
CONGRESS'S POWER TO DEFINE THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP

In 1866, months after the end of the Civil War and the ratification of the Thirteenth Amendment, Congressman John Bingham introduced a new constitutional amendment to the floor of the House of Representatives.¹ Bingham announced that his amendment would “arm the Congress . . . with the power to enforce the bill of rights” and require state governments to respect the privileges and immunities of citizens of the United States on equal terms.² The proposal stated in its entirety:

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.³

The House rejected the amendment as unneeded, however, because even its supporters believed Congress already possessed the power it supposedly conferred.⁴

Indeed, later that year and without the firepower of Bingham’s amendment, Congress passed the Civil Rights Act of 1866.⁵ That statute not only made all persons born in the United States citizens, but also prohibited state governments from discriminating against “such citizens” with regard to their right to contract, sue, testify, hold property, or receive the “full and equal benefit of all laws.”⁶ Opponents of the Civil Rights Act, including Bingham, argued that Congress had no constitutional power to interfere with these state-law “privileges and immunities.”⁷ Bingham was so persistent that even after the Act’s passage, he introduced his constitutional amendment again — this time as the first and fifth sections of what would become the Fourteenth Amendment.⁸

Much scholarly and judicial attention has been dedicated to deciphering the Privileges or Immunities Clause of the Fourteenth Amendment, which states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁹ Some scholars, echoing antebellum judicial opin-

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

² *Id.*

³ *Id.*

⁴ *See, e.g., id.* at 1054 (statement of Rep. William Higby) (“When we read this proposed amendment we will think it already embraced in the Constitution . . .”).

⁵ Ch. 31, 14 Stat. 27.

⁶ *Id.* at 27.

⁷ *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866) (statement of Rep. Michael C. Kerr).

⁸ *Id.* at 2542 (statement of Rep. John Bingham).

⁹ U.S. CONST. amend. XIV, § 1, cl. 2.

ions,¹⁰ suggest “privileges or immunities” refer to so-called natural rights, such as property ownership.¹¹ Others suggest “privileges or immunities” refer to protections granted by positive law, either by state law¹² or by the Bill of Rights.¹³ Both groups criticize nineteenth-century judicial interpretations, such as the *Slaughter-House Cases*,¹⁴ for arriving at yet another suspect: benefits that require federal citizenship for their protection, such as the right to use navigable waters, travel, or seek protection overseas.¹⁵ Much less attention has been dedicated to determining the appropriate detective — is it even up to courts to determine what the “privileges or immunities of citizens” are in the first place?

This Note suggests that in the eighteenth and nineteenth centuries, privileges and immunities were widely understood as the products of legislation, to be defined by courts *and* legislatures. The Privileges or Immunities Clause was understood as empowering Congress, not just courts, to itemize particular rights as subject to federal protection. Just as the Civil Rights Act of 1866 enumerated attributes of citizenship and protected them from state discrimination, the 1866 Congress thought the Fourteenth Amendment would confirm its authority to articulate attributes of citizenship and prevent states from granting or withholding those privileges unequally — even if they were solidly within core state functions. Despite modern Supreme Court restrictions on Congress’s power to enforce the Fourteenth Amendment — most notably in *City of Boerne v. Flores*¹⁶ — a historically sensitive interpretation of the Privileges or Immunities Clause today would give Congress the power to define certain rights as privileges of federal citizenship that states cannot distribute unequally. Such privileges could include the

¹⁰ See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823); *Douglass v. Stephens*, 1 Del. Ch. 465 (1821); *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797); *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812); *Murray v. McCarty*, 16 Va. (2 Munf.) 393 (1811).

¹¹ See, e.g., BERNARD H. SIEGAN, *THE SUPREME COURT’S CONSTITUTION* 46–71 (1987); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 264–66 (1984); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 360 (1997).

¹² See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1396–97 (1992); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1185 (2009).

¹³ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 74–75 (1997); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 (2001).

¹⁴ 83 U.S. (16 Wall.) 36 (1873).

¹⁵ See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 693 n.127 (“The overwhelming weight of historical and scholarly opinion is that *Slaughter-House* was wrong in this regard.”); see also, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 175–76 (1986); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1257–59 (1992).

¹⁶ 521 U.S. 507 (1997).

right of same-sex couples to marry, the right of ex-felons to vote, or the right of children to receive an education.

Part I of this Note briefly discusses how the terms *privileges* and *immunities* were used in colonial charters, the Continental Congress, and the antebellum period. The terms were often used in reference to legislation, suggesting that contemporaries considered legislatures responsible for their definition and protection. Part II dives into the legislative histories of the 1866 Civil Rights Act and the Fourteenth Amendment. The 39th Congress understood itself as having the power to define the privileges and immunities of national citizenship, which in the Civil Rights Act included benefits typically regarded as nonfederal. The same Congress intended for the Fourteenth Amendment to constitutionalize this power beyond question. Part III offers brief suggestions for how the Privileges or Immunities Clause might be interpreted today in light of subsequent developments, especially *City of Boerne*.

In short: Prior to 1866, privileges and immunities were considered products of legislation. In keeping with this principle, Congress passed the 1866 Civil Rights Act to enumerate privileges that states could not withhold or grant on unequal terms. In order to avoid future challenges to its power to pass the Act, Congress constitutionalized its power to define citizens' privileges and immunities in the Fourteenth Amendment. Congress retains the right to exercise this vested power today.

I. PRIVILEGES AND IMMUNITIES: A LEGISLATIVE HISTORY

In *City of Boerne*, a 1997 case involving Congress's power to define the protections of the Fourteenth Amendment, the Supreme Court held that the federal legislature does not have plenary power "to decree the substance of the Fourteenth Amendment's restrictions on the States."¹⁷ In particular, the Court held that under "the traditional separation of powers between Congress and the Judiciary . . . [, t]he power to interpret the Constitution in a case or controversy remains in the Judiciary," not Congress.¹⁸ The Court concluded that while the federal judiciary has the power to require states to treat certain rights equally, Congress lacks the power to interpret the Fourteenth Amendment to define rights more broadly than express judicial interpretations to the contrary.¹⁹

This separation of powers holding, which I will return to in Part III, is at odds with another, related tradition: the history of legislatures defining and protecting *privileges* and *immunities*. Legislatures have had the primary power to define these terms of art since at least the

¹⁷ *Id.* at 519.

¹⁸ *Id.* at 523–24.

¹⁹ *See id.* at 528–29.

1600s. The Fourteenth Amendment, whose oft-quoted second sentence begins “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,”²⁰ is part of a historical legacy in which legislatures, not just courts, defined the scope of privileges and enforced their protections.

A. *Privileges and Immunities in the American Colonies*

“Privileges” and “immunities” have been regulated by legislatures throughout Anglo-American legal history.²¹ In the early Middle Ages, the terms were used interchangeably to describe any legal benefits granted “by special grace of the king himself” to particular individuals within a larger community.²² Beginning in the sixteenth century, Parliament began regulating the King’s privileges by statute, withholding the privilege of asylum,²³ for example, from traitors.²⁴ By the time William Blackstone summarized English law in the 1760s, it was clear that the Parliament, “by its absolute and transcendent authority,” could regulate privileges and immunities whether granted to individuals, corporations, entire colonies, or Parliament itself.²⁵

The charters of the American colonies illustrate the various privileges the Crown and Parliament could grant. They could be as great as the power to practice one’s own religion or as mundane as the powers to hunt, fish, or import crops without paying a tax.²⁶ In addition to specific privileges, charters also broadly granted colonists all the “liberties and Immunities” that Englishmen born in England would possess.²⁷ As a term of art, the phrase *liberties and immunities* was purposefully capacious, as it incorporated all of English common and statutory law and transferred it across the Atlantic Ocean.

After the American Revolution, the thirteen colonial legislatures and the Continental Congress took responsibility for distributing privi-

²⁰ U.S. CONST. amend. XIV, § 1, cl. 2.

²¹ See generally Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010).

²² 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 166–67 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (c. 1235); see also Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 516 (2006).

²³ R.H. HELMHOLZ, THE *IUS COMMUNE* IN ENGLAND 16–20 (2001).

²⁴ 26 Hen. 8, c. 13 (1534); see also 21 Jac., c. 28, § 7 (1623) (abolishing the privilege entirely).

²⁵ 2 WILLIAM BLACKSTONE, COMMENTARIES *471–74.

²⁶ See, e.g., The Charter of Maryland — 1632, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1677, 1683–84 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE]; The Second Charter of Virginia — 1609, in 7 THORPE, *supra*, at 3790, 3790; A Declaration and Proposals of the Lord Proprietor of Carolina, Aug. 25–Sept. 4, 1663, in 5 THORPE, *supra*, at 2753, 2755.

²⁷ The Charter of Massachusetts Bay — 1629, in 3 THORPE, *supra* note 26, at 1846, 1857; see also The Second Charter of Virginia — 1609, in 7 THORPE, *supra* note 26, at 3790, 3800.

leges and immunities. Benjamin Franklin proposed early on “[t]hat each Colony shall enjoy and retain as much as it may think fit of its own present Laws, Customs, Rights, and Privileges, and peculiar Jurisdictions within its own Limits.”²⁸ Eleven of the colonial legislatures obliged, each drafting constitutions full of privileges they deemed fundamental, from “[t]he privilege of the writ of *habeas corpus*,”²⁹ and the “privilege of the trial by jury,”³⁰ to the “privilege of every *free-man* . . . to plead his own cause”³¹ and the “privileges of witnesses and counsel.”³² The constitutions also regulated the processes by which legislatures could distribute privileges and take them away. Virginia, for example, gave instructions that “the legislature shall not . . . confer any peculiar privileges or advantages on any one sect or denomination”³³ or grant “exclusive or separate emoluments or privileges from the community, but in consideration of public services.”³⁴ Massachusetts, meanwhile, paraphrased Magna Carta, stating that “no subject shall be . . . deprived of his property, immunities, or privileges . . . but by the judgment of his peers, or the law of the land.”³⁵

Congress, for the most part, relied upon state legislatures to supply privileges and immunities, resolving several times that certain noteworthy foreigners should have “the rights, privileges and immunities of natives, as established by the laws of these states.”³⁶ These privileges included “the free and uninterrupted exercise of your religion, complete protection of your persons from injury, [and] the peaceable possession of the fruits of your honest industry.”³⁷ The Privileges and Immunities Clause of the Articles of Confederation similarly gave “the free inhab-

²⁸ 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 196 (Library of Congress ed. 1904–1937) (1775) (statement of Benjamin Franklin) [hereinafter JOURNALS].

²⁹ See, e.g., DEL. CONST. of 1792, art. I, § 13, in 1 THORPE, *supra* note 26, at 568, 569; see also N.H. CONST. of 1784, pt. II, in 4 THORPE, *supra* note 26, at 2453, 2469.

³⁰ N.H. CONST. of 1784, pt. I, art. XXI, in 4 THORPE, *supra* note 26, at 2456; see also N.J. CONST. of 1776, art. XXII, in 5 THORPE, *supra* note 26, at 2594, 2598.

³¹ GA. CONST. of 1777, art. LVIII, in 2 THORPE, *supra* note 26, at 777, 785.

³² N.J. CONST. of 1776, art. XVI, in 5 THORPE, *supra* note 26, at 2597.

³³ VA. CONST. of 1830, art. III, § 11, in 7 THORPE, *supra* note 26, at 3819, 3824; see also N.J. CONST. of 1776, art. XIX, in 5 THORPE, *supra* note 26, at 2597–98; S.C. CONST. of 1778, art. XXXVIII, in 6 THORPE, *supra* note 26, at 3248, 3255–56.

³⁴ VA. CONST. of 1776, § 4, in 7 THORPE, *supra* note 26, at 3812, 3813; see also MASS. CONST. of 1780, pt. 1, art. VI, in 3 THORPE, *supra* note 26, at 1888, 1890; N.C. CONST. of 1776 Declaration of Rights, § 3, in 5 THORPE, *supra* note 26, at 2787, 2787.

³⁵ MASS. CONST. of 1780, pt. 1, art. XII, in 3 THORPE, *supra* note 26, at 1891; see also MD. CONST. of 1776, Declaration of Rights § 21, in 3 THORPE, *supra* note 26, at 1686, 1688; N.H. CONST. of 1784, pt. I, art. XV, in 4 THORPE, *supra* note 26, at 2455; N.Y. CONST. of 1777, art. XIII, in 5 THORPE, *supra* note 26, at 2623, 2632; N.C. CONST. of 1776, Declaration of Rights § 12, in 5 THORPE, *supra* note 26, at 2788; S.C. CONST. of 1788, art. XLI, in 6 THORPE, *supra* note 26, at 3257.

³⁶ 5 JOURNALS, *supra* note 28, at 654 (1776).

³⁷ 10 *id.* at 409 (1778).

itants of each of these states . . . all privileges and immunities of free citizens in the respective states,” along with “all the privileges of trade and commerce . . . as the inhabitants thereof.”³⁸

Congress also occasionally defined and distributed privileges itself. In 1780, Congress created a “committee of three . . . to ascertain and declare the privileges of members of Congress,”³⁹ which the committee declared to include the freedom of speech and debate “as well as the other privileges belonging to a legislative Body.”⁴⁰ Another committee, led by James Madison, determined that the states should grant resident foreigners immunities from military service and certain taxes.⁴¹ Madison’s committee also recommended that Congress settle on “some precise and permanent rules”⁴² with regard to the “privileges and obligations of foreigners,”⁴³ which Congress did in a series of overseas conventions. A convention on consular powers and privileges with France, for example, granted consuls “a full and entire immunity for their persons papers and houses” as well as immunities “from finding quarters for soldiers, from militia duties,” and from certain taxes.⁴⁴ Two of these congressionally negotiated immunities found their way into the federal Bill of Rights.

B. Privileges and Immunities in the Antebellum United States

Congress and state legislatures continued to define and regulate privileges and immunities throughout the antebellum period. By 1866, when Congress passed the Civil Rights Act, legislatures were widely understood as having the power to declare and withhold various privileges.

1. *Congress.* — The Constitutional Convention of 1787 infrequently discussed Congress’s power to define privileges or immunities. The Privileges and Immunities Clause from the Articles of Confederation was streamlined and adopted without much discussion.⁴⁵ The Convention did adopt a Habeas Corpus Clause similar to those in many state constitutions, which anticipated that the federal legislature might “suspend[.]” the privilege “when in Cases of Rebellion or Invasion the

³⁸ 9 *id.* at 899 (1777).

³⁹ 17 *id.* at 762 (1780).

⁴⁰ *Id.* at 774.

⁴¹ 19 *id.* at 116 (1781); *see* 18 *id.* at 1140 (1780) (assigning Madison to the committee).

⁴² 19 *id.* at 117.

⁴³ *Id.* at 116.

⁴⁴ 21 *id.* at 805 n.1 (1781); *see also* 22 *id.* at 19 (1782).

⁴⁵ U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”). The only vote on the matter, raised by Charles C. Pinckney of South Carolina, was whether “some provision should be included in favor of property in slaves.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand ed., Yale Univ. Press 1911) (Aug. 28, 1787) (statement of Charles C. Pinckney) [hereinafter FARRAND]. His proposal was voted down 9–1, with Georgia’s delegation divided. *See id.*

public Safety may require it.”⁴⁶ The Convention also discussed which House should have the “privilege of originating money bills”⁴⁷ or the power of judging “the privilege of its own members.”⁴⁸ These privileges made their way into the Origination Clause⁴⁹ and the Rules and Expulsion Clause.⁵⁰

The Constitutional Convention was very concerned, by contrast, with naturalization. In the first week of the Convention, Charles C. Pinckney and Edmund Randolph each proposed plans for reforming the Articles of Confederation by giving the federal government “the exclusive right of declaring on what terms the privileges of citizenship and naturalization should be extended to foreigners.”⁵¹ The Convention quickly adopted the Naturalization Clause, granting Congress the power “[t]o establish a uniform Rule of Naturalization.”⁵² Evidently, James Madison believed this language was sufficient to give Congress the power to determine the various privileges of citizenship. Madison strongly opposed lengthy residency requirements for senators, for example, because he believed “the Nat[ional] Legis[ature] is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship.”⁵³

The First Congress picked up on Madison’s logic when it enacted the Naturalization Act of 1790.⁵⁴ Everyone who debated the Act believed the Constitution “enable[d] Congress to dictate the terms of citizenship to foreigners, and to prevent them from being admitted to the full exercise of the rights of citizenship by the General Government.”⁵⁵ Congress apparently thought it could award new citizens some privileges but withhold other privileges, including the ability to vote, until the citizens fulfilled some other criteria.⁵⁶ Some members even ranked the various privileges, listing the ability to hold property among the “inferior” privileges⁵⁷ while reserving “electing, or being elected into

⁴⁶ U.S. CONST. art. I, § 9, cl. 2.

⁴⁷ 2 FARRAND, *supra* note 45, at 4 (July 14, 1787) (statement of James Wilson).

⁴⁸ *Id.* at 502 (Sept. 4, 1787) (statement of Charles C. Pinckney).

⁴⁹ U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

⁵⁰ *Id.* art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”).

⁵¹ 3 FARRAND, *supra* note 45, at 120 (May 28, 1787) (statement of Charles C. Pinckney); 1 *id.* 25 (May 29, 1787) (statement of Edmund Randolph).

⁵² U.S. CONST. art. I, § 8, cl. 4.

⁵³ 2 FARRAND, *supra* note 45, at 235 (Aug. 9, 1787) (statement of James Madison).

⁵⁴ Ch. 3, 1 Stat. 103, *repealed by* Naturalization Act of 1795, ch. 20, 1 Stat. 414.

⁵⁵ 1 ANNALS OF CONG. 1116 (1790) (Joseph Gales ed., 1834) (statement of Rep. Thomas Tudor Tucker).

⁵⁶ *See, e.g., id.* at 1113 (statement of Rep. Thomas Hartley).

⁵⁷ *Id.* at 1124 (statement of Rep. George Clymer).

office” as examples of “higher privileges of citizens.”⁵⁸ Although the First Congress was conflicted about whether it had the similar power to award privileges normally conferred by *state* legislatures — such as the privilege of holding *state* office⁵⁹ — its members had no doubt that all privileges “depend[ed] upon the constitutions and laws” enacted by state or federal legislatures.⁶⁰

2. *States.* — State constitutions in the antebellum period proceeded along the same lines as those of the 1770s and 1780s, defining privileges as the stuff of statutes and positive law. References to privileges in state constitutions can be grouped into four categories: judicial and personal benefits; special benefits of office; corporate or special-use benefits; and rules regarding the process by which future privileges could be granted or taken away. All four categories anticipated that state legislatures would be responsible for creating, defining, or withdrawing privileges and immunities — including what might now be considered “fundamental” rights. The clauses demonstrate that even when privileges were constitutionalized, the drafters expected legislative involvement.⁶¹

The first group of privileges that state constitutions protected concerned particular rights in judicial proceedings. Many states explicitly authorized legislatures to “prescribe the manner in which . . . powers shall be exercised by the Superior or Inferior courts, and the privileges to be enjoyed.”⁶² Such privileges might include anything from the ability to change one’s name or legitimate one’s child⁶³ to “trial by petit jury, . . . the privilege of appeal,”⁶⁴ and “[t]he privilege of the debtor to enjoy the necessary comforts of life.”⁶⁵ Other constitutions restricted legislatures from withdrawing certain judicial privileges. Following the Federal Constitution, for example, virtually every state enacted habeas corpus clauses that specified when legislatures could suspend the privilege of habeas corpus.⁶⁶

⁵⁸ *Id.* at 1121.

⁵⁹ *Id.* at 1113–14 (statement of Rep. Alexander White); *see also id.* at 1118 (statement of Rep. Michael J. Stone); *id.* at 1115, 1120 (statements of Rep. John Laurance).

⁶⁰ *Id.* at 1115 (statement of Rep. John Laurance); *see also id.* at 1120.

⁶¹ *See, e.g.*, IND. CONST. of 1851, art. I, § 23, *in 2* THORPE, *supra* note 26, at 1073, 1075 (“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”).

⁶² GA. CONST. of 1798, art. I, § 26, *in 2* THORPE, *supra* note 26, at 791, 796; *see also* DEL. CONST. of 1831, art. VI, § 15, *in 1* THORPE, *supra* note 26, at 582, 593.

⁶³ GA. CONST. of 1798, art. I, § 26, *in 2* THORPE, *supra* note 26, at 796.

⁶⁴ DEL. CONST. of 1831, art. VI, § 15, *in 1* THORPE, *supra* note 26, at 593.

⁶⁵ IND. CONST. of 1851, art. I, § 22, *in 2* THORPE, *supra* note 26, at 1075; NEV. CONST. of 1864, art. I, § 14, *in 4* THORPE, *supra* note 26, at 2401, 2403; WIS. CONST. of 1848, art. I, § 17, *in 7* THORPE, *supra* note 26, at 4077, 4078.

⁶⁶ *See, e.g.*, CONN. CONST. of 1818, art. I, § 14, *in 1* THORPE, *supra* note 26, at 536, 538; IND. CONST. of 1816, art. I, § 14, *in 2* THORPE, *supra* note 26, at 1057, 1059; KY. CONST. of

Second, state constitutions also conferred upon legislatures the power to determine certain privileges of office. The most common “office” regulated by legislatures was that of the elector, and most constitutions stated grandly that the “privilege of free suffrage shall be supported by laws regulating elections.”⁶⁷ A few constitutions gave the legislature “full power to exclude from the privilege of electing or being elected any person convicted of bribery, perjury, or any other infamous crime,”⁶⁸ or “idiots” and other disfavored characters.⁶⁹

Third, nineteenth-century constitutions limited legislatures’ powers to award privileges to corporations. In Pennsylvania, where “the legislature [was] consumed in the enactment of special laws conferring corporate powers, rights to sell or mortgage real estate, or other personal and peculiar privileges,”⁷⁰ the people passed an amendment in 1864 resolving that “[n]o bill shall be passed by the legislature granting any powers or privileges in any case where the authority to grant such powers or privileges has been or may hereafter be conferred upon the courts of the Commonwealth.”⁷¹ Other general incorporation provisions prohibited legislatures from “granting peculiar privileges to any joint-stock company.”⁷²

Finally, perhaps the most important set of constitutional rules concerning privileges were those that regulated the process by which privileges could be awarded or withdrawn. Many states adopted religious freedom clauses that forbade legislatures from “diminish[ing] or enlarg[ing]” the “civil rights, privileges, or capacities of any citizen . . . on account of his religion.”⁷³ More broadly, many contained

1792, art. XII, § 16, *in 3* THORPE, *supra* note 26, at 1264, 1275; LA. CONST. of 1812, art. VI, § 19, *in 3* THORPE, *supra* note 26, at 1380, 1389–90.

⁶⁷ ALA. CONST. of 1819, art. VI, § 5, *in 1* THORPE, *supra* note 26, at 96, 109; KY. CONST. of 1792, art. VIII, § 2, *in 3* THORPE, *supra* note 26, at 1272; LA. CONST. of 1812, art. VI, § 4, *in 3* THORPE, *supra* note 26, at 1388; *see also* CONN. CONST. of 1818, art. VI, §§ 2, 6, *in 1* THORPE, *supra* note 26, at 544.

⁶⁸ ILL. CONST. of 1818, art. II, § 30, *in 2* THORPE, *supra* note 26, at 972, 975; *see also* ALA. CONST. of 1819, art. VI, § 5, *in 1* THORPE, *supra* note 26, at 109; CONN. CONST. of 1818, art. VI, §§ 2, 6, *in 1* THORPE, *supra* note 26, at 544.

⁶⁹ *See, e.g.*, CAL. CONST. of 1849, art. II, § 5, *in 1* THORPE, *supra* note 26, at 391, 393; IOWA CONST. of 1846, art. II, § 5, *in 2* THORPE, *supra* note 26, at 1123, 1125; OHIO CONST. of 1851, art. V, § 6, *in 5* THORPE, *supra* note 26, at 2913, 2924.

⁷⁰ *Wolf & Bernheisel’s Appeal*, 58 Pa. 471, 474 (1868).

⁷¹ *Id.* at 473 (quoting PA. CONST. of 1838, art. XI, § 9 (1864)) (internal quotation marks omitted).

⁷² W. VA. CONST. of 1861, art. XI, § 5, *in 7* THORPE, *supra* note 26, at 4013, 4031; *see also, e.g.*, FLA. CONST. of 1838, art. XIII, § 4, *in 2* THORPE, *supra* note 26, at 664, 678; IOWA CONST. of 1846, art. VIII, §§ 1–2, *in 2* THORPE, *supra* note 26, at 1132; LA. CONST. of 1845, tit. VI, arts. 122–123, *in 3* THORPE, *supra* note 26, at 1392, 1405; N.Y. CONST. of 1846, art. III, § 18, *in 5* THORPE, *supra* note 26, at 2653, 2678; WIS. CONST. of 1848, art. IV, § 31, *in 7* THORPE, *supra* note 26, at 4077, 4101.

⁷³ ARK. CONST. of 1836, art. II, § 4, *in 1* THORPE, *supra* note 26, at 268, 269; KY. CONST. of 1792, art. XII, § 4, *in 3* THORPE, *supra* note 26, at 1264, 1274; *see also* CONN. CONST. of 1818, art. VII, § 1, *in 1* THORPE, *supra* note 26, at 545; GA. CONST. of 1798, art. IV, § 10, *in 2*

proto-Equal Protection Clauses that provided that “[a]ll laws of a general nature shall have a uniform operation,”⁷⁴ or, “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”⁷⁵ Many state constitutions also contained due process clauses that specified that privileges could be deprived only “by the judgment of [one’s] peers or the law of the land.”⁷⁶ And some even allowed legislatures to grant Indians or foreigners “all the rights and privileges of free white citizens . . . upon such terms as the legislature may from time to time deem proper.”⁷⁷ Legislatures thus remained intimately connected with the awarding, defining, and withdrawing of personal privileges.

3. *Courts.* — Finally, although judges also occasionally sought to define the content of various “privileges” clauses, their opinions made clear that privileges and immunities were items for which legislatures and constitutions — sources of positive law — were responsible. In the oft-cited *Corfield v. Coryell*,⁷⁸ for example, Bushrod Washington, sitting as a Circuit Justice, suggested that the “privileges and immunities of citizens in the several states” were those that “are, in their nature, fundamental,”⁷⁹ including the right to travel; “to claim the benefit of the writ of habeas corpus”; to sue and hold property; and to vote.⁸⁰ But the holding of the opinion went on to state that New Jersey’s legislature had the authority to grant, as a privilege of state citizenship,

THORPE, *supra* note 26, at 791, 800–01; IOWA CONST. of 1846, art. I, § 4, *in 2* THORPE, *supra* note 26, at 1123–24; MICH. CONST. of 1835, art. I, § 6, *in 4* THORPE, *supra* note 26, at 1930, 1931; N.J. CONST. of 1844, art. I, § 4, *in 5* THORPE, *supra* note 26, at 2599, 2599.

⁷⁴ IOWA CONST. of 1857, art. I, § 6, *in 2* THORPE, *supra* note 26, at 1136, 1137.

⁷⁵ IND. CONST. of 1851, art. I, § 23, *in 2* THORPE, *supra* note 26, at 1073, 1075; *see also, e.g.*, ALA. CONST. of 1819, art. I, § 1, *in 1* THORPE, *supra* note 26, at 96, 96; CONN. CONST. of 1818, art. I, § 1, *in 1* THORPE, *supra* note 26, at 537; KAN. CONST. of 1859, Bill of Rights § 2, *in 2* THORPE, *supra* note 26, at 1241, 1242; KY. CONST. of 1792, art. XII, § 1, *in 3* THORPE, *supra* note 26, at 1274; MICH. CONST. of 1835, art. I, § 3, *in 4* THORPE, *supra* note 26, at 1931; OR. CONST. of 1857, art. I, § 21, *in 5* THORPE, *supra* note 26, at 2998, 2999; TENN. CONST. of 1834, art. XI, § 7, *in 6* THORPE, *supra* note 26, at 3426, 3439; TEX. CONST. of 1845, art. I, § 2, *in 6* THORPE, *supra* note 26, at 3547, 3547.

⁷⁶ ILL. CONST. of 1818, art. VIII, § 8, *in 2* THORPE, *supra* note 26, at 972, 981; TENN. CONST. of 1796, art. XI, § 8, *in 6* THORPE, *supra* note 26, at 3414, 3422; *see also, e.g.*, ARK. CONST. of 1836, art. II, § 10, *in 1* THORPE, *supra* note 26, at 270; MINN. CONST. of 1857, art. I, § 2, *in 4* THORPE, *supra* note 26, at 1991, 1991; N.Y. CONST. of 1821, art. VII, § 1, *in 5* THORPE, *supra* note 26, at 2639, 2647; TEX. CONST. of 1845, art. I, § 16, *in 6* THORPE, *supra* note 26, at 3548.

⁷⁷ MISS. CONST. of 1832, art. VII, § 18, *in 4* THORPE, *supra* note 26, at 2049, 2062; *see also* ALA. CONST. of 1819, art. VI, § 22, *in 1* THORPE, *supra* note 26, at 110; ARK. CONST. of 1836, art. VII, § 9, *in 1* THORPE, *supra* note 26, at 284; MINN. CONST. of 1857, art. XV, § 2, *in 4* THORPE, *supra* note 26, at 2019.

⁷⁸ 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

⁷⁹ *Id.* at 551.

⁸⁰ *Id.* at 552.

the right to fish in particular waters.⁸¹ Other opinions that addressed some of the enumerated privileges of Justice Washington's opinion made clear that new residents could only obtain full citizenship rights, including the privilege of the franchise or the right to sue, "according to the laws of such State."⁸² In short, throughout the nineteenth century, Congress, states, and courts could all agree that although courts participated in identifying the "privileges and immunities of citizens," the central task of defining, granting, and withdrawing new privileges and immunities fell upon legislatures.

II. THE FOURTEENTH AMENDMENT: ANOTHER LEGISLATIVE HISTORY

In its 1997 *City of Boerne* decision regarding Congress's power "to interpret and elaborate on the meaning of the [Fourteenth] Amendment through legislation,"⁸³ the Supreme Court dismissed the suggestion that the Amendment gave "Congress, and not the courts, [power] to judge whether or not any of the privileges or immunities [that the Amendment protected] were not secured to citizens in the several States."⁸⁴ But by the mid-nineteenth century, the terms *privileges* and *immunities* had been associated with legislative action for centuries. At no point was this clearer than when Congress passed the Civil Rights Act of 1866. The Act and its subsequent constitutionalization are evidence that the Thirty-Ninth Congress, which drafted the Fourteenth Amendment, considered itself empowered to enumerate specific privileges and immunities of federal citizenship and protect them from unequal state legislation.

A. *The Civil Rights Act of 1866*

The immediate background for the Civil Rights Act of 1866 was the end of the Civil War. The passage of the Thirteenth Amendment had freed millions of slaves in southern states, yet northern politicians did not trust southern state legislatures to guarantee privileges and immunities to black freedmen on equal terms.⁸⁵ This was particularly true after southern states passed "black codes," the name for laws that "prohibited blacks from renting land, provided for the seizure of those who breached labor contracts, . . . [and] made certain conduct criminal only when done by blacks."⁸⁶ Unfortunately for members of Congress

⁸¹ *Id.*

⁸² *See, e.g.,* *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827).

⁸³ *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997).

⁸⁴ *Id.* (quoting HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 64 (1908)) (internal quotation marks omitted).

⁸⁵ *See, e.g.,* ERIC FONER, *RECONSTRUCTION* 242-45 (1988).

⁸⁶ Farber & Muench, *supra* note 11, at 260.

opposed to these codes, the laws concerned rights that traditionally had been regulated exclusively by the states. The Civil Rights Act was intended to prohibit these codes without raising the specter of undue federal “centralization.”⁸⁷

1. *The Senate.* — On January 5, 1866, Senator Lyman Trumbull of Illinois introduced the bill that became the Civil Rights Act on the Senate floor.⁸⁸ Trumbull declared that the bill would eliminate “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.”⁸⁹ After friendly amendments,⁹⁰ the bill stated:

That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁹¹

The second section of the bill provided criminal penalties for “any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act.”⁹² The next section provided federal courts with jurisdiction to enforce the Act.⁹³

Trumbull grounded the constitutionality of the Act in three provisions — all of which were attacked as dubious sources for Congress’s authority to act. Trumbull primarily argued that the bill was authorized by section 2 of the Thirteenth Amendment,⁹⁴ which he claimed gave Congress power to protect privileges “essential to freemen.”⁹⁵ Trumbull also argued that the Naturalization Clause of Article I⁹⁶

⁸⁷ See FONER, *supra* note 85, at 242–43.

⁸⁸ CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866). See generally Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011) (analyzing the congressional debates leading up to the Fourteenth Amendment with a focus on the role of Rep. John Bingham).

⁸⁹ CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

⁹⁰ See, e.g., *id.* at 474.

⁹¹ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

⁹² *Id.* § 2.

⁹³ *Id.* § 3.

⁹⁴ U.S. CONST. amend. XIII, § 2.

⁹⁵ CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866) (statement of Sen. Lyman Trumbull).

⁹⁶ U.S. CONST. art. I, § 8, cl. 4 (empowering Congress “[t]o establish a uniform Rule of Naturalization”).

combined with the Privileges and Immunities Clause of Article IV⁹⁷ gave Congress power “to declare, under the Constitution of the United States, who are citizens” and to grant such individuals “the rights of citizens.”⁹⁸ Referencing various judicial interpretations of Article IV, including *Corfield v. Coryell*, Trumbull maintained that the Act would protect certain “fundamental” *civil* rights (such as property ownership) but not less-fundamental *political* rights (such as the right to vote).⁹⁹ This distinction — between the “civil” rights the Act protected and the “political” rights it did not — was a calculated attempt to preempt criticisms that the Civil Rights Act was the first step toward enabling black suffrage in the South.¹⁰⁰

The opponents of the Civil Rights Act fiercely responded that the Act was “flagrantly unconstitutional.”¹⁰¹ What did the Thirteenth Amendment’s prohibition of slavery have to do with the ability to contract or testify in court — core state-granted privileges that not even married women could legally exercise in many states?¹⁰² What part of Article IV gave Congress the power to enforce the Privileges and Immunities Clause, which had been previously understood as a self-executing provision?¹⁰³ And what did the Naturalization Clause have to do with *state* citizenship, much less the power to confer federal citizenship directly rather than with a uniform rule?¹⁰⁴

More significantly for present purposes, the opponents also recognized that if Congress possessed the power to *define* the privileges of citizenship through a statute, then Congress was also empowered to eliminate state-imposed inequalities in every manner of life — including voting. For many, this was a slippery slope that could not be avoided by Trumbull’s artificial distinction between “civil” and “political” privileges, which were interchangeable in the nineteenth-century lexicon. “Talk to me, sir, about the words ‘civil rights’ not including the right to vote!” Democratic Senator Willard Saulsbury, Sr., challenged Trumbull.¹⁰⁵ “The right to vote is not a natural right; I did not possess it by nature, I only possess it by virtue of law.”¹⁰⁶ The oppo-

⁹⁷ *Id.* art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

⁹⁸ CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Lyman Trumbull).

⁹⁹ *Id.* at 599.

¹⁰⁰ See *infra* notes 105–108 and accompanying text.

¹⁰¹ E.g., CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866) (statement of Sen. Willard Saulsbury, Sr.).

¹⁰² See *id.* at 529 (statements of Sens. Garrett Davis and Daniel Clark); see also *id.* at 476 (statement of Sen. Willard Saulsbury, Sr.) (“The attempt . . . to confer civil rights which are wholly distinct and unconnected with the *status* or condition of slavery, is an attempt unwarranted by any method or process of sound reasoning.”).

¹⁰³ *Id.* at 595 (statement of Sen. Garrett Davis).

¹⁰⁴ *Id.* at 597; see also, e.g., *id.* at 497 (statement of Sen. Peter Van Winkle).

¹⁰⁵ *Id.* at 606 (statement of Sen. Willard Saulsbury, Sr.).

¹⁰⁶ *Id.* at 478.

nents feared that the Civil Rights Act could serve as valuable precedent if a more radical Congress decided to eliminate other state-tolerated distinctions. “[I]f we can, by legislation, authorize the negro to sue, we are authorized to go one step at least toward making him a citizen,” Senator Reverdy Johnson explained.¹⁰⁷ “If we authorize him to testify we take another step; and so to go on by assuming that we authorize him to do every other act that a white man can do, short of the right of voting, what is there in the Constitution which denies us the power to stop when we come to the exercise of that right?”¹⁰⁸

The Senate passed the Civil Rights Act by a vote of 33–12,¹⁰⁹ its supporters presumably convinced that the Thirteenth Amendment and Article IV gave Congress sufficient powers to pass the bill. But the Act’s opponents not only disagreed with this legal conclusion, they also maintained as a matter of logic that if Congress possessed the power to require states to distribute certain state-law privileges on equal terms, then Congress also had the power to do much more, such as erase antimiscegenation laws,¹¹⁰ give women the right to vote,¹¹¹ or desegregate schools.¹¹² Not all “citizens” had the same rights in 1866 America — men and women, corporations and humans, Indians and Asians could all be “citizens” for certain purposes but not others. With the Civil Rights Act, Congress had embarked for the first time on removing some of these distinctions from state books by defining certain rights as privileges of federal citizenship.¹¹³

2. *The House.* — The Civil Rights Act proceeded in the House of Representatives in similar fashion, but with one key difference: the representatives simultaneously debated a proposed constitutional amendment that would expressly authorize Congress “to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States.”¹¹⁴ Representative John A. Bingham of Ohio introduced the amendment the month after the Senate passed the Civil Rights Act, arguing that Congress had no constitutional authority to “enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens.”¹¹⁵ Unfortunately for Bingham, few other representatives thought the amend-

¹⁰⁷ *Id.* at 530 (statement of Sen. Reverdy Johnson).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 606–07. Five senators were absent. *Id.*

¹¹⁰ *See id.* at 505 (statement of Sen. Reverdy Johnson).

¹¹¹ *See id.* at 529 (statements of Sens. Garrett Davis and Daniel Clark).

¹¹² *See id.* at 500 (statement of Sen. Edgar Cowan).

¹¹³ *See, e.g., id.* at 504 (statement of Sen. Reverdy Johnson).

¹¹⁴ *Id.* at 1088.

¹¹⁵ *Id.* at 1090.

ment was “absolutely needed,”¹¹⁶ as the powers it purported to grant Congress were “already embraced in the Constitution”¹¹⁷ in the same clauses listed by Senator Trumbull. As a result, discussion of the amendment was postponed until after the House could discuss the Civil Rights Act.¹¹⁸

Once the Act was introduced, opponents again argued that the law had nothing to do with Congress’s powers under the Thirteenth Amendment or Article IV. They also maintained that Congress was claiming the power “to interfere with the internal policy of the several States so as to define and regulate the ‘civil rights or immunities among the inhabitants’ therein.”¹¹⁹ As Representative Michael C. Kerr explained, “[t]his bill rests upon the theory that Congress has the right to declare who shall be citizens of the United States, and then to provide that *such* citizens shall enjoy in the *States* all the privileges and immunities allowed therein to the most favored class of citizens of such State.”¹²⁰ But if Congress had that power, “Congress may, then, go into any State and break down any State constitutions or laws which discriminate in any way against any class of persons within or without the State.”¹²¹ Traditional state laws this power could affect included antimiscegenation laws or laws imposing disabilities on married women.¹²² President Andrew Johnson eventually vetoed the bill on similar grounds,¹²³ explaining that “[i]f Congress can declare by law who shall hold lands, who shall testify, who shall have capacity to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and, finally, to vote ‘in every State and Territory of the United States.’”¹²⁴

B. *The Fourteenth Amendment, 1866*

Congress passed the Civil Rights Act over Johnson’s veto within two weeks.¹²⁵ Yet the bill’s supporters remained apprehensive about Congress’s constitutional power to pass the legislation. Representative Bingham therefore again proposed his constitutional amendment —

¹¹⁶ *Id.* at 1057 (statement of Rep. William D. Kelley).

¹¹⁷ *Id.* at 1054 (statement of Rep. William Higby).

¹¹⁸ *Id.* at 1095.

¹¹⁹ *Id.* at 1295–96 (statement of Rep. George R. Latham).

¹²⁰ *Id.* at 1268 (statement of Rep. Michael C. Kerr).

¹²¹ *Id.*

¹²² *Id.* at 1064–65 (statement of Rep. Robert S. Hale).

¹²³ *Id.* at 1679–80 (statement of President Andrew Johnson).

¹²⁴ *Id.* at 1680.

¹²⁵ *See id.* at 1809, 1861. *See generally* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1289–96 (2013).

rewording it to state that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” while still giving Congress “power to enforce by appropriate legislation the provisions of this article.”¹²⁶

Virtually all of the debate over section 1 of the Fourteenth Amendment proceeded under the assumption that the section did little other than constitutionalize the Civil Rights Act.¹²⁷ Where Congress’s power to pass the Act was once dubious, the Fourteenth Amendment proposed to grant Congress the express power to pass a similar Act in the future. Although opponents of the section caustically suggested that the proposal of a constitutional amendment was “an admission”¹²⁸ that the Civil Rights Act was “clearly unconstitutional,”¹²⁹ its supporters maintained that “a reaffirmation of a good principle will do no harm.”¹³⁰ Some supporters embraced the amendment as a way “to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon” the Civil Rights Act,¹³¹ while others held that the amendment would “lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution.”¹³²

Nevertheless, opponents again realized that if Congress had the *constitutional* power to pass the Civil Rights Act again in the future, “it would be for Congress to define and determine by law in what the ‘privileges and immunities’ of citizens of the United States consist.”¹³³ As Representative Charles E. Phelps observed, if “[t]he ‘privileges or immunities’ of citizens are such as Congress may by law ascertain and define,” then an “act of Congress to define the privileges and immunities of citizens could and doubtless would be made to include the privileges of voting, serving upon juries, and of holding office. Those privileges must, then, be incorporated into the constitution and laws of each of the States”¹³⁴ Representative Andrew J. Rogers agreed that the list of privileges Congress might regulate in the future was nearly limitless: “The right to vote is a privilege. The right to marry is a

¹²⁶ JOURNAL OF THE J. COMM. ON RECONSTRUCTION, 39th Cong., 1st Sess. (1866), reprinted in S. DOC. NO. 63-711, at 44 (3d Sess. 1915).

¹²⁷ See CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (statement of Rep. Andrew J. Rogers).

¹²⁸ *Id.* at 2506 (statement of Rep. Charles A. Eldredge).

¹²⁹ *Id.* at 2461 (statement of Rep. William E. Finck); see also, e.g., *id.* at 2502 (statement of Rep. Henry J. Raymond); *id.* at 2896 (statement of Sen. James R. Doolittle).

¹³⁰ *Id.* at 2539 (statement of Rep. John F. Farnsworth).

¹³¹ *Id.* at 2511 (statement of Rep. Thomas D. Eliot).

¹³² *Id.* at 2462 (statement of Rep. James A. Garfield); see also, e.g., *id.* at 2464 (statement of Rep. M. Russell Thayer).

¹³³ *Id.* at 2398 (statement of Rep. Charles E. Phelps).

¹³⁴ *Id.*

privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege.”¹³⁵ Despite these worries, the amendment passed through Congress by a wide margin and was subsequently ratified in 1868.¹³⁶

III. CONGRESS’S POWER TO DEFINE THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP

Although the amendment’s opponents no doubt intended to scare its supporters, it is difficult to show why their fears were wrong. In passing the Civil Rights Act and subsequently constitutionalizing its provisions into the Fourteenth Amendment, Congress really had required all states to extend certain privileges and immunities equally to all residents within their borders. In this respect, by 1868, when the Fourteenth Amendment was ratified, it seemed clear to observers that Congress suddenly had the power to define and secure the privileges and immunities of citizenship. What had once been thought of as purely local matters could now be protected by federal legislation.

Virtually every scholar or judge who has written about the Fourteenth Amendment’s Privileges or Immunities Clause has analyzed it in terms of what rights it might protect — whether natural rights, such as property ownership, or positive rights, such as those enshrined in the Bill of Rights.¹³⁷ But another way of looking at the clause is to ask not what rights it protects on its own, but what powers it gave to Congress. As Bingham himself argued, a primary purpose of section 1 was “to arm the Congress of the United States” with powers that the Civil Rights Act’s opponents thought it lacked.¹³⁸

The most significant clue as to what powers the Privileges or Immunities Clause gives to Congress is the Civil Rights Act, whose constitutionality Congress sought to ensure with the Fourteenth Amendment. The Act’s passage depended on Congress’s power to define certain state-granted privileges as privileges of federal citizenship and thereby secure them from discrimination. Importantly, however, this power to define rights as privileges of citizenship did not also mean that Congress necessarily possessed the power to *create* new privileges or immunities as well. That is, Congress was not inventing privileges that had never before been explicitly recognized, such as a twentieth-century right of privacy.¹³⁹ All Congress was doing was prohibiting

¹³⁵ *Id.* at 2538 (statement of Rep. Andrew J. Rogers).

¹³⁶ *See generally*, e.g., Lash, *supra* note 125, at 1300–01, 1329–32.

¹³⁷ *See* sources cited *supra* notes 10–15.

¹³⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. John Bingham).

¹³⁹ *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

state legislatures from distributing existing privileges on unequal terms.

The constitutional concern of the Act's opponents was that Congress had no power to regulate core state-law privileges, which since the Articles of Confederation had been left for state legislatures to distribute as they saw fit. But this concern was defeated when Congress and the states ratified the Fourteenth Amendment, which undoubtedly wrote Congress's power to pass the Act into the Constitution.¹⁴⁰ In light of the Fourteenth Amendment's continued existence, it would seem logical to conclude that Congress continues to have the power to regulate certain state-granted privileges and immunities even in the twenty-first century. That is, Congress still has, under the Fourteenth Amendment, the authority to define certain state-granted privileges as privileges of *federal* citizenship, which states must distribute equally to all citizens.

In short, there is no reason why Congress tomorrow could not pass a modern version of the Civil Rights Act of 1866 that eliminates state-imposed distinctions between straight and gay citizens with regard to marriage,¹⁴¹ between rich and poor citizens with regard to access to education,¹⁴² or between ex-felons and others with regard to access to the ballot.¹⁴³ All three areas — marriage, education, and the franchise — are traditionally understood as core state-granted privileges that states may distribute unequally, provided there is a rational relationship to a legitimate government interest. But just as the 1866 Congress enumerated certain core state-granted privileges (such as the right to testify or own property), and prohibited states from distributing or withholding this privilege on certain grounds (such as race), the 2015 Congress should be able to mandate a regime of equality with respect to other state-granted privileges.

Supreme Court precedent provides two immediate counterarguments to this conclusion. First, the Court has often declared that Congress does not have plenary power to define the substantive scope of the Fourteenth Amendment due to principles of federalism and the separation of powers. If Congress has the power to define the privileges or immunities of citizenship, then its interpretation might inappropriately conflict with the Court's power to "say what the law is."¹⁴⁴

¹⁴⁰ See Harrison, *supra* note 12, at 1389–90.

¹⁴¹ See *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (holding that a same-sex marriage ban does not violate the Fourteenth Amendment).

¹⁴² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (holding that district-based school financing does not violate the Fourteenth Amendment).

¹⁴³ See *Johnson v. Bush*, 405 F.3d 1214, 1222–27 (11th Cir. 2005) (holding that a felon disenfranchisement law does not violate the Fourteenth Amendment); *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) (same); *Buckner v. Schaefer*, 36 F.3d 1091 (4th Cir. 1994) (per curiam) (same).

¹⁴⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Second, the Court has already interpreted the Privileges or Immunities Clause, construing it as providing only a limited class of rights — a class that definitely does not include the right to vote or marry. But whatever the merit of these arguments as policy matters, they are incorrect as a matter of history.

The Court articulated the federalism and separation of powers argument most clearly in its 1997 decision *City of Boerne v. Flores*. The decision involved the Religious Freedom Restoration Act of 1993,¹⁴⁵ in which Congress used its Fourteenth Amendment powers to reverse a prior Supreme Court interpretation of the Constitution. The Court had determined in 1990 that the First Amendment, as applied to the states through the Fourteenth Amendment's Due Process Clause, did not require the states to grant religious exemptions from neutral laws of general applicability.¹⁴⁶ Congress's 1993 Act, by contrast, required states to grant exemptions unless they could offer compelling reasons not to. *City of Boerne* addressed a challenge to this requirement.

The Supreme Court struck down the application of the Act to the states on federalism and separation of powers grounds. In its federalism discussion, the Court noted that the law "intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."¹⁴⁷ The law defined the substantive restrictions the Fourteenth Amendment imposed on the states — a power the Court maintained Congress never possessed.¹⁴⁸ If Congress did possess such a power, the Court believed, its power to alter the Constitution would have no limits, "effectively circumvent[ing] the difficult and detailed amendment process contained in Article V."¹⁴⁹ The federal-state balance, the Court held, limited Congress's power to remedying or preventing state violations of *judicially* recognized constitutional protections.¹⁵⁰

In its separation of powers discussion, the Court similarly noted that "[a]ny suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law."¹⁵¹ After examining the legislative history of the Fourteenth Amendment, the Court concluded that while Bingham's *first* proposal might have given Congress "a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design cen-

¹⁴⁵ 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

¹⁴⁶ See *Emp't Div. v. Smith*, 494 U.S. 872, 878–82 (1990).

¹⁴⁷ *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

¹⁴⁸ See *id.* at 527.

¹⁴⁹ *Id.* at 529.

¹⁵⁰ See *id.* at 524–29.

¹⁵¹ *Id.* at 527.

tral to the Constitution,¹⁵² this power was rejected by the *second* proposal.¹⁵³ Relying heavily on nineteenth-century contemporaries' understanding of the Fourteenth Amendment, the Court held that, "[a]s enacted," the Fourteenth Amendment did not "depart[] from [a] tradition" in which courts, not legislatures, elaborated on the meaning of constitutional provisions.¹⁵⁴ Accordingly, the 1993 Congress had no authority under the Amendment to contradict the Court's earlier assessment of the scope of the Due Process Clause.¹⁵⁵

The problem with the *City of Boerne* Court's conclusion is that any historically sensitive "theory of the Fourteenth Amendment must . . . explain how it validates the Civil Rights Act,"¹⁵⁶ in which Congress gave itself the power to define and regulate core state-law privileges and immunities. The *City of Boerne* Court quoted several of the Act's opponents who argued that federalism and separation of powers principles should prevent Congress from defining the privileges and immunities of citizenship.¹⁵⁷ Yet Congress enacted the Civil Rights Act and passed the Fourteenth Amendment despite the opponents' concerns. The *City of Boerne* Court also wrote that the Fourteenth Amendment could not have given Congress the power to intrude into traditional areas of state responsibility. Yet the 1866 Civil Rights Act prevented states from determining who may marry, sit on juries, sue, and own property — all traditional state-law determinations — on the basis of race. The 1866 Civil Rights Act thus undermines the Court's conclusion that Congress "rejected" the principles behind Representative Bingham's first draft in its final version of the Fourteenth Amendment. As Bingham himself stated in 1871, the final draft differed from the first draft only in that it "embraces all and more than did the [earlier] proposition," as it gave Congress the same powers and was self-executing as well.¹⁵⁸

This is not to suggest that *City of Boerne* was wrongly decided — after all, Bingham and supporters of the Act and Amendment did quite consciously think they were "remedy[ing] or [preventing] unconstitutional state action."¹⁵⁹ Moreover, *City of Boerne* is probably correct that Congress never thought it had *plenary* power to interpret constitutional protections. In 1866, neither the supporters nor the opponents of the Civil Rights Act and Fourteenth Amendment suggested

¹⁵² *Id.* at 521 (citing various legislators' statements in CONG. GLOBE, 39th Cong., 1st Sess. 1063–95 (1866)).

¹⁵³ *Id.* at 520–24.

¹⁵⁴ *Id.* at 524.

¹⁵⁵ *Id.* at 536.

¹⁵⁶ Harrison, *supra* note 12, at 1390.

¹⁵⁷ *City of Boerne*, 521 U.S. at 520–21.

¹⁵⁸ CONG. GLOBE, 42d Cong., 1st Sess. app. 83 (1871) (statement of Rep. John Bingham).

¹⁵⁹ *City of Boerne*, 521 U.S. at 533.

that Congress had the power to *create* new privileges that no state already protected. Rather, the debate was over whether Congress could take from the states their ability to discriminate along certain lines (such as race) in the provision of certain benefits (such as property ownership). In modern terms, Congress was eliminating any legitimate interest a state might have in discriminating with regard to property ownership, judicial rights, or other state-law functions. Despite language in *City of Boerne* to the contrary, Congress's actions were part of a long tradition of legislatures, not just courts, defining the scope of constitutional protections.

This tradition was not disrupted by the many other Supreme Court decisions that have limited the scope of the Privileges or Immunities Clause over the past 150 years. Ever since the Court's 1873 decision in the *Slaughter-House Cases*, the Court has consistently interpreted the Privileges or Immunities Clause as protecting a very limited class of rights, such as the right to travel.¹⁶⁰ In *Bradwell v. Illinois*,¹⁶¹ for example, Myra Bradwell challenged the state's refusal to grant her a license to practice law because she was a woman.¹⁶² The Court dismissed her argument under the Privileges or Immunities Clause, holding that "the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government."¹⁶³ Similarly, in *Walker v. Sauvinet*,¹⁶⁴ the Court held: "A trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge."¹⁶⁵ In *United States v. Cruikshank*¹⁶⁶ and the *Civil Rights Cases*,¹⁶⁷ the Supreme Court further held that the Fourteenth Amendment "does not authorize Congress to create a code of municipal law for the regulation of private rights."¹⁶⁸ Together, all of these decisions might suggest that Congress does not have the power to, say, extend the state-law definitions of marriage to same-sex couples.

These decisions are all distinguishable, however, because none of them focused on the power Congress exercised with the Civil Rights

¹⁶⁰ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1873); see also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873); *Walker v. Sauvinet*, 92 U.S. 90 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁶¹ 83 U.S. (16 Wall.) 130.

¹⁶² *Id.* at 130.

¹⁶³ *Id.* at 139.

¹⁶⁴ 92 U.S. 90.

¹⁶⁵ *Id.* at 92.

¹⁶⁶ 92 U.S. 542 (1875).

¹⁶⁷ 109 U.S. 3 (1883).

¹⁶⁸ *Id.* at 11; accord *Cruikshank*, 92 U.S. at 552–53.

Act — the power to prohibit states from distributing existing privileges or immunities unequally. In the *Slaughter-House Cases*, for example, a group of butchers presented the Supreme Court with the question of whether a state-sanctioned monopoly violated the Privileges or Immunities Clause.¹⁶⁹ Congress had not acted on the question, however, so the only issue before the Court was whether the clause itself protected the petitioners from the state's legislation.¹⁷⁰ Unsurprisingly, the Court held that the right to be free from monopoly was not a privilege or immunity protected by the Federal Constitution.¹⁷¹ Although scholars¹⁷² and later Justices¹⁷³ have strongly criticized the decision's narrow holding, the decision and its follow-on cases, such as *Bradwell*, did not modify Congress's power to enforce the clause. Similarly, *Cruikshank* and the *Civil Rights Cases* were more concerned with Congress's power to regulate private action than "State action . . . [that] impairs the privileges and immunities of citizens of the United States."¹⁷⁴ Only *City of Boerne* directly limits Congress's power to determine the scope of these privileges and immunities.

* * *

A historically sensitive reading of the Fourteenth Amendment suggests that the Amendment confirmed Congress's power to prohibit state legislatures from discriminating in their distribution of certain privileges, from contractual and property rights to marital, voting, and educational privileges. In the years ahead, Congress may wish to return to the field with a modern Civil Rights Act and attempt to determine what additional attributes of federal citizenship should be treated equally by states. Congress may wish to pass a marriage equality law that would eliminate state-law distinctions along sexual orientation lines. Congress could pass a law eliminating states' interest in discriminating against ex-felons. Or Congress could pass a law prohibiting states from funding schools on the basis of a district's wealth. Many privileges or immunities of federal citizenship have yet to be defined, and it may be up to Congress, not just the courts, to protect them.

¹⁶⁹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 38, 43–44, 65 (1873).

¹⁷⁰ *See id.* at 80.

¹⁷¹ *Id.* at 80–81.

¹⁷² *See, e.g.*, BLACK, *supra* note 13, at 74–75; Amar, *supra* note 13, at 631 & n.178.

¹⁷³ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3060–61 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Saenz v. Roe*, 526 U.S. 489, 521–22 (1999) (Thomas, J., dissenting); *Adamson v. California*, 332 U.S. 46, 75–78 (1947) (Black, J., dissenting).

¹⁷⁴ *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *see also* *United States v. Cruikshank*, 92 U.S. 542, 554 (1875).