

Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony

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"We know that [legislative power] is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."¹

I. INTRODUCTION

For too long, individuals and the courts have treated the Fourteenth Amendment² as the panacea for unfavorable legislation.³ The Reconstruction Congress debated extensively on areas of civil rights, political rights, and social rights: voices were heard, opinions were raised, and compromises were reached.⁴ While many argued for broader coverage, the Fourteenth Amendment was limited in its scope of federal protection. Subsequent judicial use of the amendment has been unfaithful to these limitations.⁵

The central proposition of this article is a critique of substantive equal protection⁶ and substantive due process⁷ jurisprudence following the passage of the Fourteenth

1. *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (Waite, C.J.) (reviewing the constitutionality of a law setting the maximum price charged for storing warehouse grain).

2. U.S. CONST. amend. XIV.

3. *Davidson v. City of New Orleans*, 96 U.S. 97, 104 (1878) (noting the increase in cases involving the Due Process Clause); *see, e.g., Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) ("[M]ore than a century of decisions under this Clause of the Fourteenth Amendment have produced [no useful or consistent] results. They have instead produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass 'arbitrary,' 'illogical,' or 'unreasonable' laws. Except in the area of the law in which the Framers [of the amendment] obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.").

4. *See infra* Part III (discussing the limitations of the Fourteenth Amendment).

5. *See infra* Part IV (illustrating the Court's abuse of the amendment).

6. "[N]or deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (Equal Protection Clause).

7. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (Due Process Clause).

Amendment.⁸ The article argues two positions. First, the amendment was not an open-ended grant for the judiciary. Second, the Supreme Court, particularly the "judicial trusteeship" of Justice Field,⁹ expanded the breadth of Reconstruction legislation, substituting buoyant, natural law¹⁰ principles reflecting latitudinarian ideals which, when operationalized, distort the intended limitations of the amendment.¹¹ The evolution of Justice Field's open-ended interpretations has resulted in a drastic change in federalism and loss of state sovereignty.¹²

8. See *infra* Part IV (arguing that the courts have been unfaithful to a dichotomy of rights set forth in Reconstruction legislation); see, e.g., Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 499-502 (1985) (questioning various interpretations of the Equal Protection Clause and criticizing open-ended theories).

9. One commentator characterized the judicial review of Justice Field as opposite to the self-restraint of Justice Holmes. See Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L. J. 851, 853 (1943). Justice Field served from 1863 to 1897. See PAUL KENS, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* 10 (1997); Robert McCloskey, *Stephen J. Field*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1069 (Leon Friedman & Fred Israel eds., 1980); see also John C. Eastman & Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?*, 6 NEXUS 121 (2001) (outlining key developments of Field's career). See generally *Stephen J. Field as Judge of the Supreme Court of the United States*, in SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD AS LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 39 (Chauncey F. Black & Samuel B. Smith eds., California, S.B. Smith 1881).

10. See Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 348, 393-96 (1995) (suggesting that the use of natural law principles results in "any expansion of the Clause that may strike the Supreme Court's fancy"). See generally George P. Fisher, *Of the Distinction Between Natural and Political Rights*, 23 NEW ENGLANDER AND YALE REV. 1-27 (1864) (discussing the distinctions between political rights and natural rights), available at <http://cdl.library.cornell.edu/cgi-bin/moa/sgml/moa-idx?notisid=ABQ0722-0023-3>; Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 357-58 (1997) (detailing the foundation of natural law and various constitutional provisions).

11. See *infra* Part IV (illustrating the overbreadth of Justice Field's non-majority and later majority opinions); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 9, 44 (1955) (discussing the changes to the original draft to appease conservatives and moderates by avoiding the "latitudinarian" or overly broad constructions).

12. For a good example illustrating the effect of late nineteenth century judicial interpretations of the Fourteenth Amendment, compare THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (5th ed. 1883) (author's last self-edited edition), with THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (8th ed. 1927).

The Civil Rights Act of 1866 (“CRA of 1866”)¹³ built upon the authority of the Thirteenth Amendment¹⁴ which abolished the legal institution of slavery.¹⁵ Legislation following the Civil War promoted equality but also advanced limited intrusion upon state sovereignty.¹⁶ With the CRA of 1866, Congress distinguished between rights considered civil rights and those considered political rights.¹⁷ Senator Lyman Trumbull, a Republican lawyer from Illinois and former justice of the Illinois Supreme Court, introduced the Civil Rights Bill in January of 1866:

The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights.¹⁸

13. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)).

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

14. U.S. CONST. amend. XIII. Members of Congress were concerned about the passage of the Thirteenth Amendment and its intrusion upon state affairs. CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865). Representative Cox asked what would follow the natural direction of the Thirteenth Amendment: “If you begin with this amendment, what laws are to be passed to carry it out? Do you not break down, by this amendment, the distinction between the spheres of the State and national Governments, which is characteristic of our system, as old as our Union?” *Id.* (statement of Rep. Cox). Cox and other members of Congress were worried about excessive centralized power once the function of the national government was expanded, posing the question not as an abolition of slavery but as a question of national regulation of state affairs. *Id.*

15. After passing the Thirteenth Amendment, Congress sought to remedy many of the retaliatory and uneven applications of the law for newly freed slaves in the southern states. *See infra* Part II.B (discussing the end of the Civil War and congressional reaction to the Black Codes); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 271-73 (1997) (commenting on the Black Codes and congressional reaction to the treatment of blacks in post-war South).

16. *See infra* Part III (noting that many legislators differed as to what equality meant when operationalized to invalidate state legislation).

17. *See infra* Part III.

18. CONG. GLOBE, 39th Cong., 1st Sess. 599-600 (1866) (statement of Sen. Trumbull).

The CRA of 1866 sought to elevate all blacks to citizenship, allowing all citizens to enjoy the protected privileges and immunities of national citizenship.¹⁹ Controversy between state sovereignty and congressional power²⁰ complicated the passage of the CRA of 1866.²¹ To constitutionalize the Act, Congress adopted the Fourteenth Amendment.²²

Congress debated the language and scope of the Fourteenth Amendment vociferously.²³ Ultimately, the existing version passed, generally limited to protecting

19. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)) (listing the enumerated provisions in the CRA of 1866); *infra* Part II.B; see also *infra* Part IV.A (reviewing major Court holdings distinguishing between national and state privileges and immunities). See generally Olson, *supra* note 10, at 414-15 (arguing that Bingham and others supported the concept of national citizenship).

20. Senator Saulsbury of Delaware regarded the Civil Rights Bill as an obnoxious bill "fraught with danger," "full of mischief," and out of step with the Thirteenth Amendment, which expressly outlawed the status of slavery. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Sen. Saulsbury). Saulsbury felt the bill was inconsistent with the principle that the states reserved those powers not granted to the federal government. *Id.* at 478. See generally John Choon Yoo, *Federalism and Judicial Review*, in THE TENTH AMENDMENT AND STATE SOVEREIGNTY—CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES 131-32 (Mark R. Killenbeck ed., 2002) (describing the Court's role in preserving state sovereignty in the face of growing national legislation); RAOUL BERGER, *FEDERALISM: THE FOUNDER'S DESIGN* 53-54 (1987) (advancing that states were to retain those unenumerated powers not necessary for national government).

21. See *infra* Part II.C. Representative Hale suggested, when discussing an earlier draft, that the amendment was a departure from the theory that prohibited the federal government from meddling with state affairs. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (statement of Rep. Hale). See also CONG. GLOBE, 39th Cong., 1st Sess. app. at 134 (1866) (statement of Rep. Rogers) ("This is but another attempt to consolidate the power of the States in the Federal Government. It is another step to an imperial despotism. It is but another attempt to blot out from the flag the eleven stars that represent the States of the South and to consolidate in the Federal Government, by the action of Congress, all the powers claimed by the Czar of Russia or the Emperor of the French.").

22. President Andrew Johnson vetoed the CRA of 1866 citing constitutional concerns. See CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866) (Veto Message). During the debate over CRA of 1866, efforts were already under way for an amendment to constitutionalize the Act. *Id.* (arguing that the CRA of 1866 provides safeguards not extended to the white race, and the operation of the bill interferes with the legislation of the states and is yet another step towards centralization). See generally Bickel, *supra* note 11, at 11-29 (detailing the legislative history of the CRA of 1866 and the changes made to gain moderate and conservative support for its adoption). The actual ratification of the Fourteenth Amendment is a point of controversy. If the southern states were allowed representation, the amendment likely would not have been ratified. Congress compelled its ratification by force. See Douglas H. Bryant, *Commentary, Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 563-70 (2002) (describing the irregular nature of the amendment's compelled ratification).

23. See ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS*, at vii (Supp. 1967) (noting the "unreconstructed" Garrett Davis of Kentucky denouncing the Civil Rights Bill as monstrous vis-à-vis radical Republicans urging for outright Negro suffrage); CONG.

a set of privileges and immunities enumerated in the CRA of 1866 and to the concept of securing equal protection of the law.²⁴

While the Constitution, the Court, and the Legislature have not exhaustively defined privileges and immunities or political rights, a distinction is clear between the two sets of rights.²⁵ In general, Reconstruction legislation categorized rights into protected privileges and immunities on the one side and political and social rights on the other.²⁶ To secure the amendment's passage, Congress explicitly excluded controversial political and social rights such as suffrage and school desegregation from congressionally protected civil rights.²⁷

The judiciary has largely ignored this dichotomy.²⁸ Initial judicial interpretation of the Fourteenth Amendment varied from a narrow interpretation in the *Slaughter-House Cases* majority²⁹ to broad interpretations first advocated by Justice Field and brethren in non-majority opinions.³⁰ These broad opinions, eventually reaching a majority of the Court, circumvented the limitations of Reconstruction legislation by manipulating the guiding principles of natural law³¹ and liberty within the language of the Constitution and the amendment.³² Modern Fourteenth Amendment

GLOBE, 39th Cong., 1st Sess. 3038 (1866) (statement of Sen. Yates) (remarking on the moderation of the legislation between radical and conservative).

24. See *infra* Part II.C; see also CONG. GLOBE, 39th Cong., 1st Sess. 1293-94 (1866) (statement of Rep. Shellabarger) (advancing the meaning of the Civil Rights Bill as securing citizenship rights listed in the Civil Rights Bill (not political rights) and stating that these provisions are necessary for the protection of citizens).

25. See *supra* notes 16-18 and accompanying text (distinguishing civil and political rights); *infra* notes 60-63 and accompanying text (noting that the CRA of 1866 pertains to civil rights and not to political rights).

26. See *infra* Part III; CONG. GLOBE, 35th Cong., 2d Sess. 981-85 (1859) (statement of Rep. Bingham) (discussing the admission of Oregon and issues of natural rights and states' rights). For background on Bingham, see Olson, *supra* note 10, at 403-05 (providing a brief biography of Bingham).

27. See *infra* Part III (listing rights left to the states including voting, school and public accommodation desegregation, and interracial marriage). But see *infra* Part V (describing the Warren Court's activism in areas of general constitutional law).

28. See *infra* note 126 and accompanying text (discussing the Court's minimization of federalism concerns with respect to states' rights).

29. 83 U.S. 36, 82 (1873) (ruling narrowly on the distinction between federally protected national privileges and immunities and state privileges and immunities); see *infra* Part IV (Justice Field's expansion of the amendment).

30. See *infra* Part IV (discussing early dissenting opinions by Justice Field which later captured the majority in *Barbier v. Connolly*, 113 U.S. 27 (1885) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

31. See generally Smith, *supra* note 10, at 360-65 (revisiting the background of the Privileges or Immunities Clause).

32. See *infra* Parts IV.C, V (discussing the Court's expansion of the Fourteenth Amendment).

jurisprudence, which traces its origin to historical precedents from Justice Field and Field-like jurisprudence, has not only rewritten the amendment but also the theory of American government.³³

Following this brief introduction, Part II discusses the Civil War setting with an emphasis on introducing Reconstruction legislation. Part III illustrates the intended limitations of the Fourteenth Amendment by illuminating the many compromises in the debates and the explicit changes to the language of the amendment. Additionally, Part III curbs open-ended constructions of the amendment by outlining the contextual background and the need for subsequent legislation to secure various political rights. Part IV demonstrates how Justice Field and brethren fused a substantive reach into both due process and equal protection to bypass the amendment's intended limitations. Part V discusses how controversial cases under Warren and later Courts trace back to Justice Field. Finally, Part VI concludes with implications and recommendations.

II. RECONSTRUCTION LEGISLATION

A. *Civil War and the Black Codes*

The Civil War not only cost hundreds of thousands of lives, but also tore the Union in two.³⁴ The war began in 1861 and ended in 1865.³⁵ Roughly 620,000

33. See *infra* Parts IV-V. Generally, the Fourteenth Amendment constitutionalized the Civil Rights Bill which contained enumerated privileges and immunities. See *infra* Part II.C. For a more radical view, see also Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143 (1992) (contending that the Court has constantly made "tragic mistakes" since it first interpreted the amendment, resulting in adoption of positions that are "undesirable as a matter of constitutional interpretation and social policy").

34. Though slavery was the *de facto* cause of the war, the Lincoln administration insisted that slavery was not the major cause of the Civil War. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1867, at 4-5 (1988). In the South, plantation owners had huge investments in the plantation way of life, and for some, the Civil War was largely an economic concern. See *id.* at 11.

35. The first act of war involved the seizure of federal forts, arsenals, custom houses, and other government property in several southern states. SAMUEL S. COX, UNION-DISUNION-REUNION: THREE DECADES OF FEDERAL LEGISLATION 1855 to 1885, at 146 (Providence, R.I., J.A. & R.A. Reid 1888). Only Fort Sumter in South Carolina remained in Union possession. *Id.* In early January 1861, efforts were made to resupply the fort, but Confederate forces drove the supplies back. *Id.* In April of 1861, Union forces again attempted to resupply the fort. *Id.* at 148. On April 12th, Confederate forces opened fire on Fort Sumter and the Civil War had begun. *Id.* at 149. The war ended on April 19, 1865. *Id.* at 336.

Americans lost their lives during the conflict.³⁶ After the war, Congress sought to reconstruct the states and to assimilate the millions of former slaves.³⁷

The end of the war and the enactment of the Thirteenth Amendment abolished slavery, but the oppressive laws of several states did not fall with the end of slavery.³⁸ Slave Codes did not allow slaves to sue or be sued in court, slaves had no ability to make contracts, and no legal protection of the laws.³⁹ Following the war, several states enacted Black Codes⁴⁰ to regulate post-war race relations.⁴¹ For many, Black Codes offered little improvement.⁴² In Louisiana, for example, the town of Opelousas passed an ordinance stating “no negro or freedman shall be permitted to rent or keep a house within the limits of the town under any circumstances[;] . . . [n]o negro or freedman shall reside within the limits of the town of Opelousas who is not

36. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 854 (1988) (mentioning the total losses at 360,000 Yankees and 260,000 Confederates).

37. See *infra* note 48 and accompanying text (discussing efforts to establish citizenship rights).

38. CONG. GLOBE, 39th Cong., 1st Sess. 3034 (1866) (statement of Sen. Henderson, Republican from Missouri) (commenting on how the former slave was denied the right to hold property, to bear witness, and forced to bear unequal burdens).

39. See *id.* at 322-23 (statement of Sen. Trumbull) (advocating ending slavery by abolishing slave codes which did not allow contracting, purchasing, or holding property); *id.* at 1263 (statement of Rep. Broomall) (articulating that “[f]or thirty years prior to 1860 . . . the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of others 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”).

40. See Saunders, *supra* note 15, at 271-75 (discussing the 39th Congress and the remedy to Black Codes enacted by some states); FONER, *supra* note 34, at 120 (detailing accounts of murders and whippings in post-war Louisiana); CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) (statement of Sen. Wilson of Massachusetts) (articulating that the laws passed by some states were “wholly incompatible with the freedom of freedmen”).

41. See generally THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 10, 61-95 (1965) (suggesting the constitutional conventions convening in 1865 to enact Black Codes were efforts to retain former slaves in inferior positions of semi-slavery). A large portion of these conventions dealt with realigning the secession statutes but several also addressed assimilation of newly freed slaves. *Id.* at 62-63.

42. See *id.* at 66-67 (illustrating how states enacted laws that forced newly freed slaves back to labor with punishments for aiding runaways with food, clothing, or employment). Many states enacted these codes under the belief that former slaves would not work without compulsion. 1237 S. EXEC. DOC. NO. 2, at 16 (1865) (noting the frequency of this belief and coming to the conclusion that it was the common sentiment of the South). Many southern whites also feared mass black insurrection and violence against whites. See James B. Browning, *The North Carolina Black Code*, J. NEGRO HIST. 461, 462-63 (1930) (discussing white southerners’ fear of free black men) available at <http://www.jstor.org> (follow “SEARCH” hyperlink; then follow “Article Locator” hyperlink; search using information from original citation above); AVINS, *supra* note 23, at ii (noting the fear of slave revolts).

in the regular service of some white person or former owner.’⁴³ Major General Carl Schurz reported the poor condition of the South to President Andrew Johnson and Congress in December of 1865.⁴⁴ The Schurz Report detailed how freedmen were forced to occupy their previous roles as servants and those attempting to leave the plantations were usually met with violence.⁴⁵ Accounts indicate that former slaves who did not subject themselves to the will of their former master were harassed, beaten, and sometimes killed.⁴⁶ While some debate exists regarding the scope and veracity of the violence in the South,⁴⁷ the message conveyed persuaded Congress to act to secure civil rights for newly freed slaves.

B. *Establishing Citizenship Rights: The Civil Rights Act of 1866*

As an immediate effort to halt the Black Codes and oppressive conditions in the post-war South, Congress passed the CRA of 1866 to supplement the Thirteenth Amendment.⁴⁸ The CRA of 1866 introduced one of the first comprehensive post-war legislative efforts at assimilation.⁴⁹ The CRA of 1866 established citizenship rights for newly freed slaves and colored freemen.⁵⁰ To achieve this goal, the CRA of 1866

43. 1237 S. EXEC. DOC. NO. 2, at 23-24 (1865) (remarking that in the South, many felt that there were no other valid employment objectives other than the regular service of a white man); *see also* WILSON, *supra* note 41, at 68 (describing new vagrancy laws which applied to idle blacks and white persons associating with them).

44. *See generally* 1237 S. EXEC. DOC. NO. 2 (1865) (describing much tension and violence in post-war relations and listing several first and second-hand accounts of southern injustice and ill-will towards blacks).

45. *Id.* at 17.

46. FONER, *supra* note 34, at 121 (adding that Northerners who intervened on behalf of the freedmen were also confronted with animosity).

47. *See* Bickel, *supra* note 11, at 13-15 (questioning the extent and veracity of the reports on Black Code violence in the South).

48. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958 (1995) (describing the passage of the bill under the authority of the Thirteenth Amendment and noting its effort to counter the Black Codes; but also indicating that many had doubts as to its constitutionality from the beginning); CONG. GLOBE, 39th Cong., 1st Sess. 476-77 (1866) (statement of Sen. Saulsbury) (expressing disbelief that the Civil Rights Bill extends naturally under the jurisdiction of the Thirteenth Amendment); *id.* at 650-51 (statement of Rep. Grinnell) (discussing the barbarous laws where a white man can enter the state but a black person who enters the state is a felon; a white man can own a gun, but a black man cannot; a white man raping a Negro woman is not an offense, a Negro raping a white woman is punishable by death). The CRA of 1866 developed from efforts to expand the Freedmen's Bureau which began in the last year of the war to regulate issues involving newly freed slaves. CONG. GLOBE, 38th Cong., 2d Sess. 743, 766-67, 989 (1865).

49. Passed over Presidential veto on April 9, 1866. *See infra* note 66 and accompanying text.

50. *See* Civil Rights Act of 1866 ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C.

and subsequent legislation sought to secure federally protected national privileges and immunities and expressly overturn the *Dred Scott v. Sanford*⁵¹ decision of 1857.⁵² Until this time, persons of African descent had limitations on their basic freedom to travel and work.⁵³ The CRA of 1866 gave all citizens the rights to buy and sell land, hold and inherit property, and to form contracts.⁵⁴ The CRA of 1866 also addressed

§ 1981 (2000)); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1390 (1992) (reciting that the CRA of 1866 makes newly freed slaves and those of African descent citizens of the United States); see also Alfred Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 ARIZ. L. REV. 236, 237-39 (1966) (discussing the development of privileges and immunities protection in the post-war South). See generally Smith, *supra* note 10, at 359-65 (revisiting the background of the Privileges or Immunities Clause); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 191 (1951) (citing Trumbull's natural liberty as the source of the Civil Rights Bill).

51. *Dred Scott*, 60 U.S. (19 How.) 393, 403-06 (1857) (limiting construction of citizenship and holding that States could not invest citizenship in descendants of slaves brought to the states under the Federal Constitution where the Constitution did not intend to embrace this group).

52. *E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 95 (1873) (Field, J., dissenting) (noting the Fourteenth Amendment as rectifying the *Dred Scott* decision: "The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependant upon his citizenship of any State.").

53. See RAUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 34-35 (2d ed. 1997) (suggesting that the purpose of the Bill was to destroy the discrimination which did not allow a Negro to travel freely). See, *e.g.*, Avins, *supra* note 50, at 237-39 (commenting on the controversy of sending Representative Samuel Hoar into South Carolina in 1844 to test the southern prohibitions of jailing Negro seamen under a legal privileges and immunities theory). Cf. CONG. GLOBE, 31st Cong., 1st Sess. app. at 1664 (1850) (statement of Sen. Douglas) (discussing Illinois and the right for Negroes to travel and immigrate to the state). See generally *Dred Scott*, 60 U.S. (19 How.) 393 (addressing the question of whether descendants of slaves were citizens); CONG. GLOBE, 39th Cong., 1st Sess. 1116-18 (1866) (statement of Rep. Wilson) (discussing the naturalization of citizens and the *Dred Scott* case but holding that citizenship did not contain political rights); Olson, *supra* note 10, at 362-69 (detailing the background of the abolitionist movement and the privileges and immunities controversy in Reconstruction legislation).

54. Civil Rights Act of 1866 § 1; see, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. Wilson) (referring to preventing the kind of law in Louisiana in which "any freedman who makes a contract . . . is perfectly at the control and will of the man with whom he makes the contract. If that man is a bad man, at the end of the year the freedman will not receive a farthing for his year's labor. He can trump up charges to cheat and defraud the laborer."). In 1861, Judge Stone of the Alabama Supreme Court wrote:

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

the fact that the Civil War left many citizens without the protection of the law.⁵⁵ The civil rights protected by the CRA of 1866 were considered fundamental and necessary for national citizenship.⁵⁶

The passage of the CRA of 1866 reflected the controversy of the era. After extensive debate, Congress limited the coverage of the CRA of 1866 to move away from radical positions such as universal suffrage to gain the needed votes for the legislation to pass.⁵⁷ In fact, Representative Bingham, a Republican lawyer from Ohio and one of the principal drafters of the Fourteenth Amendment, advocated for a limitation of the first draft of the CRA of 1866 by striking the words providing no discrimination in "civil rights and immunities" as being too broad.⁵⁸ Representative James Wilson, a Republican lawyer from Iowa, was often opposed to the more radical Bingham, however, they both agreed on the limitations of "civil rights and immunities" as used in the CRA of 1866.⁵⁹ "What do these terms [civil rights and immunities] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they so be construed."⁶⁰ Trumbull, author of the CRA of 1866, responded to a request to define

Martin v. Reed, 37 Ala. 198, 199-200 (1861).

55. See *infra* Part II.C.2 (expanding the historical meaning attributed to the term "protection").

56. See CONG. GLOBE, 39th Cong., 1st Sess. 1757-58 (1866) (statement of Sen. Trumbull).

57. See Bickel, *supra* note 11, at 7, 12-13, 15-16 (advancing that Congress wanted a narrow construction of civil rights so as not to permit jury or school desegregation); McConnell, *supra* note 48, at 959 (discussing the controversy of the "no discrimination" provision and the belief of some that outlawing segregated schools was "monstrous"). See generally Kenyon D. Bunch, *The Original Understanding of The Privileges and Immunities Clause: Michael Perry's Justification For Judicial Activism or Robert Bork's Constitutional Inkblot?*, 10 SETON HALL CONST. L.J. 321, 326-27 (2000) (stating that the framers intended a narrower interpretation of the amendment and this runs contrary to many activist positions with expansive interpretations of privileges and immunities).

58. See *infra* Part III.D.2 (discussing several revisions to broad language in the original drafts); see also CONG. GLOBE, 39th Cong., 1st Sess. 1089-94, 1290-92 (1866) (statement of Rep. Bingham). While discussing an early draft, Bingham expressed his desire to have all the protections of the Bill of Rights enforced for the citizens but conceded:

[T]he Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials . . .

Id. at 1291.

59. Bingham objected to the Civil Rights Bill as oppressive and objectionable and moved to strike the phrase "there shall be no discrimination in civil rights or immunities among citizens." CONG. GLOBE, 39th Cong., 1st Sess. 1290-91 (1866). Although Bingham objected to language in the bill, Bingham felt that civil rights, though conceding that many deem civil rights distinct from political rights, should be read to include political rights. *Id.* at 1291. But see CONG. GLOBE, 39th Cong., 2d Sess. 450, 454 (1866) (Bingham suggesting that voting is a state political privilege).

60. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson). Wilson

“civil rights” by answering that “civil rights” under the bill include “the right to make and enforce contracts, to sue and be sued, . . . to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property”⁶¹ After describing these civil rights, Trumbull was further asked whether the bill would go farther than protecting life, liberty, and the protection of the courts, specifically whether the bill would reach political rights.⁶² Trumbull responded that “this bill has nothing to do with the political rights or the status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man.”⁶³

During legislative debates, many members of Congress questioned the constitutionality of the CRA of 1866.⁶⁴ In April of 1866, President Andrew Johnson vetoed the Act as unconstitutional.⁶⁵ Determined to pass civil rights legislation, Congress overrode the veto⁶⁶ and sought to amend the Constitution.⁶⁷

C. Constitutionalizing the CRA of 1866: The Fourteenth Amendment

The Fourteenth Amendment provides a constitutional basis for the Act.⁶⁸ Generally, the amendment covers the same privileges and immunities as the CRA of

goes on to state that voting, sitting on juries, and the right to school desegregation are not civil rights. He defined civil rights as the rights to personal security, personal liberty, and the right to acquire property.

61. *Id.* at 476 (statement of Sen. Trumbull).

62. *Id.* (statement of Sen. McDougall) (noting the civil right/political right distinction); *see also id.* at 1832 (statement of Rep. Lawrence) (distinguishing political and civil rights); *id.* at 1293 (statement of Rep. Shellabarger) (noting that political rights were left to the states).

63. *Id.* at 476 (statement of Sen. Trumbull).

64. *See* Bickel, *supra* note 11, at 22-24 (articulating Bingham’s objection to the constitutionality of the Civil Rights Bill); CONG. GLOBE, 39th Cong., 1st Sess. 1295-96 (1866) (statement of Rep. Latham) (questioning the ability of Congress to legislate for civil rights against the states under the Tenth Amendment); *see also* Bowlin v. Commonwealth, 65 Ky. (2 Bush) 5, 6-9 (1867) (citing constitutional concerns over the CRA of 1866). *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 1268 (1866) (statement of Rep. Kerr) (commenting on the logical results of breaking down all abilities of state legislative self-defense).

65. CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866) (Veto Message) *reprinted in* ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS’ DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 193-96 (1967).

66. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866) (voting to override the President’s Veto).

67. *See id.* at 2079-81 (returning to debate upon an early draft of the Fourteenth Amendment, introduced *id.* at 1033-34).

68. *See, e.g., id.* at 2462 (statement of Rep. Garfield) (noting his approval of Section One and commenting that the Civil Rights Bill is currently “a part of the law of the land,” but will fail to be a part of the law of the land as a simple statute unless fixed “in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it”); *see also id.* at 2465 (statement of Rep. Thayer) (stating the amendment brings the Civil Rights Bill

1866.⁶⁹ The amendment gave Congress power to enforce violations of protected civil rights by the states.⁷⁰ In the amendment's final form, states were to remain regulators of life, liberty, and property.⁷¹

into the Constitution to secure the necessary protection of equal administration of the law); *id.* at 2498 (statement of Rep. Broomall) (suggesting that all who voted for the Civil Rights Bill will vote for the amendment in this shape and the reason we need to vote for the amendment which is already enacted as a law is because of the constitutional problems with the law); Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y. L. F. 385, 398 (1966) (stating that Rep. Bingham was opposed to the fact that the Civil Rights Bill only affected protection of citizens and not other persons).

69. See *infra* notes 95-105 and accompanying text; CONG. GLOBE, 39th Cong., 1st Sess., 2498 (1866) (statement of Rep. Broomall) (describing the amendment as different from the CRA only in that a mere majority will not be able to disturb it); *id.* at 2883 (statement of Rep. Latham) (reading the first section as preventing discrimination in "civil rights" as distinguished from political rights and suggesting that the Civil Rights Bill "covers exactly the same ground as this amendment"); CONG. GLOBE, 42d Cong., 1st Sess. 575-77 (1871) (statement of Sen. Trumbull) (finding that privileges and immunities are of a civil character and not a political character, stating that the amendment's first section is a "copy of the civil rights act," and remarking that the Privileges or Immunities Clause of the Fourteenth Amendment secures the same privileges and immunities as found in the Constitution); *id.* app. at 87 (1871) (statement of Rep. Storm) ("[T]he first clause of the fourteenth amendment enacted nothing new. As the gentleman from Ohio [Bingham] said, it was simply the civil rights bill reenacted through an abundance of caution. The first clause of the fourteenth amendment, in view of the previous provisions of the Constitution and the decisions of the courts under those provisions, was merely a piece of tautology, adopted from superabundant caution. The privileges and immunities of citizens of the United States had already been secured by article four, section two, clause one of the Constitution . . .").

The amendment did not change the political/civil rights dichotomy of the CRA of 1866. See CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson) (finding that the amendment protects civil rights and has "nothing to do with subjects submitted to the control of the several States"); *Slaughter-House Cases*, 83 U.S. 36, 96 (1873) (Field, J., dissenting) (finding that the amendment did not confer any new privileges or immunities but that existing privileges and immunities will be enforced against the state); see also Maltz, *supra* note 8, at 538-39 (commenting that Republicans meant for the Privileges or Immunities Clause to be fixed and that suffrage was not one of these privileges and immunities). See generally BERGER, *supra* note 53, at 44-51.

70. See *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (Strong, J.) ("It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged [by the amendment;] Congress is authorized to *enforce* the prohibitions by appropriate legislation."); *infra* Part III.A (noting that the amendment was not intended to be self-executing). But see Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 462 (2004) (reviewing the constraints on state violations of fundamental privileges and immunities and suggesting that the Fourteenth Amendment's privileges and immunities protection is broader than the CRA of 1866's privileges and immunities protection). See generally BERGER, *supra* note 53, at 245-52 (commenting on the use of the Court and not Congress to enforce Section One and adding that the framers of the amendment were distrustful of the Court).

71. See *infra* Part III.

Bingham, described by some as the most liberal Republican,⁷² is generally considered the author of the Fourteenth Amendment.⁷³ Bingham articulated that the amendment was designed for the protection of Americans of African descent and loyal white citizens.⁷⁴ Bingham also quipped that a broader construction of the amendment should apply to states that have laws “that are in direct violation of every principle of our Constitution.”⁷⁵ Representative Hale, a Republican lawyer from New York, took issue with Bingham over the extension of the amendment to give Congress the power to “legislate upon all the matters pertaining to the life, liberty, and property” in the several states, posing the question where would federal power end.⁷⁶

Joining Bingham and Hale, other members of the 39th Congress were also worried about encroaching upon states’ rights and disrupting the existing balance of federalism.⁷⁷ Some were worried that a broad sweep in post-war congressional action would eradicate the concinnity between sovereign state government and limited national government.⁷⁸ Framers of the amendment changed the language in

72. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (statement of Rep. Rogers).

73. *See* Bickel, *supra* note 11, at 30 (detailing Bingham’s role in the amendment as author and manager of the debate).

74. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Bingham) (debating with Rep. Hale on the extent of the amendment).

75. *Id.*

76. *Id.* (statement of Rep. Hale). Years earlier, Bingham advocated for a limited application of civil rights legislation in debates concerning the admission of Oregon. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham).

All free persons, then, born and domiciled in any State of the Union, are citizens of the United States; and, although not equal in respect of political rights, are equal in respect of natural rights. Allow me, sir, to disarm prejudice and silence the demagogue cry of “negro suffrage,” and “negro political equality,” by saying, that no sane man ever seriously proposed political equality to all, for the reason that it is impossible. Political rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of the qualified electors of any State, and by the minority only nominally.

Id. at 985; *see also* CONG. GLOBE, 37th Cong., 2d Sess. 1639-40 (1862) (statement of Rep. Bingham) (discussing the emancipation of the slaves and the importance of the Due Process Clause in protecting life, liberty, and property; and observing that the laws of Ohio fully protect “the right of every citizen,” man, woman, child, white or black—“that is that they shall not be deprived of life, or liberty, or property, without due process of law”); Maltz, *supra* note 8, at 514.

77. *See, e.g.*, Maltz, *supra* note 8, at 502-03 (summarizing that congressional Reconstruction debates indicate that it was not the intent to change federalism and that open-ended interpretation of equal protection would drastically change federalism); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Hale) (advocating that protection of individual rights is found within a decentralized government).

78. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham) (suggesting striking the language that there “shall be no discrimination in civil rights or immunities” for oppressive and unconstitutional implications with respect to the Tenth Amendment, and arguing that a loose extension of civil rights might include political rights and that generally every state makes “some discrimination on account of race and color”); *see also infra* Part III.D.2 (discussing

the initial draft to reflect this concern.⁷⁹ The evolution of the amendment illustrates the moderation of the more radical proponents.⁸⁰ While a few of the original framers of the Fourteenth Amendment hoped to secure school desegregation and universal suffrage with the amendment, those intentions were not shared by all and were not promulgated into the amendment.⁸¹

Much of the initial congressional debate surrounding the Fourteenth Amendment focused on the interpretation of the Privileges or Immunities and Equal Protection Clauses.⁸²

1. Privileges and Immunities

The Fourteenth Amendment is based largely on the Civil Rights Act of 1866 which enumerated the supervised citizenship privileges and immunities protected under the Act.⁸³ The privileges and immunities enumerated in the CRA of 1866 and

the revisions of the CRA and Fourteenth Amendment).

79. See *infra* Part III.D.2; CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (statement of Rep. Hale) (conveying disapproval that a provision such as this (reference to first draft of Amendment) will abolish all state legislation in favor of congressional legislation and that this notion is far from the framers' intention despite the amendment taking its language directly from the Constitution); *id.* at 2538 (statement of Rep. Rogers) (sarcastically equating the amendment as meaning that the states were prevented from refusing "anything to anybody").

80. See CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866) (statement of Sen. Yates) ("While gentlemen upon the other side of the Chamber are opposed to these measures as too radical, I am opposed to them, so far as I might present points of opposition, because they are not radical enough. At all events, therefore, we have the medium between extremes; we have moderation. If we do not meet the views of the Radicals on the one hand, nor the views of the pro-slavery Democracy on the other, we at all events have the medium, the moderation which has been agreed upon by the collective wisdom of the American Senate.").

81. See Bickel, *supra* note 11, at 61-62 (stating that anything beyond the Civil Rights Act of 1866 would not have carried the 39th Congress); BERGER, *supra* note 53, at 50-51 (criticizing several commentators for proposing that the amendment did more than constitutionalize the CRA of 1866). See generally McConnell, *supra* note 48, at 979-80, 987 (discussing in detail the school desegregation provision in the Civil Rights Act of 1875); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (refuting criticisms of the theory of litigating on original intentions).

82. See *infra* Parts III-IV (detailing the judicial expansion of the amendment). The controversy surrounding the Due Process Clause was largely a judicial creation. The actual phrase "due process" was not part of the original language, CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866), and came about in efforts to narrow the amendment's initial overbreadth, *infra* Part III.D.2. When asked what "due process" meant, Bingham casually passed it off as decided by the courts long ago. See also *infra* notes 324-325, 335-336 and accompanying text.

83. See *supra* notes 68-69 and accompanying text; *infra* notes 95-105 and accompanying text; see also CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (equating the Privileges or Immunities Clause, citizenship, and civil rights as fundamental rights to acquire property and protection of that property in the same manner as the property of other citizens of the

referenced in the Fourteenth Amendment are directly related to the privileges and immunities of the Comity Clause.⁸⁴

The privileges and immunities provision is simple, but its interpretation has been marred with complexity. The original intent was that privileges and immunities would be denied by rival states.⁸⁵ As applied to the post-slavery controversy, however, the clause addressed the concern that national privileges and immunities would be denied by one's own state.⁸⁶ In a late eighteenth century case, *Campbell v.*

state without extra taxes or extra burdens). Rep. Samuel Shellabarger, a lawyer from Ohio, stated that the CRA of 1866 was "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 distinction based on race or former condition in slavery. If it undertook, for example, to say that a married woman or child under age of intelligence should testify, that would invade the rights reserved to the State. . . . It permits the States to say that the wife may not testify, sue, or contract. . . . Its whole effect is to require that whatever rights as to each of these enumerated civil (not political) matters the States may confer upon one race or color of the citizens shall be held by all races in equality" and to secure "equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races." *Id.* at 1293 (statement of Rep. Shellabarger); *see also id.* at 1757 (statement of Sen. Trumbull) (discussing the President's Veto Message and reaffirming the civil right/political right distinction).

84. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). *See generally* CONG. GLOBE, 42d Cong., 1st Sess. app. at 83-85 (1871) (statement of Rep. Bingham) (explaining the language change from the Civil Rights Act to the amendment as an effort to use language from the Constitution); Smith, *supra* note 10, at 359-73 (discussing the history and natural law foundation of the Privileges or Immunities Clause). The immediate predecessor to the Privileges and Immunities Clause from Article IV, § 2 is Article IV of the Articles of Confederation.

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

ARTICLES OF CONFEDERATION art. IV (1777).

85. *See* CHARLES WARREN, *THE SUPREME COURT AND SOVEREIGN STATES* 9-10 (1924) (commenting that the differences between the states in 1787 in religious, social, and economic beliefs was as different as the countries of Europe following World War I and this was the cause of hostile legislation). Conflicts between Vermont and New York nearly rose to the point of war in 1784. *Id.* at 11. In 1850, Missouri and Iowa went as far as to call up troops over a boundary dispute before the Court settled the issue. *Id.* at 41.

86. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (discussing the removal of laws prohibiting colored persons from traveling to the state or residing in that state without a pass, or in one case from preaching the gospel); *Slaughter-House Cases*, 83 U.S.

Morris, Justice Chase⁸⁷ referred to the interpretation of this provision as not perfect but able to be ascertained with some satisfaction.⁸⁸ Chase ruled against a broader interpretation of the clause, construing the meaning of the clause as limited without the intention of reducing the states into one common mass.⁸⁹

[I]t never could have been the intention of the framers of our national government, to melt down the states into one common mass; to put the citizens of each in the exact same situation, and confer on them equal rights: this principle would have been wholly destructive of the state governments.⁹⁰

Justice Bushrod Washington, nephew of George Washington, discussed the clause while riding circuit in the case *Corfield v. Coryell*.⁹¹ The court again limited the construction of the clause but stated that an absolute definition would be difficult to achieve.⁹² The court in *Corfield* limited the reach of the clause to those

(16 Wall.) 36, 79-80 (1873) (constructing privileges and immunities under the Federal Constitution as including habeas corpus and the right to protection of life, liberty, and property); see also CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866) (statement of Rep. Bingham) (discussing the Articles of Confederation and attempts to restrict privileges and immunities to free white citizens).

87. Justice Chase was born in Maryland and held office in Maryland from the time he was twenty years old. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLLIVER ELLSWORTH* 96 (1995). Chase initially opposed the Constitution only later to be more sympathetic to the design of a federal government. *Id.* at 96-97. President Washington nominated Chase to the Court in 1796. *Id.* at 69.

88. *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), available at 1797 WL 430, at *12 (stating that the provisions can be ascertained satisfactorily as enabling the acquisition of real property in any of the states, allowing for the general defense of the union, and promoting the general welfare).

89. *Id.* (“[A] particular and limited operation is to be given to these words, and not a full and comprehensive one,” allowing basic rights such as holding property and protection of property but distinguishing political rights such as the right to election or to hold or run for office.).

90. *Id.* at *19.

91. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823) (No. 3230). Justice Bushrod Washington’s 1823 opinion in *Corfield v. Coryell* is frequently cited by commentators as an early interpretation of privileges and immunities. See BERGER, *supra* note 53, at 39-42 (noting some uses and misuses by the *Corfield* Court); Barnett, *supra* note 70, at 459-64 (discussing congressional history of “privileges and immunities” in the Fourteenth Amendment and various constructions of Section One as open-ended).

92. See *Corfield*, 6 F. Cas. at 552 (articulating the spirit of the clause). Justice Bushrod Washington noted:

We feel no hesitation in confining these expressions to 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

fundamental principles underlying the national privileges and immunities of general citizenship.⁹³ Reconstruction legislation followed this limited theory of the Privileges and Immunities Clause of Article IV and did not intend to create new congressionally protected federal rights but instead intended to protect citizenship rights already existing under the clause.⁹⁴ Reconstructionists felt the federally protected privileges and immunities under the amendment were to be limited to those discussed in the CRA of 1866 and those existing prior to the war.⁹⁵ Representative Bingham stated:

The amendment is exactly in the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States. It is not to transfer the laws of one State to another State at all. It is to secure to the citizen of each State all the privileges and immunities of citizens of the United States in the several States.⁹⁶

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.

Id. at 551-52. See generally Olson, *supra* note 10, at 365-67 (discussing the connection between the Comity Clause, the *Corfield* Court, and national citizenship); McCready v. Virginia, 94 U.S. 391, 395-96 (1877) (finding that the Privileges and Immunities Clause of Article IV, Section 2 did not vest in citizens of other states the right to fish or plant oysters in Virginia).

93. *Corfield*, 6 F. Cas. at 551; see also CONG. GLOBE, 42d Cong., 1st Sess. app. at 47-48 (1871) (statement of Rep. Kerr) (arguing against expansive interpretation beyond national citizenship privileges and immunities and not, as the popular mind connotes, the entire catalogue of human rights or privileges and immunities of the state). But cf. Chemerinsky, *supra* note 33, at 1143 (“Fundamental freedoms, such as the rights to marry, procreate, purchase and use contraceptives, obtain abortions and raise children, are protected as part of the liberty safeguarded by the Due Process Clause.”).

94. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1875) (Waite, C.J.) (“The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.”); see also CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) (urging that the bill “merely affirms existing law” and “establish[es] no new right [and] declar[es] no new principle,” and that “[i]t is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen”).

95. See *supra* note 69 and accompanying text; see also CONG. GLOBE, 39th Cong., 1st Sess. 1294-95 (1866) (statement of Rep. Wilson) (equating protection of life, liberty, and property with the enumerated terms of the CRA of 1866); *id.* at 1117-18 (discussing the limitations of civil rights and immunities as not including political rights and stating if the states would follow the Constitution’s Privileges and Immunities Clause following the *Corfield* interpretation, then we would not need the Civil Rights Bill in the first place). But see, e.g., Bunch, *supra* note 57, at 344-45, 47 (expressing frustration at the expansive interpretations of the *Corfield* Court privileges and immunities opinion).

96. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Bingham).

Representative Hotchkiss, a Republican lawyer from New York, followed Bingham:

Constitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them

The first part of this amendment, to which the gentleman [Bingham] alludes, is precisely like the present Constitution; it confers no additional powers.⁹⁷

Representative Samuel Shellabarger, a Republican lawyer from Ohio:

[The CRA of 1866 was] 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 distinction based on race or former condition in slavery.

If it undertook, for example, to say that a married woman or child under age of intelligence should testify, that would invade the rights reserved to the State. . . . It permits the States to say that the wife may not testify, sue, or contract. . . . Its whole effect is to require that whatever rights as to each of these enumerated civil (not political) matters the States may confer upon one race or color of the citizens shall be held by all races in equality . . . [and to secure] equality of protection in those *enumerated civil rights* which the States may deem proper to confer upon any races.⁹⁸

The original concept of protected privileges and immunities did not contain political rights, such as the right to vote,⁹⁹ or other forms of class legislation left to the

97. *Id.* (statement of Rep. Hotchkiss).

98. *Id.* at 1293 (statement of Rep. Shellabarger) (emphasis added).

99. *See id.* at 1291 (statement of Rep. Bingham) (questioning the ability to define terms such as “civil” and “political” and that if “civil” is taken broadly, the enforcement provision will deeply affect states where nearly all states have some form of discrimination). Some commentators suggest that there is “indeterminacy” concerning suffrage under the Fourteenth Amendment. *See, e.g.,* Bunch, *supra* note 57, at 347-50 (discussing various commentators’ views of the amendment). Trumbull, the author of the Civil Rights Act and a moderate Republican from Illinois, reiterated that suffrage rights were not within the Civil Rights Act: “I have not thought so, because I have never thought suffrage any more necessary to the liberty of a freedman than of a non-voting white, whether child or female.” CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866) (statement of Sen. Trumbull); *cf. id.* at 2539-40 (statement of Rep. Farnsworth) (wishing for more under the amendment but conceding that suffrage will not secure the needed two-thirds vote but emphasizing his support of Negro suffrage all the same). In 1859, Bingham did not believe universal suffrage was a natural right but instead was to be left to the states. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. Bingham). Later, Bingham changed his position to equivocate that suffrage may be considered a privilege under privileges and immunities, and that Section One might protect suffrage, though admitting the Second Section “excludes the conclusion that by the first section suffrage is subjected to congressional law.” CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham); *see also id.* at 3039 (statement of Sen. Howard) (“We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States.

states and not within congressional oversight including school desegregation,¹⁰⁰ public accommodations desegregation,¹⁰¹ miscegenation,¹⁰² and jury laws.¹⁰³

Representative William Lawrence, a Republican lawyer from Ohio, summed up the inclusion of privileges and immunities as follows:

The Constitution does not define what these privileges and immunities are; but all privileges and immunities are of two kinds, to wit, those which I have shown to be inherent in every citizen of the United States, and such others as may be conferred by local law and pertain only to the citizen of the State.

But conceding, as the courts have held, that the privileges referred to in the Constitution are such as are fundamental civil rights, not political rights nor those dependent on local law, then to what extent shall they be enjoyed by a citizen of one State removing into another? Not simply so far as they may be enjoyed by "some portion" or "some description" of citizens, but "all the privileges and immunities of citizens;" that is, all citizens under the like circumstances.

....

This clause of the Constitution therefore recognizes but one kind of fundamental civil privileges equal for all citizens. No sophistry can change it, no logic destroy its force. There it stands, the palladium of equal fundamental civil rights for all citizens.¹⁰⁴

It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States.").

100. See CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) ("Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights or immunities.").

101. See *infra* Part III.D.3 (discussing Civil Rights Act of 1875).

102. See CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull); see also *id.* app. at 134 (statement of Rep. Rogers) (emphasizing that states should regulate political rights of suffrage and interracial marriage).

103. See *id.* at 1117 (statement of Rep. Wilson); *id.* at 599-600 (statement of Sen. Trumbull) (intending for the civil rights provision to guarantee "every person of every color the same civil rights").

104. *Id.* at 1836 (statement of Rep. Lawrence); see also *id.* at 2462 (statement of Rep. Garfield) (protecting the CRA of 1866 from a simple majority vote with the adoption of the amendment).

The national privileges and immunities congressionally protected under the Fourteenth Amendment were limited and not intended to be substantive vehicles for new political or social rights.¹⁰⁵

2. Equal Protection Clause

The congressional meaning of "equal protection" was also limited in Reconstruction-era legislation.¹⁰⁶ The distinction between protection of equal laws,

105. Chief Justice Waite, cognizant of the limited notion of "privileges and immunities," articulated this understanding in 1875 by refusing to craft the language of the amendment to invalidate a state constitution granting suffrage to male citizens. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177-78 (1875) (refusing to create new privileges and immunities under the Fourteenth Amendment). Justice Waite held: "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." *Id.* at 171. Trumbull reaffirmed this understanding in a post-ratification debate, stating that: "The fourteenth amendment has not extended the rights and privileges of citizenship one iota. They are right where they always were." CONG. GLOBE, 42d Cong., 1st Sess. 576-77 (1871) (statement of Sen. Trumbull).

106. See Bickel, *supra* note 11, at 56-58 (discussing the limited sense of equal protection); Harrison, *supra* note 50, at 1433-34 (discussing the orthodox view of equal protection and challenging a substantive interpretation into equal government actions). See generally CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statements of Rep. Moulton and Rep. Thornton) (debating whether interracial marriage is a civil right). Trumbull commented:

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

Id. at 322 (statement of Sen. Trumbull). Responding to a question about intermarriage laws, Trumbull stated:

[The object] is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa*? I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races.

Id. (discussing the Freedman's Bureau Bill but commenting that this is akin to the CRA of 1866). But see *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964) (holding "[b]ecause the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold [the statute] invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment"), *overruling* *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (Field, J.) (refusing to invalidate interracial marriage law as a violation of the Equal Protection Clause). See generally Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966) (criticizing the Warren Court's reversal of state law covering interracial marriage).

equal treatment, and equal protection of the law is not always clear.¹⁰⁷ Alfred Avins, noted for scholarly work on Reconstruction legislation, discussed the distinctions and specific rephrasing of “equal protection of the laws” throughout the various drafts of the Fourteenth Amendment.¹⁰⁸ The word “protection,” in context, did not refer to a broad substantive application, but rather literally to protection¹⁰⁹ or fair administration of the laws of the states.¹¹⁰ Representative Shellabarger of the 39th Congress recited Section One of the Fourteenth Amendment as securing to all citizens “equality of protection in those enumerated civil rights.”¹¹¹ The CRA remedied the Black Codes by protecting enumerated civil rights, enforcing the equal application of laws, and providing for equal punishments and burdens.¹¹² The main

107. See Avins, *supra* note 68, at 386 (remarking on the various uses of the term “equal” in the Equal Protection Clause as eventually resulting in the Court’s reasonable classification test). See generally Avins, *supra* note 50, at 236-52 (detailing the orthodox view of equal protection and describing several supporting uses of “protection”); Richard S. Kay, *The Equal Protection Clause in the Supreme Court 1873-1903*, 29 BUFF. L. REV. 667 (1980) (reviewing equal protection adjudication after the passage of the amendment); CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (statements of Rep. Bingham and Rep. Hale) (discussing initial views on the introduction of the first draft of the amendment).

108. Avins, *supra* note 68, at 390 (quoting Bingham’s reserved concept of equality with respect to government protection under the law as only referring to those universal and indispensable rights); Avins, *supra* note 106, at 1253-55 (illustrating the intended limitation of the amendment’s coverage concerning state regulation of miscegenation).

109. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (“Government which has the exclusive right to confer citizenship, and which is entitled to demand service and allegiance, which is supreme over that due to any State, may, nay, must, protect those citizens in those rights . . . to contract, sue, testify, [and] inherit . . .”); see also *Munn v. Illinois*, 94 U.S. 113, 124 (1877) (articulating the role of becoming a member of society and parting with some rights and retaining some rights). See generally Avins, *supra* note 50 (outlining key developments in the concept of protection before and after the Civil War).

110. See generally Avins, *supra* note 68 (exhuming the use of “protection” to foster a more accurate interpretation of the Equal Protection Clause); Maltz, *supra* note 8, at 507-22 (tracing the origin of the concept of protection and illustrating its usage in the amendment); CONG. GLOBE 39th Cong., 1st Sess. 2539-40 (1866) (statement of Rep. Farnsworth) (supporting the amendment with some reservation, finding the Equal Protection Clause as surplusage to the rest of Section One); CONG. GLOBE, 42d Cong., 1st Sess. 608 (1871) (statement of Sen. Pool) (“The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. Rights conferred by laws are worthless unless the laws be executed. The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.”); Rep. Kerr, also a member of the 39th Congress, described the addition of the “Equal Protection Clause” during later enforcement debates as involving “no grant of power[, and being] simply declaratory of the preexisting law of the country, the preexisting, fundamental, constitutional law declared by all the courts and tribunals of the entire country.” *Id.* app. at 48-49 (statement of Rep. Kerr).

111. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger).

112. See *id.* at 1292 (statement of Rep. Bingham) (discussing the need for greater coverage

thrust of “protection” in civil rights legislation was to cure the uneven administration of the law by requiring equal application of laws.

[T]he law which operates upon one man shall apply *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man in precisely the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man.¹¹³

The Equal Protection Clause was drafted to include “persons”¹¹⁴ who were not citizens and who were not being given protection of citizenship rights under the Privileges or Immunities Clause.¹¹⁵ Although the original interpretation of equal protection is closely related to the equal punishments clause of the CRA of 1866,¹¹⁶ many subsequent interpretations by the judiciary would fuse a substantive reach into the clause.¹¹⁷

Having briefly described the Civil War setting and given a cursory look at the main provisions of the Fourteenth Amendment, the next part argues against some of the common, open-ended constructions of the amendment.

than merely for citizens under CRA of 1866 and that “person” is used under the Constitution for the same effect).

113. *Id.* at 2459 (statement of Rep. Stevens). *See also* Maltz, *supra* note 8, at 524 (describing the introduction of the amendment by Stevens as supporting the orthodox view of protection). *See generally* CONG. GLOBE, 42d Cong., 1st Sess. app. at 150-52 (1871) (statement of Rep. Garfield) (reciting the meaning of the Equal Protection Clause as restraining the states from making and enforcing laws which are on their face and in their provisions unequal and “must be so administered that equal protection under them shall not be denied to any class of citizens”).

114. CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham) (discussing the more comprehensive use of “person” as opposed to “citizen” in the Constitution). *See In re Ah Fong*, 1 F. Cas. 213, 218 (D. Cal. 1874) (No. 102) (construing the Fourteenth Amendment to cover alien Chinese under “persons”).

115. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (finding protection of citizenship requires the protection of the rights to contract, sue, testify, and inherit property).

116. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)).

[All persons shall have] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

117. *See infra* Parts IV-V.

III. THE LIMITED FOURTEENTH AMENDMENT

Reconstruction debate over civil rights was extensive, spanning well over a decade and covering tens of thousands of pages in the Congressional Globe and Congressional Record. The result was a bipartisan, finely wrought amendment representative of Congress as a whole.¹¹⁸ Despite the wishes of some Republicans and the use of the amendment by Justice Field and other judges in early post-Reconstruction opinions, the original Fourteenth Amendment was a limited doctrine inconsistent with modern Fourteenth Amendment jurisprudence.¹¹⁹

Throughout the debates, members of Congress represented diverse views. Radical Republicans and abolitionists introduced controversial legislation that some suggested would have degraded the states into a consolidated mass.¹²⁰ Though there was some strength to the radical Republicans, they failed to carry an amending majority for most of their platform.¹²¹ Republicans were mocked to require officers to "arrest, imprison, and fine a young woman in any State of the South if she were to refuse to marry a negro man on account of color, race, or previous condition of servitude, in the event of his making her a proposal of marriage, and her refusing on that ground."¹²² The radical Democrats, on the other hand, would probably have called for a *de facto* slave society.¹²³

Moderate Reconstructionists curtailed the breadth of the proposed legislation, refusing to lend constitutional protection—at the expense of state sovereignty—to rights greater than basic citizenship rights.¹²⁴ In this moderation, Congress

118. See generally AVINS, *supra* note 65 (reprinting the Reconstruction civil rights debates). Though a diverse viewpoint was present, delegates from the rebel states were excluded in the debates on the Fourteenth Amendment. See Bryant, *supra* note 22, at 559 (discussing the absence of representatives from the rebel states). The exclusion of the rebel states and the forced ratification of the Fourteenth Amendment is a point of controversy on the validity of the amendment. *Id.* at 563-65.

119. See CONG. GLOBE, 42d Cong., 1st Sess., app. at 149-52 (1871) (statement of Rep. Garfield) (expressing frustration at the re-interpretation of the amendment, equating Section One directly to the CRA of 1866 with the addition of the Equal Protection Clause, and maintaining that this was the overwhelming view of the Republicans approving the bill); *infra* Part V (showing how Field-like jurisprudence contributed to Warren Court holdings on the Fourteenth Amendment).

120. See *infra* note 138 and accompanying text (illustrating the concern over state sovereignty); see also CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (statement of Rep. Rogers) (expressing viewpoints on the consolidating effect of the amendment).

121. See Bunch, *supra* note 57, at 326-29 (illustrating the limited amendment by showing the failure of more radical positions to carry a majority).

122. McConnell, *supra* note 48, at 1020 (quoting 2 CONG. REC. 343 (1874) (statement of Rep. Beck)).

123. See CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) (statement of Rep. Cook) (describing enacted vagrancy laws as equivalent to reenacting slavery); *id.* at 598 (statement of Rep. Davis) (refuting the notion of protecting civil rights under CRA of 1866); see also discussion on Black Codes *supra* Part II.A.

124. See Bickel, *supra* note 11, at 9. See generally BERGER, *supra* note 53, at 18 (discussing

distinguished between citizenship rights and political rights.¹²⁵ Despite many of Congress's concerns, post-enactment use of the amendment, specifically the Equal Protection Clause, frequently ignores or minimizes federalism concerns with respect to states' rights.¹²⁶

A. The Fourteenth Amendment was not Designed to be Self-Executing

A global criticism of modern constitutional law is that the framers of the Fourteenth Amendment did not intend for the amendment to be self-executing to the extent modern jurisprudence allows.¹²⁷ In describing the amendment prior to its adoption, and noting that the amendment supplied a main shortcoming of the Constitution, Representative Bingham maintained:

[Now it is within] the power [of] the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do . . . to protect by

judicial activism).

125. See *supra* notes 16-18, 58-63 (political/civil right distinction); *infra* note 169 (same); CONG. GLOBE, 34th Cong., 3rd Sess. app. at 139-40 (1857) (statement of Rep. Bingham) ("Mere political or conventional rights are subject to the control of the majority; but the rights of human nature belong to each member of the State, and cannot be forfeited but by crime. . . . [While arguing against the institution of slavery, it] must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that no person shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life."); see also CONG. GLOBE, 35th Cong., 1st Sess. 1965 (1858) (statement of Sen. Douglas) ("I do not question the right of the people of Maine to confer just such privileges as they think proper in that State, under their local constitution, upon the colored population. If they choose to encourage a colored instead of a white population, it is their right to do so. If they choose to confer on them the right of self-government within the limits of that State, it is their right to do so. I did not question their right in Maine to allow a negro to vote, if they see proper These are matters that belong to the sovereignty of each State to decide for itself."); CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence) (reaffirming that the Civil Rights Bill did not affect political rights including suffrage and sitting on juries).

126. See *infra* Part IV (post-enactment use of the amendment); *infra* note 148 and accompanying text (identifying the Court's use of "class legislation" to expand the Fourteenth Amendment); see, e.g., CONG. GLOBE, 39th Cong., 1st Sess. app. at 156-59 (1866) (statements of Rep. Wilson and Rep. Delano) (listing the concerns of the 39th Congress with respect to states' rights and congressional protection of civil rights); see also *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1871) (commenting on the distinct sovereignties of the federal and state governments).

127. *Contra City of Boerne v. Flores*, 521 U.S. 507, 522, 524 (1997) (Kennedy, J.) ("Section [One] of the new draft Amendment imposed self-executing limits on the States.").

national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.¹²⁸

When Bingham initially introduced the first draft to Congress, he emphasized that the amendment would protect the spirit of Bill of Rights and the enforcement of the “injunctions and prohibitions” which by oath, the states owed to the people.¹²⁹ The draft of the amendment, stated Bingham, would give the “people of the United States the power, by legislative enactment, to punish officials of States for violations of the oaths enjoined upon them by their Constitution.”¹³⁰ Bingham held firm on his position that it is the power of Congress which is enlarged under the Fourteenth Amendment:

The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof.¹³¹

Bingham, pushing for congressional legislation protecting rights, did not believe the Fourteenth Amendment enlarged the judicial sphere, but was merely a procedural door for Congress to legislate to protect rights:

[B]y virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guaranteed [sic] by

128. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

129. *Id.* at 1090.

130. *Id.*

131. CONG. GLOBE, 42d Cong., 1st Sess. app. at 81 (1871) (statement of Rep. Bingham) (referring to the question of whether it is competent for Congress to legislate to enforce the Fourteenth Amendment). Compare the broad language of the Fourteenth Amendment with the self-executing language of §§ 2-10 of the CRA of 1866.

the fourteenth amendment, and to enforce which Congress is thereby expressly empowered.¹³²

Bingham and the framers of the amendment did not intend for the Supreme Court to read new rights into the first section of the amendment, but instead intended for the amendment to constitutionalize congressional enactments protecting citizenship rights, such as the CRA of 1866, as those issues came before Congress.¹³³ Initially, courts recognized the amendment's distinction between the judiciary and Legislature.¹³⁴

It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged [by the amendment;] Congress is authorized to *enforce* the prohibitions by appropriate legislation.¹³⁵

The judiciary was to enforce existing national privileges and immunities and congressional enactments under the amendment. This relationship between Congress and the judiciary is confirmed by examination of the first few rejected drafts of Section One, which contemplated but rejected broad congressional power to enact substantive positive law.¹³⁶ The revisions to the language of the amendment from draft to draft reflect the animosity of the 39th Congress toward giving Congress plenary powers to legislate to protect life, liberty and the pursuit of happiness in defiance of state sovereignty. The final enacted version gave Congress remedial

132. *Id.* app. at 85. This is similar to Bingham's argument upon first introducing the initial draft of the amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham) (referring to an early version of the amendment as "simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent – no more.'"). Though Bingham initially pushed for broader congressional coverage, Bingham and the committee were forced to revise the scope of the amendment several times and one would infer that the force of his commentary on the power of Congress under the amendment is subject to these revisions. See *infra* Part III.D.2.

133. See *supra* notes 68-71, 95-105 and accompanying text. Additional congressional legislation passed under the authority of the Fourteenth Amendment would carry the same general limitations impressed on the Fourteenth Amendment, e.g., political-civil distinctions and state sovereignty considerations.

134. *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (Strong, J.).

135. *Id.*; see also 2 CONG. REC. app. at 358 (1874) (statement of Sen. Morton) ("Congress shall have power by appropriate legislation to enforce the amendment. Who shall be the judge of what is the appropriate legislation? Congress only. It is not for the courts to judge and determine whether the legislation is appropriate.").

136. See *infra* Part III.D.2 (describing the changes in various drafts of the amendment).

powers and states remained the regulators of life, liberty, and property.¹³⁷ No mention of the Court having plenary powers to read rights into Section One was made in either the debates or the drafts of the amendment.

Recognizing that the amendment was not self-executing reconciles the apparent paradox between the language of the amendment and the understanding of the 39th Congress. The framers of the Fourteenth Amendment used broad language in the amendment but discussed with great appreciation the notion of protecting states' rights and limiting congressional supervision to civil rights and not to political or social rights.¹³⁸ The framers rarely discussed the concept of judicial construction of the amendment and when they did, the reply was that judicial interpretations of the clauses should be as they always had been and that the amendment did not create new

137. See *infra* Part III.D.2; see also Civil Rights Cases, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights [was] not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws [T]he amendment invests Congress with power to enforce it by appropriate legislation[.] . . . [t]o adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to.").

138. The concept of the state sovereignty and the concern over the reach of both the CRA and the amendment was a constant theme throughout Reconstruction legislation. See *supra* Part II, notes 16-18, 58-63 and accompanying text (discussing the political/civil rights dichotomy); CONG. GLOBE, 39th Cong., 1st Sess. 1063-65 (1866) (statement of Rep. Hale) (remarking on an early version of the amendment and states' rights); *id.* at 1088 (statement of Rep. Woodridge) (assuring other members of the limited reach of the amendment and that the amendment did not disrupt state sovereignty); *id.* app. at 158-59 (statement of Rep. Delano) (finding problems with the initial version and suggesting an approach similar to the final version wherein Congress exercises remedial powers); *id.* at 1291 (statement of Rep. Bingham) ("The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised."); *id.* at 1295-96 (statement of Rep. Latham) (conceding congressional oversight of federal legislation but suggesting the right to define and regulate civil rights is among the powers of the state reserved by the Tenth Amendment); *id.* app. at 135 (1866) (statement of Rep. Rogers) ("The name of this committee ought to be changed from the committee on reconstruction to the committee on destruction. It is a source of despotism and partakes of the character of the English Inquisition and the Jacobin committee of France. It usurps the power to regulate the affairs of the Union, sits in secret inquisition over the liberties of the people, issues edicts and mandates to Congress, and with imperial dignity orders Congress to pass laws which would sap the life-blood of the nation, prostrate the Constitution, break down the Union, and destroy the rights and liberties of the people of America.").

rights.¹³⁹ The substance of civil rights protection under the amendment was intended to come from congressional enactment, not from judicial interpretation.¹⁴⁰

B. The "Class Legislation" Test Circumvents the Limited Fourteenth Amendment

Expanded judicial interpretations of the Fourteenth Amendment usually refer to the amendment as prohibiting "class legislation" or some variation thereof.¹⁴¹ Under a class legislation or classification test, the Court compares the effect a law has on one set of persons with a particular characteristic or attribute vis-à-vis another set of persons without that characteristic.¹⁴² While Congress intended to outlaw some forms of class legislation affecting fundamental civil rights through the amendment and other Reconstruction legislation, other forms were not contemplated and would not have been promulgated by an amending majority.¹⁴³ As discussed below, an all-things class legislation test obfuscates the federalism dimension by generating a blanket comparison test as the standard of the Equal Protection Clause.¹⁴⁴ Furthermore, usage of the term "class legislation" gives no address to the distinction between political and civil rights commonly debated under the CRA of 1866 and the amendment.¹⁴⁵

The term "class legislation" came into use in its broad sense by more radical Republicans who used the term as shorthand for Reconstruction legislation goals.¹⁴⁶

139. See *supra* Part II.C.

140. See *infra* Part III.D.2-3 (pointing out the revisions to the language and Congress's role in enacting the substance of Section One in the years following the amendment's adoption).

141. See *infra* Parts III-IV (providing insight to the judicially created "class legislation" test).

142. See *infra* Part III.B, Part IV.C (classification test reaches majority). See generally Kay, *supra* note 107, at 684-89 (discussing various breakdowns of class legislation including unjustifiable class legislation and impermissible class legislation).

143. See *supra* Part II.A (discussing Reconstruction laws remedying Black Codes).

144. See Maltz, *supra* note 8, at 520-22 (arguing that Bingham did not view the amendment as aimed at the general problem of class-based discrimination). See also *infra* Part III.E (analysis of Fourteenth Amendment should include federalism axis).

145. See *supra* Part II.B-C. See generally CONG. GLOBE, 42d Cong., 1st Sess., app. at 149-52 (1871) (statement of Rep. Garfield) (expressing frustration at the lack of faithfulness to the limitations of the amendment where Congress had rejected several earlier versions for overbreadth).

146. CONG. GLOBE, 39th Cong., 1st Sess. 2764-66 (1866) (statement of Sen. Howard) (articulating a broad interpretation of the Privileges or Immunities Clause and the Equal Protection Clause in the absence of the ill Senator Fessenden, specifically stating that the Equal Protection Clause "prohibits all class legislation"); *id.* at 322-23 (statement of Sen. Trumbull) (quoting the President's annual message: "Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our Government is that of equal laws and freedom of industry."). See, e.g., Maltz, *supra* note 8, at 520-22 (discussing several of Bingham's illustrations of equal protection without the "classification" language); CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Rep. Eliot) (urging that the law should prohibit state legislation from discriminating against classes of

Following the *Slaughter-House Cases* and the truncation of expansive readings of the Privileges or Immunities Clause,¹⁴⁷ the broader forms of “liberty” (Due Process Clause) and “class legislation” (Equal Protection Clause) were read into Section One to resuscitate radical viewpoints rejected in the adoption of the amendment.¹⁴⁸ Congressional debates as a whole suggest that class legislation concerning political rights was to be left for state regulation as long as the national privileges and immunities or civil rights of the citizens were not violated.¹⁴⁹

citizens and also adding his demand for more than the limited Fourteenth Amendment including political rights).

147. See *infra* Part IV.A.

148. See 2 CONG. REC. 408-09 (1874) (statement of Rep. Elliott) (articulating an expansive “equal protection” interpretation after the narrow *Slaughter-House Cases* ruling to effect social rights protection under the Equal Protection Clause).

[I]s not the denial of such privileges [mixed schools and desegregated inns and travel ways] . . . a denial . . . of the equal protection of the laws? For it is under this clause of the fourteenth amendment that we place the present bill No matter, therefore, whether his rights are held under the United States or under his particular State, he is equally protected by this amendment. He is always and everywhere entitled to the equal protection of the laws. All discrimination is forbidden; and while the rights of citizens of a State as such are not defined or conferred by the Constitution of the United States, yet all discrimination, all denial of equality before the law, all denial of the equal protection of the laws, whether State or national laws, is forbidden.

Id. at 409; see also 3 CONG. REC. 1794-96 (1875) (statements of Sen. Morton and Sen. Thurman) (arguing back and forth whether an open-ended interpretation of the Fourteenth Amendment is consistent with several existing laws and means to interfere with political privileges); CONG. REC. app. at 358-61 (1874) (statements of Sen. Merrimon and Sen. Morton) (broadening equal protection by Morton after the *Slaughter-House Cases* to class based discrimination and Merrimon maintaining the political/civil distinctions of the Fourteenth Amendment). But see *supra* Part II.C.2 (limited Equal Protection Clause); CONG. GLOBE, 39th Cong., 1st Sess. 2539-40 (1866) (statement of Rep. Farnsworth) (reaffirming that the amendment did not cover political rights and suggesting that the Equal Protection Clause is mere surplusage to other measures of the amendment and the Constitution); *id.* at 1270-71 (statement of Rep. Kerr) (commenting specifically on how civil rights and immunities support one contention right now, in its passing, but will likely be another thing later after the bill becomes law, that the anti-slavery had one simple meaning at the time of its passage “but now it is confidently appealed to as authority for this bill and almost every other radical and revolutionary measure advocated by the majority in this Congress. Those gentlemen often have strange visions of constitutional law, and it is not safe to judge from their opinions to-day what they will be to-morrow.”); CONG. GLOBE, 42d Cong., 1st Sess. app. at 149-52 (1871) (statement of Rep. Garfield) (frustrated with the use of the amendment after its enactment as not representative of its limitations).

149. See CONG. GLOBE, 39th Cong., 1st Sess. 1836-37 (1866) (statement of Rep. Lawrence) (distinguishing between civil and political sets of privileges and immunities and stating that states should not deny any class of citizens the right to make contracts or to own property); *supra* notes 15-18, 59-62 and accompanying text (political-civil right dichotomy). See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale) (discussing an earlier draft of the amendment protecting equal political rights: “For we all know it is true that probably every State in this Union

The frequently cited support for equating a broad, open-ended ban on class legislation with the Fourteenth Amendment generally traces back to Senator Jacob Howard's use of the term during his presentation of the amendment to the Senate.¹⁵⁰ Howard, a more radical Republican, briefly mentioned prohibiting class legislation when introducing the amendment to the Senate for the ill, and more moderate, Senator William Fessenden:

This [amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield it throws over the white man.¹⁵¹

Earl Maltz, a well-known scholar on the Fourteenth Amendment, discusses ambiguous interpretations of Howard's statements.¹⁵² One interpretation suggests that all class legislation is prohibited, regardless of whether it is political or civil.¹⁵³ Yet Howard's supporting illustration of a crime resulting in the execution of a black man but a different, lesser punishment for a white man, tends to define his understanding of "abolishes all class legislation" to require equal administration of the law similar to the "like punishment, pains, and penalties" provision under the CRA of 1866.¹⁵⁴

fails to give equal protection to all persons within its borders in the rights of life, liberty, and property. It may be a fault in the States that they do not do it. A reformation may be desirable, [but by my knowledge] . . . reforms of this character should come from the States, and not be forced upon them by the centralized power of the Federal Government."); *Ex parte Virginia*, 100 U.S. 339, 367 (1880) (Field, J., dissenting) (discussing specific political rights: "The equality of the protection secured extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration.").

150. CONG. GLOBE, 39th Cong., 1st Sess. 2765-67 (1866) (statement of Sen. Howard) (introducing the revised Amendment to Congress and expressing wishes for a broader measure but conceding lack of support for any broader protections); Bickel, *supra* note 11, at 50-52 (positing that Howard probably advocated for a more radical doctrine than the committee as a whole endorsed); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2536 (1866) (statement of Rep. Longyear) (objecting that the amendment did not go far enough but did head in the right direction).

151. CONG. GLOBE, 39th Cong., 1st Sess. 2765-67 (1866) (statement of Sen. Howard); *see also* Chemerinsky, *supra* note 33, at 1144, 1146-47 (advancing an expansive interpretation of the substantive Due Process Clause as accounting for the "privileges and immunities" tragedy under the *Slaughter-House Cases* ruling).

152. *See* Maltz, *supra* note 8, at 526-27.

153. *Id.*

154. *See id.*; Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)).

Regardless of Howard's meaning, his view of Reconstruction legislation was admittedly in the minority.¹⁵⁵ In the same opening speech, Howard admitted that his view is more radical than would pass Congress and that he would rather add other political rights, such as universal suffrage, to the amendment.¹⁵⁶ Reluctantly, Howard concedes that voting rights are not covered under the amendment.¹⁵⁷

We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States.¹⁵⁸

While many commentators cite Howard's speech as support for open-ended interpretations of the amendment,¹⁵⁹ reference to the larger context pares such an expansive interpretation.¹⁶⁰

155. See *supra* note 146 and accompanying text (criticizing Howard's "classification" introduction as not being representative of the amendment).

156. CONG. GLOBE, 39th Cong., 1st Sess. 2765-67 (1866) (statement of Sen. Howard) (admitting that he would add suffrage if he thought it would pass). See generally HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 74-75 (1908) (describing many Republican authors' wishes for more in the amendment than would pass a majority, specifically suffrage rights).

157. CONG. GLOBE, 39th Cong., 1st Sess. 2766-67 (1866) (statement of Sen. Howard).

158. *Id.* at 3039.

159. See Saunders, *supra* note 15, at 280-81 (arguing that Reconstruction legislation moved away from race-based legislation to focus generally on partial and special privileges or those wrongs that advantage one class and not another); Chemerinsky, *supra* note 33, at 1144 (expressing disappointment that equal protection has been "terribly restricted" to only a few suspect classifications).

160. Under the limited Amendment, class legislation regulation would not cover such things as marriage, segregated schools, jury service, or voting. See CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson) (reaffirming that citizens are entitled to certain rights but taking issue with Bingham's interpretation: "He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond . . . the rule of construction which must apply here and [the role of Congress]."). In a debate over an early draft, Hale contemplated whether it was a right for Congress to legislate in the States to make protection of life, liberty and property equal:

Take the case of the rights of married women; did any one ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women? There is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or less[er] extent still exist. Many of the States have taken steps for the partial abolition of that

Thaddeus Stevens, Howard's counterpart in the House, introduced the amendment on May 8th, 1866.¹⁶¹ His summary is similar to Howard's but more precise and likely more representative of the committee and of the Constitution-amending majority.

This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this. . . . Believing, then, that this is the best proposition that can be made effectual, I accept it.¹⁶²

Representative Stevens digressed and discussed his mortification at the defeat of some of the more radical proposals, such as securing general enfranchisement, before going on to explain the meaning of the sections of the amendment to the House:

The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever

distinction in years past, some to a greater extent and others to a [lesser extent]. But I apprehend there is not to-day a State in the Union where there is not a distinction between the rights of married women, as to property, and the rights of *femmes sole* and men.

Id. at 1063-64 (statement of Rep. Hale) (noting that it was not in the scope of the original Constitution to bar state class legislation concerning married women's property rights); *see id.* at 1089 (statement of Rep. Bingham) (appeasing concern that equal protection of rights in life, liberty, or property would impair state and local regulation of the class of married women); *see also* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 137-39 (1873) (finding that the right to practice law was not a privilege or immunity under the Fourteenth Amendment). *See generally* Kay, *supra* note 107, at 677-79 (distinguishing the *Slaughter-House Cases* and *Bradwell* with regards to Justice Bradley and Justice Field's non-majority opinions).

161. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

162. *Id.*

means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedman. Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.¹⁶³

Stevens not only observed that the amendment was coextensive with the CRA of 1866, but articulated the concept of equal protection by referring to examples of what the clause was designed to eliminate.¹⁶⁴

While many litigants attempt to use the language of the Fourteenth Amendment in any kind of action, the more accurate understanding of Reconstruction legislation is that the national privileges and immunities supervised by Congress are, generally, the privileges and immunities enumerated in the Civil Rights Act of 1866 and those already in existence at that time.¹⁶⁵ Representative James Wilson of Iowa argued that the Civil Rights Bill did not create any new rights but only protected those rights already established in the Constitution—"[a] colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted" and "[t]his is the spirit and scope of the bill, and it goes not one step beyond."¹⁶⁶

Furthermore, the Equal Protection Clause did not create additional substantive protection beyond the Privileges or Immunities Clause. The Equal Protection Clause of the amendment covers any *person* in the jurisdiction who is not covered as a citizen under the Privileges or Immunities Clause.¹⁶⁷ The Equal Protection Clause as

163. *Id.*; see *id.* at 2498 (statement of Rep. Broomall) (describing the amendment as different from the CRA only in that a mere majority will not be able to disturb it); *supra* note 104 and accompanying text (discussing the probable repeal of any mere majority legislation once the Democratic party is able to gain strength).

164. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (statement of Rep. Stevens) (discussing the intended effect of the equal protection clause and noting its similarity to the CRA).

165. See *supra* notes 68-69 and accompanying text. But see CONG. GLOBE, 39th Cong., 1st Sess. 1089-90, 1291-92 (1866) (statement of Rep. Bingham) (advocating a mass of privileges and immunities ripe for congressional protection which overlap with the first eight Amendments of the Bill of Rights).

166. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson).

167. See *supra* note 114 and accompanying text (describing use of "person"). If the concept of equal protection were broad enough to prohibit all "class legislation" then it is hard to see where

a whole might reach into the substance of enacted law (substantive equal protection) if any state legislation facially provided unequal administration of civil rights¹⁶⁸ such as those enumerated in the CRA of 1866. However, the clause does not apply to political or social rights including possible class legislation or classifications with regards to voting, interracial marriage, and school and public accommodation desegregation.¹⁶⁹ Equal protection does not bar all classifications but instead extends *protection* to any person, not just citizens within one's jurisdiction, from uneven penalties and unequal administration of enacted law.¹⁷⁰

the Privileges or Immunities Clause or other forms of protection were needed. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence) (reaffirming the nature of the Civil Rights Bill to protect civil rights and not political rights). Lawrence goes on to illustrate that there are two ways to deny these inalienable, absolute rights: either by "prohibitory laws" or by failing to enforce the laws. *Id.* at 1833.

168. *See* CONG. GLOBE, 39th Cong., 1st Sess. 598, 1414-16 (1866) (statement of Sen. Davis) (discussing Kentucky's scheme of different punishments for identical crimes, e.g., rape of a white woman by black person is death and noting this is not the punishment for that crime committed by a white person); *see also* discussion on Slave and Black Codes, *supra* Part II.A-B.

169. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (articulating that the whole effect of the CRA is to allow "whatever rights as to each of these enumerated civil (not political) matters the States may confer upon one race or color . . . shall be held by all races in equality" and that the whole effect of Section One is to secure to all races those enumerated civil rights. "If you permit a white man who is an infidel to testify, so you must a colored infidel."); *supra* notes 16-19, 59-62 (political/civil right dichotomy); *see also* CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870) (statement of Sen. Stewart) (discussing the Enforcement Act, and enumerating the commonly-understood protections of the Equal Protection Clause in an additional provision to guarantee protection for aliens).

170. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 153 (statement of Rep. Garfield) (describing the chief complaint as unequal enforcement of the laws); Maltz, *supra* note 8, at 507-08, 510 (discussing the various origins and uses of the concept of protection prior to the Fourteenth Amendment); CONG. GLOBE, 39th Cong., 1st Sess. 1262-63 (1866) (statement of Rep. Broomall) (discussing allegiance and citizenship as concepts under the meaning of "protection"); *supra* Part II.C.2.

The rights and duties of allegiance and protection are corresponding rights and duties. Upon whatever square foot of the earth's surface I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection, I owe it no allegiance and can commit no treason.

CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (statement of Rep. Broomall); *see also id.* at 1063-64 (statement of Rep. Hale) (criticizing the secrecy of the committee proceedings and the breadth of the proposed language in early drafts of the amendment, commenting that every state fails to give equal protection to all persons within its borders in life, liberty, and property in some form, and noting that this is a matter for state governments); *id.* at 2459 (statement of Rep. Stevens). *But see* tenBroek, *supra* note 50, at 197-200 (noting, while discussing the concept of equal protection, that if all men receive the full protection of the law they receive equal protection of the law but also touching upon a broader equal enjoyment theory).

C. Enforcement Efforts Define the Equal Protection Clause

The Fourteenth Amendment's Equal Protection Clause is not explicitly enumerated in its objects, as is its predecessor, the CRA of 1866. General interpretations of the amendment—at least prior to the *Slaughter-House Cases* ruling—equated equal protection for citizens and aliens with the “equal benefits, burdens, and punishments” language of the CRA of 1866.¹⁷¹

After enacting the Fourteenth and Fifteenth Amendments, Congress, through its remedial mechanisms, began the arduous task of enforcing the amendments through various enforcement acts.¹⁷² In an effort to remedy civil rights violations against aliens, Senator William Stewart, a Republican lawyer from Nevada, added Fourteenth Amendment enforcement protections (designed to “secure to all persons equal protection of the laws”) to provisions currently being debated under the Fifteenth Amendment.¹⁷³ Stewart's language illustrates his understanding of the clause by enumerating the contents of “equal protection” as equivalent to the civil rights secured by the original CRA of 1866.¹⁷⁴

[Persons] shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .¹⁷⁵

Senator Stewart's enforcement of equal protection was a re-enactment of the CRA of 1866. For Senator Stewart, the Equal Protection Clause of the amendment was the CRA of 1866.¹⁷⁶ Adopting this argument, even if one enters into the substantive frontier of “protection of equal laws” vis-à-vis the mechanical equal application of the

171. See *supra* Part II.C.2 (limited Equal Protection Clause); *infra* note 174 and accompanying text (enforcement acts under Equal Protection Clause); *supra* notes 161-162 (presenting committee draft to Congress).

172. See AVINS, *supra* note 23, at xx-xxi.

173. Stewart was not satisfied with the general conditions for the Chinese aliens in the Pacific. See CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870) (statement of Sen. Stewart). Compare CONG. GLOBE, 41st Cong., 2d Sess. 3807-08 (1870) (statement of Sen. Stewart) (urging the Enforcement Act to protect the Chinese), with *id.* at 3877-79 (statement of Rep. Johnson) (listing fears of Chinese migration and potentially losing native religion and other institutions). Most of this Enforcement Act dealt with the Fifteenth Amendment. See Stewart *id.* (enforcing the Equal Protection Clause). See generally Avins, *supra* note 50, at 249-52 (describing the treatment of the Chinese and its relationship to the Fourteenth Amendment).

174. See CONG. GLOBE, 41st Cong., 2d Sess. 1536, 3480, 3657-58 (1870) (statement of Sen. Stewart) (re-enacting the Civil Rights Bill without the privilege-of-citizenship provisions and enumerating what is meant by “equal protection” as the language of CRA of 1866).

175. See *id.* at 1536.

176. *Id.*

law, the intended substantive equal protection was not so broad as to invalidate or even question all conceivable forms of class legislation but only those civil rights under CRA of 1866.¹⁷⁷ The term “equal benefit” as used by Stewart to characterize equal protection is likely to be a paraphrasing of the last portion of the CRA of 1866 which subjects all to the same “punishments, penalties, and pains” as white citizens.¹⁷⁸

Another major area of enforcement of the Fourteenth Amendment involved addressing the assassinations by the Ku Klux Klan in the South. Ku Klux organizations were scattered throughout the South and were known to attack colored persons and loyal white Republicans.¹⁷⁹ The primary use of the Equal Protection

177. See *supra* Part III.B.

178. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)) (“[T]o 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.”).

179. CONG. GLOBE, 42d Cong., 1st Sess. 390-91 (1871) (debate leading up to the Anti-Ku Klux Klan Act).

One of the most cowardly and [inhuman] attempts at murder known in the annals of crime was made last Wednesday night, the 22d instant, by a band of disguised men upon the person of Dr. J. Winsmith at his home about twelve miles from town. The doctor, a man nearly seventy years of age, had been to town during the day and was seen and talked with by many of our citizens. Returning home late, he soon afterward retired, worn out and exhausted by the labors of the day. A little after midnight he was aroused by some one [sic] knocking violently at his front door. The knocking was soon afterward repeated at his chamber door, which opens immediately upon the front yard. The doctor arose, opened the door, and saw two men in disguise standing before him. As soon as he appeared one of the men cried out, “Come on, boys! Here’s the damned old rascal.” The doctor immediately stepped back into the room, picked up the single-barreled pistols lying upon the bureau, and returned to the open door. At his reappearance the men retreated behind some cedar trees standing in the yard. The doctor, in his night clothes, boldly stepped out into the yard and followed them. On reaching the trees he fired, but with what effect he does not know. He continued to advance, when twenty or thirty shots were fired at him by men crouched behind an orange hedge. He fired his remaining pistol and then attempted to return to the house. Before reaching it, however, he sank upon the ground exhausted by the loss of blood, and pain, occasioned by seven wounds which he had received in various parts of his body. As soon as he fell the assassins mounted their horses and rode away.

The doctor was carried into the house upon a quilt, borne by his wife and some colored female servants. The colored men on the premises fled on the approach of the murderers and the colored women being afraid to venture out, Mrs. Winsmith herself was obliged to walk three quarters of a mile to the house of her nephew, Dr. William Smith, for assistance. . . .

The occasion of this terrible outrage can be only the fact that Dr. Winsmith is a Republican. One of the largest land-holders and tax-payers in the county, courteous in

Clause was to address the failure of local governments to enforce laws against these conspiracies.¹⁸⁰

These enforcement acts show that, contrary to modern usage, the design of the Equal Protection Clause was a simple provision to address the case where a law was either selectively applied or an existing law was selectively unenforced when applied to newly freed slaves or undesirable aliens.¹⁸¹ If the states took no redress to selective action or inaction by the state, the states' action or inaction would violate the Equal Protection Clause.¹⁸² Representative James A. Garfield, a Republican lawyer from Ohio, former Union General, and future President of the United States, commented:

[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.¹⁸³

manner, kind in disposition, and upright and just in all his dealing with his fellow-men Because he has dared become a Republican, believing that in the doctrines of true republicanism only can the State and country find lasting peace and prosperity, he has become the doomed victim of the murderous Ku Klux Klan.

The tragedy has cast a gloom over the entire community, and while we are glad to say that it has generally been condemned, yet we regret to state that no step has yet been taken to trace out and punish the perpetrators of the act. The judge of this circuit is sitting on his bench; the machinery of justice is in working order; but there can be found no hand bold enough to set it in motion. The courts of justice seem paralyzed when they have to meet such issues as this. Daily reports come to us of men throughout the country being whipped; of school houses for colored children being closed, and of parties being driven from their houses and their families. Even here in town there are some who fear to sleep at their own homes and in their own beds. The law affords no protection for life and property in this county, and the sooner the country knows it and finds a remedy for it, the better it will be. Better a thousand times the rule of the bayonet than the humiliating lash of the Ku Klux and the murderous bullet of the midnight assassin.

CONG. GLOBE, 42d Cong., 1st Sess. 394 (1871) (quoting the SPARTANSBURG REPUBLICAN (South Carolina), Mar. 29, 1871).

180. See Avins, *supra* note 68, at 413 (discussing the Anti-Ku Klux Klan law enacted to secure equal protection of the law).

181. See *supra* Part II.C.2 (explaining the understanding of equal protection).

182. See Avins, *supra* note 68, at 415 (advancing that the Equal Protection Clause did not contain substantive rights); CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (statement of Rep. Lowe) (observing that the murders, whippings, and lynching were abundant with little or ineffective administration of the law); *id.* at 427-28 (statement of Rep. Beatty) (describing the broad goals of Reconstruction and the failure of equal protection of the law where violence takes the place of peaceful order, and suggesting that the military assist in the fight against the Ku Klux organizations); *supra* Part II.C.2.

183. CONG. GLOBE, 42d Cong., 1st Sess. app. at 153 (1871) (statement of Rep. Garfield); see also *id.* app. at 160 (statement of Rep. Golladay) (interpreting privileges and immunities and calling

Representative Michael Kerr, a Democrat and lawyer from Indiana, described the addition of the Equal Protection Clause during later enforcement debates as involving “no grant of power[;] [i]t is simply declaratory of the pre[e]xisting law of the country, the pre[e]xisting, fundamental, constitutional law declared by all the courts and tribunals of the entire country.”¹⁸⁴ Disregarding the understanding of the 39th Congress, subsequent judicial use of the clause would convert “equal protection” into a substantive vehicle for creating new rights and judicially invalidating state legislation.

D. Contextual Factors Support the Notion of a Limited Amendment

Undermining the intended limitations of the amendment, open-ended abstractions find nourishment in various scraps of legislative history taken out of the broader context.¹⁸⁵ The broader context surrounding congressional enactment of the amendment reinforces the shared understanding of the amendment's limited character. Three observations support a limited amendment theory and provide context for Reconstruction legislation.

1. The Fourteenth Amendment's Predecessor Enumerated Rights and Protection

First, as noted above, the CRA of 1866 specifically enumerates the civil rights protected by Congress.¹⁸⁶ The protected privileges and immunities discussed in the Fourteenth Amendment are the same as those enumerated in the CRA of 1866.¹⁸⁷

for congressional legislation where corrupt officials cooperating with the offenders violate the equal administration of the law); *id.* at 608 (statement of Sen. Pool) (describing the clauses of Section One as aimed at the legislative, judicial and executive branches of state governments; with the first clause establishing citizenship rights, the second clause protecting against positive legislative enactment (privileges and immunities), the third clause providing judicial process (due process), and the fourth providing against failure of the executive (equal protection)).

The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. Rights conferred by laws are worthless unless the laws be executed. The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.

Id.

184. *Id.* app. at 48-49 (statement of Rep. Kerr).

185. See *supra* notes 150-151 and accompanying text; see also *infra* Part IV.

186. See *supra* note 13.

187. See CONG. GLOBE, 42d Cong., 1st Sess. 575 (1871) (statement of Sen. Trumbull) (stating that Section One of the amendment passed after the Civil Rights Act was a “copy of the act”; Trumbull goes on to state, “[t]he words ‘privileges and immunities’ . . . have nothing to do with voting. They refer to civil rights.” *Id.* at 576); CONG. GLOBE, 39th Cong., 1st Sess. 474-76 (1866); *supra* notes 68-69 and accompanying text; *supra* Part II.C.1; see, e.g., FLACK, *supra* note 156, at 142-

Commentators generally agree that the thrust of the Fourteenth Amendment was to constitutionalize the CRA of 1866 and that the Fourteenth Amendment referred to the same enumerated ends as those in the CRA of 1866.¹⁸⁸

[Citizens shall have the same right] 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.¹⁸⁹

By enumerating and supervising specific citizenship rights which embody the national privileges and immunities of citizenship of the several states, the CRA of 1866 and other Reconstruction legislation generate a dichotomy between those rights federally supervised and those rights left for local regulation.¹⁹⁰ This dichotomy was not changed by the amendment.

2. Several Revisions Illustrate the Limitation of the Amendment

Second, framers specifically rejected both the initial drafts of the CRA of 1866 and the Fourteenth Amendment for being too latitudinarian in the far-reaching language proposed.¹⁹¹

45 (discussing viewpoints of the amendment in the radical and conservative press and the general contention that the public believed that the first section of the amendment embodied the Civil Rights Bill). See generally BERGER, *supra* note 53, at 39-44 (discussing the interpretation of *Corfield v. Coryell* and criticizing open-ended readings of *Corfield*); CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) (statement of Rep. Cook) (urging the necessity of the Civil Rights Bill and condemning any discrimination of the enumerated rights toward any class of men on account of color).

188. See *supra* note 69; see also CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) (addressing the unconstitutionality of CRA of 1866 and expressing concern of the Democrats regaining power and abolishing the simple majoritarian law); *supra* notes 162-163 (discussing the purpose of the amendment to prevent a simple majority from abolishing the Civil Rights Bill).

189. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)).

190. See CONG. GLOBE, 34th Cong., 3rd Sess. app. at 139-40 (1857) (statement of Rep. Bingham) ("Mere political or conventional rights are subject to the control of the majority; but the rights of human nature belong to each member of the State, and cannot be forfeited but by crime."); CONG. GLOBE, 35th Cong., 1st Sess. 1965 (1858) (statement of Sen. Trumbull) (advancing that states should deal with political rights as they choose); *id.* (statement of Sen. Douglas) (remarking that it is the right for the citizens of Maine to adopt regulations allowing the Negro to vote if they so choose). See generally Olson, *supra* note 10, at 429-30 (reiterating that the Constitution was to limit the federal government and that states are the protector of life, liberty, and property).

191. See Bickel, *supra* note 11, at 29-33, 38-41, 44-48, 50-55 (describing the series of changes from the amendment's conception to the final version presented to Congress); see also Maltz, *supra* note 8, at 531-34 (noting that the revisions in the language were efforts to moderate the

The original draft of the CRA of 1866 stated "there shall be no discrimination in civil rights or immunities."¹⁹² Drafters of the Act were worried about the extent of this language prohibiting the use of any distinctions based on race or gender.¹⁹³ Republicans responded to the concerns of overbreadth raised by many moderates and Democrats with assurances of its limited application.¹⁹⁴

These same concerns were raised with the introduction of the first draft of the Fourteenth Amendment. Early drafts of the amendment by radical Republicans in the Reconstruction Committee included language establishing "equal political rights and privileges."¹⁹⁵ The committee revised this far-reaching language to add protection for states' rights and limitations on Congress's ability to legislate in the areas of life, liberty, and property.¹⁹⁶

One of the first drafts of the amendment read: "Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property."¹⁹⁷ Rejecting this initial draft, the full committee reviewed several alternate drafts.¹⁹⁸

reach of the amendment). See generally CONG. GLOBE, 42d Cong., 1st Sess. app. at 149-53 (1871) (statement of Rep. Garfield) (discussing the significance of the changes between the rejected proposals and the adopted proposals).

192. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham) (arguing that amending the bill to strike the "no discrimination in civil rights or immunities" language will create a less oppressive and unjust bill).

193. See *id.* (finding that the bill has unconstitutional implications with respect to the Tenth Amendment and arguing that a loose extension of civil rights might include political rights and that generally every state makes "some discrimination on account of race or color"); *id.* at 1122 (statement of Rep. Rogers) ("[W]hat broader words than privileges and immunities are to be found in the dictionary?"); Bickel, *supra* note 11, at 9 (discussing the rejection of such "latitudinarian" constructions); see also CONG. GLOBE, 39th Cong., 1st Sess. 1295-96 (1866) (statement of Rep. Latham) (discussing the ability of Congress to pass laws which state "there shall be no discrimination on account of race, color, or previous condition of slavery in civil rights or immunities" and suggesting that there shall be no discrimination in federal courts but Congress might not have the authority to define and regulate state civil rights).

194. See Bickel, *supra* note 11, at 22-29 (reviewing the rationale of limiting the "no discrimination in civil rights or immunities" provision of the bill); see also *supra* Part II.B-C.

195. See Bickel, *supra* note 11, at 30-36 (earlier drafts were revised before being submitted).

196. *Id.* at 31-36. See CONG. GLOBE, 42d Cong., 1st Sess. app. at 149-52 (1871) (statement of Rep. Garfield) (expressing frustration at the constructions of the amendment to legislate directly in the states with respect to life, liberty and property); Bickel, *supra* note 11, at 37-39 (commenting that the earlier drafts of the amendment were too broad and centralized too much power in Congress); Maltz, *supra* note 8, at 534 (noting the importance of the change from equal protection of life, liberty, and property, to equal protection of the laws); *supra* note 138 and accompanying text (discussing congressional corrective power and the notion that states were to remain regulators of life, liberty and property).

197. See Bickel, *supra* note 11, at 30 (reviewing the legislative history of the Joint Committee drafting the amendment).

198. See *id.* at 30-31.

A later version stated: "Congress shall have the power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges."¹⁹⁹ This version also failed in the committee.²⁰⁰

The committee's next draft kept the "necessary and proper" grant of power but changed the "every state" language to "secure to the citizens of each State all privileges and immunities of citizens in the several States" and changed "full protection in the enjoyment" to "equal protection in the rights of life, liberty and property."²⁰¹ The committee's revision rejected the language securing "equal political rights and privileges" completely.²⁰² Moderates and conservatives rejected these earlier versions as granting blanket bans on matters they felt should be left up to the states.²⁰³

Subsequent debate in the committee limited the draft further.²⁰⁴ The more moderate version, which passed, states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

199. See *id.* at 32-33 (discussing the evolution of the language of the first draft of the Fourteenth Amendment); CONG. GLOBE, 39th Cong., 1st Sess. 1063-65 (1866) (statement of Rep. Hale) (discussing the absence of an understanding for "necessary and proper" and that it should mean indispensable but might instead have a relaxed meaning and expressing concern at a relaxed application with respect to legislating against states' rights). Hale commented on the reach of the judicial interpretation of "necessary and proper" as not implying an "indispensable necessity" but also allowing for "needful, requisite, [or] conducive to" congressionally approved goals. *Id.* at 1065.

200. See Bickel, *supra* note 11, at 32-33.

201. See *id.* at 32-33 (specifying the eliminated language from revision to revision).

202. *Id.*

203. See *id.*; Maltz, *supra* note 8, at 531-34 (interpreting the impact of the many revisions from various viewpoints).

204. See Bickel, *supra* note 11, at 43-45 (describing another set of revisions to the amendment).

laws.”²⁰⁵ Under this final draft, Congress would have remedial powers and states would remain regulators of life, liberty, and, property.²⁰⁶

These revisions illustrate the limited scope of the amendment and reflect the moderation of the open-ended platform of the radical Republicans.²⁰⁷ The 39th Congress did not pass the Fourteenth Amendment with the intent for an open-ended Amendment banning all state legislation making distinctions based on race, gender, or political rights.

3. The Need for and Pursuit of Additional Legislation Supports the Limited Amendment

Finally, subsequent Reconstruction legislation efforts demonstrate the limitations of the amendment, specifically that Section One was not intended to be self-executing.²⁰⁸ Though Republicans did not secure all their intended protections in either the CRA of 1866 or the language of the amendment itself, they were determined to seek additional legislation covering social and political rights.

In the early 1870s, Charles Sumner²⁰⁹ introduced a new Civil Rights Act, later to become the Civil Rights Act of 1875 (“CRA of 1875”).²¹⁰ In its original form, this

205. U.S. CONST. amend. XIV; see Avins, *supra* note 68, at 404 (commenting on the rationale of those rejecting early drafts of the amendment). The term “Due Process” was added as an afterthought in the committee’s attempt to narrow the reach of the amendment with respect to federalism. See *supra* notes 138, 191-204 and Part III; *infra* notes 324-325; see also CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statements of Rep. Hotchkiss and Rep. Bingham) (back and forth on the draft of the proposed Amendment). For discussion of the Fourteenth Amendment in the 42d Congress, see CONG. GLOBE, 42d Cong., 1st Sess. app. at 149-53 (1871); Maltz, *supra* note 8, at 533 n.125 (discussing the rejected version after its passage, James Garfield recalled the rejected version as ousting the jurisdiction of the State over its people as contrasted with the adopted version which merely granted Congress the right to enforce a limited set of violations by the states).

206. See *supra* notes 138, 191-205 and Part III.A.

207. See CONG. GLOBE, 39th Cong., 1st Sess. 323 (1866) (statement of Sen. Trumbull) (“The design of these bills is not, as the Senator from Indiana would have us believe, to consolidate all power in the Federal Government, or to interfere with the domestic regulations of any of the States, except so far as to carry out a constitutional provision which is the supreme law of the land. If the States will not do it, then it is incumbent on Congress to do it. But if the States will do it, then the Freedmen’s Bureau will be removed, and the authority proposed to be given by the [Civil Rights Act of 1866] will have no operation.”); *supra* note 80 and accompanying text (marking on the moderation of the legislation between radical and conservative).

208. Civil Rights Act of 1875, 18 Stat. 335 (1875) (*partially invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883)); see McConnell, *supra* note 48, at 984-90 (outlining the chronology of the crusade by Charles Sumner of Massachusetts to abolish school segregation during the years 1870-1875); *supra* notes 127-135 and accompanying text (observing that the amendment generally was not self-executing).

209. Charles Sumner of Massachusetts was one of the most outspoken radical Republicans of the Reconstruction Congress. See McConnell, *supra* note 48, at 987.

210. Civil Rights Act of 1875.

Act included a public accommodations desegregation provision for theaters, inns, juries, common carriers, and schools.²¹¹ Those advocating for the CRA of 1875 relied on equal protection language after the rigid interpretation of privileges and immunities in the *Slaughter House Cases*.²¹²

During the progression of the bill, Sumner and other advocates fought to retain the school segregation prohibition, however they gave up on this provision in the face of stiff opposition.²¹³ The right to attend school was not a civil right or privilege at the time of the Constitution's ratification or when Congress adopted the Fourteenth Amendment.²¹⁴ The bill containing school desegregation passed some initial stages, but the Republicans lost significant support during the interim elections.²¹⁵ Eventually, a less comprehensive version of the CRA of 1875 passed, which prohibited public accommodation discrimination, but omitted language including school desegregation.²¹⁶

As the additional legislation shows, the substance of the CRA of 1875 was not something the judiciary read into Section One, but an additional congressional act protecting against state action. Similarly, the amendment granting suffrage to African Americans was not deemed to be an extension of either the Thirteenth or Fourteenth Amendments but instead something additional that needed to go before Congress in the form of a new amendment.²¹⁷

211. See CONG. GLOBE, 42d Cong., 2d Sess. 244 (1872) (reading Sumner's early bill which at this point did include school desegregation); see also *id.* at 241 (statement of Sen. Hill) (debating Sumner and stating that public accommodation segregation with the same comfort and security (separate but equal) is not a denial of a civil right).

212. 83 U.S. (16 Wall.) 36 (1873); see McConnell, *supra* note 48, at 1001-02 (giving an account of reaction to the *Slaughter-House Cases* and the resulting Republican reliance on the other clauses); *infra* notes 270-278 and accompanying text.

213. See McConnell, *supra* note 48, at 1078-86.

214. See CONG. GLOBE, 42d Cong., 2d Sess. 3189 (1872) (statement of Sen. Trumbull) (advancing that going to school together or going to church together are not civil rights and that calling this bill a civil rights bill instead of a social rights bill is a misnomer).

215. See McConnell, *supra* note 48, at 1080-86 (outlining the loss in the 1874 elections in which Republicans lost eighty-nine seats in the House and discussing the ultimate failure of the school desegregation provision of the Civil Rights Act of 1875).

216. See *id.* at 1078-87 (describing the passage of the Act with the school desegregation language deleted). If subsequent Supreme Court justices had any legitimate footing in reading school segregation as a violation of the Fourteenth Amendment, then Congress was wasting its time with the CRA of 1875.

217. This is not to say that aggressive advocates did not try to tempt the Court to create rights under the amendment. In *Minor v. Happersett*, the Court resisted construing the Privileges or Immunities Clause as granting women the right to vote in Missouri. 88 U.S. (21 Wall.) 162, 170 (1875). The Court held that the Fourteenth Amendment did not create new rights but merely enforced protection of existing rights. *Id.* at 171. See generally CONG. GLOBE, 39th Cong., 1st Sess. 1270-71 (statement of Rep. Kerr) (commenting specifically on how civil rights and immunities support one contention right now, in its passing, but will likely be another thing later after the bill

Chief Justice Waite captured this limitation of the Fourteenth Amendment by the same contextual analysis in 1875 when plaintiffs were trying to manipulate the amendment's language to create new privileges and immunities.²¹⁸

In 1872, Missouri's Constitution conferred suffrage to only male voters.²¹⁹ Mrs. Virginia Minor, a citizen over the age of twenty one, sought to register to vote as a woman²²⁰ but was refused because she was a woman and only males were allowed to vote under the state constitution.²²¹ Mrs. Minor's counsel brought suit, arguing that Mrs. Minor was denied her privileges and immunities as voting was a privilege protected by the Fourteenth Amendment.²²² Chief Justice Waite and the Court refused to read new rights into Section One, especially a right such as female suffrage, which was not only rejected in that amendment but also rejected by the Fifteenth Amendment protecting suffrage rights from impairment on account of race.²²³

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?²²⁴

Chief Justice Waite also rejected substantive due process contentions by counsel.²²⁵

So also of the amendment which declares that no person shall be deprived of life, liberty, or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only

becomes law).

218. *Minor*, 88 U.S. (21 Wall.) at 165, 170-73.

219. *Id.* at 163.

220. *Id.* at 163-64.

221. *Id.*

222. *Id.* at 164.

223. *Id.* at 171 ("The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.").

224. *Id.* at 175.

225. *Id.* at 176-77.

be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

... If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.²²⁶

The inference from the passage of the Fifteenth Amendment, taken in conjunction with additional civil rights legislation which failed to secure school desegregation but succeeded at public accommodation desegregation, further supports that Congress as a whole wanted to approve bans on state laws such as voting and desegregation piecemeal or amendment by amendment.²²⁷

While ambiguous language of the amendment fosters uncertainty, a look at the failed language and the context of subsequent Reconstruction legislation truncates any indeterminacy.²²⁸ In addition to extending congressional protection against violations of existing national privileges and immunities to citizens, the amendment was a door for *Congress* to enforce violations of civil rights by the states.²²⁹ The amendment was before Congress to constitutionalize the CRA of 1866.²³⁰ The CRA of 1866 enumerated the understanding of protected privileges and immunities of

226. *Id.* at 176, 178.

227. See CONG. GLOBE, 41st Cong., 3rd Sess. app. at 123 (1871) (statement of Rep. Woodward) (stating that the Fourteenth Amendment was limited with respect to suffrage or else we would not need the Fifteenth Amendment); see also *Ex parte Virginia*, 100 U.S. 339, 368 (1880) (Field, J., dissenting) (finding a narrow construction of the Fourteenth Amendment (in this instance) "manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required").

228. See Bunch, *supra* note 57, at 339 (discussing commentators' views on the breadth of "privileges and immunities" and criticizing the belief that there is excessive indeterminacy in the clause). See generally Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882-83 (1995) (commending McConnell's contribution to desegregation research, but finding his argument unpersuasive); CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) (arguing political rights belong to the states); *id.* at 500 (statement of Sen. Cowan) (finding the concept of forced integration of the schools monstrous, but willing to vote for an amendment to secure natural rights).

229. See *supra* Part III.A.

230. See *supra* Part II.C.

national citizenship.²³¹ Thus, the Fourteenth Amendment as passed by Congress extends generally through the CRA of 1866 to the citizenship privileges and immunities including the civil right to contract, own property, and sue, but not to political or social rights such as the right to vote, hold office, serve on a jury, or school desegregation.²³² Privileges and immunities apply to citizens while equal protection applies to any person, citizen or alien within a state's jurisdiction.²³³ In context of the Slave and Black Codes and violations of basic civil justice, the framers meant for equal protection to be equal administration and not the substantive creation of the courts in modern day jurisprudence.²³⁴ The amendment's genesis from language establishing "equal protection of life, liberty, and property" and "equal political rights and privileges" to language securing a due process requirement for deprivation of life,

231. *See supra* Part II.C.

232. *Supra* notes 15-18, 57-68 and accompanying text. Senator Trumbull distinguished between civil rights and social rights. CONG. GLOBE, 42d Cong., 2d Sess. 3254 (1872) (statement of Sen. Trumbull) (declaring the new bill not as a "civil rights" bill but as a "social equality bill"). Civil rights were protected but social and political rights were not protected. *Id.* at 901; *see also supra* Part II. Senator Trumbull supported and introduced the CRA of 1866 but felt that the 1875 Act was unconstitutional. CONG. GLOBE, 42d Cong., 2d Sess. 901 (1872) (statement of Sen. Trumbull).

[T]o the rights that belong to the individual as man and as a freeman under the Constitution of the United States, I think we had a right to pass the civil rights bill. I thought so then, and think so now; but I think that we went to the verge of constitutional authority, went as far as we could do. We intended to do so, and I believe that we did.

Id.; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence) (reaffirming that the Civil Rights Bill did not affect political rights including suffrage and sitting on juries); Bunch, *supra* note 57, at 337-39 (noting commentators' view on the breadth of privileges and immunities).

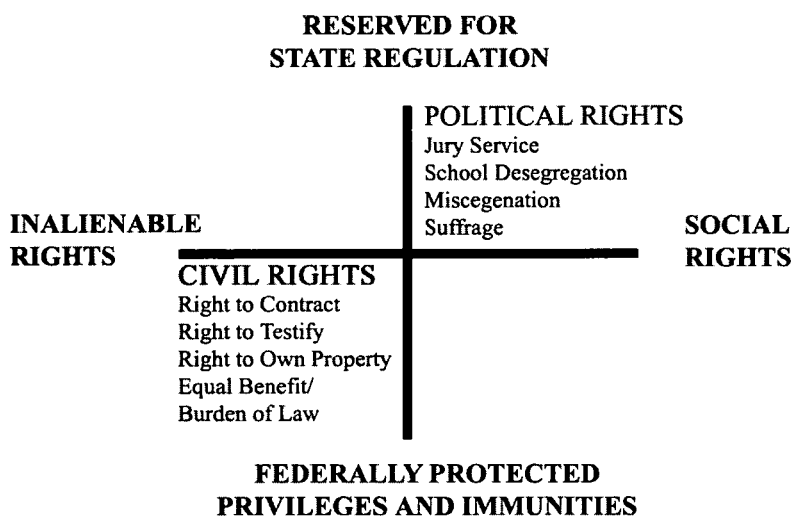
233. *See supra* Parts II.C-III.C. Specifically, the drafters of the Fourteenth Amendment stated that the amendment would not affect federalism. *See* CONG. GLOBE, 42d Cong., 1st Sess. 576-77 (1871) (statement of Sen. Trumbull) (stating that the federal government could only protect national citizenship rights, not state citizenship rights, and further that the privileges and immunities of the Fourteenth Amendment were the same privileges and immunities of Article IV of the Constitution); *see, e.g.*, 2 CONG. REC. 379-81 (1874) (statement of Rep. Stephens) (advancing the principle of civil justice between the races but distinguishing political liberty and social rights); *id.* at 384-85 (statement of Rep. Mills) (willing to allow Congress to enforce privileges including those contained in the Bill of Rights but distinguishing political rights as left for state regulation). *But see id.* at 408-09 (statement of Rep. Elliott) (articulating an expansive equal protection interpretation to effect social rights under the Equal Protection Clause).

234. *See supra* Parts II.C.2-III.C; *infra* Part IV; Maltz, *supra* note 8, at 499-500 (criticizing open-ended theories which state that the amendment was to refer to the theory of "fair classification"); Avins, *supra* note 68, at 397-98 (observing the modern-day absence of attention paid to the concept of "protection" as used by Congress during the Civil War era); CONG. GLOBE, 39th Cong., 1st Sess. 598, 1415-16 (1866) (statement of Sen. Davis) (discussing Kentucky's scheme of different punishments for identical crimes; for example the rape of a white woman by a black person is a sentence of death but a different punishment for the same crime committed by a white person).

liberty, and property and equal protection of the laws demarcates the intended limitations of the amendment. The former grants all citizens the basic privileges and immunities and access to the courts, and the latter grants all persons, including noncitizens, equal protection or administration of the law.²³⁵

E. Framework for Analysis under a Limited Fourteenth Amendment

A useful way of looking at the original Fourteenth Amendment is through a two-axis, four-quadrant framework. On the horizontal or equality-liberty axis exists the spectrum of natural and social rights under various variations of the terms life, liberty, and pursuit of happiness.²³⁶ It is inherently difficult to exhaustively define these various rights, but for purposes of the model, fundamental inalienable rights represent the far left of the horizontal axis while political and social rights represent the far right.²³⁷



235. See Avins, *supra* note 68, at 412-13 (finding no reasonable construction of the “equal protection of laws” to mean “protection of equal laws”); *supra* Parts II.C, III.A-D. Drafts of the amendment were revised to reject the concept that Congress was enforcing “equal political rights and privileges.” See *supra* Part III.D.2.

236. See *supra* note 10 (reviewing briefly a discussion of natural law).

237. See *supra* Part II.A-C.

The vertical or states' rights axis deals with principles of federalism.²³⁸ The bottom half represents the failures of the Articles of Confederation and the need for a limited federal government to deal with national issues such as war, finance, interstate commerce, and the protection of national privileges and immunities.²³⁹ Generally, the lower left addresses concern over the Slave and Black Codes and the willingness of Congress to remedy violations of civil rights as enumerated in the CRA of 1866.²⁴⁰ The top half represents the established constitutional design and the belief that states regulate life, liberty, and property.²⁴¹ The top right represents the political rights specifically excluded and left for state adoption, for example, school desegregation, interracial marriage, universal suffrage, and the privilege of jury service.²⁴² The top left covers the fundamental rights and liberties under state protection—those rights protected from federal encroachment by the Bill of Rights.²⁴³

238. See CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Hale) (“[T]here are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. I believe that whatever most clearly distinguishes our Government from other Governments in the extent of individual freedom and the protection of personal rights we owe to our decentralized system, to the fact that the functions of government with which the citizen has immediate relation are brought home to him, that he operates immediately upon them and they immediately upon him, instead of there being that long chain of communication which in a centralized government must extend from the fountain of power, whether despotic or republican, whether executive or legislative, to the citizen.”).

239. See THE FEDERALIST NO. 45 (James Madison) (advancing that the role of the national government is that which is absolutely necessary to avoid war between states and that the few powers for the federal government are for war, peace, and commerce whereas the indefinite powers left to the states are for the regulation of life, liberty, internal order, improvement and prosperity); THE FEDERALIST NO. 32 (Alexander Hamilton) (describing the limited consolidation of national government with states retaining their sovereignty except to that which is exclusively designated to the national government).

240. See *supra* Part II.A-B; THE FEDERALIST NO. 80 (Alexander Hamilton) (discussing the enforcement of the Privileges and Immunities Clause as necessary to prevent state jealousies from depriving citizens of fundamental rights); see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) (Field, J.) (“It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.”).

241. See *supra* notes 137, 239 and accompanying text.

242. See *supra* Parts II.C, III.A-D.

243. The Ninth and Tenth Amendment were included to protect local and state regulation of individual rights. See CONG. GLOBE, 41st Cong., 2d Sess. app at 354 (1870) (statement of Sen. Hamilton) (referring to the Ninth and Tenth Amendments as securing the first principle of the Constitution as an instrument of enumerated federal powers and remarking that the assumption of congressional power to the contrary would violate the “last fundamental principle of our Government” and “place all State constitutions, sovereignty, and authority under the control of the

Invalidating state legislation conflicting with the lower left quadrant posed no problems for the supermajority of the 39th Congress.²⁴⁴ On two occasions, the 39th Congress passed legislation for the protection of civil rights generally enumerated in the CRA of 1866.²⁴⁵ The political rights of the upper right quadrant, however, were specifically excluded in the passage of both the CRA of 1866 and the Fourteenth Amendment. These rights were reserved for state and local regulation.²⁴⁶ In cases falling under the top half, a judge may view legislation impolitic,²⁴⁷ needless and

General Government; and the States, once independent, great, and useful and beneficent in their separate powers of legislation, would stand in the same relations to the Government of the United States that local municipalities do now to the States"); CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866) (statement of Rep. Kerr) (questioning the prudence of the CRA of 1866: "The history of the country teaches us that the people of the States feared that, by such vicious constructions as we now daily hear, Congress might usurp powers not granted to it, and thus peril the rights of the States and of their citizens; and *therefore* the States demanded these amendments as safeguards against encroachments on the part of the General Government. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power by the General government were recommended. They were not intended to be, and they are not, limitations on the powers of the States. They are bulwarks of freedom, erected by the people between the States and the Federal Government.").

The Anti-Federalists fought for local government free from encroachment by the implied and express provisions of the federal government under the proposed Constitution. 3 BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* 527-28 (1980). Initially Federalists felt that the Bill of Rights was unnecessary, but Anti-Federalist pressure persuaded the Framers to agree to add the Bill of Rights as amendments after the Constitution was adopted. *Id.* at 527-28; *see also id.* at 444 (George Mason objecting to the proposed Constitution: "There is no declaration of rights: and the laws of the general government being paramount to the laws and constitutions of the several states, the declarations of rights, in the separate states, are no security."); *id.* at 519 (Anti-Federalist Agrippa 18, February 5, 1788) (proposing an Amendment to be included in the Bill of Rights: "Nothing in this constitution shall deprive a citizen of any state of the benefit of the bill of rights established by the constitution of the state in which he shall reside, and such bill of rights shall be considered as valid in any court of the United States where they shall be pleaded.").

244. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge) ("What is the object of proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed [sic] to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State."); *supra* Part II.

245. *See supra* Part II. The CRA of 1866 did not confer new rights but instead was a reaffirmation of existing rights to all citizens and persons, former status notwithstanding.

246. *See supra* Part III; *supra* notes 15-18, 57-62 (political-civil right dichotomy); *see also supra* notes 137, 190 (discussing local self-regulation). *See generally* Earl A. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL'Y 451 (1996) (defending an originalist perspective of Reconstruction legislation).

247. *See* *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 520-21 (1885) (Field, J.) ("It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection

wasteful,²⁴⁸ serving other motives,²⁴⁹ or silly,²⁵⁰ but would not find that the rights affected were federally protected under the federalism dimension and that the local legislation in question should instead be remedied at the polls.²⁵¹

Intervention based on the Constitution or congressional enactments securing civil rights should not only address the aims within equality-liberty dimension, but also include a federalism analysis asking whether this regulation was intended to be left to state and local government for regulation.²⁵²

Modern judicial opinions seem to focus solely on one's viewpoint along the equality-liberty axis, namely vague notions of liberty or social utopia, and in many cases, this limited analysis is the sole factor used to invalidate the local legislation.²⁵³ The fact that a judge might deem a right fundamental or inalienable does not automatically equate to federal protection under the amendment. States also protect fundamental rights under their own constitutions, and a proper analysis under the amendment should consider whether violations of a right deemed fundamental were intended, in the interests of preventing excessive centralization, to be left for state and local correction.²⁵⁴ Justice Field favored open-ended enunciations along the equality-

to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation.”). Though Field seemed to give deference to state legislation, Field actually went to great lengths with the breadth of “liberty” and the Due Process Clause to invalidate state legislation. See *infra* Part IV.

248. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (giving deference to legislative enactments). The *Williamson* Court stated “[t]he Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” *Id.*

249. See *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885) (finding that “the courts cannot inquire into the motives of the legislators in passing [legislation], except as they may be disclosed on the face of the acts, or inferable from their operation” and that the motives “will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments”).

250. See *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) (arguing that the Constitution does not protect the right to use contraception). Justice Stewart remarked that the law is silly, unenforceable, perhaps unwise and asinine, but that fact does not make it unconstitutional. *Id.*

251. See *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (discussing the constitutionality of a law fixing the maximum charge for storing warehouse grain).

252. See *supra* notes 99-103 (listing, for example, political rights excluded from protection); *supra* note 137 (limiting congressional coverage to remedy state violations).

253. See *infra* Part IV.A-B; see also *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206-07 (1849) (Shaw, J.) (refusing to litigate on uncertain principles underlying the Constitution).

254. See 3 SCHWARTZ, *supra* note 243, at 472 (“By the state constitutions, certain rights have been reserved in the people; or rather, they have been recognized and established in such a manner, that state legislatures are bound to respect them, and to make no laws infringing upon them. The state legislatures are obliged to take notice of the bills of rights of their respective states. The bills of rights, and the state constitutions, are fundamental compacts only between those who govern, and the

liberty dimension and these lofty opinions, often dicta, eventually led courts to undermine legislative legitimacy by invalidating state legislation without considering the federalism dimension.²⁵⁵

IV. JUSTICE FIELD'S UNFAITHFUL JUDICIAL INTERPRETATION

During the late nineteenth century, the Supreme Court abandoned the limited amendment and the idea that Congress was to operationalize the amendment through enforcement legislation. Substance flowed behind the terms due process and equal protection.²⁵⁶ Initially, the majority held fast to the notion of a limited amendment, refusing to invalidate state regulation outside of federal supervision.²⁵⁷ Eventually, the open-ended opinions by Field and fellow justices taking an opposite approach reached the majority.²⁵⁸

The following passage, in a case involving a state statute banning the manufacture of oleomargarine butter, is an example of protean Field jurisprudence showing little regard for the limited amendment.²⁵⁹

With the gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable

people of the same state."); *supra* note 243 and Part II.C-III.D.

255. *See infra* Part IV.

256. *See infra* Part IV.A-C; Chemerinsky, *supra* note 33, at 1146-47 (finding that a broader interpretation of privileges and immunities in the *Slaughter-House Cases* would have made substantive due process unnecessary). *But see* Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 Ky. L. J. 1, 2-3 (1993) (criticizing Chemerinsky's broad interpretations of the Fourteenth Amendment).

257. *See infra* Part IV.A-C; *see, e.g.*, *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 77-79, 81 (1873) (Miller, J.); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138-39 (1873); *Bartmeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 132-33 (1874) (Miller, J.); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170-72 (1875) (Waite, C.J.); *United States v. Cruikshank*, 92 U.S. 542, 554 (1876); *Munn v. Illinois*, 94 U.S. 113, 125, 134-35 (1877); *Davidson v. City of New Orleans*, 96 U.S. 97, 104-06 (1878); *Kirtland v. Hotchkiss*, 100 U.S. 491, 498-99 (1880).

258. *See infra* Part IV.C.

259. *Powell v. Pennsylvania*, 127 U.S. 678, 679 (1888).

rights, which, in my judgment, no State can give and no State can take away except in punishment for crime.²⁶⁰

In this case, Justice Field, in dissent, interjected his view of natural law into a harangue on the Fourteenth Amendment.²⁶¹ For Justice Field, the Fourteenth Amendment allowed the Court to take away from the states the right to regulate the manufacture of butter.²⁶²

[P]revious to the adoption of the Fourteenth Amendment . . . the validity of such legislation was to be determined by the constitution of the State If the legislation of the State thus sustained was oppressive and unjust, the remedy could be found only in subsequent legislation, brought about through the influence of wiser views and a more enlightened policy on the part of the people. . . . By the first section of the Fourteenth Amendment, which had its origin in the new conditions and necessities growing out of the late civil war, further restraints were placed upon the power of the States

It is the clause declaring that no State shall "deprive any person of life, liberty, or property without due process of law," which applies to the present case. This provision . . . was designed to prevent the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property. As I said on a former occasion, it means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. It has always been supposed to secure to every person the essential conditions for the pursuit of happiness, and is therefore not to be construed in a narrow or restricted sense.

By "liberty," as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interest not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment. . . . "[T]he term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."²⁶³

260. *Id.* at 692 (Field, J., dissenting) (citing *People v. Marx*, 2 N.E. 29, 33 (N.Y. 1885)).

261. *See id.*; *see also* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 49 (Charles W. Everett ed., 1928) (describing inherent subjectivity in applying natural law to legal decisions).

262. *Powell*, 127 U.S. at 694-98 (Field, J., dissenting).

263. *Id.* at 690-92 (citations omitted and emphasis added).

With this view of “liberty” and the Due Process Clause, the Fourteenth Amendment’s reach—*construed and operationalized solely by the Court*—is as wide as the horizon. Any state regulation is subject to reasonableness review by the Court.²⁶⁴

Through these unfaithful interpretations, Justice Field, along with other justices, belied the limited Fourteenth Amendment and expanded the understanding of the amendment.²⁶⁵ After reaching a majority, these expansive interpretations resulted in the wholesale loss of the limited Fourteenth Amendment.²⁶⁶

Surprisingly, when Justice Field was confronted directly with certain political rights discussed before the 39th Congress, he did not regress to the overly broad

264. Borrowing from English jurisprudence,

[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

WILLIAM BLACKSTONE, 1 COMMENTARIES *91 (England does not have a Constitution in the same form as the United States but the relationship between judge and statute remains instructive); *see* BENTHAM, *supra* note 261, at 154, 190-91 (noting the subjectivity of “reasonableness” review of legislation); Avins, *supra* note 50, at 236-39 (observing that “nothing about reasonableness” exists in the text of the amendment); *infra* notes 301-305, 368-381 (describing the Court’s bait-and-switch to exercise reasonableness review). When discussing judicial review, the Framers used the term “repugnant” or self-contradictory and not “unreasonable.” *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (holding that an act repugnant to the Constitution could not stand). Alexander Hamilton, one of the primary authors of THE FEDERALIST Papers, did not feel that the runaway discretion of the judiciary would be a problem.

It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the Legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the Legislative body. The observation, if it proved any thing, would prove that there ought to be no Judges distinct from that body.

THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (E.H. Scott ed., 1898). Hamilton was clear: “It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty.” THE FEDERALIST NO. 32, at 171 (Alexander Hamilton) (E.H. Scott ed., 1898).

265. *See* *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting); *Bartmeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 137-41 (1874) (Field, J., concurring); *Munn v. Illinois*, 94 U.S. 113, 136 (1877) (Field J., dissenting); *Davidson v. City of New Orleans*, 96 U.S. 97, 107 (1878) (Bradley, J., concurring). *See generally* KENS, *supra* note 9, at 10 (placing Field with other liberal courts such as the Warren Court).

266. *See infra* Part IV.C-V; CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Hale) (denying that the amendment is forged as one with the Constitution because the Constitution is a states’ rights doctrine).

constructions.²⁶⁷ Instead he supported consideration of states' rights and espoused the limited Fourteenth Amendment.²⁶⁸ Although Field remained steadfast to strong distinctions set forth in the promulgation of the amendment regarding certain political rights, with respect to economic decisions and the interpretation of the Fourteenth Amendment as a whole, Field-like jurisprudence ordained a latitudinarian view of the amendment.²⁶⁹

A. Monopolies as a Vehicle to Bypass the Limitations of the Fourteenth Amendment

In the *Slaughter-House Cases*, the Louisiana legislature ordered that the slaughter of animals be restricted to a specific location in the city.²⁷⁰ The law also granted the exclusive right of slaughtering to a handful of persons.²⁷¹ Other slaughterhouse operators sued claiming the monopoly was a violation of the Thirteenth and Fourteenth Amendments.²⁷² The aggrieved appellants in the *Slaughter-House Cases* tried to equate the loss of slaughter privileges as equivalent to slavery or involuntary servitude.²⁷³ The plaintiffs advanced that any discrimination "between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others" was a violation of the Thirteenth Amendment

267. See *Ex parte Virginia*, 100 U.S. 339, 367 (1880) (Field, J., dissenting) ("The equality of the protection secured extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration."); *Pace v. Alabama*, 106 U.S. 583, 584-85 (1883) (Field, J.) (refusing to invalidate interracial marriage law as a violation of the Equal Protection Clause); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140-42 (1873) (Bradley, J. concurring, joined by Field & Swayne, JJ.) (discussing that the claim—that the Fourteenth Amendment prohibits a law which does not allow women to pursue certain lawful employment—"assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life"). The concurring opinion stated that "[i]t certainly cannot be affirmed, as [a] historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex." *Id.* at 141. The opinion went on to comment on the role of family members. *Id.*; see also *Virginia v. Rives*, 100 U.S. 313, 335 (1880) (Field, J., concurring) (arguing that the absence of certain members on a jury is not a violation of equal protection of the laws).

Some commentators suggest that Field may have had an agenda against fighting communism and did not want any restrictions on free business following the Franco-Prussian War and the Paris Commune. See Graham, *supra* note 9, at 856-57 (comparing Justice Holmes and Justice Field); McCloskey, *supra* note 9, at 1074.

268. *Id.*

269. See *infra* Part IV.C (illustrating Field's latitudinarian version of the amendment).

270. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 59.

271. *Id.*

272. *Id.*

273. *Id.* at 91 (Field, J., dissenting).

outlawing slavery.²⁷⁴ The majority of the Court did not find that the ordinance regulating slaughterhouse operators was a violation of either the Thirteenth or Fourteenth Amendment and doubted whether the Fourteenth Amendment would ever extend beyond race relations.²⁷⁵ The majority held a narrow interpretation of the amendment's privileges and immunities provision, protecting against violations of citizenship and national privileges and immunities, but distinguishing unprotected state privileges and immunities such as the right to maintain a slaughterhouse.²⁷⁶

274. *Id.* The appellants' claim serves as a good example of the abuse of the Reconstruction Amendments. See CONG. GLOBE, 39th Cong., 1st Sess. 1270-71 (1866) (statement of Rep. Kerr) (noting the abuse of Reconstruction legislation).

275. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81.

276. *Id.* at 81-82 (finding the concept of national and state entities distinct where states were to remain regulators of civil and political rights); see also CONG. GLOBE, 39th Cong., 1st Sess. 1268-69 (1866) (statement of Rep. Kerr) (distinguishing between national citizenship and state citizenship and stating that state citizenship does not necessarily entail Union citizenship and Union citizenship does not necessarily entail state citizenship); *id.* at 1292-93 (statement of Rep. Bingham) (quoting Chancellor Kent who stated that the state courts should control the vast fields of property law, equity jurisdiction, civil, and domestic relations); CONG. GLOBE, 42d Cong., 1st Sess. 576-77 (1871) (statement of Sen. Trumbull). Sen. Trumbull and Sen. Carpenter illustrated the ongoing controversy over the amendment in a debate in 1871. Sen. Trumbull stated:

This Constitution says no such thing as that a State shall not abridge the privileges of any citizen. It speaks of citizens of the United States, and you have not advanced one step in the argument unless you can define what the privileges and immunities of citizens of the United States are. . . . [The] national Government was not formed for the purpose of protecting the individual in his rights of person and of property.

Id. at 577. Sen. Carpenter stated:

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.

Id. (statement of Sen. Carpenter). Sen. Trumbull:

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.

Id. (statement of Sen. Trumbull). Sen. Carpenter:

And that Constitution forbids them to deny them, and authorizes Congress to legislate so as to carry that prohibition into execution.

Id. (statement of Sen. Carpenter). Sen. Trumbull:

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 [Mr. Carpenter] would be right; but it says no such thing. . . . [T]he 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. The Government of the United States protects the citizen of the United States to the same extent in Carolina or Massachusetts as it protects him in Portugal or in England. 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

This narrow holding on protected privileges and immunities affected Republican strategy.²⁷⁷ With the privileges and immunities avenue blocked, later efforts to secure sought-after political and social rights would embrace the Due Process and Equal Protection Clauses.²⁷⁸

Justice Swayne, joining Field in dissent, criticized the legislature for creating a monopoly.²⁷⁹

Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. . . . "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure. "The equal protection of the laws" places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness.²⁸⁰

Justice Swayne's dissent further stated "[t]he protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men."²⁸¹ Adopting Swayne's language in dissent as a fair representation of the amendment completely disregards the intended limitations of the amendment. This substantive version is strikingly familiar to the amendment's

United States as now.

Id. (statement of Sen. Trumbull).

277. See Chemerinsky, *supra* note 33, at 1143-47 (discussing the Court's progression under the Fourteenth Amendment and the need for substantive due process to make up for the narrow construction of "privileges and immunities" in *Slaughter-House Cases*).

278. See 2 CONG. REC. 408-09 (1874) (statement of Rep. Elliott) (suggesting that the Equal Protection Clause forbids all types of discrimination including public accommodation segregation); *supra* note 148 and accompanying text; see also 2 CONG. REC. app. at 358-61 (1874) (statements of Sen. Morton and Sen. Merrimon) (broadening "equal protection" by Morton after the *Slaughter-House Cases* to class-based discrimination and Merrimon maintaining the political/civil distinctions of the Fourteenth Amendment). But see CONG. GLOBE, 39th Cong., 1st Sess. 2538-42 (1866) (statement of Rep. Farnsworth) (reaffirming that the amendment did not cover political rights and suggesting that the Equal Protection Clause is mere surplusage to other measures of the amendment and the Constitution); CONG. GLOBE, 42d Cong., 1st Sess. app. at 48-49 (1871) (statement of Rep. Kerr) (describing the addition of the "Equal Protection Clause" as involving "no grant of power[,] [i]t is simply declaratory of the pre[e]xisting law of the country, the pre[e]xisting, fundamental, constitutional law declared by all the courts and tribunals of the entire country"); see also *supra* Part II.C.2 (describing the Equal Protection Clause).

279. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 128 (Swayne, J., dissenting) ("A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country.").

280. *Id.* at 127.

281. *Id.* at 129.

earlier draft, which Congress rejected.²⁸² While this reads well as an abstract philosophy, it certainly lacks precision for a judicial doctrine invalidating state law. In the passage of the Fourteenth Amendment, the committee and Congress, as a finely wrought body,²⁸³ rejected the versions "equal protection of life, liberty, and property" and "equal political rights and privileges" in favor of a more limited reach.²⁸⁴ Similarly, Congress rejected the initial version of the CRA of 1866 which barred all discrimination in "civil rights and immunities."²⁸⁵ Language securing "equal protection to the pursuit of happiness" is appealing and harmonizes well with the general natural law language advanced by a few radical Republicans, but would not have been accepted in a provision that many worried would erode all state legislation.²⁸⁶

In a lower court opinion, Justice Bradley, who also heard the case on the Supreme Court and dissented, admitted that his reading of the Fourteenth Amendment was broader than the intended one.²⁸⁷

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 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.²⁸⁸

As a whole, the *Slaughter-House Cases* dissent was dissatisfied with a narrow application of the amendment.²⁸⁹ The dissent in the *Slaughter-House Cases* served

282. See *supra* Parts II-III.

283. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the power of Congress as a "single, finely wrought and exhaustively considered, procedure").

284. See Maltz, *supra* note 8, at 533 (noting the revision from equal protection of life, liberty, and property, to equal protection of the laws); *supra* Part III.D.2; *infra* notes 409-410 and accompanying text (Court ignored distinction and adopted rejected version).

285. See *supra* Part III.D.2.

286. See *supra* Parts II.C-III; see, e.g., *supra* notes 78-79.

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

288. *Id.* Bradley seemed to be engaging in circular reasoning.

289. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116-18 (1873) (Bradley, J., dissenting) (finding the rights of man and the constitutional history of America support a broader construction of the amendment). The dissent criticized the majority's opinion as being too narrow:

It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest

as the bellwether for the substantive retrofit of the amendment.²⁹⁰ Future court decisions would contain a similar split along the same ideological grounds.²⁹¹

Many of the initial cases under the Fourteenth Amendment dealt with monopolies and economic regulations.²⁹² Justice Field was an advocate against monopolies and distrusted the legislature.²⁹³ Field supported the application of the Fourteenth Amendment to monopolies and the finding that monopolies violate Section One by "encroach[ing] upon the liberty of citizens to acquire property and pursue happiness."²⁹⁴ In his *Slaughter-House Cases* dissent, Field equated the granting of special economic privileges as a situation where not all persons are equal before the law.²⁹⁵ Field quoted Senator Trumbull as stating: "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited."²⁹⁶ In context, Senator Trumbull's entire reference is to the civil rights under the CRA of 1866 as applied to the newly freed slaves and gives no indication for any generalized meaning for monopolies.²⁹⁷ Justice Field would have found the Louisiana statute in violation of

considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective.

Id. at 129.

290. *Id.* at 95-96 (Field, J., dissenting). *But see Ex parte Virginia*, 100 U.S. 339, 349 (1880) (Field, J., dissenting). Though Field greatly broadened areas of due process and equal protection in several opinions laden with natural law principles of liberty, he remained steadfast to the letter and context of the amendment with regards to infringement of states' rights over certain political rights. *Id.* at 366-70; *supra* note 267. Field was also a member of the *Plessy v. Ferguson* majority. *Infra* Part V.A.

291. *See infra* Part IV.A-C.

292. *See* Michael Conant, *Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 792-97 (1982). Monopolies and government have a long tradition dating back through colonial times to English common law. *Id.* A provision against monopolies was proposed as one of the Bill of Rights but was not included despite the fact that five ratifying states recommended a prohibition on monopolies. *Id.* at 799-800.

293. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 101-02. *See generally* Eastman & Sandefur, *supra* note 9, at 122-27 (detailing Field's philosophy of justice for individual rights in defiance of the legislature). Field distrusted large corporations and their possible influence upon legislation. *See* KENS, *supra* note 9, at 267.

294. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 101 (Field, J., dissenting).

295. *Id.* at 91-92.

296. *Id.* at 92 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull)).

297. *See supra* notes 18, 39, 83, 232 and accompanying text (remarking on the limited coverage of Reconstruction legislation).

the Fourteenth Amendment where the statute granted special privileges to a handful of citizens.²⁹⁸

Field's strong minority opinions serve as a stimulant for the substantive due process and substantive equal protection misinterpretations which became the understanding of the amendment in the latter part of the nineteenth and early twentieth century.²⁹⁹ His broad interpretations of liberty later captured the majority and served as precedent to redefine the Fourteenth Amendment and the relationship between the states and the Supreme Court.³⁰⁰ Similar to Justice Marshall in *Marbury v. Madison*³⁰¹—eventually finding it did not have jurisdiction after establishing judicial review³⁰²—the actual outcome of several of Justice Field's opinions did not invalidate the specific legislation at issue, but instead used the opportunity to secure great latitude in the interpretation of the amendment before finding it inapplicable. The Court would eventually use these broader interpretations to invalidate state legislation.³⁰³ This paved the road for the Court to determine "proper legislation" with respect to social and political rights.³⁰⁴ Like *Marbury*, it is the truncation of

298. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 92-93 (Field, J., dissenting) (equating the monopoly to the tyranny of preventing the French peasantry of the ability "to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press.").

299. See *infra* Part IV.B. See generally KENS, *supra* note 9, at 284 (articulating how Field as an activist judge would use concurring and dissenting opinions to articulate his ideology).

300. See *infra* Part IV.C. See generally Graham, *supra* note 9, at 882 (discussing the strategy of judges to expand doctrines through dicta in dissenting opinions). The evolution of Field's non-majority opinions is similar to the evolution of Sir Edward Coke's opinions in the seventeenth century. Coke confused the legal field for several centuries with his often internally inconsistent dicta and misconstructions of select ancient statutes and treatises. See generally Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926) (noting the flaws in Coke's jurisprudence and tracing the adoption of Coke's writings through the American Revolution).

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

302. *Id.* at 176-77.

303. See *infra* Part IV.C.

304. See *infra* notes 372-381 (leaving the legislation intact but securing open-ended language as the appropriate test and characterization of the Fourteenth Amendment). The *Mugler v. Kansas* Court emphasized the legitimacy of legislation on the one hand, but carefully curtailed the legislative grant on the other:

[Courts] are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Mugler v. Kansas, 123 U.S. 623, 661 (1887) (Harlan, J.). The validity-of-legislation test conceived

legislative legitimacy which stands as precedent for later generations.³⁰⁵ After the *Slaughter-House Cases* decision, Louisiana amended its Constitution to address monopoly legislation.³⁰⁶

In serving the aim to grant newly freed slaves citizenship rights and equal protection of the law, the principles discussed and the broad language used gave rise to potential ambiguity. Justice Rehnquist once wrote that the judicial construction of the amendment has put Adam in the Garden of Eden where interpretation is held back only by self-restraint.³⁰⁷ Contrary to such judicial constructions, the framers of the

and developed under Field's influence is the foundation for our two-tier-plus review of legislative enactments.

305. For example, in *Barbier v. Connolly*, Field did not actually hold the class legislation invalid after affirming the class legislation test, articulating open-ended constructions of the amendment, and carving out the proper role of legislation. 113 U.S. 27, 30-32 (1885); see also *infra* notes 368, 372-385 and accompanying text (describing the Court's bait-and-switch strategy to subordinate state police power).

306. See *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 656 (D. La. 1870) (No. 8408). The issue went back to the Supreme Court in 1884, see *Butchers' Union Slaughter House & Live-Stock Landing Co. v. Crescent Slaughter-House Co.*, 111 U.S. 746 (1884) (reviewing the complications concerning the Slaughter-House contract after the State amended their constitution), and again in 1887, see *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U.S. 141 (1887).

307. See *Trimble v. Gordon*, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting) (discussing the judicial abuse of the Equal Protection Clause); Kay, *supra* note 107, at 669. The Anti-Federalist *Brutus*, thought to be Robert Yates, argued against adopting the Constitution in part because of the power of the federal judiciary.

[Those that are vested with the judicial power] are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.

Brutus Letter XI (Jan. 31, 1788), in *THE FEDERALIST WITH LETTERS OF "BRUTUS,"* 501 (Terence Ball ed., 2003). *Brutus* predicted that the national judiciary would completely subvert the state judiciaries and even the state legislatures. *Id.*; see also *CONG. GLOBE*, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Hale).

[I]t is the inevitable tendency of power always to augment itself; to acquire additional power by mere amplification and accretion. Power goes on to increase and arrogate to itself power, from time to time, by extension and enlargement. That has been the tendency under the Constitution as it exists. The principle that it is the part of a good judge to amplify his jurisdiction has been not only a maxim of the courts but it also seems to have been the principle and maxim upon which the Federal Government has operated. Now I put it to the gentleman [Mr. Bingham] . . . whom I know sometimes at least to be disposed to criticize this habit of liberal construction, to state where he apprehends that Congress and the courts will stop in the powers they may arrogate to themselves under this proposed amendment.

Id.; see also *infra* note 337 (commenting on the judiciary's abuse of the Fourteenth Amendment).

Fourteenth Amendment intended for the amendment to address violations of citizenship rights and to constitutionalize congressional enforcement of civil rights. However, advocates have exploited ambiguity and taken terms such as "liberty" and concepts such as barring "class legislation" out of the broader bipartisan context to redefine the Fourteenth Amendment.³⁰⁸

B. Expansive Use of "Liberty" to Erode the Balanced Fourteenth Amendment

Regarding expansive interpretations of Section One, the judiciary's use of a colorful phrase of "absolute equality," "class legislation," or "liberty" quickly loses its legitimacy when carried beyond congressional enactment or existing national privileges and immunities and into political or social rights not covered by the amendment.³⁰⁹

In *Munn v. Illinois*, the majority gave deference to the validity of the statute regulating the maximum rate charged for grain storage.³¹⁰ Chief Justice Waite stated that "[e]very statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."³¹¹ The *Munn* Court discussed the role of members of society and the need to sacrifice some rights and privileges under a social compact with government.³¹² The Court emphasized that it is the province of the Legislature to cure the defects in the common law and bring constitutional principles

308. See 3 CONG. REC. 1794 (1875) (statements of Sen. Morton and Sen. Thurman) (questioning whether the expanded interpretation of the Fourteenth Amendment was consistent with several classifications and meant to interfere with political privileges); *supra* note 278 and accompanying text (illustrating the debate over class discrimination and the broadened meaning of equal protection).

309. See *supra* Part III.E; see also Bunch, *supra* note 57, at 342-47 (criticizing expansive interpretations of privileges and immunities); *Ex parte Virginia*, 100 U.S. 339, 349 (1880) (Field, J., dissenting) (articulating a reserved interpretation of the Fourteenth Amendment in dissent when certain political rights were at issue). See generally Charles Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926) (noting the use of "liberty" before and after the amendment and criticizing the incorporation of rights under "liberty"); *infra* Part V.B (discussing modern Fourteenth Amendment jurisprudence).

310. *Munn*, 94 U.S. 113, 123, 135 (1877).

311. *Id.* at 123.

312. *Id.* at 124-25 ("When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'"); see also CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (statement of Rep. Broomall) ("The rights and duties of allegiance and protection are corresponding rights and duties. Upon whatever square foot of the earth's surface I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection, I owe it no allegiance . . .").

up to date.³¹³ The *Munn* majority noted: "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."³¹⁴

Justice Field, in dissent, however, used the opportunity to unravel the amendment and construe the terms broadly.³¹⁵ Field decorated the pages of his dissent with emotive filler about how the protection of life is more than "mere animal existence."³¹⁶ Against this backdrop, Field discussed his view of what the term "liberty" meant in the Fourteenth Amendment.

By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.³¹⁷

313. *Munn*, 94 U.S. at 134-35.

314. *Id.*; see also *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830) ("This vital power may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation.").

315. See generally *Munn*, 94 U.S. at 136-54 (Field, J., dissenting).

316. *Id.* at 142. Field pontificated:

The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

Id.

317. *Id.* For example, in *Powell v. Pennsylvania*, 127 U.S. 678, 690-91 (1888), Justice Field's dissent adds a restrictive "necessary" hook to constitutional validation of police power regulation.

[T]he term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.

Id. at 692, quoting *People v. Marx*, 2 N.E. 29, 33 (N.Y. 1885).

Justice Field was determined to consume the legislative function in open-ended, indeterminate terms of “life,” “liberty,” and the “pursuit of happiness.”³¹⁸ Justice Field would have found the regulation of warehouse rates an interference with private business and thus a violation of the Fourteenth Amendment.³¹⁹

Converse to Justice Field’s jurisprudence, courts prior to the Civil War referred to the ambiguous clauses in the founding documents as principles to guide legislative enactments and not as litigable passages.³²⁰ In *Roberts v. City of Boston*, a case involving school desegregation in Boston, the Massachusetts Supreme Judicial Court refused the opportunity to litigate on the amorphous principles underlying the Constitution.³²¹ The Court conceded that all are equal before the law, but rejected an extension of that concept into political adjudication.³²² The Court referred to the obscure clauses merely as guiding principles for the legislature.³²³

318. *Munn*, 94 U.S. at 141-42 (Field, J., dissenting). Field stated:

Unless I have misread the history of the provision now incorporated into all our State Constitutions, and by the [Fifth] and [Fourteenth] Amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, State or Federal, has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no State can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.

Id.

319. *Id.* at 152-53 (positing that even chimney-sweeps should be able to claim the amount of compensation which they can bargain for and the legislature assigning reasonable rates is not proper).

320. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206-07 (1849) (“The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make.”); *Beebe v. State*, 6 Ind. 501 (1855), available at 1855 WL 3616, at *29.

It has been urged that the act is a sumptuary law; that it interferes with the abstract rights of individuals, in the pursuit of happiness, which is guaranteed by the bill of rights. . . . The “pursuit of happiness” is a vague and indefinite term, which can have no relation to relative rights or duties. Allowing what is claimed for it, there would be an end of the criminal code. On a motion to quash an indictment for bigamy, for instance, this claim of abstract rights would receive little consideration. It is the common pretense of communists, anti-renters, and other outlaws, that society has invaded their abstract and inalienable rights; but until society is revolutionized and instituted upon a different basis, these claims will be disallowed.

Id.

321. See *Roberts*, 59 Mass. (5 Cush.) at 206-07.

322. *Id.* at 206-07. Justice Shaw held:

[The principle that all persons by age or sex, birth or color, origin or condition, are equal before the law is] as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the

Prior to Reconstruction, the principle of due process³²⁴ had long been part of the constitutional and governing framework, but once utilized in the manner advocated by Justice Field and others, its use increased dramatically.³²⁵ The Court identified this abuse in *Davidson v. City of New Orleans*.³²⁶ The issue of due process in *Davidson* concerned whether an assessment of real estate in New Orleans for draining the city swamps was depriving citizens of property without due process of

whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

Id.; see *supra* notes 127-136 and accompanying text; see also CONG. GLOBE, 42d Cong., 1st Sess. app. at 81 (1871) (statement of Rep. Bingham) ("The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof.").

323. *Roberts*, 59 Mass. (5 Cush.) at 206-07; see, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."); cf. John Marshall (Virginia Ratification, June 20, 1788) commented: "The bill of rights is merely recommendatory. Were it otherwise, the consequence would be that many laws which are found convenient would be unconstitutional." 4 Schwartz, *supra* note 243, at 812.

324. See CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham) (referring to the Due Process Clause as being settled long ago by the courts); CONG. GLOBE, 42d Cong., 1st Sess. app. at 48 (1871) (statement of Rep. Kerr) (reaffirming the procedural roots of the Due Process Clause, that the Courts "in every instance . . . have . . . held to mean that no person shall be deprived of life, liberty, or property, except in the regular course of administration through courts of justice, or of legal proceedings under the laws of the land").

325. See generally Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975) (criticizing the divergence from the centuries of prior interpretations which held "Due Process" to be equivalent to the usual procedures of the law). The phrase "Due Process" first appeared in 1354, "That no man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due process of the Law." 1354, 28 Edw. 3, C.3 (Eng.). Due process secures judgment before execution. This guarantee was needed to prevent the King from arbitrarily executing his authority without seeking judgment or following the existing custom or law of the land. See WILLIAM SHARP McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 381 (2d ed. 1914) (discussing Chapter 39 which is the antecedent to the concept of "Due Process"); *The Civil Rights Cases*, 109 U.S. 3, 23-24 (1883) (suggesting that allowing persons who have committed crimes, for example, horse stealing, to be seized and hung by the posse comitatus was a violation of the clause protecting deprivation of life, liberty, or property without due process of law).

326. 96 U.S. 97 (1878).

law.³²⁷ The Court discussed the historical context and the limitation of the phrase “due process” by giving a brief example of depriving another of land without “due process of the law.”³²⁸ The majority of the *Davidson* Court was critical of the increased use of the Due Process Clause:

There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the [Fourteenth] Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.³²⁹

The Court emphasized the usefulness of a complete definition for due process, but relegated the interpretation of the Federal Constitution “by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require.”³³⁰ The Court went on to say that a party cannot claim a lack of due process where it has had a fair trial according to the modes and procedures which govern the case.³³¹

While the majority of *Davidson* Court confined the interpretation of due process to its procedural roots, Justice Bradley, in concurrence, echoed Field’s dissent in

327. *Id.* at 105-06 (holding that the fulfillment of a fair hearing in the lower court and later the Supreme Court is due process and “[i]f this be not due process of law, then the words can have no definite meaning as used in the Constitution”).

328. *Id.* at 102 (“It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision.”); *see also* *R.R. Co. v. Richmond*, 96 U.S. 521, 529 (1878) (“All property within the city is subject to the legitimate control of the government, unless protected by ‘contract rights,’ which is not the case here. Appropriate regulation of the use of property is not ‘taking’ property, within the meaning of the constitutional prohibition.”).

329. *Davidson*, 96 U.S. at 104; *see also* BRUCE R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 159 (1938) (discussing the increase in the Court’s docket and suggesting the Fourteenth Amendment was responsible in part for the increase); CONG. GLOBE, 39th Cong., 1st Sess. 1270-71 (1866) (statement of Rep. Kerr) (discussing the tendency to distort Reconstruction legislation); 3 CONG. REC. app. at 103-04 (1875) (statement of Hon. Bayard) (criticizing the play of language under “great fundamental principles” and noting that “there seems to [be some] . . . strange confusion in the minds of those who [drafted] this bill, under the fourteenth amendment, in referring to ‘nativity, race, color, or persuasion, religious or political, when the fourteenth amendment contains no such language’”).

330. *Davidson*, 96 U.S. at 104.

331. *See id.* at 105.

Munn, and imported the broad substantive reach to expand the procedure of due process.³³²

I think, therefore, we are entitled, under the [Fourteenth] Amendment, not only to see that there is some process of law, but "due process of law". . . and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be *arbitrary, oppressive and unjust*, it may be declared to be not "due process of law."³³³

Justice Bradley emptily feigned that the role of judicial interpretation is narrow and modification is limited without interfering with the larger legislative discretion.³³⁴ With this dicta, Field and fellow justices fused substance to the phrase "due process or law of the land," making the term "due process" interchangeable with their particular view of life, liberty, and the pursuit of happiness.³³⁵ This reading of due process renders the phrase "due process" as not merely a guarantee for procedure of fair notice or process of the law, but instead a judicial doctrine with the potential to consume the states' regulation of life and liberty under an ad hoc judicial reasonableness test.³³⁶ These non-majority interpretations would soon become the majority's understanding of the amendment. As a result, the states' general police power and sovereignty, contrary to the design of the amendment, would become subject to the Court's reasonableness review.³³⁷

332. *Id.* at 107 (Bradley, J., concurring).

333. *Id.* at 107 (emphasis added).

334. *Id.* at 107-08 (concurring that the Court is able to review legislation notwithstanding the large discretion that the legislature has to enact legislation according to the "laws, habits, customs, and preferences of the people of the particular State").

335. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519-20 (1885) (Field, J.) (adding an interpretation of the amendment allowing judges to invalidate legislation they deem arbitrary, unreasonable, unjust, or oppressive); *Bartmeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 137-41 (1874) (Field, J., concurring).

336. *See supra* note 264; *infra* note 472 and accompanying text; *infra* notes 381-391 and accompanying text (establishing reasonableness review).

337. *See supra* Part III (describing the limited Amendment). In a highly criticized opinion shortly after Justice Field left the bench, the *Lochner v. New York* Court, based on principles of freedom to contract, invalidated a restriction on working hours. 198 U.S. 45 (1905). Holmes' dissent served as a beachhead for judicial restraint involving economic substantive due process litigation. "It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract." *Id.* at 75 (Holmes, J., dissenting). Holmes argued that judges are likely to have convictions and prejudices with regards to various economic theories. *Id.*

But a Constitution is not intended to embody a particular economic theory . . . [i]t is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our

C. The Field Influence Captures the Majority

The non-majority opinions giving great breadth to the amendment captured the majority in a series of cases involving Chinese immigrants and laundry wash houses in California.³³⁸

During the late nineteenth century, Chinese launderers monopolized the laundry industry on the west coast.³³⁹ Laundering was a major economic activity for the Chinese, comprising approximately one third of all Chinese-owned businesses.³⁴⁰ Estimates indicate that about ten percent of the Chinese worked as launderers in wash houses.³⁴¹ Laundering required long hours and paid low wages.³⁴² Wash houses were often located in cheaply constructed buildings to increase profit.³⁴³ As Chinese

judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. . . . Every opinion tends to become a law. I think that the word "liberty," in the [Fourteenth] Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Id. at 75-76; *see also* *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes J., dissenting) (expressing anxiety "at the ever increasing scope given to the [Fourteenth] Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."). Eventually with respect to economic decisions, the Court tended to adopt Holmes' view giving legislation concerning economic regulation greater deference. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (acknowledging legislative enactments "may exact a needless, wasteful requirement in many cases" but postulating that "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement").

338. Justice Field precipitated this capture of the majority by establishing precedent with his Supreme Court non-majority interpretations in the Ninth Circuit. Justice Field and others were able to reshape and recharacterize the Fourteenth Amendment in any manner they chose in Ninth Circuit habeas corpus decisions ("Ninth Circuit Law") with little fear of rebuke by the Supreme Court since Supreme Court appellate jurisdiction had been temporarily removed. *See Graham, supra* note 9, at 882-87 (discussing "Ninth Circuit Law" and Congress's ultimate reinstatement of appellate review of habeas corpus cases to stop the abuse by Ninth Circuit judges intentionally enlarging federal review of state police powers with interpretations in defiance of Supreme Court precedent).

339. *See* Paul M. Ong, *Development and Decline of an Ethnic Enterprise: Chinese and Laundries in Early California 1* (Fall 1981) (on file with Asian American Studies Library, Univ. of Calif., Berkeley).

340. *Id.* at 3.

341. *Id.*

342. *Id.* at 1.

343. *Id.* at 14.

migration increased, laundering operations conflicted with local ordinances and laundry guilds often brought suit to challenge laws they deemed discriminatory.³⁴⁴ Many of these regulations involved health and safety standards enacted to restrict the geographical location of wash houses, to prescribe regulations against working certain hours of the night, and to require compliance with building safety codes to reduce the risk of fire.³⁴⁵

Justice Field previously lived in California and had served both in the legislature and on the California Supreme Court.³⁴⁶ Field had a significant presence in both lower court opinions and later Supreme Court opinions involving the Chinese. In a lower court opinion, Field, riding circuit, heard a case involving an 1876 ordinance, the "Queue Ordinance," which involved the cutting of hair for any male serving time in jail.³⁴⁷ The ordinance provided that: "[E]very male person imprisoned in the county jail . . . shall immediately upon his arrival at the jail have the hair of his head 'cut or clipped to [a] uniform length of one inch from the scalp thereof.'"³⁴⁸ Field held that the ordinance was aimed directly at the Chinese and served no measure for discipline or regulation of prisoners.³⁴⁹ In so holding, Field described the Fourteenth Amendment as follows:

This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts; but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.³⁵⁰

While Field may have described the limited amendment in form, his actual application of the amendment to the facts at hand was quite expansive and in line with his earlier monopoly and economic interpretations. Field implied motives to

344. David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 227-37 (1999); Ong, *supra* note 339, at 19-21.

345. See Ong, *supra* note 339, at 19-21.

346. See generally Stephen J. Field as Judge of the Supreme Court of the United States, *supra* note 9.

347. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 253 (D. Cal. 1879) (No. 6546).

348. *Id.*

349. *Id.* at 253-54.

350. *Id.* at 256.

those enacting a general law affecting all male prisoners and then deemed the law to be beyond the police power of the state.³⁵¹ His review of the reasonableness of the ordinance gave no deference to the judgment of the Board of Supervisors.

The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended and cannot be maintained as a measure of discipline or as a sanitary regulation. The act by itself has no tendency to promote discipline, and can only be a measure of health in exceptional cases. Had the ordinance contemplated a mere sanitary regulation it would have been limited to such cases and made applicable to females as well as to males, and to persons awaiting trial as well as to persons under conviction.³⁵²

Field refused to accept the Board's contention that the regulation was for the general health of the city.³⁵³ He completely dismissed the fact that this legislation was a general application to all males and deemed the legislation "class legislation" because of its effect on the Chinese queue.³⁵⁴

When the law imposes a punishment which only a certain class of persons, because of peculiar but innocent habits, sentiments or beliefs, can feel, and imposes it for the avowed purposes of affecting this class as others are not affected, it seems plain that not only is the equal protection of the laws denied to the class, but that they are directly and purposely subjected to pains and penalties which others of different habits, sentiments or beliefs are never expected to feel.³⁵⁵

Field's finding of unequal burdens and selective administration of a law might carry water if he had isolated a case where other non-Chinese males in the prison did not have their hair "immediately upon [their] arrival at the jail . . . 'cut or clipped to [a] uniform length of one inch from the scalp thereof.'"³⁵⁶ Absent this or any other ground for judicially voiding the ordinance, all that is left is Field's arbitrary reasonableness review of the ordinance.³⁵⁷

351. *Id.* at 254.

352. *Id.*

353. *Id.*

354. *Contra Ex Parte Moynier*, 2 P. 728, 730 (Cal. 1884) (finding that general health and sanitary regulations prescribing certain types of building materials and certain hourly working restrictions were not violations of the Fourteenth Amendment where "[i]ts terms apply to all persons establishing, maintaining, or carrying on the business of a public laundry or public wash-house[.] . . . [i]t is no more special and discriminating than the prohibition of the storage of powder or the slaughtering of animals.").

355. *Ho Ah Kow*, 12 F. Cas. at 257.

356. *Id.* at 253.

357. See *supra* notes 264, 301-305, 336; *infra* notes 372-381 (describing the foundation of

The Chinese were in the courts on multiple occasions involving multiple issues. The ordinances specifically conflicting with laundry operations reached the United States Supreme Court several times.³⁵⁸ During the early 1880s, several justices left the Court and this allowed Justice Field to have a strong influence on the Court.³⁵⁹ Field's influence was likely able to shift the Court from its earlier holdings.

In *Barbier v. Connolly*,³⁶⁰ the non-majority abstractions of Justice Field and fellow justices captured the majority. In this case, the plaintiff was convicted for operating a wash house within the prohibited hours of ten o'clock in the evening and six o'clock in the morning.³⁶¹ The trial court sentenced the plaintiff to five days in jail.³⁶² The plaintiff appealed and was denied a writ of habeas corpus from the Superior Court.³⁶³ The plaintiff also moved for a discharge on the grounds that the ordinance violated the Fourteenth Amendment where it discriminated between a class of laborers engaged in laundry businesses and those engaged in other businesses and where it denied the right to labor and the right to acquire property.³⁶⁴

From the denial of the writ and other claims, the plaintiff sought review by the Supreme Court.³⁶⁵ In form, the Court left the local ordinance intact on the ground that it was proper for the city to regulate upon the risk of fire.³⁶⁶ In doing so, the Court undermined the limited amendment, blurring the distinction between those rights constitutionally protected and those rights left for the states.

The Fourteenth Amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property . . .³⁶⁷

the Court's reasonableness review under the amendment).

358. *E.g.*, *Barbier v. Connolly*, 113 U.S. 27 (1885); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

359. Four new justices entered the Court in the years between 1880 and 1882. *See Oyez: U.S. Supreme Court Media*, <http://www.oyez.org/> (follow "justices" hyperlink) (last visited Oct. 8, 2007).

360. 113 U.S. 27 (1885).

361. *Id.* at 28-29.

362. *Id.*

363. *Id.* at 29.

364. *Id.* (dismissing the writ of habeas corpus which in turn generated the writ of error to the Supreme Court).

365. *See id.* at 30-32.

366. *Id.* at 30.

367. *Id.* at 31. Contrast this holding with Justice Field's dissent in *Ex parte Virginia*

The recharacterization of the limited amendment in *Barbier* greatly expanded the scope of the amendment. While the significance of *Barbier*'s interpretation of the amendment is overshadowed as the Court allowed the ordinance to stand and held that there was no "class discrimination," the Court set the stage for an opposite result by including the substantive due process and substantive equal protection language into the majority opinion as the new "meaning" of the amendment.³⁶⁸ Thus, the significance of *Barbier* is that for the first time, the Supreme Court held as a majority that Field's broad, open-ended language describing the Fourteenth Amendment often articulated in earlier non-majority opinions was now accepted.³⁶⁹ In *Barbier*—without citing a single source in the entire opinion—Field recklessly ignored the limited Fourteenth Amendment, moving instead toward a broader inchoate interpretation of the amendment, one which gave the judge complete and arbitrary domination over state and local legislation.³⁷⁰

With Fourteenth Amendment precedent-establishing cases like *Barbier*, Field and brethren cast out a long rope describing the broad police power and deference to the Legislature while simultaneously baiting the Court's jurisdiction and establishing precedent for the Court's review of the states' general legislative power.³⁷¹ The first step of this bait-and-switch was to adopt describing (defining) language but leave the legislation intact. Step two, with the new definitions (interpretations) in place, the Court was ripe to switch and apply the new precedent to invalidate legislation not deemed reasonable.³⁷² The Court's initial opinions exercised jurisdiction to review the legislation under the Fourteenth Amendment and find, for example, the legislation legitimate in the general police power to pass laws extending to all regulations for the

concerning the political right of jury service:

Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure,—than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws. It will be only another step in the same direction towards consolidation, when it assumes to exercise similar coercive authority over governors and legislators of the States.

Ex parte Virginia, 100 U.S. 339, 358-59 (1880) (Field, J., dissenting); see also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138-39 (1873) (refusing to extend the concept of privileges and immunities to cover admission to the bar).

368. See *supra* notes 299-304; *infra* notes 371-385 (establishing substantive reasonableness review of police power legislation).

369. See *supra* Part IV.A-B (discussing Field and fellow justices' non-majority opinions).

370. See generally *Barbier*, 113 U.S. 27.

371. See *supra* Part IV.A-B (discussing Justice Field's non-majority opinions).

372. See *supra* notes 301-305 (describing the *Marbury* precedent); see also *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16-18 (1947) (finding, in form, that the First Amendment was not violated, but adopting a controversial reading of the First Amendment which would later rewrite the original understanding of church and state relations).

health, order, morals and safety of society.³⁷³ While registering its approval of the instant legislation, the Court in effect, severely limited general state legislation to serve “reasonable” ends under a substantive interpretation of the amendment.³⁷⁴ For example, in *Missouri Pacific Railway Co. v. Humes* Field gestured:

It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation.³⁷⁵

But on the other hand held:

And a similar purpose must be ascribed to [the terms “law of the land”] when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the *arbitrary deprivation of life or liberty, and the arbitrary spoliation of property*.³⁷⁶

373. *Barbier*, 113 U.S. at 31 (referring to the legitimate police power “to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity”); *Powell v. Pennsylvania*, 127 U.S. 678, 695 (1888) (Field, J., dissenting) (“[T]his power of a State extends to all regulations affecting, not only the health, but the good order, morals, and safety of society”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 87 (1873) (Field, J., dissenting) (“That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways.”).

374. *Compare Powell*, 127 U.S. at 694-95 (Field, J.) (finding legitimate legislation in the police power to pass laws “for the health of the people of the State[,] . . . extend[ing] to all regulations affecting not only the health, but the good order, morals, and safety of society”), with *Munn v. Illinois*, 94 U.S. 113, 142 (1877) (Field, J., dissenting) (noting that the term “Life” as used in the Fourteenth Amendment means more than “mere animal existence” and that the term “Liberty” means more than “mere freedom from physical restraint or the bounds of a prison”), and *Powell*, 127 U.S. at 692 (Field, J.) (“The right to pursue one’s happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no State can give, and no State can take away, except in punishment for crime.”).

375. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 520-21 (1885) (Field, J.).

376. *Id.* at 519 (emphasis added).

In *Humes*, Field, apparently amenable to the statute at hand, did not invalidate the legislation, but the power of the opinion was in the dictum.³⁷⁷ Under the Court's application of the amendment, any state legislation deemed "arbitrary," "capricious," "unreasonable," or against "liberty" and the "pursuit of happiness" became fair game for judicial reasonableness review.³⁷⁸ The Court's baiting with a broad description (authorization) of police powers qualified by a substantive due process interpretation would soon switch to become a noose for the states' police power. A quote from CATO'S LETTERS illustrates the Court's gambit:

The Fox in the Fable, wanting to rob a Hen-roost, or do some such Prank, humbly besought Admittance and House-room only for his Head; but when he got in his Head, his whole Body presently followed: And Courts, more crafty, as well as more craving, than that designing animal, have scarce ever gained an Inch of Power, but they have stretched it to an Ell; and when they have got in but a Finger, their whole Train has followed.³⁷⁹

Following the Court's one-two, the entire body of state police power legislation became subject to the Court's judicial review.³⁸⁰ Through the Court's now established "reasonableness" filter, the broad description of the states' general police powers contemplated in the Constitution and preserved in the amendment, lost its breadth and state legislation became enumerated under the Court's unwritten substantive due process and equal protection jurisprudence.³⁸¹

377. *Id.* at 523 (holding that the application of the Fourteenth Amendment to a law requiring railroad companies to erect fences at a farm crossing to protect cattle is untenable).

378. See *infra* notes 380-385 and accompanying text.

379. Letter No. 76 from Thomas Gordon (MAY 12, 1722), in 3 CATO'S LETTERS 88-89 (6th ed. 1755). Sir Edward Coke, in a manner similar to Justice Field's expositions, uttered a few sentences in *Dr. Bonham's Case* about the power of the common law to rule an Act of Parliament void for being contrary to common right and reason. 8 Coke Rep. 113b, 77 Eng. Rep. 646, 652-54 (1610). Scholarship has demonstrated Coke to be in error here and elsewhere. See generally Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926) (demonstrating the flaws in Coke's jurisprudence and tracing the adoption of Coke's writings through the American Revolution). Nonetheless, similar to later use of Field-like jurisprudence with respect to the Fourteenth Amendment, Coke's errors have germinated and established precedent in the American colonial concept of judicial review. *Id.* at 61-68.

380. Field wrote: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier v. Connolly*, 113 U.S. 27, 32 (1885); *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886); see, e.g., Maltz, *supra* note 8, at 537 (advocating that the Equal Protection Clause was not intended as a "safeguard against unfair classifications"); Kay, *supra* note 107, at 684 (criticizing justices for creating the class legislation test without citing precedent); see also *supra* Part III.B.

381. See *infra* Part V (leaving states with enumerated (valid) police powers); *Barbier*, 113 U.S. at 31 (reading substantive due process and substantive equal protection into Section One); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (providing judicial foundation for two-tier review and

With each new grasp, the distortion of the language and the context of the amendment were extended: "equal protection in the pursuit of happiness,"³⁸² "class legislation,"³⁸³ "liberty as more than mere animal existence."³⁸⁴ Eventually, the Fourteenth Amendment, hijacked by the judiciary, would have none of the intended protection for states' rights.³⁸⁵

The Civil Rights Act and the Fourteenth Amendment were limited in the scope of the rights protected.³⁸⁶ The language of the Fourteenth Amendment does not refer to the broad principle of "class legislation."³⁸⁷ Any implicit adoption of the term must take into consideration the context of the debates as a whole.³⁸⁸ Judicial variations of the term "class legislation" do injustice to the careful federalism considerations and are not representative of the amending majority.³⁸⁹ The use of the term has created a "class legislation" test. If manipulated accordingly, any legislation could suffer a "class legislation" imputation.³⁹⁰ Although some members of the 39th Congress in legislative discussions used the term "class legislation" or "class discrimination," litigating on this shorthand term is questionable when one fails to take into consideration the context of the debates as a whole.³⁹¹ Framers of Reconstruction legislation noted that "civil rights" as contemplated and approved by an amending majority did not mean that "all things civil, social, political, all citizens,

the standards of scrutiny); *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897) ("[Classifications] must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.").

382. See *supra* Part III.D.2.

383. See *supra* Part III.B.

384. See *supra* notes 315-319 and accompanying text.

385. See *supra* Part III.

386. See *supra* Part III; see also Maltz, *supra* note 8, at 499-501 (discussing various interpretations of the Equal Protection Clause and criticizing open-ended theories).

387. See *supra* Part III.D.2.

388. See *supra* Part III.B.

389. See *supra* Part III; see, e.g., Maltz, *supra* note 8, at 530 (discussing Hale's concerns of federalism and the House's refusal to accept the first proposal).

390. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (finding dismay at the extension of the "living Constitution" and characterization of the Court in a brief where petitioners before the Court urged that "Prisoners are like other 'discrete and insular' minorities for whom the Court must spread its protective umbrella because no other branch of government will do so. . . . This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated.") (emphasis added). Rehnquist commented that the Court and the "living Constitution" were not elected officials nor responsible to a constituency and therefore should not be interjecting themselves into social problems by finding that the Constitution was offended by the unpleasant living conditions of prisoners in confinement. See *id.*

391. See *supra* Part III.B.

without distinction of race or color, shall be equal," and specifically did not include political rights with regards to voting and school desegregation.³⁹² Prior to *Barbier*, this language was found in dissenting and non-majority opinions.³⁹³ After *Barbier*, it became the understanding of the Fourteenth Amendment—notwithstanding any of the congressional debates or previous Supreme Court holdings to the contrary.³⁹⁴

Justice Field applied the refitted substantive amendment conceived in *Barbier* to his opinion in *Soon Hing v. Crowley*.³⁹⁵ In *Soon Hing*, like *Barbier*, the issue of "class legislation"³⁹⁶ was over the requirement of prohibiting laundry in areas of the city during certain hours.³⁹⁷ The first claim by the plaintiff involved an attempt to bring a class discrimination suit where certain laundry work was affected but other types of work were not subject to the restrictions.³⁹⁸ The second claim was an attempt to find relief where the regulation prevented all men from the ability of working any hours they so chose.³⁹⁹ The Court rejected both claims.⁴⁰⁰ The Court reviewed the statute on its face, but surprisingly dismissed an inquiry into the motives of the legislators.⁴⁰¹ The Court further stated that invalidation of the statute would require class discrimination and not depend on the motive of those drafting the ordinance.⁴⁰²

Once again, while the actual outcome of the case was in favor of the city and the ordinance, the interpretation of the amendment adopted by the Court was not representative of the amendment. In Field's characterization of the Fourteenth Amendment as incorporating a "class legislation" prohibition, he cited no precedent on point other than *Barbier* and failed to discuss or distinguish any other court holdings on the limited Fourteenth Amendment.

392. See CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); *supra* notes 15-18, 57-69 and accompanying text.

393. See *supra* Part IV.A-B.

394. See *infra* notes 395-414 and accompanying text.

395. *Soon Hing v. Crowley*, 113 U.S. 703, 708 (1885) (Field, J.).

396. *Id.* at 708 ("No invidious discrimination is made against any one by the measures adopted. All persons engaged in the same business within the prescribed limits are treated alike and subjected to similar restrictions.").

397. *Id.* at 707-08.

398. *Id.* at 708-09.

399. *Id.* at 709.

400. *Id.* at 708-11.

401. See *id.* at 710-11 ("Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.").

402. *Id.* at 711 ("[E]ven if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence.").

Following the same trend as *Barbier* and *Soon Hing*, the Court in *Yick Wo v. Hopkins* again took up a case involving Chinese laundrerers.⁴⁰³ In this case, a general ordinance affecting old wooden laundry houses, deemed a fire risk by the city's supervisors, was held invalid for discriminating against Chinese laundrerers.⁴⁰⁴ In *Yick Wo*, the Court incorporated the foothold language of *Barbier* and *Soon Hing*, not only to reinforce the mischaracterization of the amendment, but also to invalidate the ordinance.⁴⁰⁵ The *Yick Wo* Court synthesized earlier minority opinions, including open-ended readings of the Fourteenth Amendment, as barring arbitrary deprivation of life or liberty and securing equal protection in the enjoyment of the pursuit of happiness.⁴⁰⁶ The Court also solidified the "class legislation" concept as a majority by holding that no impediments should apply to one which do not apply to another in the same condition, and class legislation which favors some but not all in similar situations is prohibited.⁴⁰⁷ The Court quoted Field's broad, open-ended constructions of the Fourteenth Amendment as stated in *Barbier*:

[The Fourteenth Amendment] undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property,

403. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

404. *Id.* at 368 (reviewing legislation requiring, in the interests of protecting against the risk of fire, owners of wooden laundries and laundries with excessive rooftop scaffolding obtain permits). At this time there were 320 laundries, of which 310 were made of wood. Brief of Appellant and Plaintiff in Error at *2, 5, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Nos. 1280-81), 1886 WL 15067. Chinese laundrerers owned approximately 240 laundries. *Id.* The city required that new laundries be built from brick or stone but old ones that were well-maintained, well-ventilated, well-drained and without excessive scaffolding could apply for a permit to continue to operate. Resp. Brief, 1885 WL 18153 at *13. The city argued, in denying wooden laundries in violation of the ordinance, that some of the wooden buildings rented to the Chinese were in a dilapidated condition, "hardly fit for human habitation." *Id.* at *1. The Petitioners claimed that several non-Chinese applicants, including those with wood frames, were not refused a license. Appellant's Brief at *2. Specifically, Petitioners stated that eighty non-Chinese owners of wooden laundries were all granted permits except one wooden laundry owner. *Id.* The city contradicted this, stating that they knew of only two non-Chinese wooden laundry owners who were granted permits. Resp. Brief at *13-14, 20, 40-41. The city argued that generally, the eighty non-Chinese wooden laundries did not have scaffolding in violation of the ordinance or were not situated in a high-risk-of-fire location. *Id.* at *13-14. Furthermore, the city pointed out that white laundrerers not complying with the ordinance were also arrested along with the Chinese and their cases were also in court. *Id.* at *20. The city, defending against the charge of specific discrimination, noted that the wooden facilities which were granted permits employed a large number of Chinese and, thus, the city was not seeking to discriminate against this segment of the population. *Id.* The Court's opinion did not address the city's arguments. See generally *Yick Wo*, 118 U.S. 356.

405. *Yick Wo*, 118 U.S. at 374.

406. *Id.* at 367 (distinguishing the outcome of *Barbier* and *Soon Hing* in which the Court found the police power regulations valid).

407. *Id.* at 367-68. See generally Kay, *supra* note 107, at 689-95 (reviewing the holding in *Yick Wo* and noting its significance as the first case to invalidate unjustifiable class discrimination).

but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property⁴⁰⁸

The language the *Yick Wo* Court mimicked the exact kind of language rejected by the framers of the Fourteenth Amendment in drafting the Equal Protection Clause. The Court stated: “[The Fourteenth Amendment] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and *the equal protection of the laws is a pledge of the protection of equal laws.*”⁴⁰⁹ In drafting the amendment, the committee rejected similar “protection of equal laws” language for its broad implication that the amendment authorized Congress to attempt to establish “equal political rights and privileges” throughout the states.⁴¹⁰ The Court’s substitution from “equal protection of the law” to “protection of equal law” has been sharply criticized.⁴¹¹

In these laundry cases, the breadth of the Court’s interpretations of the amendment does little justice to the careful consideration given to federalism by the 39th Congress.⁴¹² *Barbier* does not cite any sources,⁴¹³ *Soon Hing* cites only *Barbier*, and *Yick Wo* only cites *Barbier* and *Soon Hing* for the substance of the Court’s classification holding.⁴¹⁴ Yet, these cases, due to their intoxicating appeal in allowing the Court to exercise reasonableness review of state legislation, are cited exhaustively for Fourteenth Amendment judicial activism.⁴¹⁵ With these three

408. *Yick Wo*, 118 U.S. at 367 (quoting *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)).

409. *Id.* at 369 (emphasis added).

410. *See supra* Part III.D.2.

411. Avins, *supra* note 68, at 386 (“By the same token, a pair of alligators is an alligator pear; or, to quote Abraham Lincoln, it is ‘but a specious and fantastic arrangement of words, by which a man can prove a horse chestnut to be a chestnut horse.’”).

412. *See supra* Part III.

413. *See Barbier v. Connolly*, 113 U.S. 27 (1885).

414. *See supra* notes 370-407; *cf.* Brutus Letter XV (Mar. 20, 1788), in *THE FEDERALIST WITH LETTERS OF “BRUTUS,”* 528 (Terence Ball ed., 2003) (“Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them. In the mean time all the art and address of those who wish for the change will be employed to make converts to their opinion.”).

415. According to WestLaw KeyCite Citing References, 172 U.S. Supreme Court decisions and over 400 Circuit Court cases have cited *Yick Wo* (updated Sept. 24, 2007). *See Kay, supra* note

Supreme Court cases, the broad, open-ended non-majority constructions captured the majority in what can be fairly characterized as redefining the amendment to be an arbitrary constitutional grab bag, with no definition and no bounds other than ephemeral judicial self-restraint. It is this interpretation that serves as precedent for the modern “meaning” of the Fourteenth Amendment and not the earlier opinions of the Court or the limitations contemplated in the congressional debates.

Attempts to legitimately reconcile a “class legislation” concept with the true context of Reconstruction legislation will digress into juggling levels of class legislation, which, when sorted, mimic the civil/political rights dichotomy.⁴¹⁶ Unless some kind of fractured class application is advanced, the emphasis and judicial use of boundless language such as that used in *Barbier* and progeny eradicate the limitations of the Fourteenth Amendment.⁴¹⁷ A more representative “class legislation” concept might separate “class” into civil-class discrimination following the general enumerated privileges and immunities discussed in the CRA of 1866 while leaving

107, at 689 (noting the frequent reference to *Yick-Wo*).

416. See Kay, *supra* note 107, at 684-85, 687-89 (discussing various breakdowns of class legislation including unjustifiable class legislation and impermissible class legislation); CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (statement of Rep. Windom) (stating with great emphasis the grant of “absolute equality of rights of the whole people, high and the low, rich and poor, white and black,” but that the “perjured white traitor shall have no civil rights or immunities which are denied to the black patriot,” and going on to list enumerated civil rights but excepting, though preferring otherwise, the political rights of voting and other social privileges); *supra* Part III.B-C; *supra* notes 15-18, 58-63 and accompanying text (noting the civil-political rights distinction).

417. See *Barbier*, 113 U.S. at 30-31; Kay, *supra* note 107, at 673-89 (constructing various class legislation models which might accord with varying post-Reconstruction opinions). Representative Lawrence of Ohio described the bill in terms of classes without losing the distinction between political rights and civil rights. CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

But conceding, as the courts have held, that the privileges referred to in the Constitution are such as are fundamental civil rights, not political rights nor those dependent on local law, then to what extent shall they be enjoyed by a citizen of one State removing into another? Not simply so far as they may be enjoyed by “some portion” or “some description” of citizens, but “all the privileges and immunities of citizens;” that is, all citizens under the like circumstances.

This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of “some class,” or “some race,” or “of the least favored class,” or “of the most favored class,” or of a particular complexion, for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice.

This clause of the Constitution therefore recognizes but one kind of fundamental civil privileges equal for all citizens. No sophistry can change it, no logic destroy its force. There it stands, the palladium of equal fundamental civil rights for all citizens.

Id.

political-class legislation to the states.⁴¹⁸ Interference with political-class legislation would be interference with state autonomy.⁴¹⁹

Contrary to Justice Field jurisprudence, Reconstruction legislation would not bar state legislation to the extent various advocates desired.⁴²⁰ Reconstruction legislation meant for an equal application guarantee and not for an open-ended class prohibition effect.⁴²¹ Political rights were left to the states to regulate.⁴²² The use of the “class legislation test” or expansive notions of “liberty” as the judicial understanding of the Fourteenth Amendment necessarily glosses over the limitations of the amending majority.⁴²³ While various legislators’ use of the language in different senses without real clarification generates potential ambiguity when taken out of context, any indeterminacy is resolved by looking at the reoccurring positions in conjunction with the context of the unambiguous broader legislative history.⁴²⁴ During the Reconstruction debates, Congress provided for segregated schools in the District of Columbia,⁴²⁵ the Fifteenth Amendment was needed to secure voting rights for African Americans,⁴²⁶ and the Nineteenth Amendment⁴²⁷ was needed to secure voting rights for women.⁴²⁸ Many of these examples were specifically addressed as excluded under the Fourteenth Amendment’s reach.⁴²⁹ For judges and commentators to argue, for example, that state laws regulating miscegenation, school desegregation, or desegregated juries were violations of the Fourteenth Amendment would be legal fiction.⁴³⁰

418. See *supra* Part III.B (noting the limitations of the Fourteenth Amendment and discussing the flaw of the “class legislation” test).

419. See *supra* Part III.B; *supra* notes 15-18, 58-67 and accompanying text (commenting on the civil-political rights distinction).

420. See *supra* Part IV.A.

421. See *supra* Part III.D; see, e.g., Maltz, *supra* note 8, at 521-22 (describing the equal protection provision as extending on equal terms the mechanism of the law as opposed to its granting substantive rights).

422. See *supra* Part II; *supra* notes 15-18, 58-67 and accompanying text.

423. See *supra* Part III.B.

424. See *supra* Part III.

425. The Senate passed bill No. 247 dedicating public land for colored schools without debate. CONG. GLOBE, 39th Cong., 1st Sess. 2719, 4242 (1866).

426. U.S. CONST. amend. XV.

427. U.S. CONST. amend. XIX.

428. See *supra* Part III.D; see also *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171-78 (1875) (articulating that the Fourteenth Amendment did not grant all citizens the right to vote and that voting is not one of the privileges and immunities granted to all citizens where the Fourteenth Amendment did not expand the privileges and immunities granted to citizens but merely protected those already existing).

429. See *supra* notes 99-103 and accompanying text.

430. See *infra* Part V.

Radical latitudinarian provisions did not receive support from the amending majority. The Court, however, bypassed the notion of congressional enforcement and adopted the rejected versions in both open-endedness and breadth.⁴³¹ The opinions of Justice Field and others left the interpretation of the Fourteenth Amendment open to any arbitrary, creative application of the particular justice wielding the amendment. While the particular application of Field's opinions may not have invalidated state regulation of particular political and social rights while Justice Field was on the Court, many of his opinions are cited for this purpose in later Supreme Court opinions.⁴³²

V. THE RETROFITTED FOURTEENTH AMENDMENT: FROM FIELD TO WARREN AND BEYOND

Later Courts used the buoyancy of broad judicial interpretations of "liberty" and "due process" in conjunction with substantive equal protection applications to invalidate legislation in other political and social areas.⁴³³ The citations cited for controversial Warren Court decisions are variations of early post-Reconstruction opinions by Field and fellow justices.⁴³⁴ A complete breakdown of the evolution of the Fourteenth Amendment during the Warren Court era is beyond the scope of this Article. However, a look at a few of the major decisions illustrates the influence of Justice Field's jurisprudence.

A. *Separate but Equal*

The often cited infamous *Plessy v. Ferguson* Court did not find that the "separate but equal" doctrine⁴³⁵ conflicted with the Thirteenth Amendment barring slavery or

431. See *Barbier v. Connolly*, 113 U.S. 27, 30-32 (1885) (producing the substantive Fourteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (interpreting the Equal Protection Clause to provide an affirmative duty for a judge to establish the "protection of equal laws"); *infra* Part V.

432. See *supra* Part IV.B; see, e.g., *Ex parte Virginia*, 100 U.S. at 349 (Field, J., dissenting); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (discussing fundamental liberty and citing many of Justice Field and brethren's open-ended constructions). *Meyer* is cited as precedent for *Griswold v. Connecticut*, 381 U.S. 479, 481-83 (1965), and *Griswold* is the linchpin for the fundamental liberty-privacy doctrine. See *infra* Part V.B.

433. See *supra* Part IV (illustrating how the Courts used open-ended interpretations to redefine Reconstruction legislation); *infra* Part V.A-B; see also CONG. GLOBE, 39th Cong., 1st Sess. 1270-71 (1866) (statement of Rep. Kerr) (describing the trend to read positions into the Thirteenth Amendment not intended in its adoption); *supra* note 278 (pointing out how the Equal Protection Clause was used to support rejected positions after the Fourteenth Amendment's ratification and the narrow *Slaughter-House Cases*' restriction on privileges and immunities).

434. See *infra* Part V.A-B.

435. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 199 (1849) (discussing the separate

with the Fourteenth Amendment protecting citizenship rights.⁴³⁶ The *Plessy* Court rejected a latitudinarian temptation and articulated a faithful description of the amendment:

[The amendment's] main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁴³⁷

While *Plessy* is lambasted as a poor decision,⁴³⁸ the Court merely refused to redecorate Reconstruction legislation distinguishing civil, political, and social rights.⁴³⁹ The *Plessy* Court held fast to an equal administration of the law interpretation and not the substantive classification protection of judicially determined equal social or political rights.⁴⁴⁰ The Court held that if the statute says no person

but equal school system in Boston where colored people made up 1/62nd of the population and the teachers at the colored school, established in 1820, made the same amount of money and had the same qualifications as other teachers); *State ex rel. Games v. McCann*, 21 Ohio St. 198 (1871) (upholding separate but equal under the Fourteenth Amendment). "It is left to the discretion of the general assembly, in the exercise of the general legislative power conferred upon it, to determine what laws are 'suitable' to secure the organization and management of the contemplated system of common schools." *Id.* at 205.

436. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (refusing to invalidate separate but equal public accommodations). See generally MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8-60 (2004) (detailing *Plessy* era politics concerning race relations and segregation).

437. *Plessy*, 163 U.S. at 543-44; see *supra* Part III. See generally Bickel, *supra* note 11.

438. See Chemerinsky, *supra* note 33, at 1148 (finding the Court's refusal to invalidate separate but equal legislation in *Plessy* one of the greatest tragedies of the interpretation of the Fourteenth Amendment).

439. *Plessy*, 163 U.S. at 544-45 (holding that separation laws and other political rights have been universally recognized within the domain of state legislatures); cf. *Roberts*, 59 Mass. (5 Cush.) at 205-10 (discussing constitutional principles as guides for legislation).

440. See CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard) (articulating a broad interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment); *supra* Part IV. Though the term "class legislation" was mentioned in the debates as shorthand for violations of civil rights, it did not make the actual language of the amendment and, as used by the courts, would not have been adopted by Congress. See *supra* Part III.B. To use the Fourteenth Amendment to ban school desegregation is not consistent with the framers' intent. See *supra* Part III.B.

shall be excluded based on his or her color, then a "separate but equal" approach violated the statute, but that the Fourteenth Amendment did not, in itself, invalidate separate but equal applications.⁴⁴¹ The *Plessy* Court discussed social concerns but suggested that only natural forces could overcome social prejudices.⁴⁴²

B. Warren's Liberty Card

The Warren Court overruled *Plessy* in *Brown v. Board of Education*.⁴⁴³ With *Brown*, which some commentators regard as the "sacred cow" of Fourteenth Amendment jurisprudence,⁴⁴⁴ the Warren Court⁴⁴⁵ disregarded the limitations of the amendment and gave little deference to the notion of separate branches or to the principle of state sovereignty.⁴⁴⁶

Refusing to turn the clock back to the drafting of the amendment, the *Brown* Court concluded that "separate but equal" has no place in society and that segregation denied the plaintiffs equal protection under the Fourteenth Amendment.⁴⁴⁷ For

441. *Plessy*, 163 U.S. at 545-46; see also *supra* notes 99-103 and accompanying text (noting examples of the social and political rights left for state regulation and excluded from congressional protection. The *Plessy* majority held:

[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

Plessy, 163 U.S. at 550-51.

442. *Plessy*, 163 U.S. at 551 (advancing that equal rights cannot be achieved by forced commingling of the races: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."); see also *People v. Gallagher*, 93 N.Y. 438, 448 (1883) (finding that forced relations between the two groups would embitter more evil than good and establishing equal opportunities is the end of the legislative goal and that the government should not go further into greater social advantages).

443. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (finding that segregation is no longer appropriate, serves no valid government objective, and thus violates the Equal Protection Clause (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that segregation of public schools violates the Due Process Clause))).

444. BERGER, *supra* note 53, at 25 (suggesting that *Brown* is the foundational piece of modern constitutional law).

445. See *id.* at 4-5 (referring to the present generation as "floating on a cloud of post-Warren Court euphoria").

446. See *supra* Part III.

447. *Brown*, 347 U.S. at 495; *id.* at 490 n.5 ("It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was

additional support, the *Brown* Court cited *Bolling v. Sharpe*, which held that the Due Process Clause of the Fifth Amendment also prohibited the states from maintaining segregated schools.⁴⁴⁸ The *Bolling* Court went on to address the attractive “liberty card” consistent with Field-like jurisprudence.⁴⁴⁹

Although the Court has not assumed to define “liberty” with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.⁴⁵⁰

The *Brown* Court found that racial segregation violated an Equal Protection-Due Process amalgamation.⁴⁵¹ As a whole, the *Brown* Court merged substantive equal protection and substantive due process into a political tool malleable enough to cover school desegregation.⁴⁵² The Court had an armful of available legislative history to see that desegregation failed every attempt at securing roots in Reconstruction

primarily designed, that no discrimination shall be made against them by law because of their color?”) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880)).

448. *Bolling*, 347 U.S. at 499-500 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896)).

[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty, and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race.

Gibson v. Mississippi, 162 U.S. 565, 591 (1896).

In support of this passage in *Gibson*, Justice Harlan cited no cases. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2719 (1866) (statement of Sen. Morrill) (providing for colored schools in the District of Columbia contemporaneous with the amendment’s adoption).

449. *Bolling*, 347 U.S. at 500 (“Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”).

450. *Bolling*, 347 U.S. at 499-500.

451. See *supra* notes 443-448 and accompanying text.

452. Compare *Brown*, 347 U.S. at 494-95 (using Equal Protection to invalidate state school segregation laws), with *Bolling*, 347 U.S. at 498-500 (using the Due Process Clause of the Fifth Amendment as a related equal protection safeguard to invalidate federal school segregation laws). See also *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating efforts deemed to be “White Supremacy” in state legislation forbidding interracial marriage). There is no conceivable legitimate footing to protect interracial marriage under the amendment. Warren’s use of the Fourteenth Amendment amalgamation is not faithful to the Constitution and serves as an exemplar of Warren Court liberalism. Interracial marriage was one of the expressly stated social rights which led to the curtailment of the Reconstruction legislation as limited only to civil rights. See CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull). At the time of *Loving*, only sixteen states outlawed interracial marriage. *Loving*, 388 U.S. at 6.

legislation.⁴⁵³ Nonetheless, the Court construed that same legislation to bar segregated schools.⁴⁵⁴

The Warren Court further eroded the limitations of the Fourteenth Amendment by incorporating the Bill of Rights as a fundamental element of "liberty." This gave the judicial misinterpretation of the Fourteenth Amendment a much larger "liberty" wingspan.⁴⁵⁵ With the new arsenal of various fundamental "liberty" ammunition, the

453. See *supra* Parts II-III.

454. See *Brown*, 347 U.S. at 492-93; *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206-07 (1849) (refusing to litigate on the guiding principles and language of the Constitution); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (suggesting that the Courts should not engage in the "political thicket" and that the remedy for unfairness [here in a districting case] lies with the State legislatures or the powers of Congress: "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."); CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statements of Sen. McDougall and Sen. Trumbull) (expressing concern over the breadth of the Civil Rights Bill and the meaning of "civil" going further than protection of enjoyment of life, liberty, and pursuit of happiness and into political rights).

455. This gross form of judicial tyranny can also be credited, in part, to Field. See *O'Neil v. Vermont*, 144 U.S. 323, 360-64 (1892) (Field, J., dissenting) (advocating that the Fourteenth Amendment's Privileges or Immunities Clause incorporates the rights in the Bill of Rights). See generally Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) (discussing in detail the incorporation issue); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965) (detailing the trend of incorporation); Warren, *supra* note 309 (noting the use of "liberty" before and after the amendment and criticizing the incorporation of rights under "liberty"). Bingham and a few other radical Republicans advanced, in reference to an early draft which was later revised, that the amendment and the Civil Rights Bill protect the principles and spirit of the Bill of Rights from state infractions. See CONG. GLOBE, 39th Cong., 1st Sess. 1089-94, 1291-92 (1866) (statement of Rep. Bingham); see also CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham) (motioning that "privileges and immunities" of Section One are "chiefly defined in the first eight amendments to the Constitution of the United States"). Despite Bingham's wishes, conservatives and moderates rejected the initial draft of the amendment for overbreadth and the fact that initial language put too much power in Congress to legislate in the States' domain. See *supra* Part III.D.2. Bingham did not believe the Fourteenth Amendment enlarged the judicial sphere, but was merely a procedural door for Congress to legislate to protect rights. See *supra* Part III.A.

[B]y virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State . . . without a fair and impartial trial by jury. . . . It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. . . . It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guarantied [sic] by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered.

CONG. GLOBE, 42d Cong., 1st Sess. app. at 85 (1871) (statement of Rep. Bingham); see also *supra*

Court enlisted the judiciary to invalidate legislation in various controversial privacy matters.⁴⁵⁶ *Griswold v. Connecticut*, though factually dealing with a rather uncontroversial issue of prohibiting the usage and distribution of condoms, serves as precedent for some of the strongest invalidation measures the Court has held against the states.⁴⁵⁷ The majority described the now judicially incorporated Bill of Rights as creating a penumbra of "privacy" rights able to invalidate state legislation regulating condom usage and distribution.⁴⁵⁸ The precedent established in *Griswold* serves as foundation for one of the most controversial Supreme Court cases of the twentieth century, *Roe v. Wade*.⁴⁵⁹ Harlan's concurrence in *Griswold* questioned the incorporation of the Bill of Rights but argued that the Fourteenth Amendment's Due Process Clause should apply to the regulation of condom usage.⁴⁶⁰

Following the same general judicial privacy trend established under Warren, the Court in *Bowers v. Hardwick* granted certiorari on a case involving a state law banning homosexual conduct.⁴⁶¹ The majority of the Court in *Bowers*, however, refused to extend constitutional protection to homosexuality.⁴⁶² At the time *Bowers*

notes 127-136 and accompanying text (advocating that the framers' intent was for the amendment to be less self-executing than contemporary jurisprudence allows). Initially, the Court refused the temptation to judicially incorporate the Bill of Rights under the Fourteenth Amendment. See, e.g., *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876); *United States v. Cruikshank*, 92 U.S. 542, 552, 554-55 (1876) (reaffirming that the Bill of Rights, notwithstanding the Fourteenth Amendment, applied to Congress and not the states but that there is some overlap and that the right to peacefully assemble was also an attribute of national citizenship); *Hurtado v. California*, 110 U.S. 516, 535, 538 (1884) (Field, J. did not participate) (holding that the Fourteenth Amendment does not require grand jury indictment).

456. See Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM. & MARY BILL RTS. J. 121, 128-30 (1992) (noting the Court's application of the Fourteenth Amendment to incorporate several rights).

457. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The privacy rights under *Griswold* have been frequently cited to invalidate controversial state legislation. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (upholding a woman's right to have an abortion).

458. *Griswold*, 381 U.S. at 484-86 (constructing a "zone of privacy" from incorporated provisions of the Bill of Rights).

459. *Roe*, 410 U.S. at 152-53 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

460. *Griswold*, 381 U.S. at 499-500 (Harlan, J., concurring) (rejecting the Court's use of the incorporation doctrine).

461. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

462. *Id.* at 195 (refusing to characterize the issue as whether laws prohibiting homosexuality were desirable but instead whether the Constitution grants a fundamental right to homosexual relations). Even the breadth of the liberty, personal freedom, and right to privacy discussed under *Griswold* explicitly limited its application with respect to laws forbidding adultery and homosexuality. *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring) (reaffirming state regulation of adultery and homosexuality).

was decided twenty-four states and the District of Columbia had laws against sodomy.⁴⁶³

In 2003, the *Lawrence v. Texas* Court reversed *Bowers*.⁴⁶⁴ The *Lawrence* Court resurrected a Field-like interpretation of "liberty" in an open-ended opinion citing "spatial and . . . transcendent" bounds.⁴⁶⁵ Justice Kennedy held: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and its more transcendent dimensions."⁴⁶⁶ Though *Lawrence* cited *Griswold* for support,⁴⁶⁷ the *Griswold* concurrence actually stated specifically that in no way should its "privacy" holding affect proper state regulation such as adultery and homosexuality.⁴⁶⁸ With such a broad reach, the substantive glaucoma of the refitted Fourteenth Amendment has found its way into nearly every corner of American government, relegating state power and character to a subordinated common mass.⁴⁶⁹

Judicial interpretation of the amendment during the Warren Court was a natural extension of earlier distortions by Justice Field.⁴⁷⁰ While at times Justice Field jurisprudence remained faithful to the notion of state sovereignty, as a whole, the breadth of judicial discretion within his interpretations of "liberty" and the unwritten

463. *Bowers*, 478 U.S. at 192 nn.5-7 (discussing at length the well-established history of laws proscribing sodomy, including all thirteen states at the time of the Constitution, all but five states at the time of the Fourteenth Amendment, all fifty states prior to 1961, and at the time of the *Bower* decision twenty-four states still had sodomy laws).

464. *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003).

465. *Id.* at 562. *But see* *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (finding liberty is a perversion as used by the Court); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (criticizing nonoriginalism as judges substituting personal predilections for judicial interpretation of fundamental values).

466. *Lawrence*, 539 U.S. at 562.

467. *Id.* at 564-66.

468. *Griswold v. Connecticut*, 381 U.S. 475, 498-99 (Goldberg, J., concurring) (reaffirming state regulation of adultery and homosexuality); *cf.* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 6-7 (1965) (explaining how some private moral conduct, e.g., prostitution, incest, and abortion, can be a breach against society). *But see* Barnett, *supra* note 70, at 492-95 (advocating *Lawrence* as a proper restraint on the police power of the states).

469. *See* 3 CONG. REC. app. at 103 (1875) (statement of Sen. Bayard); *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), *available at* 1797 WL 430, at *18-*19 (advocating a limited interpretation of privileges and immunities as not allocating to citizens of each state all of the privileges and immunities of all states but instead giving citizens the privileges and immunities of the common citizen of the several states and avoiding the problem of the federal government relegating the states into a common mass); *see also supra* notes 307, 414 (describing Anti-Federalists' fears of the judiciary destroying the states).

470. *See supra* Part IV. Many of the key Warren Court cases cite *Griswold* which in turn cites *Meyer v. Nebraska*, 262 U.S. 390 (1923) which string cites a list of Field-like liberty holdings including the *Slaughter-House Cases* and *Yick Wo*.

classification tests naturally produced the judicial activism of later Courts.⁴⁷¹ Once the Court established precedent for its reasonableness review of the states' general police power, it was only a matter of time before the judge became the umpire for society's great controversies.⁴⁷²

As the open-ended language worked itself into the majority opinions, the entire notion that Congress was to draft legislation and bring civil rights up to date was overshadowed by judicial hegemony and the arbitrary creation of new rights under Section One of the Fourteenth Amendment.

VI. CONCLUSION

The radical Republicans fought against the rest of the 39th Congress for their views, but eventually they were forced to compromise.⁴⁷³ Reconstruction legislation promoted equality but also protected states' rights.⁴⁷⁴ Early judicial opinions in dissent and concurrence circumvented the limitations of the amendment with open-ended interpretations.⁴⁷⁵ These minority opinions captured the majority and many of the intended reservations of the amendment were read out of its interpretation.⁴⁷⁶

Field-like construction of Reconstruction legislation involved finding some economic regulation "class discrimination," which impaired the pursuit of happiness and interfered with a substantive reading of the clause "life, liberty or property without due process of the law."⁴⁷⁷ After Justice Field read into "due process" the principles of liberty and the pursuit of happiness, the doctrine of due process,

471. See *supra* Part IV.

472. A quote from Jeremy Bentham describes the danger of the Court's activism:

Should there be a Judge who[.] enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native Justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion.

BENTHAM, *supra* note 261, at 214; William. S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 20-21 (1929); see *supra* notes 264, 301-305, 368-381 and accompanying text (describing the Court's exercise of reasonableness review).

473. See *supra* Part III.

474. See *supra* Part III.

475. See *supra* Part IV.

476. See *supra* Part IV; CONG. GLOBE, 42d Cong., 1st Sess. app. at 149-152 (1871) (statement of Rep. Garfield) (attempting to preserve the language and meaning of the amendment as passed which "nearly every Republican who spoke to the measure" considered as limited in the ability to legislate at the expense of the states).

477. See *supra* Part IV. But see Saunders, *supra* note 15, at 293-300 (discussing "class legislation" as deriving from early court decisions invalidating "partial" or "special" privileges upon one at the expense of the other).

originally meant to require legal process before execution, quickly decayed into various standards of reasonableness.⁴⁷⁸ Similarly, the doctrine of equal protection drifted away from a moderate equal administration principle, a narrow principle that the laws cannot apply unevenly to one group and not to another, toward a substantive provision aimed at hunting class comparisons and the enacted law itself.⁴⁷⁹

Despite the prevalence of judicial hegemony since the passage of the amendment, courts are capable of reading restraint into the Fourteenth Amendment. Many of the early majority opinions held a reserved use of the Fourteenth Amendment.⁴⁸⁰ Resurrecting judicial self-restraint⁴⁸¹ could bolster state autonomy, divest the judiciary of social legislation from the bench, and result in less politicized judicial nominations.⁴⁸² A lesser judiciary, one free of legal heresy, may also encourage broader participation in the state and local legislative process and reduce skepticism with the Court.⁴⁸³

When speaking on terms of “liberty,” very few weigh equally the valid “liberty” claims of states and local communities.⁴⁸⁴ Representative Hale commented in the early debates on the Fourteenth Amendment:

Sir, I concede every disposition and every wish on the part of the gentleman [Bingham] to protect the liberty of the citizen – the humblest as well as the highest – the negro, the late slave, as well as others. In every such desire on his part I most fully and cordially concur. But let me warn gentlemen that there are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. I believe that whatever most clearly distinguishes our Government from other Governments in the extent of individual freedom and the protection of personal rights we owe to our decentralized system, to the fact that the functions of government with which the citizen has immediate relation are brought home to him, that he operates immediately upon them and they immediately upon him, instead of there being

478. See *supra* notes 264, 304, 325 and accompanying text; *supra* Part IV.B.

479. See *supra* Parts III.A-D, IV.B-C.

480. See *supra* Part IV.A-B (discussing majority opinions from cases heard shortly after ratification of the Fourteenth Amendment).

481. See *Munn v. Illinois*, 94 U.S. 113, 132-33 (1877) (holding a very limited judicial discretion to invalidate legislation only “[i]f no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.”); cf. Blackstone, *supra* note 264 (discussing judicial review of legislation).

482. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 271-322 (1990) (describing generally Bork’s unsuccessful Supreme Court nomination).

483. Cf. *id.* at 132 (describing the Court’s self-appointed role as analogous to civil disobedience).

484. See *supra* Part III.E (recommending consideration of the federalism axis in judicial analysis of the Fourteenth Amendment).

that long chain of communication which in a centralized government must extend from the fountain of power, whether despotic or republican, whether executive or legislative, to the citizen.⁴⁸⁵

The invalidation of many state laws has resulted in what Justice Samuel Chase advocated against, the degradation of the states into a common mass.⁴⁸⁶ Many of the current cases generating such immense controversy could be returned to the states, or in some cases to Congress, instead of having the Court create a new constitutional right under a tortured reading of some vague principle or aspirational guiding language within the Constitution.⁴⁸⁷ Where segments of society are diverse and differ greatly from region to region, localities could adopt community standards based on state and local norms with regard to controversial issues such as homosexuality, abortion, and the death penalty.⁴⁸⁸ Allowing for diversity between individual states and localities may vent the pressure surrounding several of the more controversial issues. Consolidating power and opinion in the federal government or the Supreme Court only frustrates the issue.⁴⁸⁹

485. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Hale).

486. See *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), available at 1797 WL 430, *19. A similar criticism of the judiciary was augured by Thomas Jefferson in a period of early struggles with the Supreme Court:

It has long, however, been my opinion, and I have never shrunk from its expression, (although I do not choose to put it into a newspaper, nor, like a Priam in armor, offer myself its champion,) that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body, (for impeachment is scarcely a scare-crow,) working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all consolidated into one. To this I am opposed; because, when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated. It will be as in Europe, where every man must be either pike or gudgeon, hammer or anvil. Our functionaries and theirs are wares from the same work-shop; made of the same materials, and by the same hand. If the States look with apathy on this silent descent of their government into the gulf which is to swallow all, we have only to weep over the human character formed uncontrollable but by a rod of iron, and the blasphemers of man, as incapable of self-government, become his true historians.

Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in 15 THE WRITINGS OF THOMAS JEFFERSON 330, 331-32 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

487. Admittedly, there might be uniformity problems, but there is no indication that compromise and dealing with uniformity problems as they arise is any worse than having end-of-discussion judicial hegemony.

488. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973).

489. Senator Thomas Bayard, a Democrat and lawyer from Delaware, commented in 1875:

Remaining faithful to the finely wrought, limited Fourteenth Amendment, the Court should abdicate its throne, enact standards of restricted judicial review, and restore the true liberty of the people which is self-rule. State and local governments—accountable to the people—are capable of legislating within the Constitution, and in the event that legislation violates the Constitution, the judiciary is not the only remedy to counter elected officials. Thomas Jefferson wrote:

[T]o consider the judges as the ultimate arbiters of all constitutional questions . . . [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. [They follow the maxim to amplify their powers and jurisdiction] and their power . . . [is] the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves. . . . When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.⁴⁹⁰

With the current application of the Constitution, one might conclude that the people need a second Bill of Rights to protect us from the Court's interpretations of the Fourteenth Amendment and the original Bill of Rights—a doctrine originally designed to prevent federal centralization and preserve individual rights through local and state self-government.⁴⁹¹ Under a model of restricted review, states would retain

If the government of the United States has the power to enter a State and take control of that vast domain of rights under the State regulation which a citizen acquires by virtue of the State laws which are regulated by the State, which are conferred by the State, which heretofore always in the history of this Government have been protected by the State, and the State alone—if the United States can assume guardianship of all those, then the State laws and the State governments are absolutely worse than useless; they are mere laughing stocks existing only at the pleasure of Congress and the Executive, liable to be disturbed, modified, or overthrown as pleasure or caprice shall dictate without regard to State constitutions or supposed reservations of power in the States or the people.

3 CONG. REC. app. at 103 (1875) (statement of Sen. Bayard).

490. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 486, at 276, 277-78.

491. See *supra* note 243 (noting the intent of the Bill of Rights to prevent federal

the character and autonomy contemplated in the constitutional design and society's great debates would remain in the halls of the legislatures.⁴⁹²

encroachment). At the time of the ratification of the Bill of Rights, the Senate rejected the proposal to make the First Amendment a restriction against the states. *See* Warren, *supra* note 309, at 434-35. Representative Hale of New York, while discussing a rough draft of the amendment, commented on the likelihood that the federal government would use the proposed amendment to "arrogate" power to itself at the expense of the states:

[I]t is the inevitable tendency of power always to augment itself; to acquire additional power by mere amplification and accretion. Power goes on to increase and arrogate to itself power, from time to time by extension and enlargement. That has been the tendency under the Constitution as it exists. The principle that it is the part of a good judge to amplify his jurisdiction has been not only a maxim of the courts but it also seems to have been the principle and maxim upon which the Federal Government has operated.

CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (statement of Rep. Hale).

492. *Cf.* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) (restating that the Tenth Amendment reserves to the states all powers not enumerated to the national government and those powers are indefinite with "NO CONSTRUCTIVE" room for Court interpretation); *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), *available at* WL 430, at *19-20; CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (statement of Rep. Bingham) (noting that states localize natural rights); *id.* at 2538-42 (statement of Rep. Farnsworth) (reaffirming that the Fourteenth Amendment did not cover political rights and suggesting that the Equal Protection Clause is mere surplusage to other measures of the amendment and the Constitution).