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The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers

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THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT: REFLECTIONS FROM THE ADMISSION OF MARYLAND'S FIRST BLACK LAWYERS

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I. INTRODUCTION

October 10, 1985, was the one hundredth anniversary of the admission to the bar of the Supreme Bench of Baltimore City of Everett J. Waring, the first black lawyer admitted to practice before the state courts in Maryland. Waring's admission was both a beginning and an ending; it was the culmination of a prolonged struggle by blacks for the right to practice law in the state and the beginning of black lawyers' participation in the struggle to establish political and civil rights. The centennial of his admission seems an appropriate time to reflect on the events that led to the opening of the bar to blacks.

Two years before Waring's birth, at least one black man in Maryland had demonstrated the knowledge and capacity to become a lawyer. In 1857 Edward G. Draper was certified by a judge of the Superior Court of Baltimore as fully qualified (except for his race) to practice law. Draper did not ask to be admitted to practice in the state courts because he knew such a request would be futile. Later, however, other blacks before Waring unsuccessfully sought admission. In 1877 the Court of Appeals of Maryland, acting on purely racial grounds despite the adoption of the fourteenth amendment, denied the application for admission of Charles Taylor. Eight years after the *Taylor* decision, the Supreme Bench of Baltimore City held that the statutory racial exclusion violated the fourteenth amendment. Within a few months the Supreme Bench admitted Everett Waring.

These landmarks on the road to the creation of a black bar in Maryland raise a host of questions. Why did Draper study for a profession from which he was barred by the law of his home state? Why did the Court of Appeals reject Taylor's challenge to that law after passage of the fourteenth amendment? Why did a lower court in Maryland admit Waring in contravention of the Court of Appeals' earlier decision in *Taylor*? Complete answers to these questions would require a book on the social, political, legal, and economic history of the period. This article is only a partial response, focusing on legal issues and examining familiar territory—the *Dred Scott* decision, the adoption of the Civil War Amendments to the Constitution, the *Slaughterhouse Cases*, the first Supreme Court decision on racial exclusion from juries, and the subsequent decision of *Plessy v. Ferguson*. Reflecting on the relationship of these legal landmarks to the efforts of blacks to become lawyers in Maryland helps illuminate the creation and transformation of the fourteenth amendment during the nineteenth century.

Draper's decision to study law was part of his decision to emigrate from Maryland to Liberia. That decision arose from his perception that a black could never be a citizen of the United States. Thus, Draper's behavior highlights the portion of Chief Justice Taney's opinion in *Dred Scott* holding that free Negroes were not citizens of the United States. Taney's critics before the Civil War focused their attack on the portion of his opinion that invalidated the Missouri Compromise.[1] The later repudiation of Taney's views on black citizenship was largely a product of the Civil War, which

1. *See* D. FEHRENBACHER, THE DRED SCOTT CASE 417-448 (1979).

began as a struggle to preserve the union and ended in a crusade against slavery.[2] Most modern critics deplore Taney's decision on black citizenship, but they pay little attention to Taney's view of the significance of citizenship.[3] Draper's life focuses attention on that important, but neglected, aspect of our legal history.

Although Taney's opinion in *Dred Scott* demonstrated how natural law arguments may be appropriated by both sides in a controversy, his view that citizenship carried with it important rights derived from natural law was shared by the framers of the fourteenth amendment. They attempted to secure those rights for blacks through the privileges and immunities clause of that amendment. But a broad construction of the clause based on natural law principles, in conjunction with the amendment's enforcement clause, would have resulted in a broad grant of power to Congress—a result which many of the amendment's framers did not intend or desire. Later the Court sought to avoid this impact on the federal system by transforming the focus of the interpretation of the fourteenth amendment from the privileges and immunities clause to the equal protection clause.

The transformation began with the Court's narrow construction of the amendment's privileges and immunities clause. As the experience of Charles Taylor reveals, this construction hindered the extension of civil rights to blacks. Taylor's decision to seek admission to the bar in Maryland was based on his belief that the fourteenth amendment removed racial barriers to the practice of law. The Maryland Court of Appeals denied his application, however, relying on the *Slaughterhouse Cases* for the proposition that the privileges and immunities clause of the fourteenth amendment did not apply to bar admission. Although the Supreme Court in *Slaughterhouse* had specifically said that the equal protection clause was directed at laws that discriminated against Negroes as a class, the Maryland court did not even mention the equal protection clause.

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2. *See* J. MCPHERSON, THE STRUGGLE FOR EQUALITY (1964).

3. *See* W. EHRLICH, THEY HAVE NO RIGHTS 137-149 (1979); FEHRENBACHER, *supra* note 1, at 335-64; Burt, *What Was Wrong with* Dred Scott, *What's Right About* Brown, 42 WASH. & LEE L. REV. 1 (1985); Teachout, *The Heart of a Lawyer's Craft*, 42 WASH. & LEE L. REV. 39 (1985). Scholars recognize that Taney used the privileges and immunities clause and the parade of horribles that he predicted would result if blacks enjoyed those privileges and immunities to support his decision on citizenship, but they rarely pause to note that Taney's position on the impact of that clause was questionable and contrasted sharply with Justice Curtis' view. Consequently, they do not emphasize the relationship of Taney's views on citizenship in *Dred Scott* to the interpretation of its meaning held by the framers of the fourteenth amendment.

Why did the court in *Taylor* read that case to destroy rather than affirm Taylor's right to practice law? The inquiry prompted by *Taylor* leads to an examination of the debates on the fourteenth amendment, which reveals the central importance of the privileges and immunities clause to the framers. More important, it leads to the discovery of the relationship between the opinion of Justice Miller in the *Slaughterhouse Cases* and the contemporaneous debates in Congress on proposals for civil rights legislation. Several commentators have suggested that the absence of racial issues in the *Slaughterhouse Cases* affected the Supreme Court's refusal to give significant content to the privileges and immunities clause,[4] but the investigation of the historical context sparked by the *Taylor* case undercuts this notion. The Maryland court understood *Slaughterhouse* to limit black claims for equal treatment because the state court recognized that the Supreme Court's interpretation of the privileges and immunities clause was a response to, and a rejection of, congressional claims of power to prohibit racial discrimination.

The second step in the amendment's transformation occurred with the Court's broad interpretation of the word "protection" in the equal protection clause. Waring's admission before the Baltimore Supreme Bench despite the *Taylor* precedent was based on reasoning derived from the Supreme Court's decision in *Strauder v. West Virginia*. There the Supreme Court had held that racial exclusion from jury service violated the fourteenth amendment's guarantee of equal protection. Waring's admission underscores the role of *Strauder* in severing the equal protection clause from its connection to the privileges and immunities clause. But his subsequent career and the decision in *Plessy v. Ferguson*, handed down a decade after his admission, show that racial prejudice continued to flourish. The transformation of the amendment still required the Court to find meaning for "equality" in values not expressly stated in the document. The Court's vision was bound to its time and place, and natural law arguments once more were used to preserve existing wrongs rather than transcend them. The Court's interpretation of the equal protection clause, independent of the rest of the amendment, focused attention on the meaning of "equality" amid a culture laden with racial prejudice in contexts not fully considered by the drafters.

The evolution of the interpretation of the fourteenth amendment continues to this day. A century after Waring's admission, the

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4. *See* A. BICKEL, THE MORALITY OF CONSENT 42-46 (1975); C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, pt. 1, at 1318-21, in 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1971).

equal protection clause has become a central feature of constitutional litigation. The efforts of the black lawyers who came after Waring, and who benefited from the broad reading of the "protection" of the fourteenth amendment, have themselves contributed to the evolving understanding of "equality."

Although the perspectives on historical events taken by this article were prompted by looking backward from the events in Maryland in an effort to try to understand how they occurred, the article itself will recount in chronological order some of the events that transformed the interpretation of the fourteenth amendment. It does not propose answers to modern problems of constitutional interpretation. It is intended, more modestly, to provide new historical perspectives to enrich the reader's own reflections on the meaning of the fourteenth amendment and the process of constitutional interpretation.

II. CITIZENSHIP AND BLACKS IN THE ANTEBELLUM ERA: *DRED SCOTT V. SANDFORD*

> *"[T]hey are not included, and were not intended to be included, under the word 'citizens' in the Constitution. . . ."*[5]

A. The Significance of Citizenship in Dred Scott: *An Overview*

Citizens, said Chief Justice Roger Taney, are members of the political body "who hold the power and conduct the Government through their representatives."[6] Citizenship does not turn on the ability to vote, but upon a recognition by those who have political power that the individual is a member of the community on whose behalf the power is exercised.[7] Legal distinctions between the rights of citizens and those of noncitizens are merely one manifestation of the political, social, and psychological effects of inclusion or exclusion in the society. Recognition by the legislature that individuals are members of the community whose interests ought to be considered produces laws more favorable to them than if the legislature did not regard them as citizens. For both pragmatic and humanitarian reasons, government should treat noncitizens fairly; but a society regards its government's primary obligation to be to that

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5. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).

6. *Id.*

7. Thus, women, minors, and persons not meeting property qualifications may be unable to vote, yet are citizens. *Id.* at 422.

society's members. The proper extent of a government's obligations to its citizens, however, is open to question. Understanding Taney's expansive view of these obligations is a key to understanding the significance of his denial of citizenship to blacks in the *Dred Scott* decision.

Blacks were subjected to discrimination in antebellum America in all but a tiny number of northern states.[8] Neither Chief Justice Taney's opinion for the Court in *Dred Scott*, which denied citizenship to blacks, nor Justice Benjamin Curtis' dissent, which argued that blacks could be citizens, was intended to extend significant rights and privileges to blacks. The nature of the reasoning used by each Justice illuminates how article IV, section 2—the privileges and immunities clause—was to become the theoretical battleground for black equality and, in the short term, the theoretical burial ground for visions of that equality.

In *Dred Scott v. Sandford*, Chief Justice Taney took a broad view of the obligations of government. He insisted that citizenship necessarily involved the possession of important rights; for that reason, he denied that blacks could be citizens of the United States. Every citizen had a fundamental right to the protection of government, to life, liberty, property, and the pursuit of happiness. Taney acknowledged the power of a state to deny any of these rights to its *residents*, and that the Constitution provided no remedy for this denial. Such a denial in his eyes demonstrated that the state did not regard such individuals as its *citizens*. But the Constitution did cast its protection over citizens of the United States when they traveled to other states. Since article IV, section 2 gave citizens of one state the privileges and immunities of citizenship in every other state, Taney reasoned that they were entitled to the fundamental rights of citizens in every state to which they traveled, regardless of the rights which that state granted its own residents. Taney believed it inconceivable that the Constitution conferred such valuable rights on blacks, and therefore he argued that blacks could not be citizens.

Justice Curtis, dissenting in *Dred Scott*, took a narrow view of the obligations of government to its citizens under the Constitution. Curtis said that a black man could be a citizen of the United States, but, under his interpretation of the Constitution, citizenship contained few rights of importance. Citizens could invoke federal court

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8. *See generally* L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961).

jurisdiction under article III by demonstrating diversity of citizenship, but their rights in the federal forum were limited to those a state was willing to give its own citizens. According to the reasoning of Justice Curtis, if a state chose to deny the right to own property to any group of its citizens, property ownership in that state was not a privilege or immunity of citizenship to which citizens of other states were entitled under article IV. It was merely a right of nonmembers of the specified group. The privileges and immunities of citizenship secured to citizens of other states by article IV, section 2 were limited to those rights which a state granted to all of its citizens, and the obligations of government to its own citizens were only those which the government voluntarily assumed. Thus, as Curtis constructed his dissenting opinion, blacks could be citizens because citizenship itself was of limited significance. It offered protection against prejudice based on residence, but not against prejudice based on race.

Although Justice Curtis' interpretation of the privileges and immunities clause of article IV is closer to that embodied in current decisions of the Supreme Court,[9] Taney's views are more significant to understanding both the impact of his opinion at the time of the Civil War Amendments and in the context of thought of the framers. *Dred Scott* was a controversial decision when rendered because it denied federal power to abolish slavery in the territories.[10] The holding that Dred Scott and other free blacks were not citizens for purposes of the jurisdictional provision of article III was less controversial. Nevertheless, an emotional response to Taney's opinion on citizenship of blacks was touched off—not by his holding as such,

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9. Curtis was also the author of Connor v. Elliott, 59 U.S. (18 How.) 591 (1856), in which he noted, with respect to the privileges and immunities clause, "It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted or denied therein." *Id.* at 593. In *Connor* he held that the Louisiana law, which provided that persons married in Louisiana or who resided in Louisiana after being married elsewhere acquired property in Louisiana as community property, was not a privilege or immunity of citizenship. He reasoned that such rights were based on the place of contract and not on the citizenship of the parties to the contract. Curtis resigned from the Court after *Dred Scott* and had no further opportunity to elaborate on the meaning of article IV, section 2. His opinions in *Dred Scott* and *Connor* demonstrate that he regarded the clause solely as a protection for nonresidents against discrimination, but they offer little help in defining which rights should be considered privileges or immunities. The view that the privileges and immunities clause protects only against discrimination based on residence has been accepted by the present Court. *See* Supreme Court of New Hampshire v. Piper, 105 S.Ct. 1272 (1985); Hicklin v. Orbeck, 437 U.S. 518 (1978); Toomer v. Whitsell, 334 U.S. 385 (1948).

10. *See* FEHRENBACHER, *supra* note 1.

but by his language and by the implications that Taney himself attached to citizenship. If citizenship meant no more than Justice Curtis said it did, the exclusion of blacks would not have raised such alarm. Indeed, Abraham Lincoln did not challenge this aspect of the decision in his famous debates with Stephen Douglas.[11] Taney, however, equated the rights of a citizen with the fundamental rights of man. Though couched in legal terms, his *Dred Scott* opinion contained a moral dimension that repudiated society's responsibility for the civil rights of blacks. The opinion, therefore, became a symbol of shame. At the same time, Taney provided a touchstone for future attempts to improve the status of blacks. Under Taney's view of the rights belonging to United States citizens, the extension of citizenship to blacks would have had tremendous consequences. In a general sense, the framers of the Civil War Amendments shared Taney's view and thus sought to effectuate a broad spectrum of rights when they guaranteed the privileges and immunities of citizenship to blacks. A precise delineation of the proper consequences of citizenship, however, was missing. The development of the concept of the rights of citizens blended positive law with appeals to natural law in a manner that could only lead to confusion.

B. Early Concepts of the Rights of Citizens

Natural law may be defined as a set of general moral standards,[12] in contrast to the existing positive law of statutes, codes, and decisions of the legal institutions. Normally there is a consensus on the substantive content of positive law, or at least on the authoritative source for determining it. No such consensus exists respecting natural law. Every person may entertain his or her own idiosyncratic view of its content. Nevertheless, in a practical sense, natural law reasoning plays an important role in the perception of a government's obligation toward its citizens. Those who make the law insist that their decisions are in conformity with natural law (even if those of earlier decisionmakers were not) and that natural law will govern future decisons as well. Only critics of the status quo deny the coincidence of natural law and positive law. Despite the clear theoretical distinction between the two, the ideology of those holding power in a society tends to deny that there is a difference in practice.[13] Thus, the line between the rights that citizens of

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11. THE LINCOLN-DOUGLAS DEBATES OF 1858, at 302 (R. Johannsen ed. 1965).

12. *See* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980).

13. In this article "natural law" refers to a set of basic principles that ought to guide society. These principles are derived both from reason and the nature of man and are

a nation ought to have and those that they do have becomes blurred. The evolution of the concept of the rights of citizens in England and America up to the time of the *Dred Scott* decision illustrates this point.

In *Calvin's Case* in 1608 Lord Coke said, "For as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects. . . ."[14] In Coke's scheme, the obligations of king and subject were independent. Thus, the king had a moral obligation to protect the life, liberty, and property of his subjects, but his failure to do so did not relieve his subject of the obligations of allegiance and obedience. The protection owed by the sovereign to his subjects was left vague.

Practically, the rights of citizens were simply those legal protections available only to citizens. English law did not fully catalog the rights of subjects; instead it specified certain disabilities imposed on noncitizens. Most litigation over citizenship, like *Calvin's Case*, involved issues of inheritance. Aliens were barred from owning land and, consequently, from suits at law over real property and from franchises and offices requiring property holding. All the powers granted an alien—acquisition of personal property, use of real property, protection of his person, and the ability to reside in the nation—were merely concessions that could be withdrawn, especially

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applicable to all societies. The rules that govern a particular society (positive law) may violate these principles, but, at least theoretically, such a violation will produce dissatisfaction. Natural law cannot serve as a complete legal system because it does not produce a single set of governing rules for all situations. For example, it may be a natural law principle that life be protected, so that a legal system failing to impose sanctions on murder could be said to violate natural law. Positive law, however, could protect life and thus conform to this principle of natural law in a variety of ways. Sanctions for taking life might range from compensation to the kin of the deceased to life imprisonment (or arguably capital punishment), while the procedures for dealing with the offender could range from self-help to a trial by jury. The avowed aim of law is normally to do justice, and those who create the rules attempt to justify these positive laws by reference to abstract ideas of justice, or natural law. To some extent ideas of justice may be influenced in turn by positive law. If an existing rule is found to be useful and convenient by society's members, they may generalize from its value or usefulness to a principle of justice (although persons who agree upon the value of a rule may nevertheless disagree on the principle which justifies the rule). It is also possible to reason from a principle of justice abstracted from one part of positive law that another aspect of positive law is unjust. Finally, in the process of making positive law, judges often turn to natural law to interpret statutes or to decide cases not covered by statutes. Indeed, early judges insisted they did not "make" law, but rather "discovered" the law which was immanent in principles drawn from nature.

14. 77 Eng. Rep. 377, 382 (1607), Calvin's Case, 7 Co. Rep. 1a, 4b (1608).

if war turned a friendly nation into an enemy.[15] The perception that alienage was a justification for withholding rights or making them subject to withdrawal, however, was accompanied by the developing belief that there were rights to which citizens, in contrast to aliens, were entitled.

In the thought of men like John Locke, conceptions of government based upon a natural order of obligation and right, such as Lord Coke's, evolved into the notion of government grounded in a contractual relationship.[16] In America, the Declaration of Independence asserted a contractual relationship between the governors and the governed. It stated that the purpose of establishing a government is to secure to the people inalienable rights, including "life, liberty and the pursuit of happiness."[17] The Declaration then listed ways in which the king denied these rights. Thus on the eve of the American Revolution, the colonists claimed a right to dissolve their ties to Great Britain because that government had failed in its obligations to them.[18]

Under the Declaration of Independence, the concept of "inalienable rights" contained reference to natural and positive law. Rights were asserted as universal principles of natural law. The fundamental rights of colonists included not only the negative rights to be free of government invasion of personal security, liberty, or property, but also the affirmative rights to the protection by government of personal security, liberty, and property. While natural law could be invoked to uphold the status quo,[19] the colonists could and did invoke natural law to overturn their government. When enforcement of rights grounded in natural law became impossible

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15. J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 6 (1978).

16. *Id.* at 44-61.

17. The Declaration of Independence, para. 2 (U.S. 1776).

18. "[W]henever any government becomes destructive of these ends, it is the right of the people to alter or to abolish it." *Id.*

19. It is no accident that Robert Filmer's *De Patriarcha*, arguing for monarchy on the basis of natural law theory, was published in 1680 during the Restoration, or that Locke's *Two Treatises on Government*, replying to Filmer, came out in 1698 after the "Glorious Revolution." The task of government is eased if the governed accept its authority and laws as legitimate. Thus, the argument that positive law (what is) coincides with natural law (what ought to be) is a useful tool to maintain the status quo. But as the revolutionary rhetoric demonstrates, natural rights theory may be appropriated effectively by opponents with a different vision of the society. The malleability of natural law produces the ambiguity of "privileges and immunities"—the existing status of citizens is justified by reference to natural law which can then be appropriated by advocates of change.

within the existing legal system, they resorted to revolution. Nevertheless, "inalienable rights" also had a positive law aspect, for their content in specific applications was derived from colonial versions of the rights of Englishmen in England.[20] Furthermore, the form that the protection of citizens' security, liberty, and property took was that of existing positive law.[21] The concept of property, for example, involves a bundle of rights to some tangible or intangible thing. These rights may be asserted against the government or against third parties. The content of these rights in any particular case, however, is largely determined by the law of the land. Thus, any claim by a citizen of a fundamental right carried with it both a natural law reference and a reference to existing positive law.

C. Privileges and Immunities—Initial Interpretation

The Articles of Confederation in 1781 recognized that each *state* afforded to its citizens rights that were defined by that state's laws. The Articles provided that

> 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 egress 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 restriction 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.[22]

Under the Articles of Confederation, each state remained sovereign.

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20. *See* E. MORGAN, THE BIRTH OF THE REPUBLIC 6, 73-75, 88 (1967); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-198 (1967); *see also* JOHN ADAMS, LIFE AND WORKS 440 (C.F. Adams ed. 1851); E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 24 (1955). Until the eve of the Revolution, American colonists claimed the rights of Englishmen. The separation produced a broader justification—the rights of man. If the monarchy did not respond to grievances, monarchy itself was wrong. Thus, an early task of American law and lawyers was to distinguish between English common law principles that derived from the law of nature and should therefore be maintained and those principles corrupted by the English system of feudal monarchy. *See* N. CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (1793), *excerpted in* P. MILLER, THE LEGAL MIND IN AMERICA 21-30 (1962).

21. Blackstone classified the fundamental rights of citizens as "the right of personal security, the right of personal liberty, and the right of private property." But, at bottom, Blackstone's discussion of the rights of mankind resolved into a discussion of the state of English law in 1765. 1 W. BLACKSTONE, COMMENTARIES *129, 134, 138.

22. ARTICLES OF CONFEDERATION, article IV.

There was no thought of affecting the way a state treated its own citizens or of obtaining for nonresidents any rights beyond those a state afforded its own citizens, and there was no effective mechanism for enforcing even the limited rights stated in the Articles.[23] Thus, there was no definitive judicial definition of privileges and immunities under the Articles.

The privileges and immunities clause of the Articles of Confederation was imported into the Constitution as the first sentence of article IV, section 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[24] Alexander Hamilton called this clause "the basis of the Union."[25] In both documents, the function of the privileges and immunities clause was not to enable any institution of the federal government to impose its theory of fundamental rights upon the states, but rather to prevent the separate states from treating citizens of other states as aliens, entitled to no rights. The "Privileges and Immunities of Citizens" were to be no greater than the existing rights that a state from time to time afforded its own citizens. In focusing on the elimination of discrimination, however, the drafters and later interpreters paid little attention to the specific content of privileges and immunities. This enabled later generations to invest the phrase with natural law overtones in the very process of limiting its application.

The zealous concern for state sovereignty manifested in the Articles of Confederation, and the continuing anxiety over the independence of the states under the Constitution, made it unlikely that the privileges and immunities clause was intended to destroy all distinctions between citizens of a state and citizens of other states; but the debates of the constitutional convention offered no details as to which rights must be the same. The courts were left to hammer out a definition of privileges and immunities that would preserve the union without encroaching on state sovereignty. Judicial decisions

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23. *See* J. GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 172-95, in 1 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1971).

24. U.S. CONST. art. IV, § 2. The clauses from the Articles of Confederation on "free ingress and egress" and "privileges of trade and commerce" were understood to be part of the privileges and immunities of citizens. The change from "free inhabitants" to "citizens of each state" was commented on in *Dred Scott*. Both Justices Curtis and Taney agreed that the change was intended to render the document more precise, that free inhabitant was understood to be the same as citizen, but the new wording made it clear that aliens would not be entitled to such rights. The change underscored the natural right notion that privileges and immunities were linked to the concept of citizenship.

25. THE FEDERALIST No. 80, at 238 (A. Hamilton) (R. Fairfield ed. 1981).

generally upheld state laws against challenges based on the privileges and immunities clause of article IV, yet they failed to settle the meaning of the phrase.[26] State court decisions were inconsistent and federal courts, with one exception,[27] avoided broad definitions by confining their decisions to the facts of particular cases. However, at least one line of cases identified the privileges and immunities of citizens with fundamental rights derived from natural law, and thus opened the way for the natural law arguments that culminated in Taney's *Dred Scott* opinion.

One of the earliest decisions interpreting the privileges and immunities clause of article IV arose in Maryland. A state statute permitted attachment of real property in the state in order to compel the appearance of a defendant. In 1797 in *Campbell v. Morris*,[28] the defendant argued that the statute was invalid because it did not allow attachment of the property of a citizen of Maryland who remained within the state.[29] The Maryland courts upheld the statute, noting that attachment was not necessary to compel attendance of Maryland residents and therefore that the statute merely produced an equality between citizens and noncitizens in amenability to suit.[30] In the course of the decision of the General Court, Judge Jeremiah Townley Chase narrowly defined the concept of privileges and immunities:

> It seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The Court are of opinion it means that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the

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26. This discussion of the article IV privileges and immunities cases is based on generally available reported decisions, usually of appellate courts. The topic could be the subject of fruitful further research into the lower court decisions of the states, and some reader may be encouraged to give the matter the serious attention it deserves.

27. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). For discussion see *infra* text accompanying notes 33-39.

28. 3 H. & McH. 535 (Md. 1797). The defendant, Robert Morris of Philadelphia, achieved lasting fame as the financier of the American Revolution. After the war he was deeply in debt, and the first two cases under the privileges and immunities clause involved his financial difficulties.

29. *Id.* at 538.

30. *Id.* at 555.

> State, in the same manner as the property of the citizens of the State is protected. It means, such property shall not be liable to any taxes, or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the State creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.[31]

Chase's definition of privileges and immunities focused on property rights and excluded political rights. It was universally conceded that nonresidents could be excluded from the franchise. Chase correctly perceived that restrictions on property ownership historically had been a major characteristic distinguishing aliens from citizens and that "one of the great objects [of article IV, section 2] . . . was the enabling the citizens of the several states to acquire and hold real property in any of the states. . . ."[32] Chase's opinion confined the operation of article IV to the prevention of discrimination in rights that were defined by history and by the needs of the union. Chase offered no hint of natural law reasoning. His privileges and immunities were not the rights of citizenship claimed in the Declaration of Independence.

In 1823 Justice Bushrod Washington, in his capacity as a federal circuit court judge in *Corfield v. Coryell*,[33] described the privileges and immunities of citizens in much broader terms, reminiscent of the Declaration of Independence:

> We feel no hesitation in confining these expressions to

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31. *Id.* at 554. Chase and Duvall held in the decision of the General Court that Morris did not have an estate in the lands attached sufficient to permit his creditor Campbell to have judgment of condemnation. *Id.* at 557. The Court of Appeals reversed on this issue without a reported opinion. 3 H. & McH. 302 (1800). In a related case, Ward, another of Morris' creditors, attempted to attach property in the District of Columbia that Morris had sold to Henry Pratt of Pennsylvania. Ward claimed the transfer was ineffective because Pratt failed to post the bond required of persons acquiring assets in Maryland from a nonresident. The court held that the law did not apply and that the deed to Pratt was valid. Chief Judge Chase in the General Court cited his opinion in *Campbell* on privileges and immunities for the proposition that the privilege of conveying lands is secured to all citizens of the United States in the same manner as to a citizen of the state where the land lies. The statement was dicta, for Chase determined that the statute in question applied only to persons from out-of-state who had been declared bankrupt in their home state, and the plaintiff did not state that Morris had gone into bankruptcy prior to the conveyance. Ward v. Morris, 4 H. & McH. 330 (Md. 1799).

32. Campbell v. Morris, 3 H. & McH. at 553-54.

33. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). In 1823 the circuit courts of the United States consisted of a federal district court judge sitting with a Justice of the Supreme Court. Thus, although Bushrod Washington was a Justice of the Supreme Court, his famous opinion was delivered in his role as a judge of the circuit court.

> those privileges and immunities which are in their nature, fundamental; which belong, of right, to the citizens of all free Governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps, be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.[34]

Washington enumerated specific rights included in the general concept of privileges and immunities:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."[35]

Although he defined privileges and immunities to include the protection of government, the enjoyment of life and liberty, the right to

34. *Id.* at 551-52.
35. *Id.* at 552.

acquire and possess property of every kind, and to pursue and obtain happiness and safety, Justice Washington found that the privileges and immunities clause did not require the extension to nonresidents of the rights of citizens of a state to the common property of the state—in this case rights to dredge for oysters.[36]

On its face, Washington's general description of the privileges and immunities of citizens was as sweeping as the description in the Declaration of Independence of the purpose of government. His references to "fundamental principles" and to "privileges and immunities" that "belong, of right, to the citizens of all free governments" suggest that his conception was grounded in natural law.[37] At the same time, he acknowledged that all such privileges are subject "to such restraints as the government may justly prescribe for the general good of the whole."[38] Every state had always offered some degree of protection for the life, liberty, and property of its citizens through its laws as well as through state constitutional guarantees. Washington said that the privileges and immunities of article IV "have, at all times, been enjoyed by the citizens of the several

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36. Justice Washington held that New Jersey could exclude nonresidents from dredging for oysters in New Jersey waters. Oysters in state waters, Washington said, are the common property of the citizens of the state, and "it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state to the citizens of all the other states." *Id.* The opinion was not a model of clarity. Washington appears to have analyzed the common ownership of natural resources in the state in terms of the proprietary rights of individuals when he argued that the privileges and immunities clause could not be used to diminish the rights of citizens of the state. He did not make clear whether this was true because rights to common property were not privileges and immunities or because this particular privilege, like the electoral franchise, was appropriately defined solely in terms of citizens who are residents of the state. Under the latter interpretation of Washington's delphic opinion, certain privileges of citizenship would necessarily be attached to residence. Extending to nonresidents the right to public goods or to the electoral franchise dilutes and thus diminishes the share of residents. The principle would affect the nonresident, for his share in the public goods and the electoral franchise of his home state would be subject to a similar diminution. Thus, denial by state Y of these privileges to a citizen of state X would not violate article IV because the citizen of state X would retain the equivalent privileges in state X while traveling in state Y, i.e., he would retain in this respect the privileges and immunities of a citizen. On the other hand, ownership of private property would not be a privilege or immunity of citizenship dependent on residence. Permitting a citizen of state X to own property in state Y does not dilute the property interests of citizens of state Y, for they had none in the specific property unless they were the sellers. Similarly, the principle that nonresidents may own property does not dilute the interests of the citizen of state X in any specific property he may own in his home state.

Later courts tended to view *Corfield* as deciding that rights to public goods were not "privileges and immunities." *See infra* note 43.

37. 6 F. Cas. at 551.

38. *Id.* at 552.

states."[39]

On a theoretical level, *Campbell* and *Corfield* were poles apart. Chase's opinion in *Campbell* sounded a positive law note, focusing on equality of treatment. Washington's opinion in *Corfield* pointed to natural law and did not address the issue of the rights of nonresidents to fundamental rights denied citizens of the state. Nevertheless, for the purposes of litigation these differences were insignificant. In this context, Justice Washington's "fundamental rights" extended no further than the existing laws of a state. His recognition that fundamental rights were "subject to such restraints as the government may justly prescribe for the general good of the whole" tied privileges and immunities to the specific laws enacted in each state. Although Washington's "fundamental rights" definition of "privileges and immunities" leads to the conclusion that article IV, section 2 implies the existence of a theoretical obligation of a state government to afford its own citizens the privileges and immunities of citizenship, on its face the constitutional provision only prohibited the denial of privileges and immunities to citizens of other states.[40] The framers of article IV seem to have assumed that states would secure fundamental rights to their own citizens. Justice Washington in *Corfield* asserted that the states had in fact done so. Any claim that states denied their own citizens fundamental rights would have been foolhardy. It would have been an extraordinary step for a court to find that a state violated the fundamental principles of government under article IV by a law that did not discriminate against nonresidents and conformed to all other federal and state constitutional provisions.[41] Thus, Washington's fundamental rights definition of privileges and immunities did not help a litigant

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39. *Id.* at 551.

40. An individual could not claim that the laws of her home state abridge her privileges and immunities under article IV. In Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833), the Supreme Court held that the Bill of Rights did not apply to the states. As Chief Justice John Marshall wrote, "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." *Id.* at 249. As applied to article IV, this reasoning led to a determination that the clause only protected citizens of other states. *Dred Scott*, 60 U.S. (19 How.) at 422-23. Thus, the citizen of a state had only state remedies to pursue.

41. Further, even if a state totally failed in its obligation to protect property, a court would necessarily be reluctant to supply the missing protection. Without some positive law protecting the property of some group, a court would have no basis for determining what specific protection would be appropriate.

to get any rights that did not already exist under positive law for the citizen of a state.

The opinions in *Campbell* and *Corfield* also contained similarities that enabled later courts to rely upon them without recognizing the differences in approach. In both *Corfield* and *Campbell* the courts used "privileges and immunities" as a term of art, which limited the scope of claims that a nonresident could assert. Not every state law conferred a privilege and immunity of citizenship. Moreover, even if a state law did confer a privilege and immunity of citizenship, a different law for nonresidents could be justified under article IV if, in effect, it merely established an equality of rights between citizens and nonresidents. The nonresident could be denied participation in government, including common ownership of the property of state government, because he retained such rights in his home state. He could not be denied the right to own property in a state (a property right or fundamental right), but his property rights could be subject to special rules (e.g., attachment) when the rules produced effective equality with the state's own citizens (e.g., amenability to suit). Thus, "privileges and immunities" included a concept of equality in rights rather than identity in rights.

Although orators and courts spoke of the importance of article IV in creating a national identity, it was rarely used successfully to invalidate differential treatment between citizens of a state and citizens of other states. Some distinctions, like that in *Campbell*, were justified as producing equality of results in view of the different circumstances of the nonresident.[42] Others, like that in *Corfield*, were upheld on the grounds that they did not involve privileges and immunities.[43] As sources for judicial protection of an economic

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42. Campbell v. Morris, 3 H. & McH. 535 (Md. 1797); *see also* Haney v. Marshall, 9 Md. 194 (1856); Duer v. Small, 17 How. Pr. 201 (N.Y. 1859); Kincaid v. Francis, 3 Tenn. (Cooke) 49 (1812). Some justifications based on equal treatment grounds appear questionable. *See* Redd v. St. Francis County, 17 Ark. 416 (1856); People v. Coleman, 4 Cal. 46 (1854); City of Mount Pleasant v. Clutch, 6 Iowa 546 (1858).

43. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa.) (No. 3230) (oyster dredging); *see also* Smith v. Maryland, 59 U.S. (18 How.) 71 (1855) (oyster dredging challenged primarily under commerce clause); Bennett v. Boggs, 3 F. Cas. 221 (C.C.D.N.J. 1830) (No. 1, 319) (dicta as to fishing rights); Dunham v. Lamphere, 69 Mass. (3 Gray) 268 (1855) (dicta as to fishing rights); State v. Medbury, 3 R.I. 138 (1855) (oysters and shellfish); *cf.* Douglass' Administrator v. Stevens, 2 Del. Cas. 489 (1819) (holding right to recover debt from decedent's estate is not privilege and immunity because that clause primarily concerned acquisition and ownership of real property). Distinctions between domestic and out-of-state corporations were upheld by denying that corporations were citizens for purposes of article IV. *See* Commonwealth v. Milton, 51 Ky. (12 B. Mon.) 212 (1851); Tatem v. Wright, 23 N.J.L. 429 (1852); Fire Dept. of N.Y. v. Noble, 3 E. D. Smith 440 (N.Y.C.P. 1854) (evasive opinion did not rely on this distinction although should

common market, the commerce clause[44] and the prohibition against taxing imports or exports[45] were far more important than article IV.[46]

Roughly a quarter of all privileges and immunities decisions in appellate courts prior to the Civil War involved issues of slavery. The law of many northern states declared that slaves who came there with their masters were entitled to freedom. Slaveowners confronted with these laws in northern courts employed two arguments based on article IV to attack this result. First, they argued that they were entitled to the privileges of the law of their home state when traveling into another state. These arguments were uniformly rejected.[47] Second, slave owners seized on the opening provided by the fundamental rights reference in *Corfield*. They argued that, since slaves were property under the laws of their home states, northern laws depriving slaveholders of that property when they traveled in northern states failed to protect property rights. Although residents

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have); Slaughter v. Commonwealth, 54 Va. 292, 13 Gratt. 767 (1856). Durational residency requirements were upheld as distinguishing between citizens and thus not based on any distinction between citizens and noncitizens of a state. *See* Austin v. State, 5 Mo. 591 (1847) (2-year residency requirement for obtaining liquor license); Frost v. Brisbin, 19 Wend. 11 (N.Y. Sup. Ct. 1837) (exclusion from imprisonment for debt of persons who had been residents of state for at least one month—might also be justified by the necessity of preventing flight by nonresident debtor); *see also* Abbot v. Bayley, 23 Mass. (6 Pick.) 89 (1827) (dicta).

44. U.S. CONST., art. I, § 8. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (upholding local pilot laws in opinion distinguishing types of state regulations affecting interstate commerce which are permissible from those forbidden); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (invalidating steamship monopoly granted by state).

45. U.S. CONST., art. I, §§ 9,10. *See* Low v. Austin, 80 U.S. (13 Wall.) 29 (1871); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (invalidating tax on imported goods still in original package).

46. Nevertheless, article IV may have prevented state legislatures from considering some forms of discrimination against citizens of other states. There were some decisions that did strike down state laws as violations of article IV privileges. *See, e.g.*, Wiley v. Parmer, 14 Ala. 627 (1848) (voiding law taxing slaves of nonresidents more than slaves of residents); *see also* Ward v. Morris, 4 H. & McH. 330, 340-41 (Md. 1799) (privileges and immunities clause used as an aid to construe a state statute). It is impossible to know the extent to which the existence of the clause simply prevented state legislative consideration of particular parochial proposals.

47. *See, e.g.*, Allen v. Negro Sarah, 2 Del. (2 Harr.) 434 (1838) (upholding against nonresident's challenge a law freeing any Negro exported out of the state by owner); People v. Lemmon, 7 N.Y. Super. Ct. (5 Sandf.) 681 (1852), *aff'd*, 26 Barb. 270 (1857). The argument that rights from the party's home state are article IV privileges was rejected in other types of cases as well. *See, e.g.*, Reynolds v. Geary, 26 Conn. 179 (1857). There was a period when northern states permitted southern citizens to take their slaves with them when visiting the north without proclaiming their freedom. This had changed by the middle of the century to virtually unanimous determinations of freedom. *See generally* M. TUSHNET, THE AMERICAN LAW OF SLAVERY (1981).

of the northern states could not claim article IV protection in their home states, the nonresident slaveowner claimed that the failure to recognize his property rights in the slave constituted a denial of the privileges and immunities of citizens in the northern state. Not surprisingly, no northern court would recognize property ownership in slaves as a privilege or immunity of citizenship.[48]

Southern laws posed a different problem. Fearful of free blacks as agents of slave insurrections, many slave states (as well as a number of free states) either prohibited the immigration of free blacks or discriminated against them. These laws were challenged as barriers to commerce and as abridgments of the privileges and immunities of citizenship. The state courts sustained such laws against commerce clause contentions as exercises of the police power.[49] They likewise upheld such laws against article IV arguments by holding that free Negroes were not citizens and thus were not entitled to the protections of article IV.[50]

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48. Northern courts took their cue from Chief Justice Shaw's opinion in Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 217 (1836), in which he said, "Though by the laws of a foreign state . . . a person may acquire property in a slave, such acquisition, being contrary to natural right, and effected by the local law, is dependent upon such local law for its existence and efficacy, and being contrary to the fundamental laws of this State, such general right of property cannot be exercised or recognized here." *See, e.g.*, People v. Lemmon, 7 N.Y. Super. Ct. (5 Sandf.) 681 (1852), *aff'd*, 26 Barb. 270 (1857). Counsel on appeal in *Lemmon* relied on Taney's *Dred Scott* opinion. Lemmon v. People, 26 Barb. at 277-82.

49. In the Passenger Cases, 48 U.S. (7 How.) 283 (1849), Justice Wayne for the majority struck down statutes of New York and Boston that imposed fees or inspection rules restricting landing of immigrants, but he specifically noted in dicta that states retained their police powers to turn away persons who threatened the state: "[T]he States where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the same class of men." *Id.* at 426.

50. *See* Pendleton v. State, 6 Ark. 509 (1846); State v. Claiborne, 19 Tenn. (Meigs) 331 (1838). *But see* State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 114 (1838) (upholding state law providing for collection of fines imposed on Negroes by hiring them out, but finding free Negroes entitled to the rights of citizens of the state and suggesting that they are also citizens of the United States). But in State v. Newsome, 27 N.C. 181, 5 Ired. 250 (1844), the same court, upholding restrictions on the rights of free Negroes to carry firearms, said it is a

> principle settled by the highest authority, the organic law of the country, that the free people of color cannot be considered as citizens in the largest sense of the term, or, if they are, they occupy such a position in society as justifies the Legislature in adopting a course of policy in its acts peculiar to them, so that they do not violate those great principles of justice which ought to be the foundation of all laws.

27 N.C. at 184-85, 5 Ired. 250; *cf.* Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70 (1820) in which a statute forbidding a Negro from striking a white was struck down as a violation of the state constitution, the court noting that the provision of the constitution in question applied to all men whether aliens, free persons of color, or citizens. *Id.* at 75. *But see* Amy v. Smith, 11 Ky. (1 Litt.) 326 (1822) applying a statute of limitations specifically

Most litigation raising article IV claims occurred in state courts.[51] For the most part, these courts did not distinguish between the reasoning of *Campbell* and *Corfield*. It would have been necessary to reject *Corfield's* language only if the state court were to find that the state's domestic legislation was valid under the state constitution, yet violated the fundamental rights of citizens. State courts were understandably reluctant to find either that their state constitutions failed to protect fundamental rights or that their state governments had denied anyone a fundamental right. Because fundamental rights refer to a natural law moral concept as well as to a potentially enforceable legal right, disclaiming legal effect for fundamental rights would not, of course, avoid the moral responsibility to afford such rights. But state courts had little incentive to announce that the state was not legally bound to afford citizens the fundamental rights of citizenship, when it was so easy simply to assert that the state did not violate these rights. In any event, state court decisions could not conclusively determine the meaning of article IV, and the

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designed for claims of allegedly free slaves to bar a suit for trespass, i.e., freedom. The court said there was a presumption that no state has made Negroes citizens, based on the federal naturalization law that applied for whites only. *Id.* at 334. Even assuming that she was a citizen of another state, the plaintiff could not claim rights greater than those granted by Kentucky to its citizens, so domestic law should prevail.

51. *Corfield* was a federal case. There were very few others, and no federal decision shed any more light on the meaning of article IV, § 2 than *Corfield*. In Smith v. Maryland, 59 U.S. (18 How.) 71 (1855) and Kearney v. Taylor, 56 U.S. (15 How.) 493 (1853), the Court upheld state laws without clearly dealing with the privileges and immunities claims raised by the parties. In Bennett v. Boggs, 3 F. Cas. 221 (C.C.D.N.J. 1830) (No. 1319), the parties did not raise the issue, but the court pointed out that *Corfield* would have caused the clause to be inapplicable in any event. In Connor v. Elliott, 59 U.S. (18 How.) 591 (1856) a Mississippi citizen claimed an interest in her late husband's land in Louisiana. Under Louisiana law, Louisiana residents or couples married in Louisiana held land as partners. The petitioner argued that as a citizen of another state, she was entitled to the same privilege (joint tenancy) as a Louisiana citizen. Justice Curtis said the right was based on place of contract regardless of the citizenship of the parties. Therefore, the right was not a privilege of citizenship. Finally, in The Cynosure, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3529), the court held that a Louisiana law prohibiting free persons of color from entering its ports was an unconstitutional interference with interstate commerce and intimated that it also violated article IV, § 2. The context of the case was unusual—a ship's master sought to deduct his costs in paying the expenses of imprisonment from the seaman's wages. Thus, the validity of the southern law was tested in a northern court, which held for the seaman. The only test of such a law in the south (other than Justice Johnson's opinion based on the commerce clause in Elkison v. De Liesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366)), was Roberts v. Yates, 20 F. Cas. 937 (C.C.D.S.C. 1853) (No. 11,919), which upheld the local law. No successful direct challenge was ever made. *See* C. SWISHER, THE TANEY PERIOD, 1836-64, at 394, in 5 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1974).

few federal decisions on privileges and immunities were inconclusive as well. These early decisions of state and federal courts often took the form of a reference to *Campbell* or *Corfield* (if any precedent was discussed) for a description of "privileges and immunities," followed by a few words exalting the importance of these rights, and finally by a decision that the state law in question was valid.

The failure of the courts to articulate a clear theory of the article IV privileges and immunities left the door open to arguments that the clause embodied natural law principles of fundamental rights. This potential argument was buttressed by the general willingness of courts to use language of natural law. Natural law has been a theme of constitutional law since its inception.[52] Judges in the post-revolutionary period often referred to natural law in support of opinions that could have rested on particular clauses of the Constitution.[53] The context of these cases, however, meant that the Court never accepted natural law as a principle of decision apart from its coincidence with specific provisions of the Constitution. Judicial dicta on natural law together with Justice Washington's recognition of fundamental rights in his interpretation of article IV mutually reinforced the proposition that the Constitution in some fashion incorporated natural law principles. Judicial decisions under the privileges and immunities clause did not foreclose that result. As explained above, however, natural law had virtually no force as a litigation strategy. Its greatest use was in political rhetoric.

The political forum produced a varied rhetoric on the obligations of government to protect its citizens. As the Civil War neared, issues surrounding the enforcement of the fugitive slave clause[54] and the possible extension of slavery to the territories sparked most of the discussion. Southern speakers insisted on the government's obligation under the Constitution to protect the institution of slavery. Their arguments relied primarily on the fugitive slave clause in

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52. In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), Justice Samuel Chase asserted that the people did not give their state or federal government power to violate natural law. Justice Iredell replied:

> The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Id. at 399 (Iredell, J., concurring).

53. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Marshall invoked natural law in case resting on the contract clause).

54. U.S. CONST., art. IV, § 2, cl. 3.

conjunction with policy considerations and appeals to a fundamental right of "self-determination" for the territories.[55] Some southerners even pointed to the due process clause and the just compensation clause to deny the federal government any power to eliminate slavery in areas under its control.[56] Most northerners, despite significant racial prejudice, believed slavery immoral and found these arguments preposterous. Nevertheless, many were willing to compromise if necessary to preserve the Union. And while they resented southern suppression of abolitionist speech, many also disapproved of the abolitionists' agitation.[57]

Abolitionists could be divided into three groups, each with different views on the obligations of government. One group agreed that the Constitution, especially the fugitive slave clause, required the protection of slavery. They therefore denounced the Constitution. The best known spokesman for this group was William Lloyd Garrison, who characterized the Constitution as a pact with the devil that violated natural law.[58] A larger group agreed that, although slavery was contrary to natural law, principles of federalism embedded in the Constitution precluded interference with slavery within the southern states. This group still embraced the Constitution, however, claiming that it was a source of power for isolating the hated institution and ultimately choking it to extinction. They

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55. The shape of southern argument depended on the issue being discussed. The fugitive slave clause was crucial to the protection of southern property in slaves and was relied on by judges and legislators to combat abolitionist efforts to protect fugitive slaves. Arguments based on the principle of popular sovereignty had natural law overtones and were used throughout the nation as a justification for permitting slavery in the territories. The Compromise of 1850 reflected these arguments, providing for a more effective fugitive slave law and "popular sovereignty" for territories acquired from Mexico. But southern leaders following Calhoun argued that Congress had the duty to protect slavery in the territories while northerners resisted both the fugitive slave law and the extension of slavery. *See* L. TODD & M. CURTI, RISE OF THE AMERICAN NATION 355-60 (2d ed. 1966); *see also* H. HAMILTON, PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850 (1964).

56. *See* 36 ANNALS OF CONG. 1521 (statement of Rep. Scott) (Feb. 1820), *cited in* W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848, at 116 (1977); *see also* Pickens' congressional speech in January 1836 and Pinkney's committee report in May 1836, *cited in* J. TENBROEK, EQUAL UNDER LAW 42 (1965).

57. On reaction to southern suppression of abolitionist speech, see G. BARNES, THE ANTI-SLAVERY IMPULSE 1830-1844, at 109-114 (1933) and R. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860, at 25, 32 (1963). On northern distaste for abolitionists, see L. RICHARDS, GENTLEMEN OF PROPERTY AND STANDING (1970) and M. DUBERMAN, *The Northern Response to Slavery*, in THE ANTI-SLAVERY VANGUARD 394-413 (1965).

58. W. WIECEK, *supra* note 56, at 228-48.

found federal power to abolish the interstate slave trade in the commerce clause, and to abolish slavery in the District of Columbia and the territories in congressional power over those lands.[59]

While virtually every abolitionist agreed that slavery violated natural law,[60] often citing the Declaration of Independence in their arguments, only a handful contended that natural law was legally binding. This third group of abolitionists, the "antislavery constitutionalists," was important despite its small size. The group's ideas bore a direct, if contrary, relationship to Taney's opinion in *Dred Scott* and influenced the framing of the fourteenth amendment. Theodore Weld, Elizur Wright, and Alvin Stewart argued that the due process clause of the fifth amendment had a substantive dimension that precluded Congress from taking from any man his property in himself. Stewart also argued that the fifth amendment was binding on the states.[61] In a more sweeping argument, Joel Tiffany and Lysander Spooner insisted that all persons born in the United States were citizens of the United States. Tiffany and Spooner said that citizens were entitled to fundamental rights by virtue of their citizenship, relying on the Preamble to the Constitution and the Declaration of Independence to bolster their arguments.[62] Although they did not rely expressly on article IV with its limitation to interstate travelers, they did apply ideas of fundamental rights of

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59.

> We fully and unanimously recognize the sovereignty of each State, to legislate exclusively on the subject of slavery which is tolerated within its limits; we concede that Congress, under the present national compact, has no right to interfere with any of the slave States, in relation to this momentous subject:
>
> But we maintain that Congress has a right, and is solemnly bound, to suppress the domestic slave trade between the several States, and to abolish slavery in those portions of our territory which the Constitution has placed under its exclusive jurisdiction.

Declaration of Sentiments of the American Anti-Slavery Society, (proceedings of the Anti-Slavery Convention, assembled at Philadephia, Dec. 4-6, 1833) *reprinted in* L. RUCHAMES, THE ABOLITIONISTS 82 (1963).

60. "The right to enjoy liberty is inalienable. To invade it is to usurp the prerogative of Jehovah. Every man has a right to his own body—to the products of his own labor—to the protection of law—and to the common advantages of society." *Id.* at 80. This natural rights claim made in 1833 paralleled Justice Washington's description in *Corfield* of privileges and immunities of citizenship—"protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." *See supra* text accompanying note 34. Although Garrison contributed to the Declaration of Sentiments, he did so before the antislavery movement splintered. All branches continued to agree that slavery violated natural law.

61. W. WIECEK, *supra* note 56, at 249-75; J. TENBROEK, *supra* note 56, at 94-115.

62. J. TENBROEK, *supra* note 56.

citizenship developed within the context of that clause. The antislavery constitutionalists marked out a path for using the doctrines of substantive due process and of the natural law privileges and immunities of citizenship to further minority freedom. Although Chief Justice Taney used the same doctrines to support slavery, he recognized that the notions of due process and citizenship embodied substantive constitutional rights. This recognition would then enhance the credibility of antislavery constitutionalist thought during discussions of the constitutional amendments after the war.

During the antebellum period, the courts, like the general population, paid scant attention to antislavery constitutionalists. The mainstream abolitionist position was a moral and philosophical position on citizenship, not a legal constitutional claim. Legally, a slave was the personal property of his owner. Clearly an item of property could not be considered a member of society. Most abolitionists denounced this situation as a moral outrage, but acknowledged that it was legally accurate. If slaves, though native born persons, were not citizens, it followed that citizenship did not depend on place of birth alone. What then determined citizenship and what rights did citizenship entail? The naturalized alien could demonstrate citizenship by a document obtained in a legal proceeding. The native born person had no such document. Citizens were entitled to some rights under the Constitution, but by 1857 the Supreme Court had not yet settled what those rights were nor how the citizenship of native born persons should be determined.

D. Dred Scott

Citizenship and its privileges and immunities were an important focus of the *Dred Scott* decision. The Civil War Amendments consistently invoked *Dred Scott* as the exemplar of what the amendments were intended to overrule. Thus, it is necessary to examine that case to understand these later enactments.

Dred Scott was born a slave. He resided for most of his life in Missouri. He accompanied his master, Doctor Emerson, a surgeon in the United States armed services, on a tour of duty in Illinois, a state where slavery had been abolished. They later moved to an army post in the upper Louisiana Territory, a United States territory where slavery was prohibited by the terms of the Missouri Compromise. After returning to Missouri with Scott, Dr. Emerson died. Scott brought a petition for freedom against Emerson's widow in state court, claiming that his previous residence in a free state and a

free territory had made him a free man. The Missouri court, reversing its own earlier precedents, held that Scott, having voluntarily returned with his master to the slave state of Missouri after temporary residence elsewhere, was a slave under Missouri law. Subsequently, Mrs. Emerson moved to Massachusetts and remarried, leaving the administration of her former husband's estate with her brother, John Sanford of New York. Dred Scott then sued for his freedom in federal circuit court, alleging jurisdiction on the basis of diversity of citizenship. Sanford filed a plea in abatement, claiming that the court had no jurisdiction because Scott could not be a citizen for purposes of diversity jurisdiction. The circuit court sustained a demurrer to the plea, thus taking jurisdiction of the case. On the merits, however, the court directed a verdict for the defendant. Scott appealed to the Supreme Court.[63]

The Supreme Court held that the judgment for defendant should be reversed and the suit dismissed for lack of jurisdiction. Although each Justice wrote separately, Chief Justice Taney's opinion was denominated the opinion of the Court. He set forth three basic propositions: That a Negro was not a citizen for purposes of diversity of citizenship jurisdiction, that the free or slave status of a black man was dependent on state law, and that the federal government could not prohibit slavery in its territories.

Justices Curtis, Daniel, Wayne, and Taney were the only judges who ruled on the preliminary jurisdictional question of whether Scott was a citizen for diversity purposes.[64] All four judges who reached the jurisdictional issue agreed that United States citizenship was a predicate for diversity of citizenship jurisdiction and for the

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63. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See generally* D. FEHRENBACHER, THE DRED SCOTT CASE (1979); W. EHRLICH, THEY HAVE NO RIGHTS (1979). These studies exhaustively detail the background of the litigation. Adding to the extensive discussion of Dred Scott already available requires some explanation: the sole justification is that little attention has been paid to the impact of Taney's privileges and immunities vision on the decision. Consequently, its impact on the later history of the Civil War Amendments has been neglected as well.

64. 60 U.S. at 402-03 (Taney, C.J.); *id.* at 454-56 (Wayne, J.) (Wayne stated his entire agreement with Taney); *id.* at 472-76 (Daniel, J.); *id.* at 565-67 (Curtis, J.). Justices Catron and McLean said that the defendant's response in the case after the demurrer to the plea was sustained waived the objection to jurisdiction and prevented the issue from coming before the Court. *Id.* at 518-19 (Catron, J.); *id.* at 530-31 (McLean, J.). Justices Nelson, Grier, and Campbell avoided deciding whether the plea was before the Court, arguing that the lower court's decision that Scott was a slave was correct. Therefore, since relief was unavailable on substantive grounds, in their view it did not matter whether relief was also unavailable for jurisdictional reasons. *Id.* at 458 (Nelson, J.); *id.* at 469 (Grier, J.); *id.* at 493 (Campbell, J.).

article IV privileges and immunities claim.[65] These Justices looked first at naturalization as a source of citizenship. They agreed that the power to naturalize was exclusively the province of the federal government, but three said that this power applied solely to persons of foreign birth.[66] They disagreed on the status of persons born in the United States. Justice Curtis contended that, since the power of naturalization extended only to aliens, the states retained power to determine which of their own native born inhabitants were citizens of the state and thus of the United States.[67] Curtis noted that free Negroes were considered citizens by a number of states, including various northern states, at the time of the adoption of the Constitution. Therefore, if Scott was a citizen by the laws of the state of his birth, he was a citizen of the United States entitled to sue under diversity jurisdiction. Since the plea in abatement did not disclose the state of his birth or his status under its laws, there was nothing in the pleadings inconsistent with his being a citizen and the plea was therefore properly overruled.[68]

Curtis' dissent, rather than serving as a model of liberal sentiment, would have excluded free blacks from citizenship if, like Dred Scott himself, they were born in a state that did not recognize them as citizens. Even this limited recognition of citizenship for some

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65. *Id.* at 403, 405 (Taney, C.J.); *id.* at 454 (Wayne, J.); *id.* at 478, 480-81 (Daniel, J.); *id.* at 571, 580-81 (Curtis, J.). Curtis cited Gassies v. Ballon, 31 U.S. (6 Pet.) 761 (1832) for the proposition that a citizen of the United States residing in a state is a citizen of that state for purposes of diversity jurisdiction. *Id.* at 571. Taney served as a lawyer in that case and had argued that the allegations were insufficient to establish diversity because the plaintiff failed to allege specifically that he was a citizen of Louisiana. The Supreme Court, per Marshall, C.J., held that allegation of citizenship in the U.S. and residence in Louisiana is the equivalent of an allegation of state citizenship for purposes of article III. *Gassies*, 31 U.S. at 761.

66. 60 U.S. at 416-17, 420 (Taney, C.J.); *id.* at 454 (Wayne, J.); *id.* at 481-82 (Daniel, J.) (power to naturalize is exclusive in Congress and has been exercised only with respect to free white aliens, but silent on issue of whether power extends to native born persons); *id.* at 577-78 (Curtis, J.).

67. *Id.* at 577-82. Curtis confined the power to determine citizenship to the state of the individual's birth. *Id.* at 585-86.

68. *Id.* at 588. Note that if the plea in abatement had stated that Scott was born a slave and was never emancipated in that state, Curtis' reasoning requires a holding that he is not a citizen. *See id.* at 585. Thus, Curtis made no general claim that free blacks were citizens, nor did his views pose any threat to southern slaveholders. He found only that the plea in abatement was defective, that any facts appearing after the plea to the merits could not be used in determining the propriety of the plea in abatement, and that if the Court had diversity jurisdiction it could find that Scott was free (although such a finding would not be tantamount to finding he was a citizen because blacks could be free, yet not be citizens of a state).

blacks was made possible by giving only a narrow substance to the benefits of citizenship.

Justice Curtis pointed out obliquely that accepting free blacks as citizens under article IV, section 2 would not pose problems for slave states because a state would not violate the terms of article IV if it denied nonresident blacks the same privileges denied resident free blacks. He did so by construing the meaning of privileges and immunities narrowly:

> [T]his clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. . . . It rests with the States themselves so to frame their constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship.[69]

In other words, discrimination on the basis of race would not violate article IV because it would not be a discrimination on the basis of citizenship.[70]

Justices Taney, Wayne, and Daniel insisted that states did not have the power to determine citizenship for purposes of the federal constitution. They argued that the policy underlying the prohibition on a state making citizens of aliens for purposes of diversity jurisdiction and article IV claims applied equally well to making native born inhabitants citizens. They contended that citizenship of native born inhabitants was determined by the Constitution. Because the document made no express statement on the issue, these Justices argued that citizenship depended on the understanding of the framers and ratifiers when the Constitution was adopted.[71]

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69. *Id.* at 583-84.

70. Southern states might still be upset with this position as it related to laws excluding immigration of free blacks. A state that permitted free blacks to reside within its borders would be unable to deny admission to free black citizens of another state. Even if state law imposed slavery on all blacks within its borders, the state would be exposed to the argument that no state can exclude citizens of a sister state from entering and that the free black who entered temporarily could claim article IV rights of whites since no black residents would be citizens.

71. 60 U.S. at 405-407 (Taney, C.J.); *id.* at 454 (Wayne, J.); *id.* at 482-83 (Daniel, J.) (Daniel suggested the possibility of a later change by Congress, noting that it had never taken such action).

Curtis had pointed out that Negroes in a few northern states could vote in 1787 and thus participated in the adoption process. Taney rejoined that citizenship was a uniform national concept, and that the behavior of a few isolated states where few Negroes lived did not determine the meaning of citizenship for the whole nation. States could create rights within their boundaries for blacks, "[f]or . . . every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights."[72] Indeed, states could do the same for an alien, but possessing rights of citizenship within a state did not make an individual a citizen of a state for national constitutional purposes. After all, only Congress had power to naturalize aliens.

The most important consideration to Taney was that slavery existed in every state of the Union at the date of the adoption of the Constitution:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[73]

Taney pointed to colonial miscegenation laws in Maryland and Massachusetts as evidence of the degraded status of all Negroes, whether free or slave, at the time of the Revolution. He acknowledged that the principles of the Declaration of Independence were inconsistent with slavery, and argued from this that the Negro race could not have been considered part of the "people" embraced by the Declaration. After pointing to constitutional provisions supporting the institution of slavery, Taney claimed that free Negroes "were identified in the public mind with the race to which they belonged, and regarded as part of the slave population rather than the free."[74]

In support of the proposition that free Negroes were not considered citizens, Taney discussed the discriminatory laws of the northern states where slavery had been abolished. He cited Massachusetts again for continuing its miscegenation laws in force and referred to the language of Connecticut's abolition statutes to demonstrate that abolition in the North was enacted to benefit

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72. *Id.* at 405.
73. *Id.* at 407.
74. *Id.* at 411.

whites rather than to secure rights to Negroes. Even New Hampshire, where blacks could vote, excluded blacks from the militia. Taney's history is persuasive that free Negroes were regarded as inferior and subject to discrimination, but that did not compel his conclusion that blacks were not citizens. Even second class citizens are citizens. Women were subject to discrimination, yet no one doubted their citizenship.

Taney's conclusion that Negroes were not citizens rested on the consequences he attributed to citizenship. The lynchpin of his argument was the privileges and immunities clause. A citizen could sue under diversity jurisdiction in federal court to receive the privileges and immunities of citizens when in other states, and states could not bar citizens of other states from entrance.[75] Thus, if a Negro from Massachusetts were a citizen for constitutional purposes, he would be entitled to enter Maryland and to receive the privileges and immunities of a citizen there. Taney said this result was unthinkable:

> [I]t cannot be believed that the large slaveholding States regarded them [Negroes] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to soujurn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own

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75. Taney was committed to the latter proposition by his dissent in the Passenger Cases, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting). Taney's dissent would have upheld a state law restricting foreign immigrants, but he noted in dicta that he would have struck down restrictions on citizen movements:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id. at 492.

> citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.[76]

In other words, freedom of movement, freedom of speech, freedom of assembly, and the right to bear arms were among the privileges and immunities of citizens. Because of the nature of these privileges and immunities, it was inconceivable to Taney that Negroes could be citizens under the Constitution, for his home state of Maryland had no compunction about prohibiting Negroes from immigrating,[77] requiring free Negroes to carry certificates attesting to their free status,[78] restricting meetings of free Negroes,[79] and requiring special licenses for Negroes to own weapons.[80] Unlike the slave, the free Negro in Maryland had state-granted rights—to sue, be sued, and own property,—but these rights were weakened in practice by a prohibition on black testimony against whites.[81] Moreover, it was generally believed that even these rights of free blacks existed only so long as the white state legislature chose to acknowledge them, and that the legislature was constitutionally free to abolish all such rights and to re-enslave free blacks because they were not citizens.[82]

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76. 60 U.S. at 416-17.

77. *See* Act of Mar. 14, 1832, ch. 323, § 1, 1831 Md. Laws (codified at MD. CODE art. 66, §§ 44-51 (1860) (repealed 1865)).

78. *See* Act of Mar. 14, 1832, ch. 323, § 2, 1831 Md. Laws (codified at MD. CODE art. 66, § 50 (1860)) required free Negroes who left the state for more than 30 days to obtain a permit from a court. Art. 66, § 33 required masters of vessels to require Negroes to produce certificates of freedom plus certificates from the clerk of court where the vessel cleared before receiving them on board. Further, slaves were required to have a pass in order to travel more than 10 miles from home. Art. 66, § 16. Lack of a pass would result in the slave being treated as a runaway. Unless a free Negro kept his certificate of freedom, he was therefore at risk of being mistakenly arrested as a runaway slave.

79. Act of Mar. 14, 1832, ch. 323, § 7, 1831 Md. Laws (codified at MD. CODE art. 66, §§ 58-65 (1860) (repealed 1865) prohibited religious meetings without a white person present, and all "out door protracted negro meetings."

80. Act of Mar. 14, 1832, ch. 323, § 6, 1831 Md. Laws (codified at MD. CODE art. 66, § 73 (1860) (repealed 1865)).

81. *See, e.g.*, Act of June 8, 1717, ch. 13, § 2.

82. For example, Maryland statutes provided that a free Negro who married a white person became a slave for life. Act of June 8, 1717, ch. 13, § 5. Criminal laws throughout the antebellum period of the nineteenth century permitted convicted free blacks in certain contexts to be sold as slaves for a period of years or for life. The specific circumstances varied under successive laws. J. BRACKETT, THE NEGRO IN MARYLAND 227-32 (1969 reprint). At a slaveholders' convention in 1859, Colonel Jacobs proposed a bill to require free Negroes to either leave the state or become slaves. His bill created a great stir, but was never submitted to the legislature. *Id.* at 252-62. The assumed power to

Chief Justice Taney's privileges and immunities argument is not simply a response to Justice Curtis' argument that the citizenship of native born persons is determined by the state of their birth. According to Curtis, if a state did not consider its free blacks to be citizens, the rights they were denied might still be rights available to all its citizens. Discrimination against free black citizens of other states might arguably then be based on "mere naked citizenship." Thus, a black citizen of Massachusetts claiming the "privileges and immunities of citizenship" in Maryland would have to be afforded the rights of white citizens of that state. If Curtis' consequences were all Taney intended to address by the privileges and immunities hypotheticals in his opinion, the argument against black citizenship would be incomplete. Acknowledging that all free blacks are citizens of the United States would resolve this problem. Then discrimination by Maryland would clearly be based on race rather than citizenship and therefore be valid. Only the laws excluding free blacks from immigration would still face constitutional problems.

Taney's discussion of privileges and immunities appears in his discussion of whether free, native born blacks are citizens for purposes of articles III and IV, set apart from his earlier conclusion that citizenship is a constitutional category not subject to state manipulation. It advances the argument that blacks are not citizens only if the privileges and immunities clause is understood to require more than just protection against disadvantages based on nonresidence. In this respect, Taney agreed with the antislavery constitutionalist rhetoric of some abolitionists that the citizenship recognized in article IV imposed fundamental obligations upon the state. Unlike those abolitionists, he understood, however, that the Constitution did not intervene between the state and its own inhabitants—it provided only that what were moral obligations of the state to its own citizens were legal obligations enforceable on behalf of citizens of other states. Taney's greatest disagreement with those abolitionists arose from his conclusion that free Negroes were not citizens.

Although Taney said the Constitution gave each citizen rights

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enslave free Negroes is the basis for Taney's remarks that Negroes "had no rights or privileges but such as those who held the power and the government might choose to grant them," 60 U.S. at 405, and that "they had no rights which the white man was bound to respect" for "the negro might justly and lawfully be reduced to slavery for his [the white race's] benefit." *Id.* at 406. Under the principles of Strader v. Graham, 51 U.S. (10 How.) 82 (1851), a state might also reduce a white man to slavery, but no state ever thought to do so. *See also infra* note 92. Perhaps Taney would have believed that states would void such laws under their own constitutions or that the Court would invalidate them, using principles of natural justice.

outside his home state, in that it "placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property,"[83] he argued that a state that does not protect the person and property of some of its inhabitants is not treating them as citizens. If a citizen of a state migrates to another state, Taney wrote, he is no longer a citizen of the first state, "[a[nd the State in which he resides may then, unquestionably, determine his *status* or condition, and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens."[84] In other words, "citizen of a state," for purposes of standing to raise a claim under article III or IV of the Constitution, referred to a national citizenship that was uniformly determined. The article IV claim was to equality in privileges and immunities with those a state afforded persons it (rather than the Constitution or national government) deemed citizens. For Taney, the exclusion of blacks from membership in American society was necessary to expand the substance of the rights of people within it.[85]

Taney probably did not expect his broad interpretation of the

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83. *Dred Scott*, 60 U.S. at 407.

84. *Id.* at 422 (emphasis in original). This is another route to the conclusion that article IV imposes natural law on the states with respect to treatment of nonresidents. Whether an individual was considered a member of society (i.e., a citizen of that society) was indicated by the manner in which the society treated him. This makes the privileges and immunities of citizenship a tautology. To the extent that a state denies any group of its inhabitants the privileges and immunities of citizens, it has treated the members of that group as noncitizens of that state. The rights of a nonresident, even if a member of that group, must be measured under article IV, § 2 by the treatment given persons whom a state considers to be its citizens.

Curtis, on the other hand, never satisfactorily explained how it could be determined whether a state did recognize an individual as a citizen. The denigration of the privileges and immunities of citizenship in his opinion intimates that a statement by the state court or the legislature would suffice to determine citizenship regardless of how the person was treated.

85. This proposition is reminiscent of Edmund S. Morgan's argument that the revolutionary belief in republican equality in Virginia rested on slavery:

> Racism thus absorbed in Virginia the fear and contempt that men in England, whether Whig or Tory, monarchist or republican, felt for the inarticulate lower classes. Racism made it possible for white Virginians to develop a devotion to the equality that English republicans had declared to be the soul of liberty. There were too few free poor on hand to matter. And by lumping Indians, mulattoes, and Negroes in a single pariah class, Virginians had paved the way for a similar lumping of small and large planters in a single master class.

E. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 386 (1975). For Taney, denying the citizenship of blacks was essential to produce first class citizenship for others. If blacks were acknowledged citizens, laws throughout the nation would violate natural law and the fundamental principles of citizenship. But Taney believed such laws were valid. They could be upheld without hypocrisy. Like the

privileges and immunities clause to change radically the judicial role in reviewing article IV claims. As a practical matter, only blacks had been drastically denied the fundamental rights ensured by article IV. After they were excluded from the reach of article IV, other state laws would almost certainly comply with its vague commands unless they discriminated against nonresidents. In essence, Taney used natural law reasoning to preserve what he saw as the status quo.

Taney's invocation of broad natural law rights was not limited to his consideration of citizenship issues. He also used natural law reasoning for his second proposition in *Dred Scott*, that the federal government could not abolish slavery in the territories. Despite a recognition of state power over slavery, the institution was a source of constant strife in Congress.[86] In *Dred Scott*, the Court apparently hoped to remove a source of friction in Congress by determining that the slavery issue was beyond congressional power:

> [A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.[87]

This passage was startling in at least three respects. First, it

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Declaration of Independence, the privileges and immunities of citizenship, which reflected the same natural law, could be proclaimed for all without hypocrisy only by denying that "all" was ever intended to include Negroes.

86. Debates over the admission of new states had produced a number of compromises in which Congress insisted that some states be free while others could choose to have slavery. Abolitionists sought to extend congressional power on several fronts—to abolish slavery in the District of Columbia and all territories of the United States pursuant to congressional power over such areas and to halt interstate traffic in slaves pursuant to the commerce power. *See* Sumner, *Duties of Massachusetts at This Crisis, A Speech Delivered at the Republican Convention at Worcester*, (Sept. 7, 1854), *reprinted in* W. PEASE & J. PEASE, THE ANTI-SLAVERY ARGUMENT 440-45 (1965).

87. 60 U.S. at 450. Taney's argument was buttressed by his position that congressional authority under article IV, § 3 to "make all needful rules and regulations respecting the territory or other property belonging to the United States" applied only to territory held when the Constitution was adopted and did not serve as a source of power over territories (like the Louisiana Purchase) acquired after that date. *Id. But see* Hooven & Allison v. Evatt, 324 U.S. 652 (1945) (article IV, § 3 applies to subsequently acquired territories); Downes v. Bidwell, 182 U.S. 244 (1901) (stating same proposition). Fehrenbacher argues that Taney never expressly stated that the Missouri compromise violated the fifth amendment, but invalidated it with an ambiguous suggestion that it was not warranted by the Constitution, which could mean that the implied power to legislate in territories acquired after the date of the Constitution should not be construed to extend to abolition. D. FEHRENBACHER, *supra* note 1, at 382.

invalidated a federal statute for the first time since *Marbury v. Madison*.[88] Indeed, it was the first time in American history that the Court held unconstitutional a federal statute that did not involve the Court's own jurisdiction. Second, it applied the "due process" clause of the fifth amendment to a substantive law rather than limiting its application to procedures for law enforcement, as a majority of state courts had done with state due process clauses.[89] Third, it suggested that the abolition of slavery was a denial of due process to the slaveholder, although half of the states in the union had abolished slavery. Moreover, the effect of the law in question was merely to prevent a slaveholder from maintaining a slave as his property if he entered the territory. After all, forfeiture of property for the violation of a law was scarcely a novel doctrine. Taney noted the argument that property in a slave differed from other property, but he insisted the Constitution recognized slaves as property. Therefore due process protected the ownership of slaves to the same degree that it protected other property.[90]

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88. 5 U.S. (1 Cranch) 137 (1803).

89. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 460, 477-79 (1911). *See generally* Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitution which Protect "Life, Liberty and Property,"* 4 HARV. L. REV. 365 (1891) (arguing that "liberty" was meant to be interpreted not in its broadest sense to denote all civil rights, but, like the terms "life" and "property," to denote one particular kind of civil right—personal liberty—of which the law is accustomed to deprive persons by way of punishment); Williams, *"Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. COLO. L. REV. 117 (1981) (arguing that the framers intended a limited construction of "liberty"—absence of incarceration—in the fifth amendment but noting that the legislative history of the fourteenth amendment might provide a basis for a broader view of procedurally protected liberty). *But see* Siegan, *Rehabilitating* Lochner, 22 U.S.D. L. REV. 453 (1985) (arguing that *Lochner's* extension of due process to include liberty of contract was not antagonistic to the basic rationale of due process nor inconsistent with the framers' meaning of due process). Justice Curtis had said in Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) that due process was a restraint on the legislature as well as the executive and the judiciary, but the case involved procedural matters.

90. Lincoln used this part of the decision to argue that *Dred Scott* would advance slavery in the North:

> While the opinion of the Court, by Chief Justice Taney, in the Dred Scott case, and the separate opinions of all the concurring Judges, expressly declare that the Constitution of the United States neither permits Congress nor a Territorial Legislature to exclude slavery from any United States Territory, they all omit to declare whether or not the same Constitution permits a State, or the people of a State, to exclude it. . . . [W]e have another nice little niche, which we may, ere long, see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a State to exclude slavery from its limits.

THE LINCOLN-DOUGLAS DEBATES OF 1858, at 19 (R. Johannsen ed. 1965)

In the great controversy between slaveholders and abolitionists, both sides claimed the due process clause as a moral basis for their position. Abolitionists argued that Africans were persons who had been immorally deprived of their liberty and their property in themselves without due process.[91] Abolition would merely rectify the original due process violation. Slaveholders contended that slaves were property, and that abolition would be a moral and legal violation of their property rights. Taney's opinion threw the weight of the Court behind the slaveholder's position.[92] He accepted the abolitionist position that natural law should be enforced throughout the nation, while denying their premise that it applied to blacks. But by the time Taney held the Missouri Compromise unconstitutional, the law had already been repealed by the Kansas-Nebraska Act in

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91. *See* J. TENBROEK, *supra* note 56, at 136-48. The party platforms of both the Free Soil and the Republican Parties prior to the Civil War maintained that the fifth amendment compelled abolition in all lands under federal control.

92. Six Justices (Taney, Wayne, Catron, Daniel, Grier, and Campbell) held the act of Congress invalid. Two Justices (McLean and Curtis) voted to uphold it. Justice Nelson's opinion found the Missouri law controlling under Strader v. Graham, 51 U.S. (10 How.) 82 (1851), regardless of congressional power within the territory and therefore did not reach the validity of the Act.

One of the fascinating sidelights to this case is the debate over whether different aspects of Taney's opinion are holding or dicta. For example, if there was no diversity jurisdiction because Scott was not a citizen, discussion of his status as slave or free would appear to be dicta. Yet only three Justices (Taney, Wayne, and Daniel) specifically stated that a free Negro was not a citizen. Justices Grier and Campbell agreed that dismissal for want of jurisdiction was the appropriate result, but grounded this disposition on finding on the merits that Scott was a slave and thus, could not be a citizen. In their opinion, it was not necessary to determine the status of free Negroes as citizens under diversity jurisdiction because Scott was not a free Negro. Neither Grier nor Campbell offered any opinion on whether the plea in abatement was properly before the Court, treating the order of dismissal for want of jurisdiction as an appropriate disposition if Scott was determined to be a slave regardless of whether the initial jurisdictional issue was before them.

Taney, Wayne, and Daniel, on the other hand, treated the plea as raising an issue before the Court that could be determined on the pleadings, and therefore one which should be decided before reaching the merits. Logically, their discussion of the act of Congress and Scott's status as a slave under Missouri law was dicta. Thus, it may be argued that only four Justices (Grier, Campbell, Catron, and Nelson) held that Scott was a slave. But if each Justice confined his opinion to the issue that was dispositive for him, there would be no majority on *any* issue in the case. Thus, it was appropriate for Taney, Wayne, and Daniel to reach the merits of Scott's status.

In turn, it may be argued that the three Justices who held free Negroes were not citizens acted improperly in reaching that issue, since a majority of the Court could be found for the proposition that Scott was a slave. Curtis, however, insisted that the plea in abatement was at issue. Thus four Justices (Taney, Daniel, Wayne, and Curtis) said that the jurisdictional issue must be addressed, while only two (Catron and McLean) disagreed. Under these circumstances, they were acting properly in reaching the jurisdictional question first and answering it.

1854,[93] and the principle of popular sovereignty seemed to be carrying the day. Thus, Taney used *his* natural law principle in an attempt to freeze existing law and to prevent Congress from banning slavery in the future. Because the due process clause bound only the federal government, the northern states' abolition laws would remain effective. This result was a curious inversion of the traditional notion that slavery was a creature of positive law because it violated natural law.[94] Thus Taney again pressed natural law into service as an argument to prevent change.

The third proposition in *Dred Scott*, that a black person's status as free or slave depended on the law of the state where he resided at the time of suit, commanded the greatest support on the Court.[95] This theory was supported by the Court's earlier decision in *Strader v. Graham*.[96] Northern states could avoid the pestilence of slavery by prohibiting its exercise when masters entered the state with their slaves. In turn, southern states could avoid the spread of abolition by reinstating slavery when master and servant returned. Local autonomy seemed the only way for a free and a slave society to coexist.[97] But such autonomy required acceptance of the proposition that a state had power to enslave free men.

Dred Scott would have been a relatively uncontroversial decision had the Court confined itself to reaffirming state power over slavery.

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93. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854) (repealed 1933). Fehrenbacher points out that the Missouri Compromise was expressly repealed by the statute only as to Kansas and Nebraska, although the text was ambiguous on its application elsewhere. Further, the Act did not affect the prohibitions on slavery in the territories that later became Oregon and Minnesota. D. FEHRENBACHER, *supra* note 1, at 177-88. Slavery had little support there in any event, and therefore the federal statutes barring it added little to the legal situation. Even if the territorial legislatures could not ban slavery, these would be free states when added to the Union.

94. *See* R. COVER, JUSTICE ACCUSED (1975). Abolitionists argued that slavery could be created only by positive law and that Congress had no power to legislate it because it denied due process. Taney said that abolition is the creation of positive law and that Congress had no power to legislate it because it denied slaveowners due process.

95. Seven Justices agreed on this point. Indeed, Justice Nelson originally prepared an opinion for the Court based solely on this issue. When the decision ultimately came out, Nelson submitted as his own separate opinion the opinion he had originally prepared for the Court as a whole. SWISHER, *supra* note 51, at 592-630. Dissenting Justices Curtis and McLean depended on the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), that federal courts in diversity cases are bound by state statutes but can apply federal common law in the absence of statute. Thus, Scott should be entitled to his freedom in a diversity suit although a slave who could not get into federal court through diversity jurisdiction would continue to be governed solely by state court decisions.

96. 51 U.S. (10 How.) 82 (1850).

97. Fugitive slave laws remained a vexing problem, for article IV, § 2 prevented northern states from declaring an escaped slave a free man.

The insulation of slavery from attack by the federal government, however, undermined a major plank of the Republican Party platform. The political response was to condemn the portion of the opinion that invalidated the Missouri Compromise as poorly reasoned dicta, not binding on future legislation.[98] This tactic diverted attention from the merits of the decision on citizenship. To the black community, however, Taney's discussion of citizenship was the most grievous injury. It excluded all blacks from the social community and by implication justified all laws that failed to protect them or otherwise discriminated against them. The decision confirmed in legal terms what many people of all races recognized as a social reality—that blacks were not recognized as members of the American political community. Within a decade, however, membership within that community would be constitutionally mandated. Congress and the courts would then be forced to confront an issue left unresolved by *Dred Scott*: What were the privileges and immunities of citizenship?

III. EDWARD GARRISON DRAPER: A LAWYER FOR LIBERIA

"qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen"[99]

Taney's views on the citizenship of free Negroes accurately reflected the political climate of his home state of Maryland. While northern blacks were free and southern blacks were predominantly slaves, the black population in the border state of Maryland was almost equally divided between free and slave when Taney decided *Dred Scott*. This division produced great tension. The state responded, as early as 1832, by adopting colonization in Africa as its official policy.[100] The implicit—and sometimes express—assumption behind that policy was that Negroes were not, and could never

98. *See* D. FEHRENBACHER, *supra* note 1, at 417-43.

99. 9 MARYLAND COLONIZATION JOURNAL 89 (1857) [hereinafter cited as MD. COL. J.].

100. Act of Mar. 12, 1832, ch. 281, 1831 Md. Laws; Act of Mar. 14, 1832, ch. 314, 1831 Md. Laws. The American Colonization Society, which helped establish the colony of Liberia, originated in private hands. It had received some grants from various states including Maryland. In 1832 Maryland ceased its contributions to the national group in order to focus on a single area, termed Maryland in Liberia, where an independent policy might be pursued. The Maryland Colonization Society was not a state agency, but it was heavily funded by the state, which saw colonization as the answer to the threat of slave revolts. *See* J. WRIGHT, THE FREE NEGRO IN MARYLAND 1634-1860, at 261-75 (1917); *see also* J. H. B. LATROBE, MARYLAND IN LIBERIA—A HISTORY OF THE COLONY PLANTED BY THE MARYLAND STATE COLONIZATION SOCIETY (1885).

be, full members of American society and that they should be encouraged to leave. Although it was possible for a free black to attain limited economic success in Maryland, he would always remain outside the dominant white community. Some insight into the impact of this exclusion, and consequently into the meaning of citizenship, can be gleaned from the lives of one man and his son.

Garrison Draper was a free black who lived with his wife, Charlotte Gilburg Draper,[101] on Forrest Street in Old Town, Baltimore before the Civil War.[102] Their only child, Edward, was born in Baltimore on January 1, 1834,[103] fifteen years after Garrison began business as a tobacconist and cigar maker.[104] Garrison was unusual, even among free blacks, in both his livelihood and his other interests. His unique position greatly influenced the path chosen by his son.

Although there were many free blacks in the slave state of Maryland, the prejudice reflected by the law meant that few became retail shopkeepers and even fewer were successful.[105] Fearful that free blacks would provide an outlet for stolen goods, the Maryland legislature had prohibited the sale by any free Negro or mulatto of

> any bacon, pork, beef, mutton, corn, wheat, tobacco, rye, or oats, unless such free negro or mulatto shall, at the time of such sale, produce a certificate from a justice of the peace, or three respectable persons residing in the neighborhood of said negro, of the county in which such negro resides, that he or they have reason to believe and does believe, that such free negro or mulatto came honestly and bona fide into possession of any such article so offered for sale . . . .[106]

Despite the licensing requirement and the prejudice and suspicion it reflected, Garrison Draper maintained a successful business for nearly forty-five years.[107]

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101. G. BRAGG, JR., MEN OF MARYLAND 21 (1925) (Bragg mistakenly refers to Garrison as "Jamison").

102. 2 MD. COL. J. 243 (1844); 9 MD. COL. J. 383 (1859).

103. BRAGG, *supra* note 101.

104. WRIGHT, *supra* note 100, at 169-293. G. and R. Draper are listed as tobacconists in the 1819 Baltimore City Directory. They were listed together at the same address until 1831, when Ryland Draper moved to another part of town.

105. *Id.* at 168-89. Only 10 black retailers were listed in city directories for 1840 and 18 for 1850.

106. Act of Mar. 14, 1832, ch. 323, § 9, 1831 Md. Laws.

107. WRIGHT, *supra* note 100, at 169. G. Draper or Garrison Draper is listed as a tobacconist in the Baltimore City Directory from 1819 to 1864.

Garrison Draper was an interesting individual with an independent and inquiring mind. The few letters of his that survive reveal a much higher level of education than was usual among free blacks.[108] He was selected Secretary of the Society of Enquiry, an organization he co-founded to learn about African colonization, and he was invited to be a correspondent to the *Maryland Colonization Journal*, the publication of the state-supported Maryland Colonization Society.[109] This interest in colonization was unusual. Most blacks, perceiving that the state's interest in a program of colonization stemmed from the white community's distaste for free Negroes in its midst, were virulently opposed.[110] But Draper in an 1844 letter to the editor of the *Maryland Colonization Journal*, asked for free copies of the *Journal* so that he and the other members of the Society of Enquiry could learn about colonization. From his studies, Draper determined that the idea of colonization had something crucial to offer American blacks. While Draper objected to enticing free Negroes to Liberia with visions of riches and ease, he argued that there was a true reason to encourage colonization:

> Within the last twenty years I have given much thought to the project of colonizing Africa with the free people of colour from the United States, and it appears to me that the right course is not pursued to induce them to emigrate, their fancy and senses are appealed to, and not their judgment. They are persuaded that by going to Africa, they can enjoy a life of ease and luxury, instead of labour and hardships. The object appears, to persuade and coax them to go. I think the solution of one or two questions would go far towards settling the matter of our *rights* in this country. What were the motives which induced the English, Scotch, Irish, French, and other European nations to emigrate to this country? Did they come of their own free will, and did

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108. 2 MD. COL. J. 242-44, 287-88, 290 (1844-1845). The census of 1860 stated that 21,699 of the 84,000 free blacks at the time could not read or write. J. BRACKETT, *supra* note 82, at 198 n.2 (1969). There was no public education for black children, and a majority of those who received any education obtained it in Sunday schools. The illiteracy rate among slaves was much higher than among free blacks. Baltimore was the center of the free black population and there were few schools, even Sunday schools, for blacks outside Baltimore City. There was also hostility to Negro education, which often forced cessation of schools outside the city. WRIGHT, *supra* note 100, at 202, 207. Draper probably attended the African School conducted by Daniel Coker. Coker conducted the school from 1812 to 1820, when he left Baltimore to go to Liberia. *See* Gardner, *Ante-bellum Black Education in Baltimore*, 1976 MD. HIST. MAG. 360, 363.

109. 2 MD. COL. J. 242-44 (1844).

110. *Id.*

> they acquire according to the customs and usages of civilized nations, legal possession of the territory? Then I would ask, what was the condition and prospects of the Africans on coming to this country? Did they come of their own accord, and did they acquire legal possession of the territory?[111]

In a subsequent letter, Draper answered the questions propounded in his first one. Citing Ramsey's *History of the United States*, he contended that European immigrants came voluntarily "not only for the pecuniary advantage of agriculture or commerce, but also to transmit the blessing of civil and religious liberty to their posterity." Africans, on the other hand, were brought "without consulting their own wishes."[112] The inference that Draper left to be drawn from these remarks was that blacks must emigrate to find a country where they could transmit liberty to their children.

Draper said that he would continue writing for the *Journal*, but after these initial exchanges, the only published letter from him was an inquiry concerning a rumor that emigrants to Liberia would be required to pay back the expenses of founding the colony.[113] Despite the cessation of correspondence in the *Journal*, Garrison Draper's interest in colonization continued unabated. Although he did not go to Liberia, he was determined that his only child would emigrate to obtain the civil and religious liberty that he lacked in Maryland.

Garrison carefully prepared his son to play a leading role in Africa. Recognizing the haphazard opportunities for education afforded blacks in Baltimore,[114] Garrison sent his son to the public school for blacks in Philadelphia.[115] The education Edward Draper received there was sufficient to enable him to pass the entrance examination at Dartmouth College in 1851 in Greek, Latin, mathematics, English grammar and geography.[116] Indeed, he finished his first year of college in the top third of his class.[117] There is no record of

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111. *Id.* at 243.

112. *Id.* at 288 (citing 1 RAMSEY, HISTORY OF THE UNITED STATES 223 (2d ed., rev. and cor. 1818).

113. *Id.* at 290.

114. *See* Gardner, *supra* note 108.

115. 9 MD. COL. J. ix, 88 (1857). Philadelphia established separate public schools for blacks in 1822. Gardner, *supra* note 108, at 361.

116. *See Dartmouth College Catalog* 1851-1852, at xxii (admission requirements). Dartmouth had been open to black students since 1824. 1 L. RICHARDSON, HISTORY OF DARTMOUTH COLLEGE 381 (1932).

117. On a grading scale of 1-5 with 1 as the highest score, Draper received a 1.7 average in his recitations and 1.8 for his examination during the freshman year. The

his second year performance, but his enthusiasm for school seemed to have waned. His grades in subsequent years went down, while absences from recitations and chapel increased.[118] Nevertheless, he graduated in 1855 "maintaining always, a very respectable standing, socially, and in his class."[119] His attitude toward the college may have been revealed in a note he inscribed in a classmate's yearbook: "Though we would both give three groans for, and bury in oblivion that insignificant body of weak minded men, called the Faculty of Dart. Coll, yet do not forget the class and especially Your Friend Edward G. Draper."[120]

On graduation, Edward Draper faced the same problem as many liberal arts graduates of today, compounded, of course, by his status as a free black. He had studied the classics, mathematics, rhetoric, philosophy, science, and history in the same required courses as his fellow students, but these studies pointed to no particular profession.[121] Although he had spent four years in a state where Negroes could vote, Edward clung to his father's vision of the creation of a black society in which the entire nation would be free. After considerable thought and discussion, Edward Draper decided to become a lawyer and to practice that profession in Liberia. Although Liberia had a number of lawyers, none was educated in the profession; therefore, the opportunity for a trained lawyer seemed great.[122]

Obtaining a lawyer's training in Maryland, however, would not be easy for a young black man. There were no law schools in the

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examination mark was among the highest for the year. Record of Freshman Class of 1851-52 (Class Roll from Adams to Lee, Dartmouth College Archives).

118. His average for recitations in his junior year was 2.1 with a very good 1.6 in the examination, but senior marks of 2.72 in recitations suggest a rapid decline when Greek and Latin were no longer the primary courses and science and philosophy replaced them. Nevertheless, a number of his classmates received 3 or below. His absence record was not remarkable among his colleagues, but at least differed sharply from his first year. In 1851-1852 he missed three recitations and four days of chapel, two days being excused. By 1854-1855 Draper had 26 absences from recitation (only 12 accompanied by an excuse) and a stunning 33 absences from chapel (six excused). Class Rolls for Dartmouth College 1851-52 (Freshman), 1853-54 (Junior) and 1854-1855 (Seniors) (copy of front page of rolls from Dartmouth College Archives available from author).

119. 9 MD. COL. J. 88 (1857). According to A. Briscoe Koger, Draper was the first man of his race from Maryland to graduate from college. A. KOGER, THE MARYLAND NEGRO 17 (1953).

120. Inscription in Silas Hardy's 1855 lithograph book (copy from Dartmouth College Archives available from author).

121. *See* catalogs of courses of instruction at Dartmouth College for 1851-1855.

122. 9 MD. COL. J. 88 (1857).

state during this period.[123] Entrance to the profession was achieved by "reading" law in the offices of a practicing attorney for at least two years.[124] There were no other formal educational requirements for admission, and most Maryland attorneys did not have a college education.[125] Despite his educational advantages, Draper's race was a major obstacle to "reading" law with an attorney. The statute regulating admission to the bar restricted admission to white males.[126] This restriction, and the prejudice of which it was a part, would keep most lawyers from offering Draper an apprenticeship. A black law student in a lawyer's office could discourage potential clients and could create difficulties for the lawyer in obtaining judicial or party acceptance of documents the lawyer prepared. However, for Charles Gilman, a retired attorney and a member of the Maryland Colonization Society Board of Managers, these problems were no longer relevant. He agreed to instruct Draper in the law and gave the young man access to his library.[127]

While reading law, Edward spent much of his time in the office of Dr. James Hall, the editor of the *Maryland Colonization Journal* and general agent of the Maryland Colonization Society. Dr. Hall described Draper as a man "of an amiable disposition, very modest and retiring, a good student, possessing a sound and discriminating

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123. David Hoffman ran a one-man school of law from 1823 to the mid-1830s, but discontinued it. Hoffman wrote that he discontinued teaching in 1836, but other evidence indicates the school ceased operating in 1833. It was not reestablished until 1869. G. CALLCOTT, A HISTORY OF THE UNIVERSITY OF MARYLAND 34-38, 68-69, 210-15 (1966); 1 E. CORDELL, UNIVERSITY OF MARYLAND 1807-1907, at 337-49 (1907).

124. The statute on bar admission required applicants to "have been a student of law in any part of the United States, for at least two years previous to said application." Act of Mar. 10, 1832, ch. 268 § 2, 1831 Md. Laws. A "student" studied in the office of an individual lawyer. Thus, for example, John H. B. Latrobe studied law in the office of Robert Goodloe Harper and, in turn, at least 17 men studied law in LaTrobe's office. J. SEMMES, JOHN H. B. LATROBE AND HIS TIMES 1803-1891, at 100-10, 395-98 (1917). For a discussion of the power of the legislature to prescribe bar admission requirements, see Note, Attorney General v. Waldron—The Maryland Judiciary's Expansive Power to Regulate the Bar under the Separation of Powers Article: Intermediate Scrutiny under Maryland's New Equal Protection "Clause," 41 MD. L. REV. 399 (1982).

125. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 177-87 (1953). As late as 1883 only a minority of the students at the University of Maryland School of Law had a college degree (25 of 53). *The Law School of the University of Maryland Catalog 1884*, at 5-6.

126. Act of Mar. 10, 1832, ch. 268, § 2, 1831 Md. Laws. The statute merely codified practice, for no black was admitted to the bar in any state until 1844 when Macon B. Allen was admitted to practice in Maine. W. LEONARD, BLACK LAWYERS 49 (1977).

127. 9 MD. COL. J. 383 (1859).

mind."[128] Tucked away in Gilman's library or Hall's office, the young black student studied law and caused no stir, but he knew that law in the books and law in practice were different experiences. "Not having any opportunities for acquiring a knowledge of the routine of professional practice, the rules, habits and courtesy of the Bar, in Baltimore,"[129] Draper spent the last few months of his study in the Boston office of Charles W. Storey, where he could attend court like other law students.[130]

Draper finished his practical training and returned to Baltimore. After marrying Jane Rebecca Jordan,[131] he was examined on his knowledge of law by Superior Court Judge Z. Collins Lee. He received a certificate stating that he was "qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen of

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128. *Id.* at 384. During a portion of Draper's training, Hall was in Liberia. He reported on the native uprising against the colonists of the Maryland Colonization Society's colony in Africa known as Maryland in Liberia. This conflict forced the state-supported colony to merge with the larger colony of Liberia, which had been created by the American Colonization Society. The colonists hoped the merger would adequately provide for their defense.

129. *Id.* at 88.

130. *Id.* at 383-84. Charles William Storey was a graduate of Harvard College and Harvard Law School. Storey was admitted to the bar in 1840. He served as clerk to the Massachusetts House of Representatives from 1844 to 1850 and was register of insolvency for Suffolk County and clerk of the Superior Criminal Court. 1 W. DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS 413 (1895). Charles Storey had studied law in the office of George T. and Benjamin R. Curtis. George was one of the counsel representing Dred Scott while his brother Benjamin became an associate Justice of the Supreme Court and was one of the dissenting Justices in *Dred Scott*. In view of Storey's connection to the Curtis brothers, the recent decision in *Dred Scott* was a likely topic of conversation between Draper and Storey, no doubt reinforcing his interest in colonization. Because Draper was born in Maryland, where the free Negro was understood not to be a citizen, even Justice Curtis' dissent consigned him to the perpetual limbo of the native born noncitizen.

Charles Storey's son, Moorfield, became one of the most prominent lawyers of his time. From 1895-96 he was president of the American Bar Association, and from 1910-29 he was president of the National Association for the Advancement of Colored People. J. ROGERS, AMERICAN BAR LEADERS 86-89 (1932).

131. BRAGG, *supra* note 101, at 21.

this State."[132] But he was neither white nor, after *Dred Scott*, a citizen. Six days after securing his certificate, he and his wife left Baltimore for Liberia on the *M. C. Stevens*.[133]

Draper and his wife, traveling as cabin passengers rather than, as was customary for emigrants, steerage class,[134] had an apparently uneventful voyage. Correspondence from Draper reveals the nature of the voyage and provides, indirectly, a tantalizing glimpse of the writer. Nearing the African coast Draper wrote his parents:

> I confess some disappointment with regard to the sea—it is not a matter of such vast consequence as I had supposed to make a sea voyage—the novelty is soon lost, for we have the same routine to go over daily.
>
> The thermometer is 83 degrees in the cabin, and I am now writing dressed in linen clothes,—the first time that I ever wore such garments in December. Our cabin fare is good, having plenty of fresh provisions, and some things which I know you have not, such as green corn, fresh tomatoes, &c.—in fact, I live much better than I ever did before.[135]

After a further description of meals on board for both cabin and steerage passengers, he continued,

> We pass time in reading, the library furnishing a good supply of books. Have morning and evening prayers, and service once on sabbath. Good order is observed by all, and it is the general aim to promote each other's comfort. We have not seen many curiosities during the voyage, passed

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132. The Text of Judge Lee's letter read as follows:

STATE OF MARYLAND
City of Baltimore,
October 29, 1857

Upon the application of Charles Gilman, Esq. of the Baltimore Bar, I have examined Edward G. Draper, a young man of color, who has been reading law under the direction of Mr. Gilman, with the view of pursuing its practice in Liberia, Africa. And I have found him most intelligent and well informed in his answers to the questions propounded by me, and qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen of this State. Mr. Gilman, in whom I have the highest confidence, has also testified to his good moral character.

This Certificate is therefore furnished to him by me, with a view to promote his establishment and success in Liberia at the Bar there.

Z. COLLINS LEE
Judge of Superior Court, Balt. Md.

9 MD. COL. J. 89 (1857).

133. *Id.* at 81.

134. *Id.*

135. *Id.* at 133.

> three or four ships, have seen but few fish and have caught none.[136]

Draper's future in Liberia after this journey seemed promising. Dr. Hall's son, G. W. Hall, a companion on this trip, wrote of Draper in a letter to the corresponding secretary of the African Colonization Society:

> The ship MC Stevens brought out, this voyage, a young man from Baltimore, who is a regular graduate of Dartmouth College, and is fully qualified, color excepted, to practice at the Baltimore bar. His success is almost certain, as there is not another lawyer in Liberia, who was bred to the profession; a second one might be equally successful, and thus, this business would gradually pass out of the hands of quacks, who now hold it without depending upon their practice for support.[137]

On arrival in Monrovia, Liberia, Draper wrote that he was pleased with the place and its people, but he did note that he found the people decidedly lazy. He and his wife, like many immigrants, became ill with a fever, but reported they were convalescing well.[138]

Edward was too optimistic about his health. Within a year, on December 18, 1858, Edward Garrison Draper died in Cape Palmas, Liberia, of pulmonary consumption (tuberculosis).[139] "He would not probably have made an orator or a very brilliant man," wrote Dr. Hall, "but what is better, a useful, reliable and honest one."[140] Edward Draper's death only two weeks before his twenty-fifth birthday was a tragic loss to his wife, his parents, and to his new country. He had risked the perils of a transatlantic voyage, the exposure to African diseases which affected all newcomers, and the dangerous political situation of his new country, to be recognized as a citizen at last.

IV. THE CIVIL WAR AMENDMENTS AND THE PROMISE OF EQUALITY

"[t]he law which operates upon one man shall operate equally upon

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136. *Id.* at 134.

137. American Colonization Society, 34 THE AFRICAN REPOSITORY 94 (1858) (letter dated Dec. 16, 1857, from G.H. Hall to R.R. Gurley).

138. 9 MD. COL. J. 133 (1858). These portions of the letter were paraphrased in the JOURNAL rather than quoted because Hall, to whom Garrison Draper had shown his son's letter, found them embedded in private or personal material "unsuitable for publication."

139. *Id.* at 383.

140. *Id.* at 384.

all."[141]

The cruel choice between home and citizenship to which Draper was put should not have faced his successors. The Civil War Amendments seemed to secure basic civil rights to blacks. Nevertheless, the debates surrounding the amendments and the accompanying Civil Rights Act, and the language of the amendments themselves, left unresolved the issue of what rights and privileges the newly created citizens could claim. The post-Civil War generation adhered to Taney's proposition that citizenship carried with it an entitlement to fundamental rights. Taney had limited the federal role to protecting the fundamental rights of citizens from other states, but even with this limitation, his position entailed a recognition that the phrase "privileges and immunities" referred to fundamental rights, whether implemented in state laws or not. Thus the Constitution acknowledged at least a moral obligation to protect those amorphous fundamental rights. If blacks were made citizens, the state would be morally obligated to afford them fundamental rights. But the distinction between a moral obligation and a legal one was blurred in the debates. Fundamental rights were undefined and had never been federally enforceable. So while the Civil War Amendments reflected agreement on the proposition that blacks were entitled to the fundamental rights of citizens, they did not reflect a similar agreement on the exact definition of those rights or the mechanism for their enforcement.

After the Civil War the institution of slavery bore the blame for every denial of fundamental rights found in America. Northerners considered slavery harmful to the slaveowner as well as the slave. The institution had corrupted southern society, leading to suppression of all dissent over the morality of slavery and eventually to rebellion against the Union itself. Slavery also led the southern states to inflict their restrictive laws on northerners who entered slave states. Thus, during the debate on the thirteenth amendment, Senator Henry Wilson of Massachusetts said:

> Twenty million free men in the free States were practically reduced to the condition of semi-citizens of the United States; for the enjoyment of their rights, privileges and immunities as citizens depended upon a perpetual residence north of Mason and Dixon's line. South of that line, the

141. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (remarks of Rep. Stevens) (emphasis added).

> rights which I have mentioned [freedom of speech, of religion, and the right to peaceably assemble and petition for redress of grievances], and many more which I might mention could be enjoyed only when debased to the uses of slavery.[142]

Focusing on the institution of slavery in effect absolved reformers from addressing the problems raised by more subtle and insidious forms of prejudice. It was not necessary to define the fundamental rights of citizens with any particularity to see that they were denied to slaves.

The thirteenth and fourteenth amendments were intended to end the denial of the fundamental rights of citizenship to blacks. To effectuate this intention, the amendments' framers adopted the general language of the Constitution regarding the privileges and immunities of citizenship. As a result, the amendments suffered from the vagueness which had afflicted fundamental rights discussion under the privileges and immunities clause of article IV, section 2. Rights could be defined—if at all—only in an infinite series of concrete cases. At the time, this vagueness was to some extent appealing. The adoption of general language concealed serious conflicts between persons involved in the amendment adoption process. It also hid the contradictory intentions often held by individual framers who wanted to "have their cake and eat it too"—to secure fundamental rights without discrimination, yet preserve state sovereignty. The rebel states were to be reconstructed by heavy federal intervention while the loyal states were to be beyond federal power—and this was to be accomplished by a single uniform constitutional command.

A. The Thirteenth Amendment

The thirteenth amendment, abolishing slavery, was widely viewed as a cure for the ills of antebellum America. The debates leading to the adoption of the amendment were not very illuminating on the precise mechanisms by which slavery's demise would secure fundamental rights. For example, Senator Wilson and Representatives John Kasson of Iowa and Green Smith of Kentucky argued for the amendment by stressing the loss of free speech that had occurred in the slave states.[143] The abolition of slavery would

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142. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

143. *See supra* note 142 and accompanying text (remarks of Sen. Wilson); CONG. GLOBE, 38th Cong., 2d Sess. 193 (1866) (remarks of Rep. Kasson). *Id.* at 237 (remarks of Rep. Smith).

presumably end prosecutions for abolitionist speech, but it was not readily apparent how the amendment would secure freedom of speech on other topics. The proponents of the amendment seem to have uncritically assumed that the states would protect the basic rights of their citizens and of citizens visiting from other states, if the corrupting influence of slavery were removed.

The language of the thirteenth amendment received little attention. It was adapted from the Northwest Ordinance, which Thomas Jefferson had drafted to provide a framework for governance of the Northwest Territories after the Revolution.[144] Opponents of the thirteenth amendment made no objection to its phrasing, nor did they seriously attempt to defend the institution of slavery.[145] They objected primarily to the violation of the basic federal principle that each state should have power to determine its own domestic institutions.[146] They also contended that compensation was due for the governmental taking of property in slaves,[147] and pointed out the social problems that would be created by immediate emancipation.[148]

The adoption of the thirteenth amendment in 1865 was a rejection of these arguments. Slavery was viewed as a threat to the entire nation; therefore, no state should be permitted to establish it as a domestic institution and Congress should be empowered to enforce this prohibition. Slavery was so evil that slaveowners should be castigated rather than compensated. In the face of such injustice, only immediate emancipation would suffice. Thus, two of the points of *Dred Scott* (state power to determine the free or slave status of its inhabitants and the lack of federal power to abolish slavery) were repudiated by the amendment.

Despite this repudiation of the principles of *Dred Scott*, the impact of the amendment on the citizenship of free blacks remained ambiguous. Citizenship was not directly discussed in the debates. The amendment altered a fundamental assumption of Taney's opinion in *Dred Scott* by placing the Negro race beyond state power to

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144. Article 6 of the Northwest Ordinance of 1787. 2 THORPE, FEDERAL AND STATE CONSTITUTIONS 962.

145. The primary objections to the phrasing of the amendment came from radical Republican Senator Charles Sumner, who sought to phrase the amendment as "[A]ll persons are equal before the law, so that no person can hold another as a slave . . . ." CONG. GLOBE, 38th Cong., 1st Sess., 1482 (1864).

146. *Id.* at 2941-42 (remarks of Rep. Wood); *see also id.* at 2982-83 (remarks of Rep. Edgerton summarizing all the arguments of opponents).

147. *Id.* at 1489 (remarks of Sen. Davis).

148. *Id.* at 2982-83 (remarks of Rep. Mallory).

enslave, and thus removed a major ground for deciding that Negroes were not citizens. Radical Republicans could now argue more forcefully that Negroes, like all other citizens, were entitled to the fundamental rights of citizens in a free society. But eliminating slavery did not fully undercut Taney's rejection of the claim for Negro citizenship, which had denied citizenship to free blacks as well as to slaves. Furthermore, even if the thirteenth amendment was read to mandate black citizenship, the power of the federal government to prevent state restrictions on black citizens' rights was unclear. The "fundamental rights" of white citizens had never been federally enforceable despite the political arguments (from radically different perspectives) of both slaveowners and antislavery constitutionalists. At best, there was some ambiguity in the cases on the rights of the citizen of one state to claim fundamental rights when in another state. The case law afforded citizens no protection against their own state governments. Thus, the effect of the amendment as a limit on state-imposed discrimination and as a source of federal power to end discrimination was unclear.

Many southern states responded to the abolition of slavery by enacting black codes, discriminating against blacks in basic rights and forcing them to remain on the plantations. Congressional reaction to the black codes evoked the first real debate over the scope of the thirteenth amendment. This debate is by no means an accurate guide to the intentions of the amendment's framers. Each side sought to characterize the amendment to advance their immediate goal: The support or defeat of a civil rights bill that prohibited racial discrimination in certain matters—a context not envisioned when the amendment was drafted.

One view of the thirteenth amendment articulated in congressional debates was rooted in Taney's *Dred Scott* opinion. Taney had stated that free Negroes were not citizens of the United States and that neither Congress nor the individual states could alter that status. Only a constitutional amendment could confer citizenship on blacks born within the United States. Under this view, the thirteenth amendment did not appear to affect the status of free blacks; the abolition of slavery simply meant that all blacks would have the same status that free blacks had prior to the Civil War. In a state like Maryland, for instance, that would mean that all blacks could be excluded from the vote and from jury service, and that they could be discriminated against in the right to testify in court, to possess weapons, to assemble publicly, to engage in certain trades and occupations, and in liability to certain criminal punishments. In short,

blacks would not be considered as citizens and would continue to be subject to innumerable types of discrimination. Congressional Democrats, including Senators Reverdy Johnson of Maryland, James Nesmith of Oregon, and Peter Van Winkle of West Virginia, who voted for the thirteenth amendment, and nominal Republicans like Senator Edgar Cowan of Pennsylvania, interpreted it in this restricted fashion. "It was intended," said Senator Cowan, "to give to the negro the privilege of the *habeas corpus*; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered. That is all."[149] Democrats, including both supporters and opponents of the thirteenth amendment, argued that the abolition of slavery did not empower Congress to legislate against racial discrimination. The views of the Democrats could be discounted perhaps, for they were a small minority of Congress. Their position, however, was supported by President Andrew Johnson.

In stark contrast to the views of the Democrats and the President were the views of some radical Republicans, who contended that the amendment of its own force forbade racial discrimination with respect to contract rights and property ownership. When Democratic Senator Thomas Hendricks argued that "no new rights are conferred upon the freedman" by the thirteenth amendment,[150] Senator Lyman Trumbull of Illinois responded:

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.
>
> Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.[151]

Subsequently, Trumbull said, "[A]ny 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."[152] He cited both *Campbell*[153] and *Corfield*[154] as descriptive of

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149. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) [hereinafter cited as 39 GLOBE]. *See id.* at 497 (remarks of Sen. Van Winkle), and *id.* at 505 (remarks of Sen. Johnson).

150. *Id.* at 318.

151. *Id.* at 322.

152. *Id.* at 474.

the civil rights of citizens. In Trumbull's view, the prewar restrictions on free blacks did not prove that discrimination was separate from slavery; instead, the restrictions on free blacks were part of the heritage of slavery. Thus, Trumbull argued that the thirteenth amendment abolished racial discrimination in all laws involving the protection of life, liberty and property.[155]

Most Republicans argued that section two of the thirteenth amendment was a source of power for legislation against racial discrimination in civil rights. Representative Burton Cook of Illinois argued that without the second section of the thirteenth amendment,

> no court could hold that any man in any State had a right to hold another as his slave in the sense in which slaves had been held before; but it is apparent that under other names and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race. They might be denied the right of freemen unless there was vested a power in the Congress of the United States to enforce by appropriate legislation their right to freedom.
>
> . . . The first section would have prohibited forever the mere fact of chattel slavery as it existed. When Congress was clothed with power to enforce that provision by appropriate legislation, it meant two things. It meant, first, that Congress shall have power to secure the rights of freemen to those men who had been slaves. It meant, secondly, that Congress should be the judge of what is necessary for the purposes of securing to them those rights.[156]

Even Republicans who agreed with Trumbull on the scope of section one recognized the likelihood that others, including state courts, might read that section narrowly to do no more than forbid the existence of slavery. They also placed their reliance on section two of the amendment. For example, Representative James Wilson of Iowa said, "A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in

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153. 39 GLOBE, *supra* note 149, at 474 (citing Campbell v. Morris, 3 H. & McH. 535 (Md. 1797)).

154. 39 GLOBE, *supra* note 149, at 474 (citing Corfield v. Coryell, 6 F. Cas 546 (C.C.E.D. Pa. 1823) (No. 3230)).

155. 39 GLOBE, *supra* note 149, at 474; *see also id.* at 600-01 (remarks of Sen. Guthrie) (taking an ambivalent position on the effect of amendment, but objecting to the civil rights bill).

156. *Id.* at 1124.

the possession of these rights insures him against reduction to slavery. This settles the appropriateness of this measure, and that settles its constitutionality."[157]

The defects of the thirteenth amendment as a vehicle for dealing with racial discrimination were apparent. Its authority as the basis for the abolition of the black codes was uncertain. Although there were good arguments in favor of its application to any racial discrimination in civil rights, many had doubts about the reception such arguments would receive in the courts.[158] Even if the courts were willing to defer to congressional power under section two of the amendment, civil rights legislation could be repealed by a later Congress.[159] Thus, Congress recognized the need for a new amendment to the Constitution that would place the constitutionality of federal legislative efforts to abolish racial discrimination beyond question and would secure those rights in the Constitution itself. The proposed new amendment and the Civil Rights Act of 1866 were debated concurrently, and they must be viewed together to understand what the framers of the fourteenth amendment believed they were doing.

B. The Rejected First Proposal for the Fourteenth Amendment

In February of 1866 a joint committee of the House and Senate proposed a new constitutional amendment:

> The 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 several States equal protection in the rights of life, liberty, and property.[160]

Congressman John Bingham of Ohio, in proposing this bill, said that its language came from article IV, section 2 and from the fifth amendment:

> The proposition pending before the House is simply a

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157. *Id.* at 1118.

158. A few Republican congressmen, like Henry Raymond of New York and John Bingham of Ohio, believed that the thirteenth amendment was an inadequate constitutional basis for prohibitions of racial discrimination. They voted against the Civil Rights Act of 1866, but supported the fourteenth amendment to accomplish a similar result. *Id.* at 2502 (remarks of Rep. Raymond); *id.* at 1291-92 (remarks of Rep. Bingham).

159. *Id.* at 1095 (remarks of Rep. Hotchkiss).

160. *Id.* at 1034 (proposal of Select Joint Committee on Reconstruction).

> proposition to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today. . . .
>
> 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. . . ."[161]

Bingham's "bill of rights" apparently consisted of the privileges and immunities clause of article IV, section 2 and the due process clause of the fifth amendment.[162] He claimed that the Constitution already declared "all men are equal in the rights of life and liberty before the majesty of American law," thus reading the "due process" clause of the fifth amendment as a command of equality.[163] As to the meaning of the privileges and immunities clause itself, Bingham apparently adopted the view that the clause referred to all rights important to a free society, going beyond Washington and Taney to see in it a recognition that the states had an obligation to afford those rights to their own citizens as the antislavery constitutionalists claimed.

Opponents of the proposed amendment, understanding the impact that a broad interpretation of the phrase "privileges and immunities" could have, protested that the amendment would convert the privileges and immunities clause from a prohibition of discrimination against nonresidents into a general charter for federal legislation. Democratic Congressman Andrew Rogers of New Jersey objected that, under the proposed amendment, all rights would become federal. He referred to the listing of privileges and immunities made by Justice Bushrod Washington in *Corfield v. Coryell*. Rogers noted that the list included the exercise of the franchise, and he argued that the proposed amendment would enable Congress to determine the qualifications for voting.[164]

Representative Robert Hale, a moderate Republican from New

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161. *Id.* at 1088-89.

162. Almost a century later, Justice Black used Bingham's argument as authority for the proposition that the fourteenth amendment was intended to apply the Bill of Rights (amendments I-VIII) to the states. Adamson v. California, 332 U.S. 46, 97-123 (1947) (appendix to dissent of Black, J.).

163. 39 GLOBE, *supra* note 149, at 1084-90, 1094.

164. *Id.* at 134-35 app.

York, pointed out that the proposed amendment gave Congress power to legislate on all privileges and immunities subject to the condition that the federal legislation be uniform.[165] Another moderate Republican from New York, Giles Hotchkiss, objected that the amendment appeared to authorize Congress to pass uniform laws protecting life, liberty, and property in the states. He argued that the destruction of state power over municipal legislation was inadvisable.[166] Bingham protested this construction, but Hotchkiss replied that, at best, the language was unclear. He added that the proposal was also defective because it only granted power to Congress, and therefore Congress could refuse to prohibit discrimination and could repeal any law it had passed. Hotchkiss suggested that the amendment should be changed to say that no state shall discriminate against any class of citizens.[167] Action on the committee's proposal was then postponed indefinitely and it was never passed. In the Senate, Senator William Stewart of Nevada noted that this proposed amendment did not accomplish its framers' intention, but was a general grant of power.[168] The debates on this early proposal and its ultimate rejection provide the basis for the argument that the Thirty-Ninth Congress did not intend to shift power to the federal government to enact the type of legislation that was previously the exclusive province of the states.

C. The Civil Rights Act of 1866

Congress did want to end racial discrimination in state laws. It initially attempted to do this by a statute based on the power of Congress under the thirteenth amendment. The broad scope of the statute was tempered with practical considerations. Congress recognized the continuing racial prejudice in the North as well as the South and made no attempt to end discrimination in political rights; nor did Congress propose direct rights of action regardless of state

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165. *Id.* at 1063-64. Bingham responded that an amendment was necessary because the Supreme Court, in Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833), had found that the federal government could not enforce the basic rights of citizens. 39 GLOBE, *supra* note 149, at 1089-90, 1094. In fact, Bingham misstated *Barron*. The issue there was not whether Congress could enforce a constitutional guarantee against the states, but whether there was such a guarantee. No question of congressional action was before the Court in that case. The Court held that the first eight amendments did not apply to the states. Bingham, however, complained, "Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights." *Id.* at 1090.

166. 39 GLOBE, *supra* note 149, at 1095 (Hotchkiss was worried about southerners controlling Congress and passing laws governing all of the states).

167. *Id.*

168. *Id.* at 1082.

law.[169]

The House took up the Civil Rights Act in March of 1866 in the interim between its consideration of the rejected proposal for the fourteenth amendment and consideration of new proposals for an amendment. The Senate had already passed a bill providing

> That all persons 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 without distinction of color 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 . . . 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.[170]

The House Judiciary Committee proposed to change all references to "inhabitants" to refer to "citizens," and to add that all citizens shall have the same right, for example, to make and enforce contracts, "as is enjoyed by white citizens."[171] The limitation of the bill to citizens was designed to meet constitutional objections over the power of Congress to require equal treatment of noncitizens. The qualification that the "same right" be the right "enjoyed by white citizens" was added to make clear that the law did not break down all legal distinctions, but only prohibited discrimination on a racial basis.[172]

Speaking for the committee, Representative Wilson explained further that the language of "no discrimination in civil rights or immunities" did not apply to voting, jury service, or presence in schools. In his view, civil rights were only the rights of personal

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169. Interpretation of the Act to give a private right of action has been a twentieth century phenomenon. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See* 6 C. FAIRMAN, *supra* note 4, at 1207-1259 (1971).

170. S. 61, 39th Cong., 1st Sess. (1866), *discussed in* 39 GLOBE, *supra* note 149, at 606-07.

171. 39 GLOBE, *supra* note 149, at 1115.

172. *Id.* at 157 app. (Rep. Wilson stated, "[I]t was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minor.").

security, personal liberty, and the right to acquire and enjoy property, including the rights of contract and access to courts essential to secure property. Civil rights did not apply to the establishment, support, or management of government. "Immunities" were designed only to create equality in the exemptions from operations of law.[173]

Representative John Broomall of Pennsylvania argued that the bill was necessary because

> for thirty years prior to 1860 everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right of domicil, the right to sue, the writ of *habeas corpus*, and the right of petition.[174]

Others articulated their own views on what rights the bill would reach.[175] Still other opponents sought to defeat the bill by condemning it as either supplanting state laws or enabling later direct federal laws. This caused Samuel Shellabarger of Ohio to defend the proposed Act:

> 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.
>
> . . . It must here be noted that the violations of citizens' rights, which are reached and punished by this bill, are those which are inflicted under "color of law," &c. The bill does not reach mere private wrongs, but only those done under color of State authority; and that authority must be extended on account of the race or color.[176]

Although Wilson reiterated his position that the proposed law

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173. *Id.* at 1117.

174. *Id.* at 1263.

175. For example, Democrat Columbus Delano of Ohio inquired whether the bill gave blacks the right to be jurors, but did not seem reassured when Wilson replied that it did not. *Id.* at 156-59 app. Delano objected to equality in testimony, inheritance, and schools. Kerr of Indiana argued that the language of "civil rights and immunities" was vague and might possibly apply to schools. *Id.* at 1270-71.

176. *Id.* at 1293-94. Congress was aware of private acts of racial violence in the South, but such behavior was presumably cognizable under state law on assault. The federal law was to operate only if the state refused, on a racial basis, to prosecute. Then such acts might arguably be under color of state law. Jones v. Mayer, 392 U.S. 409 (1968), may be good constitutional law, but it is not an accurate interpretation of the statute.

did not apply to school laws, franchise laws, or jury laws, because those were not rights of life, liberty, or property,[177] the bill was returned to committee, which struck out the clause stating that there should be no discrimination in civil rights and immunities. Wilson explained that this was done to make clear that the franchise was not covered by the bill. He contended that the deletion did not change the effect of the bill because the other sections dealt with everything that was a civil right or immunity.[178] As amended, the bill defined citizenship of the United States without regard to color; specified that all citizens have the same rights as white citizens to contract, sue, testify, and acquire property, and to full and equal benefit of all laws for the security of person and property; and that they shall be subject to like punishment. The bill passed, but President Johnson vetoed it.[179]

In the Senate, Trumbull responded to the veto message by affirming the constitutionality and limited scope of the Civil Rights Act:

> 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.[180]

In the House, Representative William Lawrence of Ohio argued that the privileges and immunities clause of article IV gave Congress power to protect the fundamental rights of citizens.[181] He claimed that fundamental rights of citizens are anterior to and independent

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177. Apparently Wilson based congressional authority to pass the law in part on the old antislavery constitutionalist thought, contending that the privileges and immunities of citizens include the protections of the fifth amendment due process clause. Contrary to *Barron*, Wilson thought all states were required to protect the citizen's life, liberty, and property. He argued further that Congress had the power to enforce these rights. Opponents had already emphatically denied this. Even Bingham had denied that the Constitution gave Congress power to legislate to enforce fundamental rights in federal courts. 39 GLOBE, *supra* note 149, at 1294.

178. *Id.* at 1366.

179. In his message vetoing the Civil Rights Bill of 1866, President Andrew Johnson said, "It cannot, however, be justly claimed that, with a view to the enforcement of this article of the Constitution, there is at present any necessity for the exercise of all the powers which this bill confers." *Id.* at 1681.

180. *Id.* at 1758.

181. *Id.* at 1835-36.

of the Constitution, but that article IV recognizes them and "by implication affirms [them] to exist among citizens of the same State."[182] Lawrence defined privileges and immunities as simply the rights to life and personal security, and the right to acquire and enjoy property.[183] Lawrence's view of congressional power under article IV had been repudiated by the courts and was inconsistent with the language and history of that clause. It was intelligible, however, as an adoption of the views of Justices Washington and Taney that significant rights accompanied citizenship, and of the antislavery constitutionalists that those rights could be protected by the federal government. Although the Civil Rights Bill protected the enumerated privileges and immunities of citizens from racial discrimination by the state, it did not apply to schools, voting, or jury selection.

Congress overrode Johnson's veto, and the Civil Rights Act of 1866 became law. It reflected the antislavery constitutionalist view of the fundamental privileges and immunities of citizenship.[184] According to its supporters, the power to pass the Civil Rights Act came from the thirteenth amendment, which, by abolishing slavery, meant that all persons were entitled to the privileges and immunities that "belong of right to citizens of all free governments."[185] Whether the provisions of the Act were broad enough to include all such privileges and immunities, however, is questionable.[186] The vagueness of the phrase "civil rights or immunities" had enabled opponents to argue that it covered items such as voting, jury membership, and education. Silent members may have believed such matters were civil rights, but recognized that a bill containing them would not pass. Thus they were willing to eliminate the general language of "no discrimination in civil rights or immunities" in favor of the specific rights itemized. Other matters, such as access to inns, common carriers, and places of public entertainment, as well as the right to pursue a chosen occupation, were never raised. The Civil Rights Act of 1866 had dealt with the most egregious examples of

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182. *Id.* at 1835.

183. Lawrence asserted that rights may be destroyed only by prohibition or failure to protect. A prohibition, he said, is a law which states that a race shall not have a particular right. A failure to protect, he explained, would be a law granting a specific protection for whites only. *Id.* at 1832-33.

184. *See supra* text accompanying notes 60-62.

185. *See supra* text accompanying notes 151-57.

186. Representative Wilson contended that it did, or at least that it covered all "civil rights" and immunities, but he was trying to protect himself from any charge that he had weakened the bill by eliminating references to "civil rights and immunities." 39 GLOBE, *supra* note 149, at 1366.

racial discrimination under state law, and the omission of comprehensive language in the statute made precise definition of the words "civil rights" or "immunities" irrelevant.

Congressmen frequently mentioned Bushrod Washington's opinion in *Corfield v. Coryell* in connection with the Civil Rights Act.[187] Justice Washington in *Corfield* had listed protection by the government, the right to institute and maintain actions in court, and to hold and dispose of property, as fundamental privileges and immunities. The Civil Rights Act included these fundamental rights. It conferred upon blacks the same rights as white citizens "to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property."[188] In some respects, the statute went beyond the examples of privileges given in *Corfield*, requiring, for example, nondiscrimination in punishment under criminal law,[189] and racial equality in the right to make and enforce contracts.[190]

Other privileges and immunities discussed in *Corfield*, however, were secured indirectly, if at all. *Corfield* mentioned the right to "pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise," and the benefit of habeas corpus.[191] These were not expressly mentioned in the Civil Rights Act of 1866. The statutory declaration of citizenship may have been understood to secure the right to travel and to change residence through the comity clause of article IV and the nature of the federal government.[192] The right of habeas corpus was probably secured to the extent it was available to white citizens, because it is a proceeding for the security of the person. The statute did not, however, reach "professional pursuits." Freedom to pursue an occupation was within both the general and specific headings of privileges of *Corfield*, yet it apparently did not receive protection by the Act of 1866. If it had been raised, however, it would probably have been considered a privilege. On the other hand, Congress clearly

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187. *See, e.g., supra* note 155.

188. Civil Rights Act of 1866, ch.31, § 1, 14 Stat. 27, 27 (1866).

189. *Id.* Washington's list of privileges and immunities mentioned "exemption from higher taxes or impositions than are paid by the other citizens of the state." *Corfield*, 6 F.Cas. at 552.

190. Civil Rights Act of 1866, 14 Stat. at 27. This was not expressly listed as a privilege and immunity in *Corfield* although it fits easily within the general headings of the right to acquire property and pursue and obtain happiness.

191. *Corfield*, 6 F.Cas. at 552.

192. *See supra* text accompanying notes 75-76.

dropped the general language of "civil rights and immunities" to avoid any implication that the statute might apply to another privilege mentioned by Washington in *Corfield*—the elective franchise.

In *Corfield*, Justice Washington left the listing of privileges and immunities open—"these and many others which might be mentioned." Representative Broomall's list of rights and immunities during the initial stages of debate on the Civil Rights Act emphasized rights not mentioned by Washington—the right of free speech and the right to petition.[193] It was, of course, this open-textured nature of privileges and immunities that led the House to omit it from the statute in favor of a specific enumeration. In sum, congressmen agreed that the matters specified by the statute were privileges and immunities of citizenship, but reached no consensus on the full coverage of that term.

D. The Fourteenth Amendment

After the passage of the Civil Rights Act, the House took up a new bill proposing an amendment to the Constitution. This bill contained the language of the present fourteenth amendment's section one without the first sentence on citizenship to all persons born or naturalized in the United States:

> No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or proprety without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[194]

Thus, the form had been changed from a grant of power to secure privileges and immunities to a prohibition on state abridgment of them, with a power merely to enforce the prohibition. Unlike Bingham's first proposed amendment, the privileges and immunities were specified to be those of citizens of the United States. This specification was not considered significant because no clear distinction had been articulated between the privileges and immunities of citizens of a state and those of citizens of the United States. Speakers discussed the new proposed amendment as though the privileges and immunities of United States citizens that it mentioned were identical to the privileges and immunities of the citizen of a

193. *See supra* text accompanying note 174.

194. 39 GLOBE, *supra* note 149, at 2286.

state referred to in article IV. The leading radical, Thaddeus Stevens of Pennsylvania, while introducing the new proposal, said that the provisions of section 1

> 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. . . . Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority.[195]

Some opponents of the amendment argued that its language would allow too broad a federal power. Representative Benjamin Boyer of Pennsylvania objected: "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race. It is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions."[196] Next, Samuel Randall of Pennsylvania complained of the first section: "Grant this power, insert it in the Constitution, and how soon will the privilege of determining who must vote within the State be assumed by the Federal power?"[197] Finally, Andrew Rogers of New Jersey thought the privileges and immunities clause could be understood to involve "all the rights we have under the laws of the country"—the right to vote, to marry, to contract, to be a judge or a juror.[198]

Supporters denied this construction, specifically focusing on the thorny issue of voting rights. Bingham noted, "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States."[199] Others sadly admitted that the people would surely reject any attempt to grant suffrage to blacks.[200]

Whatever their views of its scope, representatives on both sides of the aisle agreed that the measure corresponded to the Civil Rights Act of 1866. John Broomall of Pennyslvania noted that those

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195. *Id.* at 2459.
196. *Id.* at 2467.
197. *Id.* at 2530.
198. *Id.* at 2538.
199. *Id.* at 2542.
200. *Id.* at 2505 (Rep. McKee); *id.* at 2532 (Rep. Banks); *id.* at 2539 (Rep. Farnsworth); *id.* at 2462 (Rep. Garfield).

who were to vote on the proposed constitutional amendment "voted for this proposition in another shape, in the civil rights bill."[201] Henry Raymond said he voted against the civil rights bill because he thought it unconstitutional, "[b]ut 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," and he supported the amendment.[202]

The measure passed in the House and in May of 1866 the Senate took up consideration of the proposed amendment. When the amendment was introduced, the committee chairman, Senator William Fessenden of Maine, was ill, and Senator Jacob Howard of Michigan introduced the amendment giving "so far as I understand [the] views and motives [of the committee which drafted the amendment]."[203]

Howard first addressed the privileges and immunities clause. "[W]e may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington," he said, speaking of *Corfield*.[204] Howard stated that this case correctly characterized the privileges and immunities in the second section of article IV. "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution. . . ."[205] Howard said that these rights "are secured to the citizen solely as a citizen of the United States and as a party in their courts."[206] He acknowledged that these rights did not currently restrict state legislatures, nor did the Constitution empower Congress to give them effect against the states. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[207]

As to "equal protection" and "due process," Howard said:

> This abolishes all class legislation in the States and

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201. *Id.* at 2498.
202. *Id.* at 2513.
203. *Id.* at 2765.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 2766.

> does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . .
>
> . . . But sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law.[208]

Howard was one of the very few speakers in either body who attempted to make any elaboration on equal protection.[209] His comments suggested it was tied to the privileges and immunities clause, i.e., states must secure life, liberty, and property and perhaps other conditions necessary for the pursuit of happiness by laws ("privileges and immunities") which must be equal ("equal protection") and imposed according to due process.

The rest of Howard's speech and the discussion that followed focused on the other sections of the proposed amendment. Several days later, Howard proposed the present first sentence of the amendment dealing with citizenship. "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."[210] This was the same language that had been inserted in the Civil Rights Act. No one, however, suggested that the clause defining United States citizenship had any bearing on the content of the privileges and immunities clause. Indeed, Republican Senator John Henderson of Missouri, discussing the new clause on citizenship, referred to Taney's *Dred Scott* opinion. He said that Taney conceded to members of the community "all the personal rights, privileges, and immunities guaranteed to citizens of this 'new Government.' "[211] Taney had discussed the privileges of citizenship under article IV in terms of their application to citizens of the United

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208. *Id.*

209. In the House, Representative John Farnsworth of Illinois was one of the few members who mentioned the equal protection clause. Farnsworth's comments emphasized that the due process clause and the privileges and immunities clause were taken from existing provisions. "There is but one clause in [section 1 of the proposed amendment] which is not already in the Constitution, and it might as well in my opinion read, 'No State shall deny to any person within its jurisdiction the equal protection of the laws.' " Like several other members of Congress, he assumed the privileges and immunities of article IV were, or ought to be, applicable to the states. Thus, everyone had a right to those things fundamental to free government. But, "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' " *Id.* at 2539.

210. U.S. CONST. amend. XIV, § 1.

211. 39 GLOBE, *supra* note 149, at 3032-33.

States.[212] Henderson's speech indicated agreement with Taney's views on privileges and immunities of citizenship, but, of course, condemned Taney for excluding Negroes from citizenship.

At the beginning of June, the Republicans held a closed party caucus. They agreed on the language of the fourteenth amendment, including some changes in sections two through four, and agreed to stand behind the result without splintering on the merits of particular clauses or proposed alterations. This meant that proponents did not engage in much later discussion on the meaning of particular clauses. Howard's statement that "privileges and immunities" include the first eight amendments was never repeated. Indeed, after the caucus, Republican Senator Luke Poland of Vermont said that the privileges and immunities clause "secures nothing beyond what was intended by the original provision of the Constitution, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' "[213] Senator John Henderson of Missouri referred to the Freedman's Bureau Bill and the Civil Rights Act as affording "[t]hose fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself."[214] Democrats, such as Thomas Hendricks of Indiana and Reverdy Johnson of Maryland, objected to the insertion of privileges and immunities in the proposed fourteenth amendment because, as Johnson said, "I do not understand what will be the effect of that."[215] Nonetheless, the Senate passed the amendment. The House then passed the Senate version, with virtually no debate other than protestations of sadness at the lack of a guarantee for suffrage.[216]

The debates leave no room for doubt that the privileges and immunities clause of the fourteenth amendment referred to the same concept as the privileges and immunities clause of article IV. Every speaker who touched on the issue stated that the fourteenth amendment clause was derived from article IV.[217] Justice Bushrod

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212. *See supra* text accompanying notes 5-98.

213. 39 GLOBE, *supra* note 149, at 2961.

214. *Id.* at 3035.

215. *Id.* at 3041. For the remarks of Sen. Hendricks, see *id.* at 3039.

216. For example, Representative George Julian of Indiana complained, "Without the ballot in the hands of the freedmen, local law, reinforced by a public opinion more rampant against them than ever before, will render the civil rights bill a dead letter, and in the future, as it has been in the past, the national authority will be set at defiance." *Id.* at 3210.

217. *See* the references to article IV by Representatives Farnsworth, *supra* note 209; Stevens, *supra* text accompanying note 195; Senators Howard, *supra* text accompanying notes 204-05; Poland, *supra* text accompanying note 213; and Henderson, *supra* note 214

Washington's description in *Corfield* of privileges and immunities under article IV as the fundamental rights of citizens in a free society was taken as applicable to the new clause in the fourteenth amendment, with an exception for the franchise, which was viewed as a political right not subject to either article IV or the fourteenth amendment. Thus, the framers of the fourteenth amendment understood that they were placing a guarantee of "fundamental rights" in the document. Hindsight shows the threat to federalism from placing undefined fundamental rights in the Constitution, and some contemporaries pointed it out as well.[218] At the time, however, most framers apparently hoped to ensure such rights to blacks, while preserving state sovereignty in its current form. The general language they adopted masked the potential conflict between these goals.

State and federal courts, construing the privileges and immunities of article IV, had never given it a precise definition. They had

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and accompanying text. *See also* the remarks of amendment opponents, *supra* notes 196-98 and 215 and accompanying text. In the House, Rep. Bingham had the last word on his own proposal. "No state," he declared, "ever had the right, under the forms of law or otherwise, to deny . . . the privileges and immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." The notion of a right without a remedy suggests, at least, an appeal to "natural rights." Bingham tied these rights to the "privileges and immunities" clause of article IV, saying that such privileges 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." He concluded, "That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more. . . ." 39 GLOBE, *supra* note 149, at 2542-43.

218. *See, e.g.*, remarks of Rep. Hale, 39 GLOBE, *supra* note 149, at 1065. In recent times, Raoul Berger has argued that the problem was a limited one because the fourteenth amendment merely constitutionalized the rights provided by the Civil Rights Act of 1866. He contends that the 1866 statute defined all those matters that were considered fundamental privileges and immunities, and therefore that the privileges and immunities clause of the fourteenth amendment simply referred to those statutory rights. R. BERGER, GOVERNMENT BY JUDICIARY 36 (1977). Of course the rights described in the Civil Rights Act of 1866 were unanimously conceived of as part of the privileges and immunities of citizenship, but as demonstrated, privileges and immunities were not limited to the enumerated civil rights. Each person discussing privileges and immunities gave the phrase a slightly different content. *See* Sen. Wilson, *supra* text accompanying note 142 (emphasizing free speech); Rep. Broomall, *supra* text accompanying note 174 (including speech, travel, domicile, suit, habeas, and right of petition); Rep. Wilson, *supra* text accompanying note 179 (identifying them with the 1866 Act); Sen. Howard, *supra* text accompanying notes 204-08 (adopting *Corfield* and adding the first eight amendments); and amendment opponents commenting on vagueness. *See* Sens. Johnson and Hendricks, *supra* text accompanying note 215. Thus, Berger's limitation on the clause fails as history even if it could be justified by some other criteria of interpretation. *See* Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U.L. REV. 142 (1984).

insisted on leaving it for a case-by-case determination, so that they could find it applicable to any law when discrimination against nonresidents would threaten the functioning of the nation. They did not want to foreclose decision on any law that had not been considered individually in a concrete case for this pupose.[219] Congress understood, as Howard said, that it would be similarly up to the courts to construe the privileges and immunities clause of the new amendment on a case-by-case basis. The courts would decide whether a particular right was fundamental and therefore whether a law on that matter must be equal as to all.[220] Congress overrode objections to the vagueness of the term "privileges and immunities" because no one thought the insertion of the clause in the Constitution would result in interference with laws they believed proper.

Experience with judicial decisions under article IV suggested there was no cause for alarm.[221] Under article IV the privileges and immunities guaranteed to a nonresident were defined primarily by the laws applicable to residents of the state that he entered. In Bushrod Washington's terms, privileges and immunities were the fundamental rights of a citizen subject to "such restraints as the Government may justly prescribe for the general good of the whole."[222] Thus, their content was identified in the context of existing laws. Similarly, the rights of the black individual under the Civil Rights Act of 1866 were defined by the state laws applicable to white citizens. Instead of a vast expansion of rights, the framers of the fourteenth amendment saw privileges and immunities as a limiting concept. It selected only some of the existing laws of a state as basic rights of citizenship that must be applied to all. Members of the Republican majority asserted that states under their own constitutions already afforded their citizens all fundamental privileges and immunitites, except for those states which previously had slavery and were then enacting black codes.[223]

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219. *See, e.g.*, Connor v. Elliot, 59 U.S. (18 How.) 591, 593 (1856) ("We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein.").

220. *See supra* note 208 and accompanying text.

221. Resentment of the Court for its decision in *Dred Scott* can easily be exaggerated. Nor did *Dred Scott* raise congressional fears about entrusting broad interpretive powers to the Court. Furthermore, by 1866 a majority of the Court had been appointed by Lincoln (Chase, Miller, Swayne, Davis, and Field). *See generally* S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

222. *See supra* text accompanying note 163.

223. *See, e.g.*, 39 GLOBE, *supra* note 149, at 219 app. (remarks of Sen. Howe).

The fear of vagueness in the term "civil rights and immunities," which led Congress to drop it in favor of a specific enumeration of rights in the Civil Rights Act of 1866, produced less terror in the case of the "privileges and immunities" clause in the fourteenth amendment. Section two of the amendment provided strong textual evidence that the privileges and immunities of citizens of the United States did not include political rights.[224] A statement of principle was more appropriate in a constitution than in a statute. To some extent, the vagueness of the principle actually enhanced its acceptability. It was impossible to oppose the fourteenth amendment in the Thirty-Ninth Congress without appearing to oppose fundamental rights.[225]

The essential theme of the series of congressional debates was that slavery was the root cause of all denials of fundamental rights in a democratic society. Thus, the abolition of slavery and its incidents by the thirteenth amendment, the Civil Rights Act, and the first section of the fourteenth amendment, would automatically result in the assurance of all that was fundamental without greatly altering the federal structure.

The members of the Thirty-Ninth Congress did not want to create a centralized government whose power would include the authority to define the scope of a citizen's rights. They believed that each state would adequately protect the interests of its own white citizens, so that a prohibition on racial discrimination in the fundamental rights of the state legal system would adequately secure those rights to blacks. The Civil Rights Act was designed to secure racial equality in what Congress believed to be the most important rights of a citizen in society, rights that the states themselves had already, presumably, defined. The fourteenth amendment was to

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224. *See supra* text accompanying note 199. Section two provides for reduction in the basis of representation in Congress to the extent the right to vote is denied male inhabitants of a state who are twenty-one years old and citizens of the United States. U.S. CONST. amend. XIV, § 2.

225. *See id.* at 2468-69 (remarks of Rep. Kelley) and *id.* at 256 app. (remarks of Rep. Baker). This also explains the evidence offered by Professors Fairman and Morrison against the incorporation of the first eight amendments. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). Some rights, like freedom of the press, were secured in almost every state constitution and would be considered fundamental rights protected by the fourteenth amendment. On the other hand, state laws inconsistent with other provisions of the Bill of Rights which were not part of the state's own constitution would not be considered by the people of that state to be violations of fundamental rights.

raise nondiscrimination in all these fundamental rights to the level of a constitutional command. The congress that proposed the fourteenth amendment, however, failed to define privileges or immunities and did not see that the distinction between the language of article IV and that of the fourteenth amendment posed problems for achieving the results they sought.

V. *THE SLAUGHTERHOUSE CASES* AND THE DEMISE OF THE PRIVILEGES AND IMMUNITIES CLAUSE

"[I]t turns . . . what was meant for bread into a stone."[226]

A. Debates on Civil Rights Legislation Before the Slaughterhouse *Decision*

Problems with using the privileges and immunities language of the fourteenth amendment to combat discrimination surfaced quickly. The amendment had been ratified in 1868 with the clear understanding that it did not affect voting rights because extension of the franchise had threatened to weaken northern support. During the next two years, however, political fortunes shifted and Republicans saw the Negro vote in northern and border states as essential to maintaining their power. Thus, in 1870 the fifteenth amendment was ratified in an effort to extend voting rights to blacks.[227] Congress then passed statutes in 1870[228] and 1871[229] to secure the right to vote. Both these bills attempted to protect against interference with the right to vote by organized violence, especially the activities of the Ku Klux Klan, but the continued outrages of the Klan led to a further enactment in 1871.[230] The debates over the Enforcement Act of 1871 involved heated discussion of the proper interpretation of the fourteenth amendment.

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226. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 129 (1873) (Swayne, J., dissenting).

227. *See* W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965). Sen. Matthew Carpenter of Wisconsin was an active participant in the debates, supporting the amendment, but opposing the refusal to admit secessionist states until they had ratified that amendment. *Id.* at 102; CONG. GLOBE, 41st Cong., 2d Sess. 165 (1869).

228. Voting Rights Act of 1870, ch. 114, 16 Stat. 140 (1870). The 1870 statutes also reenacted the Civil Rights Act of 1866, which could now be based upon the fourteenth amendment. Ch. 114, § 18. Chapter 114, § 16 altered the act to extend rights other than property to all persons rather than to citizens only. The right to hold property on the same terms as white citizens continued to be limited to citizens.

229. Voting Rights Act of 1871, ch. 99, 16 Stat. 13 (1871).

230. Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871).

The legislation, as initially proposed, raised real fears that Congress, in its attempts to protect black citizens, would usurp state sovereignty. Congressional authority to pass such legislation required application of the fourteenth amendment to situations beyond those considered by its framers, and each side interpreted the new amendment according to their desire to enact or block the proposed law. Although the statements made in these debates are suspect if taken as expressions of the original intent of those who drafted the amendment, they demonstrate the possible interpretations of the language and the concerns of the time.

The problems that had always plagued interpretation of "the privileges and immunities of citizenship" cropped up again in the language of the Voting Rights Act of 1870. The Act had made it a criminal offense for two or more persons to conspire or go in disguise upon the public highway or upon the premises of another with intent to injure, oppress, threaten, or intimidate any citizen "with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[231] Given this language, Representative James Garfield of Ohio asked why additional legislation to deal with the Klan was needed.[232] Representative Shellabarger replied that the section was arguably worthless "because of its too great generality and vagueness in the description of the particular act that shall constitute the crime."[233] With such general language, it was also possible that the section would be interpreted to apply only to voting rights because the rest of the statute was concerned only with these rights.

To remedy these deficiencies, a new statute was proposed. The first section was limited to acts under color of state law, and the third dealt with circumstances in which the state was unable or unwilling to enforce its law. But section two dealt with private conspiracies against private individuals. This section made it criminal for two or more persons within the limits of any state to

> band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault

231. Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 141 (1870).
232. CONG. GLOBE, 42d Cong., 1st Sess. 130 (1871).
233. *Id.* at 68 app.

> and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny . . . .[234]

Shellabarger claimed that this provision was authorized by the fourteenth amendment. "The making of them [persons born in the United States] 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."[235] Those fundamental rights, he asserted, were those stated by Justice Washington in *Corfield*.

Both Republicans and Democrats were alarmed by Shellabarger's reasoning. Republicans were appalled by the Klan's actions and by the failure of state governments to convict Klansmen, but many were equally startled by Shellabarger's suggestion of federal power to legislate to protect life, liberty, and property from private injury.[236] Democrat Michael Kerr of Indiana pointed to the distinction between rights of state citizenship protected by article IV and rights of United States citizenship protected by the fourteenth amendment to indicate that the latter were very limited. He did not, however, clearly develop this premise.[237] Some speakers contended that the amendment did not change the constitution.[238] Farnsworth, who had contended in the original debates on the fourteenth

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234. *Id.* at 68-69 app.

235. *Id.* at 69 app.

236. Representative Farnsworth objected:

> Thus then the question presents itself . . . whether we shall obliterate State lines and abolish State constitutions and State Legislatures, and centralize all the power of these States of ours into one grand despotic central Government at Washington, or, will we preserve the State Governments, wherein resides, as I think, the chief protection of the rights of the citizen as well as the source of the powers of the General Government.

CONG. GLOBE, 42nd Cong., 1st Sess. at 117 app.

Representative Garfield spoke at length on the power of Congress under the fourteenth amendment. He pointed to the rejection of Bingham's first proposal to demonstrate that Congress was not given a general power to legislate where states had previously been the source of legislation. He denied Shellabarger's construction of the privileges and immunities clause, insisting that it gave power to Congress to act only in the event of state violations. But Garfield did state that Congress had power to do justice where state laws were equal but "by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection . . . ." *Id.* at 149-54 app. Other Republicans aghast at the implications of Shellabarger's rationale included Representatives Moore (*id.* at 112 app.), Hawley (*id.* at 382), and Willard (*id.* at 187 app.).

237. *Id.* at 47-48 app.

238. *See id.* at 86 app. (statement of Democrat Storm) and *id.* at 112 app. (statement of Republican Moore).

amendment that the equal protection clause was the only new provision, repeated that position, citing Representative Poland's remark that the privileges and immunities clause essentially reiterated article IV.[239] Several speakers took the position that the clause in the fourteenth amendment protected only against the same narrowly defined forms of discrimination forbidden by article IV.[240]

Even the specification that section two referred to acts in violation of the rights of a person "to which he is entitled under the Constitution and laws of the United States" did not assuage the opposition to the proposed statute, for many legislators saw it as an assertion that the specified offenses were offenses against the Constitution.[241] In the face of these objections, the bill was redrafted to specify that the criminal act was conspiracy "for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[242]

Members of the House sought to make clear that the bill would only reach the rights of citizens as defined by the states.[243] Nevertheless, some ambiguity remained in the amended bill. Radical Republicans like Shellabarger could interpret it to apply to any injury inflicted by two or more persons on the life, liberty, or property

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239. *Id.* at 116 app.

240. *Id.*; *see also id.* at 48 app. (statement of Kerr); *id.* at 87 app. (statement of John Storm of Pennsylvania); *id.* at 209 (statement of James Blair of Missouri); *id.* at 152 app. (statement of Garfield).

241. *See, e.g.*, *id.* at 114 app. (remarks of Farnsworth); *id.* at 188 app. (remarks of Willard).

242. *Id.* at 477.

243. Representative Horatio Burchard of Illinois, supporting the amended bill, denied that Washington's statements in *Corfield* of privileges and immunities were correct. Those were the privileges of all men, not just of citizens. He noted that if Washington's description applied to the privileges and immunities of United States citizenship, the power to protect them "must have been conferred by the original Constitution. If the General Government originally received no such power, this construction of the meaning of those words must be erroneous, and no such power can be claimed from their use in the [fourteenth] amendment." *Id.* at 314 app. Representative Poland also supported Farnsworth's views (*supra* note 146) and voted for the bill, as amended:

> The Constitution originally left to the State the administration of the local law, both civil and criminal; all offenses against person or property were to be punished by the State authorities.
>
> I do not agree that the fourteenth amendment or any amendment has changed that, except to this extent; the last clause of the fourteenth amendment provides that no State shall deny the equal protection of the laws to its citizens.

Id. at 514.

of another individual for racial reasons,[244] while others viewed it as applying only to state acts, thereby simply protecting state officials from pressure to deny equal treatment.[245] In any event, the equal protection clause, not the privileges and immunities clause, of the fourteenth amendment was regarded as the constitutional source of power for the statute.

The same issues of state sovereignty and federal power were raised in the Senate. Senator Lyman Trumbull insisted that the fourteenth amendment provision on "privileges and immunities" did not change the Constitution.[246] "[T]his national Government was not formed for the purpose of protecting the individual in his rights of person and of property."[247] Senator Matthew Carpenter of Wisconsin protested, "That is what I understand to be the very change wrought by the fourteenth amendment. It is now put in that aspect and does protect them." Trumbull rejoined, "Then it would be an annihilation entirely of the States. Such is not the fourteenth amendment. The States were, and are now, the depositaries of the rights of the individual against encroachment." Carpenter intervened, "And that Constitution forbids them to deny them, and authorizes Congress to legislate so as to carry that prohibition into execution." But Trumbull denied it:

> If the Constitution had said that the privileges and immunities of citizens of the United States embraced all the rights of person and property belonging to an individual, then

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244. Representative Shellabarger gave his understanding of the effect of these changes:

> The object of the amendment is, as interpreted by its friends who brought it before the House, so far as I understand it, to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of this section.

Id. at 477 app.

245.

> The bill thus amended will —
>
> 1. Afford further redress for violations under State authority of constitutional rights.
>
> 2. Punish conspiracies to deny the equal protection of the laws through the means and agencies by which such protection is afforded.

Id. at 315 app. (remarks of Rep. Burchard).

246. "The protection which the Government affords to American citizens under the Constitution as it was originally formed is precisely the protection it affords to American citizens . . . as it now exists. The fourteenth amendment has not extended the rights and privileges of citizenship one iota." *Id.* at 576.

247. *Id.* at 577.

> the Senator would be right; but it says no such thing. In my judgment, the fourteenth amendment has not changed an iota of the Constitution, as it was originally framed, in that respect.[248]

Trumbull then stated his view of the privileges and immunities clause in terms that would be echoed by Justice Miller on the Supreme Court within a few years:

> I insist that the privileges and immunities belonging to the citizen of the United States as such are of a national character, and such as the nation is bound to protect, whether the citizen be in foreign lands, or in any of the States of the Union . . . . National citizenship is one thing, and State citizenship another; and before this constitutional amendment was adopted the same obligation, in my judgment, rested upon the Government of the United States to protect citizens of the United States as now.[249]

A number of other senators disputed Trumbull's reading of the clause, insisting, like Carpenter, that it gave Congress the power to protect all the fundamental rights of citizens.[250]

Confronted with these conflicting interpretations of the privileges and immunities language, legislators relied instead on the equal protection clause for enforcing power. The major evil Congress hoped to remedy with the Enforcement Act of 1871 was state inaction in the face of Ku Klux Klan outrages. Blacks were assaulted and murdered, and their property was destroyed, while the state did nothing to protect them. In this context, the prohibition against state denial of equal protection of the laws offered a firmer basis for federal legislation than did the privileges and immunities clause. The focus was on state inaction, and the statute depended in large measure on finding either such inaction or some interference with the state's ability to act impartially before federal law was imposed.[251] There was no need to define the privileges and immunities of citizenship, and the law did not invade the domain of

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248. *Id.*

249. *Id.* Democrats such as Bayard also supported this construction of the fourteenth amendment (*id.* at 242 app.), but their opposition to that amendment meant that their interpretation of it would be given little weight.

250. *See, e.g.*, *id.* at 228 app. (remarks of Sen. Boreman); *id.* at 696-97 (remarks of Sen. Edmunds).

251. *See* Act of April 20, 1871, ch. 22, § 13, 17 Stat. 12 (1871).

municipal legislation except to assure that states fulfilled their obligation to enforce equally their own laws protecting persons and property.

The privileges and immunities clause was a more critical source of potential federal power in connection with other legislation during the Reconstruction era. Senator Charles Sumner made repeated attempts to secure passage of a broad civil rights bill requiring equality in inns, common carriers, theatres, schools, churches, and cemeteries, proscribing racial discrimination in jury selection, and striking the word "white" from all legislation.[252] The debates in January of 1872 on Sumner's bill raised issues on the meaning of the fourteenth amendment that faced the Supreme Court in cases it heard that same month. Two questions were of particular importance: What rights were "privileges and immunities of citizenship" under the new amendment; and, did the amendment give Congress the authority to legislate affirmatively to ensure such rights?

Democratic Senator Allen Thurman of Ohio analyzed the constitutional issues for the opposition. He argued that the equal protection clause did not apply to the subject matter of the bill. That clause applied only to the laws protecting an individual's life, liberty, or property.[253] Conceding that equal access to all places created or regulated by law is a privilege of United States citizenship, Thurman nevertheless objected to the proposed statute on the grounds that it operated directly on individuals regardless of whether state law provided a remedy for discrimination.[254]

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252. His original proposal in 1870 was reported unfavorably by committee and in the beginning of 1871 a renewed attempt was tabled. CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871). Sumner tried again in December of 1871 to attach his bill as a rider to the Amnesty Act. CONG. GLOBE, 42d Cong., 2d Sess. 240-44 (1872).

253.

> Whatever is created or regulated by law is a matter in which every citizen has equal privileges. . . . The difference between privilege and protection is clearly recognized in this [14th] amendment. It is privileges we are dealing with now; it is not with protection. This is a bill to secure to everyone equal privileges, not equal protection against injury or wrong or outrage or violence. It is not to secure either life or liberty or property, because a man's life does not depend on whether he can go into a theater or not; his liberty does not depend on whether he can go into a theater or not; his property does not depend on whether he can go into a theater or not . . . .

CONG. GLOBE, 42d Cong., 2d Sess. 496 (1872).

254.

> [T]his bill is only to secure privileges and immunities, and in respect to them the constitution is plain that no State shall make or enforce any law to deprive any citizen of them, and it is equally clear that you have no right to interfere until the State has made or enforced such a law.

Sumner and his supporters did not take issue with Thurman's reading of equal protection, but Senator Oliver Morton of Indiana replied to Thurman's reading of congressional power with respect to privileges and immunities of United States citizenship:

> If the things intended to be secured by this bill flow from United States citizenship, if a man has them because he is a citizen of the United States, from that fact and from that principle of law, then it follows that the protection of those privileges belongs to the Government of the United States.[255]

Thus, while Thurman insisted that federal power was limited to correcting state denials, Morton contended that, if equality in privileges afforded by the state was a right of United States citizenship, it could be secured directly by federal legislation. In Morton's view, for example, federal legislation could require state chartered businesses to treat people equally. Thurman responded that if direct legislation on individuals was permitted under the privileges and immunities clause of the fourteenth amendment, Congress could supplant all state laws:

> What is that argument? It is that privileges, immunities, life, liberty, property, and the protection of laws in the United States are all taken in charge, and are under the guarantee of the Constitution and the United States, and that thus taken in charge and under its guarantee and protection, Congress has a right to legislate upon any subject whatsoever, according to its own discretion, that relates to the privileges, the immunities, the life, the property, or the liberty of a citizen of the United States. . . . If this is the case, then all local self-government is wiped out in this land . . . .[256]

A few days later, Matthew Carpenter rose on the Senate floor to give his views. Carpenter was respected as one of the leading constitutional lawyers of his time. He proposed to amend Sumner's bill in several particulars to avoid possible constitutional difficulties.[257]

Id.

This of course was the holding of the *Civil Rights Cases*, 109 U.S. 1 (1883), with respect to equal protection.

255. CONG. GLOBE, 42 Cong., 2d Sess. 524 (1877).

256. *Id.* at 527.

257. For example, he wanted to delete coverage of churches for fear that requiring a church to admit members of another race would interfere with first amendment guarantees of religious freedom. *Id.* at 759-60. He considered membership on a jury to involve

He believed that the bill included some activities that were not privileges and immunities of citizenship,[258] but his proposed amendments still forbade race discrimination in any public inn, in any place of public amusement for which a license from a legal authority is required, and on any means of public carriage.

Carpenter disputed Thurman's view that the fourteenth amendment did not give Congress authority to act directly on individual denials of equal treatment in privileges or immunities. State denials of such privileges, he argued, could theoretically be struck down on appeal in federal courts. Therefore, in granting Congress the power to enforce the amendment, the framers must have envisioned some more affirmative power. In addition, he argued that the authority to legislate affirmatively could be inferred from the distinction between the language of the amendment and that of article IV. Assuming that the privileges and immunities referred to were identical in both provisions, Carpenter noted that article IV forbade only discrimination in favor of citizens of the state while the fourteenth amendment secured privileges and immunities to every citizen. If, under the amendment, no state can abridge the privileges and immunities of any citizen of the United States, then the privileges of all citizens must be the same. "[I]f the State does not, by its legislation, put all citizens upon a common footing, Congress may do so."[259] He argued that the privileges and immunities clause therefore struck down racial barriers like Maryland's bar discrimination—"That great amendment opened the bar to colored men."[260] If the object of the amendment is equality before the law in privileges and immunities,[261] Congress is not confined to reiterating the constitutional prohibition but "must be considered as authorized to enforce, by

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participation in the establishment and management of government and, like Representative Wilson in the debates over the Civil Rights Act of 1866, distinguished it from the privileges and immunities of citizenship. He also considered facilities other than inns or public carriers that did not receive a license from the state as beyond privileges and immunities.

258. *Id.* Senator Lot Morrill of Maine went beyond Carpenter. He sought to avoid the reach of the privileges and immunities clause to this bill by arguing that public accommodations were not privileges of citizenship. He maintained that the privileges and immunities of citizenship were limited to the rights stated in the Civil Rights Act of 1866—to contract, hold property, sue, etc.—and did not extend "to the matters of education, worship, amusement, recreation, entertainment, all of which enter so essentially into the private life of the people, into the personal rights of the people, they belong exclusively to the State, of which the Government of the United States has no right to take cognizance." *Id.* at 5 app.

259. *Id.* at 762.

260. *Id.*

261. This reading of federal power resembles the judicial construction in U.S. v.

affirmative legislation, the object intended to be secured by this amendment."[262]

Under Carpenter's interpretation of the fourteenth amendment, equality in rights afforded by a state was not itself a privilege or immunity of United States citizens, but a consequence of granting everyone the privileges and immunities of citizenship. To define the rights themselves, Carpenter attempted to follow the model used for interpretation of article IV in which privileges and immunities referred to natural law principles made concrete by existing state law. Article IV did not require a state to treat its own citizens equally; it simply required a state to treat citizens of other states equally with citizens of the state. Carpenter reasoned that since the fourteenth amendment made no distinction between citizens of different states, every citizen of the United States was entitled to whatever privilege or immunity a state afforded to any of its citizens. In other words, article IV was like a collective, most favored nation clause in which one group (citizens of other states) were entitled to whatever privileges a state gave to a particular defined group (its own citizens). Similarly, the fourteenth amendment was like a most favored nation clause for the individual. Whenever a state gave any individual a right that was a concrete application of the general natural law principles underlying privileges and immunities, that state-created right became a privilege of all citizens of the United States.[263]

The "right" could be defined in a manner that would render it inapplicable to most persons without affecting its status as a privilege of citizenship. For example, the state could provide a specific set of rules for enforcement of mining claims. That privilege would be available to all, but only persons who owned the particular resource could take advantage of it. Similarly, a state could license attorneys on a showing that they had specific training and legal knowledge. Even if the practice of law is a privilege or immunity, it could be conditioned in numerous ways. Only conditions that were

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Guest, 383 U.S. 745 (1966) regarding the power of Congress under the equal protection clause to reach private interference with fourteenth amendment rights.

262. *Id.* Carpenter, like virtually all supporters of this public accommodations act, assumed that inns, common carriers, and theatres were required by common law or statute in every state to serve all citizens.

263. This analysis was sparked by a brief conversation with Professor William Nelson of New York University, who is writing an historical study on the fourteenth amendment. Interview with William Nelson, N.Y.U. Professor Nelson bears no responsibility for the application made here in the text.

unrelated to the legitimate interests of the state could be inappropriate elements of the definition of privilege. For Carpenter, race was the quintessential irrelevant condition. Thus, Carpenter's speech indicated that the privileges and immunities clause boiled down to a prohibition on racial discrimination in laws implementing fundamental rights.

Reliance on natural law fundamental rights reasoning derived from article IV raised the specter of Justice Taney's view of that clause in *Dred Scott*. Taney had reasoned that article IV secured fundamental rights to out-of-state citizens even if a state denied them to its own citizens. As applied to the fourteenth amendment, that reasoning would result in congressional power to legislate to implement fundamental rights. The civil rights bill debated in 1872 seemed to be based on this view. The widespread statutory and common law protection for access to public accommodations led Carpenter and others to treat such access as a privilege of citizenship regardless of the law in any particular state. In response to such reasoning, Thurman contended that if Congress could assure individuals their privileges and immunities by providing a federal cause of action, Congress could supplant all local laws. Construed broadly with reference to natural law, sections one and five of the fourteenth amendment together would thus produce the same result as Bingham's original proposal for the fourteenth amendment—a proposal which was rejected out of fear that it would allow Congress to usurp state power.[264]

Congress did not pass the legislation on public accommodations in 1872, but the debates on federal legislative power during that session had their effect on the Supreme Court's construction of the Constitution. They revealed the potential scope of the fourteenth amendment to restructure political authority and, in Trumbell's arguments, outlined the contours of a restrictive interpretation.

B. Arguments of Counsel in the First Cases Interpreting the Fourteenth Amendment

During the same period in which Matthew Carpenter debated the amendment's meaning on the floor of the Senate in his role as a senator from Wisconsin, he argued two cases involving that amendment before the Supreme Court as an attorney.[265] On January 11,

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264. *See supra* pages 992-94.

265. It seems strange today that a legislator would argue before the Supreme Court

1872, Carpenter appeared before the Court on behalf of the Crescent City Livestock Corporation and the state of Louisiana to defend the constitutionality of an ordinance that gave the corporation a monopoly on the ownership of a New Orleans slaughterhouse. Former Supreme Court Justice John A. Campbell argued against Carpenter in the *Slaughterhouse Cases*. Campbell acknowledged the power of the state legislature to regulate occupations when the regulation applied generally, but he contended that monopolies were special privileges and thus deprivations of the privilege and immunity of pursuing an occupation on terms applicable to everyone.[266]

The defendants' briefs in *The Slaughterhouse Cases* insisted that restrictions imposed for the public benefit on property ownership and on the practice of an occupation did not abridge the privileges and immunities of citizens; that the legislature rather than the Court should determine the nature of such public benefits; and that the only effect of the fourteenth amendment was to proscribe racial discrimination in fundamental rights.[267] Defendants' briefs stated that a broad reading of the privileges and immunities clause would block all exercises of the police power over the conduct of business. Thomas Durant wrote a brief contending that

> to extend the interpretation of the amendment to the length which the plaintiffs in error demand would break down the whole system of confederated State government, centralize the beautiful and harmonious system we enjoy into a consolidated and unlimited government, and render the Constitution of the United States, now the object of our love and veneration, as odious and insupportable as its enemies would wish to make it.[268]

Defendants insisted that although the fourteenth amendment's privileges and immunities clause included the privileges and immunities protected by article IV, the amendment should be construed in light of its history as "limited to the investiture of blacks with all the

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during congressional sessions, but it was common practice throughout the nineteenth century. Daniel Webster is perhaps the most familiar example of the legislator as Supreme Court advocate. *See generally* THE PAPERS OF DANIEL WEBSTER (vol. I 1982, vol. II 1983, A. Konefsky & A. King eds.; vol. III forthcoming, A. King ed.).

266. 6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 734-63.

267. *Id.* at 587-614, 717-32 (P. Kurland & G. Casper eds.) (Brief for Defendant by Charles Allen and Thomas Durant, and Brief for Defendant on Reargument by Thomas Durant).

268. *Id.* at 732.

rights and immunities of whites, whatever these may be, and to protect them in their lives, liberties and properties just as whites are protected."[269] "The closing portion of the first section of the fourteenth amendment can have no meaning except as to persons of African descent, for in no state were any *citizens* ever subjected to any of the injuries, outrages and disabilities denounced by the amendment."[270]

Carpenter's arguments for a "narrow" reading of the privileges and immunities clause may be reconciled, with some difficulty, with his senatorial position as an advocate of broad construction of the same clause. His co-counsel's brief used the same language on the need to interpret the clause narrowly in order to avoid centralized government that his opponents invoked on the floor of the Senate. In the Senate, Carpenter pressed for a generous reading of congressional power under section five of the fourteenth amendment; however, he also argued that fundamental privileges could be conditioned, so long as the condition was not imposed arbitrarily, that is, on the basis of race. In the Court, Carpenter sought to restrict judicial power to employ section one of the amendment to invalidate state and local laws by construing the clause to require only racial equality in privileges granted. In both forums, then, he tied construction of the amendment to its purpose in preventing racial discrimination.

One week later, on January 18, 1872, Carpenter was back before the Court to argue another case involving the fourteenth amendment.[271] Myra Bradwell had been denied admission to the Illinois bar because of her gender. Carpenter was retained as her counsel, and now he argued that the privileges and immunities clause went beyond race to strike down gender barriers. He made no mention of the equal protection clause, apparently because he regarded it as applicable only to laws protecting the individual from the infliction of injury to life, liberty, or property by other individuals.[272] He relied solely on privileges and immunities:

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269. *Id.*

270. *Id.* at 728.

271. C. FAIRMAN, *supra* note 4, at 1341, 1365 (1971). Carpenter argued *Slaughterhouse* on January 11, 1872, and *Bradwell* on January 18. *Slaughterhouse* was reargued the following term, but *Bradwell* was not.

272. The equal protection clause received very little attention in debates. The reference to "equality" certainly forbade racial discrimination, but the prohibition applied only to the "protection of the laws." This did not mean that no law could discriminate, for proponents had been clear that section one of the fourteenth amendment did not apply to suffrage. Although Senator Howard said of the clause, "[T]his abolishes all

> [A] State Legislature could not, in enumerating the qualifications [for admission to the bar], require the candidate to be a white citizen. I presume it will be admitted that such an act would be void. The only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life is the provision that "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens." . . . Why may a colored citizen be admitted to the Bar? Because he is a citizen, and that is one of the avocations open to every citizen, and no State can abridge his right to pursue it. Certainly no other reason can be given.[273]

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class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another," he qualified the statement immediately by asserting it did not apply to voting. "The right of suffrage is not, in law, one of the privileges and immunities thus secured by the Constitution. It is merely the creature of law." 39 GLOBE, *supra* note 149, at 2766. This suggests that Howard understood the "protection of the laws" to refer only to the "fundamental rights" secured by the privileges and immunities clause. Under this reading, it would first be necessary to establish that admission to the bar was a privilege or immunity of citizenship before a court could find that gender restrictions violated the fourteenth amendment. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977); J. TENBROEK, *supra* note 56.

An alternative reading of equal protection would confine it to criminal penalties. *See* Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984). The law cannot punish an individual (deprive her of life, liberty, or property) unless it applies to all persons who behave in that fashion. Denial of admission to the bar is not a punishment. The refusal to permit one person to appear in court on behalf of another does not deprive the former of life, freedom of movement, or property. Even if punishment could be invoked, it would be for unauthorized practice of law. A court would probably determine that such a criminal penalty was equal to all despite the preliminary inequality of the gender bar to admission. Under this reading of the clause, Myra Bradwell would lose.

A third possible construction of "protection of the laws" is that it refers to the protection of the individual from harms caused by others — i.e., statutory and common law protection from private individuals who interfered with another's life, liberty, or property must protect blacks as well as whites. The equality is in the persons protected rather than in the persons regulated. Myra Bradwell did not seek the protection of the law, she sought to be protected *from* the law.

There are other possible interpretations of equal protection with a broader scope. *See, e.g.*, 2 W. CROSSKY, POLITICS AND THE CONSTITUTION, 1083-1118 (1953) (equal protection is the right to be equally protected from acts of the state or acts of private individuals, but equality is between persons and not applicable to lines drawn on the basis of conduct). The words were given a larger significance in the congressional debates after the *Slaughterhouse Cases* had destroyed the usefulness of "privileges and immunities" as a protection against racial discrimination. The point is that Carpenter, seeking to win his client's case, must have considered one of the narrower versions of the clause accurate. Otherwise, he would have used the clause in his argument.

273. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (for argument of Carpenter, see 21 L.Ed. 443 at 444).

Although the briefs for his client in *The Slaughterhouse Cases* restricted the clause to prohibiting racial discrimination, Carpenter sought in *Bradwell* to extend its application to gender discrimination:

> I maintain that the 14th Amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters and our daughters.[274]

Matthew Carpenter was one of the leading lawyers of his time, but even he must have had some problems presenting in the same month the positions which he took in *Bradwell*, *Slaughterhouse*, and the floor debates on civil rights legislation. If "intelligence, integrity and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation," a monopoly on ownership of a slaughterhouse is hard to justify. The attempt in his co-counsel's brief in *Slaughterhouse* to prevent the privileges and immunities clause of the fourteenth amendment from destroying federalism by limiting it to a nondiscrimination provision was undercut in *Bradwell*. If gender as well as race was an impermissible basis for discrimination, then any arbitrary classification might be subject to challenge in the courts and to congressional legislation. Further, the invocation of deference to legislative judgment used to limit the exercise of federal judicial power under the privileges and immunities clause in *Slaughterhouse* could be used to expand federal legislative power under that same clause. If the nondiscrimination principle arose from a requirement that all citizens of the United States receive the same privileges and immunities, Congress might have power to determine their content.

C. The Slaughterhouse Cases *Opinion*

Although everyone who spoke in Congress during the framing of the fourteenth amendment, as well as counsel on both sides in

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274. 21 L.Ed. at 444. Carpenter devoted most of his argument to showing that women could properly be denied the ballot. This seems exceedingly strange until it is recalled that he was the Chairman of the Judiciary Committee and presented its report on the Right of Women to Vote. *See* CONG. GLOBE, 42d Cong., 2d Sess. 582 (1872).

The Slaughterhouse Cases, assumed that the privileges and immunities of United States citizens protected in the fourteenth amendment encompassed the same fundamental rights secured from discrimination against nonresidents by the privileges and immunities clause of article IV, the Court on its own rejected this construction.

Justice Miller noted that the fourteenth amendment specified two types of citizenship—state and national.[275] Article IV protected the privileges and immunities of state citizenship while the fourteenth amendment protected those of national citizenship. The privileges of state citizenship, said Miller, were the fundamental rights which all men have in a free society, while the privileges of national citizenship are limited to those rights arising out of a citizen's special relationship to the federal government.

The separate content of the two citizenships could have been reconciled by finding fundamental rights in relation to government that were components of both state and federal citizenship and noting a few specific relationships that applied only to one or the other.[276] The Court rejected this reading by arguing that the profound consequences of assuming that the fourteenth amendment forbids abridgment of fundamental rights by the states were not intended by Congress or the ratifying states.

In effect, Miller, in his *Slaughterhouse* opinion for the Court, accepted both the slaughterhouse counsels' view that the amendment was intended solely to overturn racially discriminatory laws, and the view of the butchers' counsel that the privileges and immunities clause was not limited to racial discrimination and required Congress and the Court to exercise judgment on whether it has been violated. There were two ways out of the dilemma this posed. One had been suggested by Justice Bradley in his opinion below as a circuit court justice in *The Slaughterhouse Cases*:

> It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils

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275. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 73-74 (1873).

276. For example, rights of interstate travel and protection in foreign relations are solely federal matters, while rights to publicly owned resources relate to state citizenship.

> which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.[277]

In other words, although Congress, in proposing the fourteenth amendment, did not anticipate transferring power over the privileges of citizenship from state to federal hands, the language it adopted produced this result.

Miller took another route, reversing Bradley's presumption:

> The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; where the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of state and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[278]

Miller concluded that the privileges and immunities of citizens of the United States could be confined to those "which owe their existence to the Federal government, its national character, its Constitution, or its laws."[279] But the supremacy clause already prohibited states from depriving persons of those rights. In other words, the privileges and immunities clause did not alter the existing law. State regulations of property rights and business activities were not covered by the clause, and therefore it did not apply to the New Orleans monopoly. This construction of the privileges and immunities clause was not original. Senator Trumbull, debating with Senator Carpenter over the Ku Klux Klan Act in April of 1871, had set forth the same proposition.[280] The construction was linguistically possible, and it preserved the original relationship between the

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277. Livestock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughterhouse Co., 15 F.Cas. 649, 652 (D. La. 1870) (No. 8408).

278. 83 U.S. at 78.

279. *Id.* at 79.

280. CONG. GLOBE, 42d Cong., 1st Sess. 577 (1871).

states and the federal government unless a state violated due process or equal protection. Miller went on to find that the Louisiana statute did not violate either clause.

The majority opinion in *The Slaughterhouse Cases* in effect destroyed the "privileges and immunities" clause as a significant source of protection to the rights of blacks. It left them only the more limited safeguards of due process and equal protection. Mrs. Bradwell lost her suit in an opinion delivered the same day because her argument was based solely on privileges and immunities. Admission to the bar was not a privilege or immunity of citizens of the United States, but only a privilege of state citizenship.[281] The effect of this limit was quickly recognized.

D. Reaction to the Opinion: Passage of the Public Accommodations Act

After the decision in *The Slaughterhouse Cases*, the public accommodations bill again came before Congress for consideration. Representative James Beck of Kentucky, an opponent of the bill in the House, seized on *Slaughterhouse* to demonstrate that the bill did not deal with rights protected by the fourteenth amendment.[282] In response, for the first time, a few congressmen switched their ground of authority for the proposed statute from the privileges and immunities clause to the equal protection clause. Robert B. Elliott, a black congressman from South Carolina, was the first to contend that a denial of a "privilege" was a denial of equal protection.[283] Representative William Lawrence elaborated. "Protection," he said, "must not be understood in any restricted sense, but must include every benefit derived from laws."[284] Most participants in the debate, however, continued to speak of of the bill with little precision as to its specific constitutional basis.

The Senate considered the bill in the spring of 1874.[285] In a blunderbuss approach, Senator Frederick Frelinghuysen of New Jersey cited all the Civil War Amendments—thirteenth through fifteenth—as sources of power for the bill. He used language from *Slaughterhouse* to argue that equal protection was a privilege of

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281. The *Slaughterhouse* dissenters, with the exception of Chief Justice Chase, concurred in *Bradwell*, joining in Justice Bradley's well-known opinion on the proper place of women.

282. CONG. REC., 43d Cong., 1st Sess. 342 (1873).

283. *Id.* at 404.

284. *Id.* at 412.

285. The bill's original supporter, Sen. Charles Sumner, had meanwhile died.

United States citizenship.[286] Senator Oliver Morton of Indiana agreed with the position of Elliott and Lawrence that equal protection meant equal benefit of the laws, but he pressed the bill as a vindication of the rights of citizens.[287] Opponents continued to perceive the basic argument of the bill's supporters as resting on privileges and immunities.[288] Carpenter explained that he could not support the bill because the jury provision was beyond congressional power.[289] But despite these arguments and uncertainties, the bill passed the Senate.

In the House, supporters still clung to the bill as a means of vindicating the rights of black citizens.[290] Raging arguments over integrated schools and miscegenation resulted in deletion of the reference to schools.[291] Since the Senate and House versions conflicted, the Senate had to consider the issue once more. This time Senator Carpenter delivered a lengthy speech anticipating the Supreme Court invalidation of the statute. He stated that Congress had some power under the commerce clause, but that the bill was not adapted to the reach of that power. Holding to his original view of equal protection, he said, "It is manifest that [the equal protection clause] . . . has no application to this subject, especially to the jury clause of this bill."[292] Despite his position in earlier debates and his argument in *Bradwell* and *Slaughterhouse*, Carpenter now accepted as controlling the Court's narrow reading of the privileges and immunities clause. He conceded that the clause did not apply to public accommodations or jury service. Thus, Carpenter argued that the principles from *Slaughterhouse* left Congress without power to enact the bill.

The Senate passed the bill over Carpenter's objections. Throughout the debate, different supporters at one time or another effectively canvassed every possible constitutional basis of power. Sumner had started with the thirteenth amendment;[293] others referred to inherent rights of citizens, to equality, to specific protections of citizenship and the privileges and immunities of citizenship,

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286. CONG. REC., 43d Cong., 1st Sess. 3454 (1873).

287. *Id.* at 358-60 app.

288. *Id.* at 4156 (remarks of Sen. Cooper); *id.* at 4163 (remarks of Sen. Kelly); *id.* at 361-62 app. (remarks of Sen. Hamilton).

289. *Id.* at 4166.

290. CONG. REC., 43d Cong., 2d Sess. 945 (1875) (remarks of Rep. Lynch); *id.* at 939 (remarks of Rep. Butler).

291. *Id.* at 1010 (reading of deletions and reissued bill).

292. CONG. REC., 43d Cong., 2d Sess. 1861 (1875).

293. CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872).

and finally, after *Slaughterhouse*, to the equal protection clause.[294] Supporters clearly believed that racial discrimination in public accommodations violated the civil rights of a citizen and that such an outrage should be outlawed. But the constitutional arguments were weak. Equal protection offered a way to overcome the holding in *The Slaughterhouse Cases*, but only a few Republicans seized upon it. The problem of state action plagued any attempt to rely on that clause to support the new bill. Most congressmen continued to talk vaguely of equality as a right of citizens, even as they realized that the decision in *Slaughterhouse* was an almost direct response to the earlier debates that had raised that notion.

E. Further Cases on the Theme

The next group of significant Supreme Court decisions on the fourteenth amendment continued the themes of *The Slaughterhouse Cases*. While dicta hinted at a special concern for racial discrimination, the Court read the amendment's privileges and immunities clause narrowly to avoid expansion of federal power. Two decisions in 1876 dealt with the federal legislation adopted to cope with Klan activities. In *United States v. Reese*,[295] municipal election inspectors in Kentucky were indicted for refusing to receive the vote of a Negro. The indictment was under the 1870 federal statute that punished persons who wrongfully prevented an individual from voting.[296] The Court held that the statute was unconstitutional because it punished any wrongful interference with voting and was not limited to interference on racial grounds. Although Congress could constitutionally have reached the factual situation presented by the case, the statute as drafted was so broad as to be beyond congressional authority. Justice Hunt dissented. He agreed with the majority on constitutional doctrine, but argued that the statute should be read to apply only to cases of racial discrimination.[297]

In *United States v. Cruikshank*,[298] a unanimous Court discharged defendants who had been indicted under section 6 of the 1870 statute on numerous counts of conspiring to deprive citizens of rights

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294. *See supra* text accompanying notes 283-87.

295. 92 U.S. (2 Otto) 214 (1876).

296. Voting Rights Act of 1870, ch. 114, 16 Stat. 140 (1870).

297. 92 U.S. at 238-56. Section 2 of the Act specified the duty of state officials to give persons the equal opportunity to perform the prerequisites of voting without regard to race. Hunt contended that the phrase "as aforesaid" in sections 3 and 4 of the Act referred to the racial discrimination element of section 2, but the majority disagreed with Hunt's statutory interpretation.

298. 92 U.S. (2 Otto) 542 (1876). Justice Clifford concurred in a separate opinion.

or privileges secured under the Constitution or laws of the United States. The Court dismissed counts charging conspiracy to interfere with the citizens' rights to peaceably assemble, to bear arms for lawful purposes, and not to be deprived of life and liberty without due process. Chief Justice Waite stated that the freedom of assembly guaranteed by the first amendment and the right to bear arms in the second amendment did not apply to the states. In other words, the fourteenth amendment did not incorporate the first eight amendments of the Constitution and apply them to the states.[299] Further, violation of these rights by private citizens was purely a matter of state law and not a matter of federal concern.[300] The *Cruikshank* decision reinforced the limited reading of the privileges and immunities clause of *Slaughterhouse*, made clear that the clause did not

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299. *See* Palmer, *The Parameters of Constitutional Reconstruction: Slaughterhouse, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739. Palmer argues that Miller's opinion in *Slaughterhouse* favored interpreting the privileges and immunities clause as incorporating the Bill of Rights, and points to *Cruikshank* as a repudiation of Miller's reasoning. He notes that Miller had stated, "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution." 83 U.S. at 79. But Miller's listing of the privileges and immunities of citizens of the United States included matters relevant to the federal government alone, e.g., "to demand the care and protection of the Federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government." *Id.* There can be no inference that the prohibition of the fourteenth amendment against a state denying the privileges and immunities of citizenship meant that states now must also afford such care and protection to citizens abroad. That right surely remained only one against the federal government. Similarly, the rights of assembly and habeas corpus that applied against the federal government may simply have been mentioned as examples of privileges of citizenship without altering their character from restrictions of federal power to restrictions of state power. This reading of Miller's opinion is supported by the comment of Justice Field in dissent that

> [i]f this inhibition [the privileges and immunities clause of the fourteenth amendment] has no reference to privileges and immunities of this character [fundamental rights], but only refers, *as held by the majority of the court in their opinion*, to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, *it was a vain and idle enactment, which accomplished nothing*
> . . . .

Id. at 96 (emphasis supplied). Further, Miller joined in *Cruikshank*. The silence of the *Slaughterhouse* dissenters, Justices Field, Bradley, and Swayne, on this issue suggests that they felt themselves bound by *Slaughterhouse* and *Bradwell*. If they had relied solely on vagueness grounds, they presumably would have joined Justice Clifford's concurrence.

300. Several other counts were dismissed for failure to state that the deprivation of the specific right, such as voting, was *based on* race, although each of these counts noted that the victims were in fact "persons of color." Four counts did specifically say that the deprivations were "for the reason that they . . . were . . . not white citizens," but the Court found those particular counts failed to specify the rights violated and were thus impermissibly vague.

incorporate any of the Bill of Rights against the states, and suggested a willingness on the part of the Court to strain to avoid application of the enforcement acts.

The opinion of the Court in these two cases left open the possibility that Congress could proscribe racial discrimination by state officials and possibly prohibit some conspiracies by private persons to prevent assertion of rights because of race. Yet the tenor of the opinions, narrowly construing both the statute and indictments under it, bespoke an unwillingness to support the rights of blacks at the expense of state sovereignty. It was apparent that the Court was treading very carefully with respect to the power of Congress under the new amendments.

VI. JUDICIAL REACTION TO *THE SLAUGHTERHOUSE CASES*: *CULLY V. BALTIMORE & OHIO RAILROAD* AND IN RE *TAYLOR*

"[T]he 14th Amendment has no application."[301]

Lower courts, taking their cue from the *Slaughterhouse* decision, tended to take a restrictive view of the changes wrought by the fourteenth amendment.[302] Some courts held that the Civil Rights Act of 1875 permitted separate but equal treatment in public accommodations[303] while others held the Act itself unconstitutional.[304] The privileges and immunities clause had been the centerpiece of section one of the fourteenth amendment. When the Court rendered it ineffective, there was no rush to replace it. Maryland provided an illustration of this reaction.

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301. *In re* Taylor, 48 Md. 28, 33 (1877).

302. *See* Lurie, *The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberties Cases, 1870-1890—A Preliminary Assessment*, 28 AM. J. L. HIST. 295 (1984). Lurie's study of state court cases involving religion and public school education and racial discrmination in the North, Midwest, and Far West indicates that both advocates and state courts did not consider the amendment to have incorporated the establishment clause, nor was it used as a legal weapon against racial discrimination. "More frequently, lawyers cited the amendment in support of their claim *for* segregation, and most frequently the judges ignored the new enactment altogether." *Id.* at 312 (emphasis added).

303. Charge to the Grand Jury—The Civil Rights Act, 30 F. Cas. 999, 1000 (C.C.W.D.N.C. 1875) (No. 18,258) ("From the preamble and all the provisions of the [amendment], it is obvious that the civil rights bill neither directly nor indirectly confers, nor was intended to confer, any rights or privileges of social equality among men."). *See generally* Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the 'Separate but Equal' Doctrine, 1865-1896*, 28 AM. J. L. HIST. 17 (1984) (a study indicating that lower federal courts, from Reconstruction onward, were consistent in decreeing "Jim Crow" segregation to be constitutional and consistent with the laws of the land).

304. Charge to the Grand Jury—The Civil Rights Act, 30 F. Cas. 1005 (C.C.W.D. Tenn. 1875) (No. 18,260). *See also* Riegel, *supra* note 303, at 33 n.70.

Late in 1876 the issue of the constitutionality of the Civil Rights Act of 1875 came before a federal district court in Maryland. The judge considering the Act, Judge William Fell Giles, was a respected Republican who could be expected to be sympathetic to the Act based on his earlier civil rights decisions. He had twice previously ruled in favor of black plaintiffs from out of state who challenged discriminatory actions of the Baltimore City Passenger Railroad Company. In the first case, *Thompson v. Baltimore City Passenger Railway*,[305] the railway company had required blacks to stand on an uncovered platform outside the covered portion of the railway car. Judge Giles held that a black citizen of New York could maintain an action for refusal to allow him to be seated inside the car. The city passenger railway then established separate cars—limiting blacks to those cars marked as permitting colored passengers. In the second case, *Field v. Baltimore City Passenger Railway*,[306] Giles held that a black citizen of Virginia could recover for denial of the right to ride in an unmarked car when white passengers were allowed to ride in the marked car. In both cases, the nonresidents sued under diversity jurisdiction for breach of the duty of a common carrier to accept all passengers, subject to reasonable regulations. In federal courts under diversity jurisdiction, the right of an individual not to be discriminated against by a common carrier was a matter of federal common law if no state statute governed the matter.[307] Giles concluded

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305. 23 F.Cas. 1023 (D.C. Md. 1870) (No. 13,941). The text of the case is not reported, but Judge Giles discusses his holding in that case in Cully v. Baltimore & O.R.R., 6 F.Cas. 946, 947 (D.C. Md. 1876) (No. 3,466). *See infra* text accompanying notes 8 and 9. Giles delivered his opinion sustaining the cause of action without even hearing argument from Anderson Thompson's counsel, Archibald Stirling, because "his convictions were very clear." Giles' opinion holding the discrimination to be a violation of the railroad's duty as a common carrier was quoted in the Baltimore Am. & Commercial Advertiser, Apr. 30, 1870, at 2, col. 6. Counsel agreed on damages of $10, Stirling noting that the suit was brought to determine the law and not to make money. *Id.*; *see also* Baltimore Sun, Apr. 30, 1870, at 1, col. 6.

306. 9 F.Cas. 11 (D.C. Md. 1871) (No. 4763). The text of this case is not reported, but Judge Giles discusses his holding in the case in Cully v. Baltimore & O.R.R., 6 F. Cas. at 947. *See* Baltimore Sun, Nov. 10, at p. 4, col. 2, & Nov. 14, at p. 4, col. 4, 1871; Baltimore Am. & Commercial Advertiser, Nov. 13, 1871, at p. 4, col. 2. Giles sat with Judge Hugh Bond in this case, and the rulings were joint. Brackett said that the decision resulted in the integration of municipal transit. *See* J. BRACKETT, NOTES ON THE PROGRESS OF THE COLORED PEOPLE OF MARYLAND SINCE THE WAR 64 (1890); *see also* W. PAUL, THE SHADOW OF EQUALITY: THE NEGRO IN BALTIMORE 1864-1911, at 101-02 (1972) (unpublished Ph.D. thesis).

307. In *Cully*, 6 F.Cas. at 946, 947, Judge Giles describes his holding in the two earlier cases, but with a somewhat faulty memory five years later. He thought Thompson was from Virginia and Field from New Jersey.

that federal common law required equal treatment (although separate accommodations might be permitted if truly equal).

These two decisions expanded the rights of black citizens and resulted in the integration of local transport in Baltimore. But when faced with a case in which no diversity existed, Giles had to look at the power of the federal government to forbid discrimination by common carriers. He was forced to follow the clear line of cases that precluded use of the privileges and immunities clause to force a state to redefine a state-granted right or privilege to include blacks. In doing so, he found the Civil Rights Act of 1875 to be unconstitutional.

In *Cully v. Baltimore & Ohio Railroad*,[308] Maryland plaintiffs sued a Maryland railroad for forcing them to ride in separate and inferior accommodations. Giles distinguished the earlier cases because no federal common law issue was presented in a suit in which there was no diversity of citizenship. He then cited *Slaughterhouse*, *Reese*, and *Cruikshank* for the proposition that travel rights on the railroad were a privilege of state citizenship rather than a privilege of citizens of the United States:

> The act of Congress of March 1, 1875, under which this action is brought, so far as it seeks to inflict penalties for the violation of any or all rights which belong to citizens of a state, and not to citizens of the United States as such, was the exercise of a power not authorized by any provision of the constitution of the United States, and as the privilege to use for local travel any public conveyance is not a right arising under the constitution of the United States, there can be no recovery . . . .[309]

Although Maryland had been a slave state, both Archibald Stirling, Jr., the U.S. Attorney involved in *Fields* and *Cully*, and Judge Giles were fervent Republicans. The *Fields* and *Thompson* cases showed their eagerness to void discrimination in common carriers, yet neither Stirling in his argument in *Cully*, nor Giles in his decision invoked the equal protection clause to support the Civil Rights Act of 1875. Like Matt Carpenter in the Senate, they understood the privileges and immunities clause to lie at the core of the fourteenth amendment. With its demise in *Slaughterhouse*, they believed that federal power was limited to securing racial equality in voting

308. *Id.* at 946.
309. *Id.* at 948.

(under the fifteenth amendment), and in laws protecting life, liberty, and property (under the equal protection clause).

Following these civil rights cases came another attempt to use the fourteenth amendment to advance black rights. The case arose in state court when a black attorney from Massachusetts, Charles S. Taylor, sought to practice law in Maryland.[310] Although Matt Carpenter had assumed in his arguments before both the Court and the Senate that the fourteenth amendment prohibited states from denying admission to the bar on racial grounds, the *Slaughterhouse*, *Bradwell*, *Cruikshank* and *Cully* decisions raised substantial doubts. Taylor was determined to test the issue. He moved to Maryland, where he was admitted without difficulty to the federal bar on motion of Archibald Stirling, Jr.[311] Federal litigation, however, provided scant sustenance for an attorney in 1877. Taylor therefore petitioned for admission to the Court of Appeals of Maryland.

Taylor argued that admission to the bar was a privilege of state citizenship under article IV and that it was "one of that class of privileges that a State legislature [could not] abridge on account of race or color."[312] He cited *The Slaughterhouse Cases* for the proposition that "[w]hile [the fourteenth amendment] confers no new privilege upon the citizen generally, it prohibits the State from enforcing any law that discriminates against the negro (race) as a class."[313] This argument apparently referred to Justice Miller's discussion in *The Slaughterhouse Cases* of the equal protection clause:

> 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. . . .
> . . . 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.[314]

The problem with Taylor's use of this discussion of equal protection

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310. *In re* Taylor, 48 Md. 28 (1877).

311. A. KOGER, THE NEGRO LAWYER IN MARYLAND 2-3 (1948). Although Koger said that Taylor was the first Negro lawyer to be accepted by a court within the confines of Maryland, *id.* at 3, Walter Leonard found that the honor went to James Harris Wolff, who was admitted to practice in the U.S. circuit court in Maryland soon after his graduation from Harvard Law School in 1875. W. LEONARD, BLACK LAWYERS 293 (1977).

312. 48 Md. at 29.

313. *Id.*

314. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1875).

to support his admission to the bar was that Justice Miller did not define the scope of the clause, and the Supreme Court had not yet expanded the definition of equal protection beyond protection of life, liberty, and property to reach "privileges" under state law. It was clear that laws affecting life, liberty, and property "discriminated with gross injustice and hardship" and that a state could be barred, as it was by the Civil Rights Act of 1866, from discrimination in enforcement of contract and property rights. But whether the clause went further, to reach discrimination in other matters, had not been specifically addressed. Taylor, of course, asserted that "the privileges and immunities which belong to a citizen of a State as such, cannot be abridged on account of race or color,"[315] but the cases cited did not support this proposition. Although Taylor asserted his right to equal treatment, his argument repeatedly stressed that admission to the bar was a privilege of citizenship. His argument was never specifically anchored in the equal protection clause.

The Maryland Court of Appeals denied Taylor's petition. The court noted that article IV did not apply because Taylor was now a resident of Maryland. Citing *Slaughterhouse*, the court noted that the privileges of state as opposed to national citizenship "rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph [the privileges and immunities clause] of the Amendment."[316] Citing *Bradwell*, the court said that admission to the bar was a privilege of state and not national citizenship. "In our opinion these decisions are conclusive of the present case. They determine that the 14th Amendment has no application."[317]

Like the federal district court in *Cully*, the Maryand Court of Appeals in *Taylor* did not even discuss the application of the equal protection clause. Like Matt Carpenter, the court assumed that equality in privileges under law was covered only by the privileges and immunities clause and was distinguishable from equal protection of the law. Thus *The Slaughterhouse Cases* had destroyed the basis for challenge to discrimination in laws that did not involve personal security, movement, or property. Barred from the practice of law by the court's decision upholding the statutory racial exclusion, Taylor soon returned to Massachusetts.[318]

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315. 48 Md. at 29, *citing*, *inter alia*, *Corfield* and the privileges and immunities clause of article IV.

316. 48 Md. at 32.

317. *Id.* at 33.

318. A. KOGER, *supra* note 311, at 3.

VII. THE BROADENING OF EQUAL PROTECTION: *STRAUDER V. WEST VIRGINIA*, AND IN RE *WILSON*

> *"the right to exemption from unfriendly legislation against them distinctively as colored"*[319]

Defeat in the courts apparently left citizens who desired the elimination of racial barriers to the practice of law no option but to pursue their goal through the legislative process. Although blacks constituted the voting core of the state's Republican Party, the Republicans were unable to secure political power. Thus, an attempt in 1878 to eliminate the racial criteria for bar membership failed in the state legislature.[320] Maryland never did ratify the fifteenth amendment, and an inveterate prejudice against black participation in government processes was reflected in the state's continued exclusion of blacks from juries and from the legal profession.

While legislative efforts at the state level foundered, evolution in federal case law made a favorable judicial decision more likely. In 1880, a Supreme Court decision opened a new path for black participation in the legal system. The earlier cases under the fourteenth amendment had focused on preserving federalism, leaving responsibility with the states for protecting individuals' basic rights. The lower courts had reacted to the gutting of the privileges and immunities clause by assuming that it substantially destroyed the amendment's impact in prohibiting racial discrimination. The Supreme Court, however, never intended to nullify the Civil War Amendments. The majority of the Justices on the Supreme Court were Republicans appointed by Lincoln or Grant. In their earlier opinions they consistently noted that the purpose of the fourteenth amendment was to assure civil equality for blacks. Further, those who had been dissenters in *Slaughterhouse* continued to believe that the amendment should apply to a broad area of government behavior, even though the decision had foreclosed any significant use of the privileges and immunities clause.

The equal protection clause provided common ground to reconcile these views without disturbing the limits imposed on the privileges and immunities clause. The occasion for decision was presented in *Strauder v. West Virginia*,[321] in which the Court held that a statute excluding nonwhites from juries "amounts to a denial of

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319. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).
320. M. CALLCOTT, THE NEGRO IN MARYLAND POLITICS 1870-1912, at 63 (1969).
321. 100 U.S. 303 (1880).

the equal protection of the laws to a colored man when he is put on trial for an alleged offense against the state."[322] Dissenting Justices Field and Clifford (the only Democrats on the Court) protested that the equality of protection intended by the fourteenth amendment "does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices, or to be clothed with any public trusts."[323] They could also have noted the careful exclusion of the right to sit on juries during the debates on the Civil Rights Act of 1866.[324]

The majority responded that the purpose of the entire amendment was to require that all persons stand equal before the law, and "in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."[325] Justice Strong, writing for the majority, asserted that the amendment contained a necessary implication of "the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."[326] This liberal understanding of the meaning of "protection" of the laws reopened the courts as an avenue to challenge the racial bar to legal practice. Nevertheless, Strong's sweeping language in the opinion was dicta. The issue before him dealt with the right to equal protection within the context of a criminal trial, and therefore clearly involved rights of life and liberty. Strong's opinion also contained narrower language:

> [The fourteenth amendment's] language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, *either for life, liberty, or property*. Any state action that denies this immunity to a colored man is in conflict with the Constitution.[327]

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322. *Id.* at 310.

323. *Ex parte* Virginia, 100 U.S. 339, 367 (1879) (Justices Field and Clifford dissenting in an opinion also applicable to *Strauder*. *See Strauder*, 100 U.S. at 312).

324. *See supra* notes 169-93 and accompanying text.

325. 100 U.S. at 307. In these cases, which involved total exclusion of blacks from the jury, no question of whether segregation would constitute discrimination was presented.

326. *Id.* at 308.

327. *Id.* at 310 (emphasis supplied). When the issue of black jurors was raised during debates over the Civil Rights Act of 1866, congressmen focused on the right of a black person to be a juror. A majority perceived participation in making law, like voting, to be a political right not part of the basic privileges of citizenship. *Strauder* changed the focus

The Court in *Strauder* did not intimate that the federal government could now define citizens' rights for the states through affirmative federal legislation; it merely used the fourteenth amendment as authority for judicial prohibition of discriminatory state laws. This distinction was made clear in 1883 by *The Civil Rights Cases*.[328] There the Supreme Court narrowly construed congressional power under the fourteenth amendment despite the involvement of black rights. The Court held section 1 of the Civil Rights Act of 1875 unconstitutional, as District Judge Giles had done in *Cully* seven years earlier. Unlike Giles' opinion, however, the Supreme Court's opinion was based on the doctrine of state action, hinting that federal laws that were directed at racial discrimination by the state, in contrast to federal laws that supplanted state laws, would be upheld.[329]

In Maryland, *The Civil Rights Cases* had little practical impact because the statute in question had been unenforceable there since *Cully*, but the cases did raise questions on how far the Court would go in protecting blacks against discrimination. The state action doctrine of *The Civil Rights Cases* still kept the federal government from direct legislation against individuals, continuing the trend from *Slaughterhouse* and *Cruikshank*. On the other hand, Justice Bradley's majority opinion said that the fourteenth amendment would be violated by any state legislation

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to the right of a criminal defendant to a jury free from bias in its composition. The change in perspective made clear how the individual's liberty was affected unequally. Indeed, it is strange that Field did not agree with the majority, for in Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546), on circuit he had seen that an ordinance requiring prisoners to have their hair cut to a uniform length of one inch was a violation of equal protection as applied to Chinese, for whom the wearing of a queue (a long single braid of hair) was important. Field insisted in his *Ex parte* Virginia dissent on the distinction between civil rights protected by the fourteenth amendment and political rights "such as arise from the form of government and its administration" which he said were not protected. 100 U.S. at 368-69.

328. 109 U.S. 1 (1883).

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> [I]n all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Id. at 17-18.

> denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. . . . The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.[330]

The impetus added by *Strauder* to the political struggle for repeal of the racial exclusion from bar admission was not deflected by *The Civil Rights Cases*. In editorials in February and March of 1884 commenting on the most recent legislative attempt to repeal the exclusion, even the Democratic *Baltimore Sun* stated that the racial exclusion was wrong.[331] The bill to permit black lawyers in state courts passed the Maryland Senate but failed in the General Assembly.[332]

The failure of these legislative efforts sent pressure for reform back to the judicial system. The leader in this effort was Reverend Harvey Johnson, the pastor of the Union Baptist Church. Despite *Taylor* and the invalidation of the 1875 Civil Rights Act by both the Maryland federal court and the United States Supreme Court,[333] Reverend Johnson believed that the law could be a vehicle to achieve racial justice.

Johnson's first attempt to use the courts to achieve racial equality arose from an incident that occurred in his pastoral role. When four women church members were compelled to move to second class accommodations on a boat during a church outing, Johnson arranged for them to bring suit and obtained Archibald Stirling, Jr., and Alexander Hobbs as their attorneys.[334] In 1885, District Judge Morris in *The Steamer Sue*[335] followed the earlier opinions of Judge Giles in *Field* and *Thompson*. He held that although the steamer *Sue* could provide separate accommodations for the races, it had no

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330. *Id.* at 23-24. Bradley was thus able to shift from his privileges and immunities argument in *Slaughterhouse* to the equal protection clause to deal with the same concern of restrictions on employment.

331. Baltimore Sun, Feb. 7, 1884, at 2, col. 1, and Mar. 12, 1884, at 2, col. 4.

332. J. BRACKETT, *supra* note 306, at 72-73 (1890).

333. *In re* Taylor, 48 Md. 28 (1877); Cully v. Baltimore & O.R.R., 6 F. Cas. 946 (D.C. Md. 1876) (No. 3466); The Civil Rights Cases, 109 U.S. 1 (1883).

334. E. FREEMAN, HARVEY JOHNSON AND EVERETT WARING 17-18 (1968) (unpublished M.A. thesis at George Washington University). Stirling had participated in the litigation which led to the integration of the city transit system in 1871 and in the unsuccessful suit against the railroads under the Civil Rights Act of 1875.

335. 22 F. 843 (D. Md. 1885).

common law right to provide inferior accommodations. The plaintiffs were awarded $100 each for the conduct of the steamer's officers. In another incident, in the spring of 1885, Johnson and another minister were arrested in Virginia because they went into the cabin on the white person's side of a ferryboat. Although a magistrate found them not guilty of any offense against the law, they were made to pay the costs of their arrest.[336] It seems likely that these experiences led Johnson to renew the effort to obtain bar membership for black lawyers.

Reverend Johnson hired attorney Alexander Hobbs to bring another test case on bar admission.[337] The biggest problem was to find a proper plaintiff. The racial exclusion in the statute and the decision in *Taylor* had effectively discouraged blacks in Maryland from devoting years of their life to the study of law. Even if they desired to make such a foolhardy attempt, no white lawyer would be likely to waste his time teaching a person who could never go into practice. Further, black lawyers trained in other states had little incentive to come to Maryland in view of the need for costly and possibly fruitless litigation to secure the right to start practice. Nevertheless, after a diligent search, Johnson and Hobbs discovered Charles S. Wilson.

Wilson had been admitted to the Massachusetts bar where he practiced for three years, but he decided to forego the opportunity to practice there and came to Maryland in 1883 to teach secondary school at Sunnybrook in Baltimore County.[338] Wilson apparently had no burning desire to return to the practice of law, but Hobbs and Johnson persuaded him to serve as plaintiff in the test case. At their request, he applied for admission to the Supreme Bench of Baltimore City.[339] At that time, the *Baltimore Sun* reported that many leaders of the bar thought that the practice of law should be open to blacks. Colonel Charles Marshall and Bernard Carter, two leaders at the bar who had taught at the School of Law of the University of Maryland, both stated they would have no objection to black admission; Mayor Ferdinand Latrobe thought admission proper and

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336. E. FREEMAN, *supra* note 334, at 17; W. ALEXANDER, THE BROTHERHOOD OF LIBERTY 9-10 (1891).

337. W. HAWKINS, HARVEY JOHNSON'S CONTRIBUTION TO THE LIFE OF BALTIMORE 7-8 (1922).

338. Baltimore Sun, Feb. 16, 1885, at 2, col. 2. Wilson was a graduate of Amherst College. He passed the bar in 1880 and practiced in Massachusetts for almost three years. *See* W. DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS 538 (1974).

339. E. FREEMAN, *supra* note 334, at 21.

Judge Charles Phelps of the Baltimore Supreme Bench called the exclusion "a relic of barbarism."[340]

At the initial hearing, Judges Brown and Fisher said they thought the racial exclusion was wrong, but they felt themselves bound to uphold it by the Court of Appeals decision in *Taylor*. Attorney Hobbs urged that later Supreme Court cases overruled *Taylor* and was consequently granted a hearing.[341] The *Sun* anticipated that the Court would uphold the exclusion and continued to urge legislative change.[342]

At oral argument, Hobbs cited the decisions of the Supreme Court in *Strauder* and its companion cases on racial exclusion in jury selection for the proposition that racial discrimination violated the equal protection clause. Expanding the reach of *Strauder*, he pointed to a California federal circuit court decision in 1880, which applied the *Strauder* language to invalidate a California constitutional prohibition on the employment of Chinese.[343] "This right to choose one's calling is an essential part of that liberty which is the object of the government to protect, and a calling, when chosen, is a man's property and right."[344] He even invoked Justice Bradley's reference to pursuit of an avocation in *The Civil Rights Cases*.[345]

In a unanimous decision on March 19, 1885, the Supreme Bench held that the racial exclusion in the 1832 Act was a denial of equal protection under the fourteenth amendment.[346] The judges grumbled that it was unfortunate that they had to overturn the decision of the state's highest court in *Taylor*, but they found that *Strauder's* reliance on "equal protection" compelled this result. They noted that *Taylor* had relied on "privileges and immunities" and had made no reference to equal protection; further, the Court

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340. Baltimore Sun, Feb. 10, 1885, at 1, col. 7.

341. *Id.*, Feb. 9, 1885, at 2, col. 4.

342. *Id.*

343. Baltimore Sun (Supp.), Feb. 16, 1885, at 2, col. 2. Hobbs referred to *In re* Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880).

344. 1 F. at 510 (quoting The Slaughterhouse Cases, 83 U.S. (16 Wall.) 116 (Bradley, J., dissenting)). Sawyer also cited Justice Field's opinion while on circuit in Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546) in which he said, "[H]ostile and *discriminating legislation by a state* against persons of any class, sect, creed or nation, in whatever form it may be expressed, *is forbidden by the fourteenth amendment*. . . . No charges or burdens shall be laid upon him which are not equally borne by others." 1 F. at 510-11 (emphasis in original) (quoting 12 F.Cas. at 256). These quotes displayed the continuing vitality of Field and Bradley's view of the breadth of privileges and immunities transferred into equal protection language.

345. 109 U.S. at 23-24. Hobbs' argument is in the Baltimore Sun, Feb. 16, 1885, at 2, col. 2.

346. Baltimore Sun, Mar. 20, 1885, at 1, col. 4.

of Appeals had considered the statute in a vacuum. The Baltimore Supreme Bench reasoned that if blacks could not be discriminated against in jury selection, they also could not be discriminated against in the opportunity to become judges because judges selected juries, controlled trials, and made rulings on facts as well as law. *Strauder*, the court ruled, "is equally applicable to a law which removes from the negro race all chance of participation in other branches of the administration of the law quite as essential to their security."[347] Admission to the bar was a state constitutional prerequisite to eligibility for a judicial position. That provision was in itself constitutional and would become invalid only if the statutory exclusion were given effect. In a conflict in which either a state statute or a state constitutional provision would be held invalid, the statute rather than the constitution had to be struck down. Therefore, the court held blacks must be eligible for admission to the practice of law.

The decision, although potentially far-reaching, was at least momentarily a hollow one, because the court ultimately found Wilson not qualified to practice law.[348] Moreover, the narrow opinion of the supreme bench left open the possible legality of a constitutional amendment that would permit judges to be drawn from the general population, thus freeing the statutory exclusion of blacks from the bar from its unconstitutional effect. Such an amendment, however, would undoubtedly have been strenuously opposed by the legal profession and would have required far greater popular support than a statutory change. The legislature was already leaning toward repeal of the statutory exclusion, and therefore such a change would have been politically impossible. Further, dicta in the supreme bench opinion suggested that the court might adopt the broad language of the *Strauder* majority and strike down the racial exclusion anyway.[349] Indeed, one year later in *Yick Wo v. Hopkins*,

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347. *Id.*

348. *See* A. KOGER, *supra* note 311, at 5.

349. After its analysis of the impact of the relationship between the statutory bar and the state constitutional requirement that judges be lawyers, the court said that the principles of *Strauder* "conclusively settle this case, not only upon the grounds already stated [relationship of jurors to judges and lawyers], but upon others also." The court then read *Strauder* to protect not only the defendant's right to an unbiased jury, but also the right of the black man not to be excluded on the basis of race from that jury. It relied on the broadest language of *Strauder* to conclude that

> to exclude them would be to discriminate against them as citizens in the enjoyment of their own rights, because it would be unfriendly legislation against them distinctly as colored and because it would be a discrimination which would be a step towards reducing them to the condition of a subject race.

the United States Supreme Court applied the equal protection clause to invalidate the exclusion of Chinese from operating laundries.[350] The abstract right of blacks to become lawyers in Maryland was thus finally secure. There remained the concrete problem of demonstrating fitness for the practice of law.

VIII. THE ADMISSION OF EVERETT WARING

> *When public sentiment demands a separation of the passengers [according to race], it must be gratified to some extent."*[351]

Buoyed by the invalidation of the racial bar to attorneys, but also burdened financially because he personally paid all the costs of the suit, Reverend Johnson sought the support of other black ministers to form the Mutual United Brotherhood of Liberty in June 1885 to advance the interests of blacks.[352] Seeking a black lawyer to advance the cause of black civil rights, Johnson persuaded Everett J. Waring, a graduate of Howard Law School, to come to Baltimore.

Waring was born in Ohio in 1859. When he graduated from the Columbus, Ohio, Negro high school where his father was principal, he was appointed assistant principal. Later, he succeeded his father as principal of the Negro schools in Columbus. In 1882 he also edited a small paper there, but later that year he moved to Washington, D.C., where he had obtained a job as examiner of pensions.[353] While working in the District, Waring attended Howard Law School, graduating in 1885. As a result of the decision in Wilson's case, the field was open for a black lawyer in Baltimore, and Waring moved to Maryland. On October 10, 1885, Waring was admitted to the Supreme Bench of Baltimore on motion of Assistant State's Attorney Edgar H. Gans.[354] Soon Joseph Seldon Davis, another graduate of Howard Law School, was also admitted to the practice of law before the Baltimore Supreme Bench.[355] Waring

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In re Wilson, *as recounted in* Baltimore Sun, Mar. 20, 1985, at 1, col. 4.

Therefore, the Baltimore Supreme Bench said that to debar a man from a profession because of his race "tends to degrade and stigmatize the whole class by depriving them of a privilege which all other citizens possess and of the equal protection of the law." *Id.*

350. 118 U.S. 356 (1886).

351. McGuinn v. Forbes, 37 F. 639, 639-41 (1889).

352. W. HAWKINS, *supra* note 337, at 9; W. ALEXANDER, *supra* note 336, at7.

353. E. FREEMAN, *supra* note 334, at 27-28.

354. A. KOGER, *supra* note 311, at 5; TEST BOOK, SUPERIOR COURT, 1880-1895, at 205 (available at the Court museum, Clarence Mitchell, Jr., Courthouse, Baltimore, Md.).

355. TEST BOOK, SUPERIOR COURT, 1880-1895, at 205. Davis was admitted March 1, 1886.

and Davis became co-counsel for the Brotherhood of Liberty.[356]

Despite the decision of the Baltimore Supreme Bench, there remained some question whether the Maryland Court of Appeals would reverse its decision in *Taylor*. Waring's first case and a similar one following it suggested that the courts were not overly receptive to discrimination claims. Waring represented a young black woman who sought to force the father to pay for the support of her illegitimate child. The state statute under which suit was brought was criminal in form, but the penalty for fathering an illegitimate child was merely to pay the child's mother or the child's custodian an "adequate" sum for maintenance. The statute, however, applied only to children of white women. Despite Waring's invocation of the equal protection clause, the Baltimore Supreme Bench denied relief.[357] A second challenge to the same statute brought by another lawyer reached the Court of Appeals in 1887. In *Plunkard v. State*,[358] a man appealed from a conviction for fathering an illegitimate child by a white woman. The defendant claimed the statute was unconstitutional because it applied only when the mother was white. The Court of Appeals upheld the statute, after noting that the procreation of illegitimate children was not a privilege or immunity of citizenship.[359] The court said that the statute did not confer any benefit on white women because payment went to them as custodians of the children and not as mothers. The court then found no discrimination against the child because the child would be maintained by the public if not supported by the father.[360] Finally, the Court of Appeals said that the statute did not deny equal protection to defendant fathers because the statute did not distinguish between fathers of different races.[361] The lone dissenter, Judge Stone, saw clearly that the law had a racial basis.[362] The majority's refusal to find a violation of the equal protection clause here suggested the

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356. The Brotherhood, emboldened by its success in securing admission for Waring and Davis, concentrated its efforts on improving public education for blacks. They persuaded the City Council to extend the program for black high schools to the full four years and to hire black teachers for the black schools. Prejudice was still high, however, and the latter gain was achieved only by accepting the condition that black teachers and white teachers would not be employed at the same schools. J. BRACKETT, *supra* note 306, at 88-90.

357. E. FREEMAN, *supra* note 334, at 29-30.

358. 67 Md. 364 (1887).

359. *Id.* at 370.

360. *Id.*

361. *Id.* at 370-71.

362. *Id.* at 372.

possibility they would continue to uphold statutory discriminations, even in admission to the bar.

The possibility of unfavorable judicial action on bar admission was, however, precluded at last by legislation. In 1888, John Prentiss Poe, the dean of the School of Law of the University of Maryland, presented the Maryland General Assembly with a codification of Maryland laws, as they had requested. The codification removed the reference to race in the recently challenged statutes on bastardy and in the statute on bar admission.[363] The new code was passed without any comment on this action, and in that same year Waring was admitted to the Court of Appeals practice.[364]

Waring's admission to the bar and the success of the Brotherhood of Liberty in securing their initial demands gave hope for greater equality in other matters. These hopes were soon dashed. Waring had few victories in litigation against discrimination.[365]

Reverend Robert McGuinn, a black minister from Annapolis, purchased a ticket in 1887 on the steamer *Mason Weems* for travel to Virginia. He sat down for supper at a table. The white passengers refused to come to dinner when they saw McGuinn seated there. The captain asked him to move to another table and attempted to move his chair, but McGuinn refused to budge. The captain then

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363. Poe was far from being a champion of black rights. As a leading legal advisor to the regular Democratic Party in later years, he drafted an amendment to the state constitution which, by imposing literacy test for voting (with a grandfather clause), was aimed at effectively disenfranchising blacks. *See generally* M. CALLCOTT, *supra* note 320, at 114-25 (1969). His legal reasons for removing the references to race in the 1888 code were not stated, but perhaps he viewed *Strauder* and *Yick Wo* as dispositive of racial bars. Note that the statutes at issue in these cases had created racial barriers to receiving any benefits. Thus, their elimination did not suggest any qualms about the provision of separate facilities, a common practice in the public schools.

364. *See* M. CALLCOTT, *supra* note 320, at 79, E. FREEMAN *supra* note 334, at 34. Waring was admitted on April 17, 1888 to the Court of Appeals. C. SAMS, BENCH AND BAR OF MARYLAND 431 (1901).

365. *See* E. FREEMAN, *supra* note 334, at 76-77. In addition to Waring's unsuccessful challenge to the racially discriminatory features of the state bastardy law, Waring unsuccessfully defended a black man, Ernest Forbes, who was convicted and hung for raping a white woman (another black man subsequently confessed to the crime on his death bed); he lost a suit claiming an insurance company discriminated against blacks by charging them more than whites (the company defended on the basis that blacks had higher mortality rates); and he was involved in the unsuccessful appeal in Reverend Johnson's suit against the ferry company which sought his arrest. *Id.* at 28-32. He also lost in court in his defense of black laborers on Navassa Island in the Caribbean who had killed some white men in a fray arising out of the desperate conditions there, although some of the defendants were ultimately given clemency. *Id.* at 46-54. Waring appeared before the Supreme Court of the United States to argue an issue of jurisdiction in the Navassa case, thus becoming one of the first black attorneys to argue before the Court. Jones v. U.S., 137 U.S. 202 (1890).

asked the white passengers to take the other table. One of the passengers later assaulted McGuinn, and threats were made to throw the minister overboard. The captain testified that he told the passengers to leave McGuinn alone, but, fearing for his safety, Reverend McGuinn left the vessel before it arrived at his destination.[366] McGuinn hired Waring to sue the captain and owners of the ship for damages arising from mistreatment based on race. Judge Morris, the author of the opinion in *The Steamer Sue* , dismissed the complaint, showing the hollowness of the promise of equality raised by that case. Citing *The Steamer Sue*, Morris said that when persons pay first class fare, the carrier must make "a bona fide effort" to furnish the same accommodations regardless of race.[367] Nevertheless, Morris continued,

> When public sentiment demands a separation of the passengers, it must be gratified to some extent. While this sentiment prevails among the traveling public, although unreasonable and foolish, it cannot be said that the carrier must be compelled to sacrifice his business to combat it. Within reasonable limits the carrier must be allowed to manage his own affairs.[368]

Although this case involved federal common law rather than the Constitution, the acceptance by a Republican judge of segregation, and even "some discomfort and humiliation," as within the reasonable limits of equal treatment required by law was an omen of *Plessy v. Ferguson*,[369] and the long night of separate and unequal that followed.

The framers of the fourteenth amendment had not directly confronted the problem of segregation. Equality under the equal protection clause meant identity of rights with a white person, but the rights included referred only to protection from injury inflicted by one individual on the person or property of another individual. Equality in other respects was to be ensured to all citizens by the privileges and immunities clause. Unfortunately, the intended

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366. *See* McGuinn v. Forbes, 37 F. 639, 639-41 (1889).

367. *Id.* at 641.

368. *Id.* Segregation in transport had already received the sanction of Justice Clifford, concurring in Hall v. DeCuir, 95 U.S. 485, 500-01 (1887). The Brotherhood of Liberty saw *DeCuir* as the worst decision to that date. BROTHERHOOD OF LIBERTY, JUSTICE AND JURISPRUDENCE 191-203 (1889). Nevertheless, most civil rights suits sought simply equality in treatment within a framework of segregation. Riegel, *supra* note 303, at 17. *McGuinn* helped point the way to separate but unequal.

369. 163 U.S. 537 (1896). Indeed *Plessy* cited *McGuinn* and The Steamer Sue as support for the decision of the Supreme Court. 163 U.S. at 548.

sweep of the privileges and immunities clause was never sufficiently defined to force proponents of the amendment to consider its impact on segregative practices. The article IV heritage of the clause contained some support for reasoning that equality in privileges or immunities did not in all cases require an identity of rights. But the specific privileges on which the framers had focused were those spelled out by the Civil Rights Act of 1866, and separate but equal made no sense with respect to those rights of contract, property, and legal process. During the debates, school segregation was generally thought to be acceptable under the fourteenth amendment. But public education was in its infancy and many congressmen probably did not consider it to be a privilege or immunity of citizenship. *The Slaughterhouse Cases* had cut short development of the concept of privileges and immunities. When *Strauder* returned the Court to a path requiring equality in state laws, there was no fully adequate definition of the equality envisioned. Ultimately, that vision focused on upholding the patterns of life that had achieved general acceptance in the community. The acceptance of separate facilities under federal common law led to its acceptance under the Constitution as well.

Waring's admission to the bar reflected the expanded meaning of the "protection" of the laws. This expansion was the court's response to the problem of maintaining the intended broad coverage of the fourteenth amendment while preserving the federal structure threatened by the arguments based on privileges and immunities. But Waring's subsequent legal career foreshadowed the contraction of the notion of "equality" which would take place in *McGuinn* and *Plessy*. Not only would segregation continue, but segregation with plainly unequal facilities would be permitted. Mere admission to the bar did not open the way for the representation by black attorneys of all members of society, when social prejudice confined them to a predominantly black clientele whose resources were limited.[370] Thus, early black lawyers like Waring were forced to pursue other activities to strengthen their own economic position and that of the

370. Judge Bond stated in a letter concerning the creation of a law school at Morgan College that the few black lawyers were not supported by blacks and "they can hardly be called successful practitioners." Baltimore Am., Dec. 16, 1890, at 8, col. 1. Waring responded that the five black lawyers were all "supported by the colored people" and made a good living. Harry Cummings said essentially the same thing. R. A. McGuinn, however, agreed with Bond "that the colored people do not support their legal representatives as they ought," and also noted that whites did not support black lawyers. *Id.*, Dec. 17, 1890, at 6, cols. 1-2.

black community.[371] Most of those early efforts ended in failure.[372] But these failures, like the failure of those before Waring who sought to become lawyers, were only the first steps of a struggle that ultimately changed society. Black lawyers from Maryland played a crucial role in stopping efforts in the state to disenfranchise blacks,[373] in blocking residential segregation laws,[374] in opening the graduate schools to blacks,[375] and, finally, in striking down segregation.[376] When the sad reality of the inequality of "separate but equal" was finally acknowledged by the Court in 1954, the expanded notion of "protection," which had opened the bar to black lawyers, was available to extend the new understanding of equality to every activity of the state.

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371. B. THOMAS, THE BALTIMORE BLACK COMMUNITY 1865-1910, at 231, 283 (1974) (unpublished Ph.D. thesis, George Wasington University).

372. W. PAUL, *supra* note 306, at 369-80; E. FREEMAN, *supra* note 334, at 75-89 (discussing the failure of the Lexington Savings Bank, which Waring headed, his trial for embezzlement, his vindication by a not guilty verdict and his subsequent move to Philadelphia).

373. Harry Cummings, a graduate of the University of Maryland School of Law, who became the first black elected official in the state in 1890 when he was elected to the Baltimore City Council, was one of the leaders of the Maryland Suffrage League. M. CALLCOTT, *supra* note 320, at 122.

374. W. Ashbie Hawkins, excluded from the University of Maryland School of Law at the end of his first year because the school decided to end its policy of integration, graduated from Howard Law School and successfully represented black plaintiffs challenging residential segregation. *See* State v. Gurry, 121 Md. 534, 88 A. 546 (1913); Jackson v. Maryland, 132 Md. 311, 103 A. 910 (1918). *See also* Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983).

375. Thurgood Marshall, a graduate of Howard Law School who had been prevented from attending the University of Maryland School of Law by its policy of discrimination, acted as local counsel in the successful suit to end discrimination there. Maryland v. Murray, 169 Md. 478, 182 A. 590 (1936). *See* R. KLUGER, SIMPLE JUSTICE 186-94 (1976).

376. Marshall led the group of attorneys in the litigation that culminated in Brown v. Board of Education, 347 U.S. 483 (1954). *See* R. KLUGER, *supra* note 375.