental guarantees" to accomplish the desired reform of the day.[570]

In this article, we focused on the Supreme Court's right to privacy and abortion. The Court's basis for these rights, through various court-made constructs and precedent-creep, is the Fourteenth Amendment and substantive due process.[571] The text of the Fourteenth Amendment does not include congressional protection of privacy or abortion. As we saw above, privacy and abortion were not discussed by the framers of the Amendment and were certainly not civil rights and immunities established by the CRA.[572] Modern courts find authority for this intervention in state affairs through self-executing notions of liberty and substantive due process. On the contrary, the framers of Reconstruction provided a picture of what they considered to be the protection of due process of law in terms of ending slavery and granting full access to the courts to protect life, liberty, and property.[573]

Substituting descriptions and characterizations of Congress's legislative powers[574] as new sources and redefinitions of the text itself, the Supreme

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with the CRA of 1875 but without the controversial school desegregation provision. The Supreme Court struck down sections 1 and 2 of the Act as unconstitutional in the *Civil Rights Cases*, because, among other reasons, the Fourteenth Amendment covered only state action. *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883).

567. *See generally* U.S. CONST. amends. XIII–XV.

568. The distinction between "civil rights" and "social rights" was well known in the Reconstruction era. *See supra* note 421; *The Civil Rights Cases*, 109 U.S. at 22.

569. Republicans lost elections in the late 1860s and 1870s. *See generally* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869 257–78 (1974); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 66–67 (1974); WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869–1879 236–58 (1979) (discussing electoral fallout and reaction to Republicans' 1870s policies).

570. *See supra* Parts V–VI.

571. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

572. *See supra* Part II.D (scope of the CRA of 1866).

573. The 39th Congress described the CRA and Congress's new and expanded power under the Fourteenth Amendment in terms of securing "due process," "life, liberty, and property," and "fundamental" citizenship rights—privileges and immunities of United States citizens. *See supra* Parts II.C–D, IV.A–B (access to courts and due process of law, collecting cites).

574. *See, e.g.*, *supra* Part IV.A (references to Congress's power to protect the principles of life, liberty, and property, the Bill of Rights, Declaration of Independence, among others).

Court construed Section 1 to mean that no State shall deprive one of fundamental law, with the Court determining what is "fundamental."[575] The text "depriv[ation] of . . . liberty . . . without due process of law" became "arbitrary interference with liberty" as if "depriv[ation] without . . . law" had no meaning when in fact "without . . . law" was the central purpose of the Due Process *of Law* Clause.[576] This kind of muted reasoning eventually facilitated the Court's incorporation of the Bill of Rights against the states as "fundamental guarantees."[577] Hence, no state shall interfere with whatever the courts deem to be included within the Bill of Rights. Even that was not enough for the Court as the Bill of Rights' text was too constrained. The Warren Court looked to penumbras of the Bill of Rights to find a "right to privacy" in *Griswold v. Connecticut*.[578] The right to privacy, according to the Supreme Court in *Roe v. Wade*, includes the right to abortion.[579] The line of cases continued. In 2003, "liberty" was more than "spatial . . . transcenden[ce]" and thus prohibited Texas's anti-sodomy laws.[580] In 2015, the Court extended the liberty interest to protect personal autonomy and dignity in the form of prohibiting several dozen states from recognizing marriage as a union between a man and woman.[581] These are just a few of the countless examples of the Court's substantive due process fiction.

The Supreme Court's modern jurisprudence is sharply at odds with its source of authority. The post-War Reconstruction effort did not pave new substantive inroads against the states on individual rights. With the exception of slavery and its remnants, states were to retain original jurisdiction over life, liberty, and property.[582] The CRA and Section 1 may have been described as fundamental law, enforcing life, liberty, and property (Due Process of Law),

575. *See supra* Part V.

576. *See supra* Part IV; U.S. CONST. amend. XIV.

577. *See supra* notes 468, 474.

578. Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965); *see also* Burrell, *Bill of Rights Before the Civil War*, *supra* note 65, at 114–18 (criticizing *Griswold* under Ninth and Tenth Amendment principles).

579. Roe v. Wade, 410 U.S. 113, 154 (1973).

580. Lawrence v. Texas, 539 U.S. 558, 562, 578 (2003).

581. Obergefell v. Hodges, 576 U.S. 644, 681 (2015). "Personal autonomy" is also referred to in *Casey* as a restatement of *Griswold* and *Roe*. Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992) ("*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."). *See generally Griswold,* 381 U.S. 479; *see generally Roe*, 410 U.S. 113. In the years before *Obergefell,* more than 40 states defined marriage as a union between a man and a woman. *See* Ryan Anderson*, Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUND. (Mar. 11, 2013), https://www.heritage.org/marriage-and-family/report/marriage-what-it-why-it-matters-and-the-consequences-redefining-it; *Constitutional Amendment on Marriage Fails*, FOX NEWS, (Jan. 13, 2015, 8:37 PM), https://www.foxnews.com/story/constitutional-amendment-on-marriage-fails.

582. *See supra* Parts II, III.

protecting the Bill of Rights, or giving life to the Declaration of Independence, but these explanatory descriptions were not the operational text.[583] When evaluating the text, the framers rejected generalizations in favor of enumerated capacities and anti-discrimination.[584] With states' rights in mind, the 39th Congress rejected "equal protection in the rights of life, liberty, and property."[585] A similar revision took place with the CRA, striking "there shall be no discrimination in civil rights or immunities among citizens" as too broad.[586] These revisions removed the risk of "all things" interpretations and gave Congress a more surgical reform to address black codes and slave codes while leaving state sovereignty otherwise intact.[587]

The main objective of Reconstruction was to elevate African Americans to American citizenship; it was not to disrupt federalism beyond this point.[588] The 39th Congress repeated time after time that if states did not discriminate in civil rights on the basis of race, there would be no need for federal intervention.[589] The Fourteenth Amendment did not cover political rights (Fifteenth Amendment) or *a fortiori* social rights.[590] Matters like privacy and abortion were not even remotely contemplated by the framers of

583. *See supra* Parts III–IV.

584. *See supra* Parts II–III.

585. *See supra* Part III.B.

586. CONG. GLOBE, 39th Cong., 1st. Sess. 1266, 1271, 1290–91 (Mar. 9, 1866). Revisions to the CRA reinforce its limitations. Responding to an open-ended proposal, Senator Sherman sought a protection that was more specific and definite, which resulted in the CRA of 1866. *See supra* note 242.

587. *See supra* Part II.D.

588. *See generally supra* Parts II–IV.

589. *See generally supra* Part II.C. Justice Miller, in the *Slaughter-House Cases*, recognized that Congress's power under Section 5 was generally limited to race relations arising out of the institution of slavery. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). Miller noted that the purpose of the Reconstruction Amendments was not to destroy preexisting federalism but to remedy the ills of slavery and establish citizenship and citizenship rights for blacks:

> The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the States did not conform their laws to its requirements, then by the fifth section of the [Fourteenth Amendment] Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

Id. at 81. Bingham's exposition on Congress, the Bill of Rights, and protecting basic life, liberty, and property was always grounded in anti-slavery and associated civil rights. *See supra* note 340.

590. *See supra* Part III; *supra* notes 210, 217–28 and accompanying text.

Reconstruction and, if mentioned, would have been examples of matters excluded and thereby left to the states.[591] Modern jurisprudence reorganizing the states on local matters of religion, health, education, or criminal procedure is a judicial tyranny, not a reasonable extension of Reconstruction-era reform.[592]

The best method for ascertaining the meaning of the CRA and the Fourteenth Amendment is to examine the injury the framers intended to change or address: slave codes, black codes, and the *Dred Scott* holding that blacks were not citizens and therefore did not enjoy the privileges and immunities of citizens of the United States.[593] The same approach works for the Thirteenth and Fifteenth Amendments. With this simple premise, the meaning of the Reconstruction's central pillars becomes clear. Following Reconstruction, a former slave like Dred Scott would be free, would be a citizen, would enjoy the privileges and immunities of citizens of the United States and, thereby, would be able to own and inherit property, contract, and, most importantly, would be able to use the courts to protect himself, his employment, and his property as white citizens enjoy.[594] For several congressmen, the Amendment authorized Congress to enact legislation protecting his ability to attend church and worship God against state laws to the contrary.[595] For many members, the Amendment meant that Congress

591. *See supra* notes 216–228, 256, 269 and accompanying text.

592. Justice Scalia argued:

> When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Planned Parenthood v. Casey, 505 U.S. 833, 984 (1992) (Scalia, J., dissenting), (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

593. *See generally* discussion *supra* Parts II, IV.

594. *See generally supra* Part IV.

595. *See supra* Parts II–III. Legislation such as this would be in line with Bingham's and Howard's descriptions of congressional authority to safeguard fundamental citizenship rights in the states, including rights named in the Bill of Rights. *See supra* note 341; *see also supra* note 348 and accompanying text (discussing equivalence between the CRA and the 39th Congress's citations to the Bill of Rights). In the Second Session of the 39th Congress, Representatives Bingham, Kasson, and others debated a bill protecting against "whip and scourge." CONG. GLOBE, 39th Cong., 2d Sess. 810 (1867). The proposed legislation:

> Whereas it is declared by the eighth amendment of the Constitution of the United States that no cruel and unusual punishments shall be inflicted within its jurisdiction; and whereas it appears that certain parts of the United States inferior tribunals are attempting to establish the barbarous practice of punishing offenses against the law with the whip and scourge, applied to the bodies of free citizens of the United States contrary to said provision of the Constitution and against the principles of civilization and the practice of all free Governments, and tending to degrade the privileges and personal liberty and republican citizenship: Therefore, *Be it*

would be able to ensure that a former slave like Dred Scott would be able to own a gun in the same way as others in the state were able.[596] The Amendment also meant that African American citizens would be subject to the same penalties and punishments as others and would not be subject to separate state criminal codes for blacks.[597] Eventually, African Americans would be able to vote. In a fair light, the Fourteenth Amendment is best described as a temporary, anti-*Dred Scott* measure to remove state-based disabilities stemming from slavery and thereby to raise African Americans to citizenship status.[598]

With the Amendment, American citizenship was in the Constitution beyond simple legislative repeal. Thereafter, citizenship rights for blacks began to flow as part of the basic standards of equal justice—access to due process of law and equal protection of the law—that other *citizens* enjoy. If the CRA or other enforcement legislation were needed, it would be temporary: a declaratory aid to enforce existing state law uniformly.[599] Once that legislation served its purpose, African Americans would be American citizens at law and in effect. Justice Bradley wrote:

> *enacted, &c.*, That any judge, justice, or other civil officer who shall hereafter adjudge, order, or direct that any person, being a citizen of the United States and brought before him for trial or judgment, or in any way subject to his jurisdiction touching any offense alleged to have been committed by him, shall be punished by lashes or blows, or by any other mode of physical torture; and any executive officer, or other person, who shall execute or attempt to execute any such judgment, order, or direction, shall be held to be guilty of a high misdemeanor, and on conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment for a term of not less than six months nor more than six years, or by both such fine and imprisonment, in the discretion of the court.

Id. Kasson defended the proposed legislation as an effort to protect personal rights of citizenship and prohibit physical torture, observing that the practice of whip and scourge was carried over from the institution of slavery. Others objected on federalism grounds that the states have a right to inflict punishment for crimes as they see fit and that the terms "physical torture" were subject to various interpretations. *Id*. Rep. Kasson responded that "Congress, applying the Constitution, has the right to declare what is cruel and unusual punishment; and if the declaration is true the courts must administer the law we pass and prohibit the infliction of such punishments." *Id*. Kasson continued: "The Constitution says that the citizens of one State shall have all the privileges and immunities of citizens in any other State, and I think Congress has the right to protect our citizens in the enjoyment of these rights." *Id.* at 811. Kasson felt that Congress had this power without the Fourteenth Amendment that was pending ratification by the states. CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867). Bingham countered that Congress will have this power when the Amendment is ratified. *Id.*

596. CONG. GLOBE, 39th Cong., 1st Sess. 585, 654 (1866). The right to bear arms was expressly included in the FBB, but it was only applicable in the rebel states without functioning court systems. *Id*. It was not included in the CRA which was applicable in *all* of the states. *See supra* note 245 and accompanying text.

597. *See supra* notes 364–367 and accompanying text.

598. CONG. GLOBE, 39th Cong., 1st. Sess. 3031 (1866) (indicating Section 1 was meant to address *Dred Scott* and citizenship for blacks).

599. *See generally supra* notes 192–228 (indicating that the CRA was needed to establish citizenship rights; thereafter blacks could protect themselves through existing state law).

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[600]

In a functioning constitutional system, additional reform requires new constitutional authority or at least new legislation, not judicial fiat under the Fourteenth Amendment's Due Process Clause.[601] The 39th Congress did not intend for the Fourteenth Amendment to be a black hole swallowing up state criminal laws, contracting law, or property law, let alone abortion or privacy in general.[602] With cases like *Meyer* and *Griswold*, one precedent's expanded notion of "liberty" served as the "text" of the next precedent, and that for the next until the Court's decision-making was entirely divorced from any connection to the actual text and context.[603] The Supreme Court took the outcome they desired and reverse-engineered the Constitution and Bill of Rights to effectuate new constitutional rights.[604]

Dobbs is a sober step in the right direction toward restoring constitutional integrity and republican liberty—a liberty that is not the king's liberty nor the Court's liberty but the people's liberty. This is what American citizenship and the Fourteenth Amendment were about: first with the American Revolution and second with Reconstruction for blacks. The true meaning of due process of law is rule of law—as in the people's law. The bedrock principle of American citizenship is democratic self-government. It is secured throughout the Constitution. Self-government includes the power: (1) to vote, (2) to participate in the law-making organ of the state, and (3) to access the courts to protect personal security, personal property, and liberty, with equal justice under the law.

The civil unrest in the wake of *Dobbs* is illustrative of the difficulty of undoing a Supreme Court wrong. Once the Court framed the issue simply as the Court establishing "fundamental guarantees," it created an entire generation of social justice advocates in search of landmark individual rights

600. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

601. *See* U.S. CONST. amend. XV (voting rights for African Americans); U.S. CONST. amend. XIX (voting rights for women).

602. *See* discussion *supra* Parts III–IV.

603. Burrell, *Bill of Rights Before the Civil War*, *supra* note 65, at 116–17.

604. *See supra* notes 496, 518 and accompanying text. Alternatively, Judge Ho wrote in the Fifth Circuit's *Dobbs* concurring opinion: "Replacing the Rule of Law with a regime of Judges Know Better is one that neither the Founders of our country nor the Framers of our Constitution would recognize." Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 286 (5th Cir. 2019) (Ho, J., concurring).

that are beyond regulation by the people.[605] Lost were basic federalism mechanics and an appreciation of constitutional law.

Contrary to ululating of its critics, the *Dobbs* opinion did not outlaw abortion; it restored the issue to the states and the people.[606] As a principle, the regulation of abortion is an important societal issue with visceral views on both sides. In support of their end goal, "pro-lifers" can march on state capitols; likewise, "pro-choicers" can do the same. Further, these advocates can pursue legislation or seek an amendment to the United States Constitution to make it a federal issue. As justice Alito wrote in *Dobbs*:

> Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.[607]

The same democratic process applies to many of the Court's other landmark opinions of the last seventy-five years. *Roe* was judicial tyranny; *Dobbs* represents republican liberty—true liberty.

605. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).
606. *Id.* at 2243.
607. *Id.* at 2277.