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ARTICLE

General Law and the Fourteenth Amendment

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Abstract. The Fourteenth Amendment's Section One is central to our constitutional law. Yet its underlying principles remain surprisingly obscure. Its drafting history seems filled with contradictions, and there is no scholarly consensus on what rights it protects, or even on what kind of law defines those rights.

This Article presents a new lens through which to read the Fourteenth Amendment—new to modern lawyers, but not to the Amendment's drafters. That lens is general law, the unwritten law that was taken to be common throughout the nation rather than produced by any particular state. Though later disparaged in the era of *Erie Railroad Co. v. Tompkins*, general law was legal orthodoxy when the Amendment was written.

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To those who created the Fourteenth Amendment, general law supplied the fundamental rights that Section One secured. On this view, while Section One identified the citizens of the United States, it did not confer new *rights* of citizenship. Instead, it secured preexisting rights—rights already thought to circumscribe state power—by partially shifting their enforcement and protection from state courts and legislatures to federal courts and Congress. This general-law understanding makes more sense of the historical record than existing theories, which consider the Fourteenth Amendment solely in terms of federal or state law. And it has significant implications for modern Fourteenth Amendment doctrine, from state action to civic equality to "incorporation" to "substantive due process."

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Introduction

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*[1]

What kind of law defines Fourteenth Amendment rights? The answer seems obvious. Section One of the Amendment confers federal constitutional rights: to "due process," to "equal protection," to the "privileges or immunities of citizens of the United States." So the content of these rights must be defined by *federal constitutional law*, to be divined and explicated by federal courts.[2]

Yet this seemingly obvious answer has serious flaws. The Privileges or Immunities Clause was once the core of Section One,[3] before it was rendered a dead letter in the *Slaughter-House Cases*.[4] And this Clause is often read to have guaranteed a vast swath of substantive rights, including common-law rights of property and contract[5]—the sort of fundamental rights secured against interstate discrimination under Article IV's Privileges and Immunities Clause,[6] or against racial discrimination in the Civil Rights Act of 1866.[7] But the moderate Republicans who championed the Amendment in the Thirty-Ninth

1. U.S. CONST. amend. XIV, § 1.

2. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-39 (1943).

3. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 191 (2011); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 140 (2015); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 998-1000 (1995).

4. 83 U.S. (16 Wall.) 36, 78-79 (1873); *see id.* at 129 (Swayne, J., dissenting) ("The construction adopted by the majority of my brethren . . . . turns, as it were, what was meant for bread into a stone."); BALKIN, *supra* note 3, at 191; McConnell, *supra* note 3, at 998-99.

5. *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 175, 254-55 (2011); Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 500-04 (2019); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 258 (1988); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 888 (1986); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 742-43 (2003).

6. U.S. CONST. art. IV, § 2, cl. 1; *see, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice). For identification of the date that *Corfield* was issued, see Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019).

7. Ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982).

Congress also staunchly opposed anything that might have upended American federalism by nationalizing the common law.[8] So how could the Amendment have turned all of these ordinary rights into federal constitutional law?

Equally perplexing is how the drafters and supporters of the Fourteenth Amendment could have displayed such confidence about its importance while remaining so agnostic about what it actually did. Discussing an early draft in the House, Representative John Bingham urged that "you must amend the Constitution" to assure "the immunities and privileges of citizens" to "the loyal minority of white citizens and the disenfranchised colored citizens."[9] Yet when introducing the measure in the Senate, Jacob Howard described "the privileges and immunities of citizens" as "a curious question," adding that they "cannot be fully defined," "whatever they may be."[10] How could members of Congress have expressed so much confusion about Section One's likely effects and yet have voted in supermajorities to pass the Amendment anyway?[11] And although Section One dominates the practice of constitutional law today,[12] it received relatively scant attention in the voluminous debate over the Amendment in Congress, at least as compared to Sections Two and Three.[13] How could such a fundamental measure have skated by with so little controversy?

Something in the "fundamental rights" reading has to give. Maybe the Clause protects federal-law rights, but only those enumerated elsewhere in the

8. *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 251-52 (2014); Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 273-75, 279 (1987); *see also* CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867) (statement of Rep. John Bingham) ("[T]his dual system of national and State government under the American organization is the secret of our strength and power. I do not propose to abandon it."); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 66-67 (1974) (emphasizing the moderate Republicans' nonrevolutionary aims and their influence within Congress). *But see* Kaczorowski, *supra* note 5, at 940 (arguing that the Amendment's adopters "purposely acted to revolutionize the structure of the federal union").

9. CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (statement of Rep. John Bingham). By convention, we quote speakers even when a statement comes from a report that is not a word-for-word record.

10. *Id.* at 2765 (statement of Sen. Jacob Howard). For other Republicans' seeming indifference about the scope of the rights being secured, see *id.* at 1293 (statement of Rep. Samuel Shellabarger); *id.* at 1118 (statement of Rep. James Wilson).

11. *See, e.g.*, *id.* at 3041 (statement of Sen. Reverdy Johnson); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 174-75 (1998) (wrestling with the ambiguity of the Privileges or Immunities Clause).

12. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1195 (1992) (noting that Section One incorporation cases comprise many of the most important cases of the twentieth century).

13. *See* MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR, at xli-xlii (2023).

Constitution.[14] Or maybe it requires only equality with respect to state-law rights;[15] or maybe it is just indeterminate or internally contradictory.[16] Each of these views has its supporters, but each has its flaws as well.

To solve these puzzles, we need to recover a missing piece. Fourteenth Amendment rights need not have been defined solely by federal law *or* by state law. Americans in the 1860s recognized a third option: what we now call general law.[17] Though referred to by different names, this shared body of unwritten law was not derived from any enactment by a single sovereign but instead "existed by common practice and consent among a number of sovereigns."[18] As a result, it was available to courts in many different Anglo-American jurisdictions. When no other source of law applied, these courts could draw from "known and settled principles of national or municipal jurisprudence," including "the common law," "the law of equity," and "the law of nations."[19] Historical scholarship about general law is in the midst of a renaissance, including works on the general-law grounding of many parts of the Bill of Rights.[20] But while Fourteenth Amendment scholarship is also

14. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" As an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1300 (2010); *accord* Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 600 (2019) [hereinafter Lash, *Enumerated-Rights*] (explaining that "privileges and immunities of *national* citizenship" are "rights independent of state law").

15. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 347-51 (1985); Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 68 (2011); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387-88 (1992); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 102 (2020). Harrison and Wurman express uncertainty about whether the Clause was originally understood *exclusively* as a nondiscrimination requirement. Harrison, *supra*, at 1397; WURMAN, *supra*, at 140-41.

16. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION, at xxiv-xxvi (2019); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 123 (1988); William E. Nelson, *The Role of History in Interpreting the Fourteenth Amendment*, 25 LOY. L.A. L. REV. 1177, 1178 (1992).

17. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822-24 (1997); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517-27 (1984); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 370-71 (2002).

18. Fletcher, *supra* note 17, at 1517.

19. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 737, 749 (1838).

20. *See, e.g.*, Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. F. 1010 (2023) (Takings Clause); Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861 (2022) (Speech and Press Clauses); Danielle D'Onfro & Daniel Epps, *The Fourth*

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flourishing,[21] the role of general law in the Amendment's design has been largely overlooked.[22]

This Article contends that Section One was premised on the existence of fundamental rights that the Fourteenth Amendment *secured* but did not *confer*: The rights were present already, defined by general law. What the Privileges or Immunities Clause, the Equal Protection Clause, and the Due Process Clause did was not so much substantive as it was jurisdictional. These Clauses provided for the federal enforcement of general-law rights that already limited state power but that had been beyond the power of Congress and federal courts to protect. The Amendment thus provided for federal remedies without supplying the underlying rights; the rights themselves were still grounded in general law.

The idea that the Constitution can *secure* rights without *conferring* them, and without nationalizing or constitutionalizing them either, might seem odd today. But this was a routine aspect of rights enforcement when the

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Amendment and General Law, 132 YALE L.J. 910 (2023) (Fourth Amendment); *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192-93 (2016) (emphasizing the common-law foundation of the Fourth Amendment); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) (emphasizing the common-law foundation of the Eighth Amendment). *See generally* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1866-67 (2012) (noting the importance of preexisting bodies of law in construing the Constitution's rights provisions). For other recent works on general law, see notes 22, 33, and 40 below.

21. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021); LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015); FONER, *supra* note 16; Green, *supra* note 3; Lash, *supra* note 8; David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117 (2016); Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885 (2023).

22. Most scholars of Fourteenth Amendment history do not discuss the concept of general law. In a rare exception, George Rutherglen identifies the central importance of "common law rights, part of the general law that governed relations between private citizens." GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 4 (2013); *see also id.* at 102. Yet even Rutherglen's book—which focuses on the Civil Rights Act of 1866—sometimes frames the source-of-law issue in binary terms. *See, e.g.*, *id.* at 7. One of us has recently gestured toward general law's importance to the Fourteenth Amendment, but that work focuses on historical debates about sovereignty and citizenship. *See* Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 613-15 (2023). Another of us has emphasized the general law's importance to questions of personal jurisdiction under the Amendment's Due Process Clause, but that work did not address Section One more broadly. *See* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1251-52 (2017).

Fourteenth Amendment was adopted.[23] Most importantly, many Republicans understood Article IV's Privileges and Immunities Clause to protect out-of-staters' citizenship rights, which were commonly defined by general law and linked to a status called general citizenship.[24] Such understandings played a crucial role in the decision to protect in-staters, too, against state abridgment of these "privileges or immunities of citizens of the United States."[25]

Bringing general law back into view helps solve some of the puzzles noted above. It explains why the Fourteenth Amendment's adopters thought that their work was so significant for the nature of the Union, why moderate Republicans felt so comfortable supporting the Amendment while demanding distinct roles for state and federal governments, and why the Amendment's supporters could have been, to modern ears at least, so maddeningly vague about which rights they were insulating from state interference or which kinds of equality they were guaranteeing to all. There was no need to spell out the fundamental rights to be protected or the equal citizenship to be guaranteed; those things were to be found outside the Constitution's text.

This Article seeks to recover this older way of thinking about how the Fourteenth Amendment protects fundamental rights. Part I summarizes what we call the "general-law approach." It begins with a survey of rights discourse prior to Reconstruction and explains how, in our view, the Fourteenth Amendment altered that legal landscape. Though this Part's discussion is grounded in history, our aim is primarily conceptual; that is, we describe how the general-law approach fit within the constellation of nineteenth-century legal concepts.

Part II then reexamines key pieces of historical evidence from the 1860s, focusing on debates in the Thirty-Ninth Congress. The general-law approach explains Congress's debates about the Civil Rights Act of 1866 and Bingham's subsequent drafting of Section One of the Fourteenth Amendment. General law also provides a framework for the recurring references in Congress to fundamental rights, unwritten law, and the continuing police power of the states. This Part further describes how the Supreme Court in *Slaughter-House* came to reject the general-law view (and thus to undermine Section One), as well as how general law was central to the *Slaughter-House* dissents.

Part III then turns to potential implications for equality jurisprudence, for congressional powers, for state-action doctrine, and for fundamental rights, including the incorporation of the Bill of Rights. To the modern interpreter,

23. *See, e.g.*, Bradley & Goldsmith, *supra* note 17, at 822-26 (explaining how the Constitution provided for the federal enforcement of customary international law, which remained grounded in general law).

24. *See* Campbell, *supra* note 22, at 628-51.

25. U.S. CONST. amend. XIV.

the imprecision and woolliness of general-law reasoning, including its reliance on custom and tradition, might seem an inappropriate basis for constitutional law. But the Fourteenth Amendment was made by people in the past during the heyday of general law—and *their* comfort with imprecision, woolliness, and customary background principles are among the most notable features of the historical debates. In any case, recovering the centrality of general law helps resolve several persistent historical puzzles about the original meaning of the Fourteenth Amendment, and it may point us in the right direction to resolve many more.

I. The General-Law Approach

We now sketch out a way of reading the Fourteenth Amendment based on the idea that it secures rights grounded in general law. We begin by describing certain background legal principles that predated the Amendment, followed by a discussion of how Section One may have changed the law.

A. Background Principles

1. Local law and general law

In early America, law came in two forms: local and general.[26] For many purposes, states used their own "local" law, also sometimes called "municipal" law.[27] (Today, terms such as "local" or "municipal" are associated with cities or local governments, but these words were not then limited to political subdivisions; regional customs and usages or acts of a state legislature could all be "local" in character.[28]) Through this local law, states might set their own distinct rules for which conveyances had to be recorded, which contracts had to be in writing, which limitations periods would apply in tort cases, and so on.[29] Of course, a state might choose to draw from another state's local law, following a majority rule or regional trend, but the content of each jurisdiction's local law was defined by that jurisdiction.[30] Federal courts sitting in diversity, for example, often had to apply the *local* law of the relevant state, and they deferred to state court decisions about its content.[31]

26. Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013).

27. *See id.* at 664-66.

28. *Id.*; *see also id.* at 694.

29. *See id.* at 666.

30. *See id.*; *see also id.* at 658.

31. *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). For discussion of how federal courts should construe state law in light of state judicial decisions, see BENJAMIN ROBBINS

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At the same time, states and the federal government also relied on principles of *general* law.[32] General law was conventionally unwritten law, derived from general principles and customs and operating across jurisdictions.[33] In the words of Chief Justice Marshall, this body of law included "those general principles and those general usages which are to be found not in the legislative acts of any particular State, but in that generally recognised and long established law, which forms the substratum of the laws of every state."[34] Some principles of general law were viewed as almost universal, applicable in all "civilized nations."[35] Customary international law was an example;[36] judges could cite cases from a variety of international and domestic courts to illustrate these rules of "universal jurisprudence."[37] Other general-law principles, such as the right to an impartial jury, might be found in the common law,[38] applied across Anglo-American legal systems and derived from "that country whose language is our language, and whose laws form the substratum of our laws."[39] Either way, the defining feature of general law was its cross-jurisdictional character.

The cross-jurisdictional character of general law meant that no single jurisdiction could control its content.[40] Notably, courts acknowledged this interpretive independence even when a state incorporated a general-law rule into its local law by reference.[41] As Caleb Nelson remarks, "a state's decision to

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CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 202-06 (George Ticknor Curtis & Benjamin R. Curtis eds., Boston, Little, Brown & Co. 1880); and Bellia & Clark, *supra* note 26, at 672-77, 685-86.

32. As used here, "general" law stands in contrast to "local" law, as opposed to referring to the distinction between generally applicable rules and "special legislation" (like private bills).

33. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 518-19 (2006); Bradley & Goldsmith, *supra* note 17, at 822-26; Fletcher, *supra* note 17, at 1517-21; Sachs, *supra* note 22, at 1260-69.

34. United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Circuit Justice).

35. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 536 (1839) (argument of Sergeant for the Bank of the United States).

36. *See* Bradley & Goldsmith, *supra* note 17, at 822-26.

37. *See, e.g.*, Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134) (Story, Circuit Justice).

38. *See, e.g.*, United States v. Burr, 25 F. Cas. 55, 77 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit Justice).

39. *Id.* at 159.

40. Bellia & Clark, *supra* note 27, at 681-82; *see also* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1283 (2000); Sachs, *supra* note 22, at 1262.

41. Collins, *supra* note 40, at 1281-82; *see* Bellia & Clark, *supra* note 27, at 658; Nelson, *supra* note 33, at 505; *see, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

adopt the general law did not necessarily *localize* the general law."[42] Consequently, when states embraced a general-law rule, no single jurisdiction's courts had authority to settle its content, as each was "called upon to perform the like functions."[43] The same was true in federal courts, which employed general law when directed to do so or when no other body of law would apply.[44] To be sure, there was "no common law of the United States" in the sense of a preemptive-yet-unwritten federal code,[45] such as what we now call "federal common law."[46] But some jurists still spoke of a "common law of America" in the sense of a shared body of law which American jurisdictions, both state and federal, could properly employ.[47]

Today the very existence of general law is controversial. Most lawyers take for granted, as Justice Holmes famously claimed in dissent in the *Taxicab Case*, that "there is no such body of law"—no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[48] To Holmes, the common law was "not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified."[49] Holmes's view has mostly won out in the courts, as famously reflected in the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*.[50]

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42. Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 948 (2013); *see also* 1 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 85, 87 (Boston, Little, Brown & Co. 1858); 1 EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 12 (London, G.G. & J. Robinson, Paternoster-Row 1797).

43. *Swift*, 41 U.S. at 19.

44. *See* Sachs, *supra* note 22, at 1266-68.

45. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834); *see also* Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *reprinted in* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 app. A, at 1326-27 (1985) (disparaging such a "common law of America").

46. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); Jay, *supra* note 45, at 1274.

47. *See, e.g.*, Harkness v. Sears & Walker, 26 Ala. 493, 497 (1855) (opinion of Rice, J.); Lowber v. Wells, 13 How. Pr. 454, 456 (1856); *see also* Penny v. Little, 4 Ill. (3 Scam.) 301, 304-05 (1841) (discussing American common law); Berry v. Snyder, 66 Ky. (3 Bush) 266, 291-93 (1867) (Robertson, J., concurring in the judgment) (same).

48. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

49. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

50. 304 U.S. 64, 78-79 (1938); *see also* Guar. Trust Co. v. York, 326 U.S. 99, 101 (1945) (noting that *Erie* "overruled a particular way of looking at law"). *But see infra* notes 400-04 and accompanying text.

But the Fourteenth Amendment does not enact Justice Holmes's dissent in the *Taxicab Case*. During the era in which the Amendment was written, federal courts often applied "general principles and doctrines," as Justice Story wrote in *Swift v. Tyson*,[51] even if doing so departed from state court rulings on the content of the general law. The idea here was not, as critics would later characterize, that federal courts were deliberately crafting a freestanding body of *federal* common law.[52] Rather, their interpretive independence was premised on the jurisdictional independence of the general law: When a general-law rule had to be applied, federal courts would apply it by their own best lights, just as state courts were supposed to do.[53] That federal and state judges sometimes disagreed did not mean that they were applying separate bodies of law, only that in this field neither set of judges was supreme.

2. General law and fundamental rights

General law was central to older conceptions of rights. The most elemental general-law rights were thought of as retained natural rights, which Justice Trimble described as "principles of natural, universal law."[54] Often referenced in shorthand as "life, liberty, and property," these were rights that individuals were understood to have retained upon leaving the proverbial state of nature through a social contract.[55] Crucially, these retained natural rights looked very different from the modern notion of constitutional rights. Many of them were abstract concepts that lacked legal specificity. They generally operated against private interference (a punch in the nose was a violation of natural rights); and they were regulable by law in promotion of the public good (a right to hold and convey property might be regulated via rules for transfers).[56] For the most part, they were simply "pillars of republican government"—not rights in the modern sense.[57]

51. 41 U.S. (16 Pet.) 1, 19 (1842).

52. *See Erie*, 304 U.S. at 78 (noting that the substance of the common law is generally beyond federal legislative power).

53. *See Swift*, 41 U.S. at 19; Bellia & Clark, *supra* note 27, at 681-82; Nelson, *supra* note 42, at 944-49.

54. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 319 (1827) (opinion of Trimble, J.).

55. *See* Jud Campbell, *Fundamental Rights at the American Founding*, 4 THE CAMBRIDGE HIST. OF RIGHTS (forthcoming 2024) (manuscript at 8) (on file with authors); *see also* Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 252-55 (1984).

56. *See* Campbell, *supra* note 55 (manuscript at 8); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 8-31 (2021); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 924-31 (1993); *infra* text accompanying note 320.

57. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 112 (2017).

Because retained natural rights lacked specificity, a second type of rights determined how a particular legal system might give them a more precise effect.[58] These more determinate rights were often called "civil rights," including by Republicans in the 1860s.[59] The full content of civil rights depended on the law of each jurisdiction, pursuant to its power to *regulate* retained natural rights.[60] But at the Founding, every American state had used the Anglo-American common law to specify these rights in the first instance,[61] and every state but one did so at the time of the Fourteenth Amendment's enactment.[62] Civil rights were thus defined in large part by general common law, though states could use their regulatory power to displace that law in favor of local-law rules.

Yet state legislative power to *regulate* rights was not plenary. Some of the limits on that power were defined by abstract principles, including a requirement that regulations had to promote the public good. After all, as the influential lawyer Theophilus Parsons observed, "[e]ach individual also surrenders the power of controuling his natural alienable rights, only when the good of the whole requires it."[63] State authority to regulate rights was thus

58. *See, e.g.*, 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 176 (1795) ("While we are contemplating the rights of man, it may with propriety be remarked, that they are divided into natural and civil.").

59. *See* Wurman, *supra* note 21, at 904, 909. But the term "civil rights" was used in other ways, too. Bingham, for instance, defined the term as "embrac[ing] every right that pertains to the citizen as such," and thus, in his view, it included "political rights." CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. John Bingham). *See generally* CHRISTOPHER W. SCHMIDT, CIVIL RIGHTS IN AMERICA: A HISTORY 11-31 (2021) (tracing meanings of the term "civil rights" in the nineteenth century).

60. *See, e.g.*, Ogden v. Saunders, 25 U.S. 213, 319-20 (1827) (opinion of Trimble, J.); *see also id.* at 348 (opinion of Marshall, C.J.).

61. For discussion of how the American colonies embraced the common law, see generally WILLIAM E. NELSON, E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607-1776 (2019).

62. Despite its use of the civil law, Louisiana deviated less from the other states than one might expect. For relevant discussions, see Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1847-49 (2011) (discussing the Louisiana Purchase treaty); Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 25-29 (1971) (discussing the influence of Blackstone on the Louisiana Civil Code). In the *Slaughter-House Cases*, Justice Field argued without contradiction that the Privileges or Immunities Clause had the same effect in Louisiana as elsewhere. 83 U.S. 36, 105-06 (1873) (Field, J., dissenting).

63. THEOPHILUS PARSONS, ESSEX RESULT (1778), *reprinted in* THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS app. I, at 366 (Boston, Ticknor & Fields 1859) (capitalization altered).

defined by what jurists called "police powers."[64] As Chief Justice Shaw described "the police power" in Massachusetts:

> Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution may think necessary and expedient.[65]

While Shaw found it "much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise,"[66] state authority was nonetheless constrained by basic precepts of social contract theory.[67] As the Ohio Supreme Court explained, police-power regulations had to be "*reasonable*, *uniform*, and *impartial*."[68] Statutes that violated this principle were said to be "abridgments" of civil or retained rights rather than "regulations" of their exercise.[69]

In addition to these abstract police-power limitations, state authority to regulate rights was also circumscribed by more determinate limits, usually grounded in customary law. Jurists across the states, for example, denied governmental authority to violate certain "inalienable" rights,[70] such as the natural right of speaking, writing, and publishing. They also denied governmental authority to abrogate fundamental aspects of the common law, such as the rule against prior restraints, the right to trial by jury, or the ban on cruel and unusual punishments.[71] Of course, there were disagreements about

64. For discussion of police-power jurisprudence, see generally HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR (2012); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

65. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851); *see also, e.g.*, State v. Buzzard, 4 Ark. 18, 21 (1842) (discussing the police power).

66. *Alger*, 61 Mass. at 85.

67. *See, e.g.*, Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 35-36 (2020).

68. Monroe v. Collins, 17 Ohio St. 665, 686 (1867); *see also, e.g.*, Capen v. Foster, 29 Mass. 485, 494 (1832).

69. For discussion, see Eric R. Claeys, *Blackstone's* Commentaries *and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 808-11 (2008); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 275-76 (2017).

70. Confusingly, Americans used the term "inalienable" (or "unalienable") in different ways. *See, e.g.*, Campbell, *supra* note 55 (manuscript at 4-5, 8-9).

71. For discussion, see Campbell, note 69 above, at 268-87; and Campbell, note 55 above (manuscript at 16-18).

what exactly these customary rights entailed (how many people had to be on a petit jury?) or whether certain limits existed at all (could a legislature grant monopoly privileges?).[72] But there was broader agreement that Americans enjoyed certain *fundamental* legal rights with determinate legal content—rights that "no state could rightfully abridge."[73]

Such rights were described as "principles which lie at the bottom of every free government";[74] "great fundamental principles";[75] "fundamental principles of the social compact";[76] "common rights";[77] "principles of public law";[78] "principles of all Civilized Governments";[79] "vital principles in our free Republican governments";[80] and so on. Lawyers and judges evinced the general-law character of these fundamental rights not only by using terms like these but also by explicitly describing the rights as shared among multiple jurisdictions.[81] These rights were part of the positive fundamental law of each state, but they were also defined in the first instance according to general law, even as states held primary authority to regulate and enforce them.

3. Fundamental rights and judicial review

Because these fundamental rights were rooted in general law, courts could still play a limited role in enforcing them—and in policing the boundaries of a state's regulatory power—when the rights were not enumerated in the state's

72. *Compare* Thompson v. Utah, 170 U.S. 343, 349 (1898) (requiring twelve jurors, "neither more nor less"), *with* State v. Starling, 49 S.C.L. (15 Rich.) 120, 135 (Ct. of Errors 1867) (approving an eight-person jury, when the state constitution let the legislature choose the number); *compare also* The Slaughter-House Cases, 83 U.S. 36, 65 (1873) (Miller, J.) (endorsing the legislature's power to grant monopolies), *with id.* at 106 (Field, J., dissenting) (denying that power as "interfering with the privilege of the citizen").

73. Campbell, *supra* note 22, at 656 n.216.

74. Barker v. People, 3 Cow. 686, 692 (N.Y. Sup. Ct. 1824) (argument of Benjamin Franklin Butler).

75. Young v. McKenzie, 3 Ga. 31, 44 (1847).

76. Briggs v. Hubbard, 19 Vt. 86, 91 (1848).

77. CONG. GLOBE, 24th Cong., 1st Sess. app. at 85 (1835) (statement of Rep. William Slade).

78. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice).

79. Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 265 (1828) (opinion of Carr, J.).

80. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

81. *See, e.g.*, Woart v. Winnick, 3 N.H. 473, 475-76 (1826); Rich v. Flanders, 39 N.H. 304, 320 (1859); Cincinnati v. Rice, 15 Ohio 225, 231-32 (1846) (argument of Samuel M. Hart); *see also* Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to* 51 Imperfect Solutions, 2020 U. ILL. L. REV. 1455 (discussing general constitutional law in the nineteenth century, particularly in reference to takings).

constitution.[82] A somewhat famous example is the Georgia Supreme Court's decision in *Nunn v. Georgia*, which applied the right to keep and bear arms against state legislation—even though the right was not enumerated in Georgia's written constitution,[83] and even though *Barron v. Baltimore* had recently held the Bill of Rights to be enforceable only as against the federal government.[84] In relying on the Second Amendment for its decision, *Nunn* was not saying that *Barron* was wrong, because *Nunn* was not applying the Second Amendment of its own force.[85] Rather, the court understood the Amendment as a form of *evidence*, confirming the existence of a general fundamental right that had bound states even before the federal Constitution was amended in 1791. The Second Amendment, the court explained, had "only reiterated a truth announced a century before" in the English Bill of Rights,[86] securing a right that lay "at the bottom of every free government"[87] and that was "one of the fundamental principles, upon which rests the great fabric of civil liberty."[88] Similarly, in *Terrett v. Taylor*, Justice Story denied that Virginia's legislature could confiscate private property without compensation: Though the state's constitution was silent on the subject, such authority was "utterly inconsistent with a great and fundamental principle of a republican government."[89] As he later explained in *Wilkinson v. Leland*:

> The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them . . . lurked under any general grant of legislative authority or ought to be implied from any general expressions of the will of the people.[90]

82. *See, e.g.*, AMAR, *supra* note 11, at 153-57; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 182 (1992). For further discussion, see Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 32-55 (2007).

83. *See* 1 Ga. 243, 249 (1846) (distinguishing the case from other "adjudications . . . made on clauses in the State Constitutions").

84. 32 U.S. (7 Pet.) 243, 250-51 (1833).

85. AMAR, *supra* note 11, describes the authors of such decisions as "*Barron* contrarians," *id.* at 144-46; *see also id.* at 154 (discussing *Nunn*). Beyond this label, however, he also notes that "even if the federal Bill of Rights did not, strictly speaking, bind the states of its own legislative force," it may still have been "at least declaratory of certain fundamental common-law rights." *Id.* at 147.

86. Nunn v. State, 1 Ga. 243, 249 (1846).

87. *Id.* at 250.

88. *Id.* at 249. For similar reasoning, see, for example, Sinnickson v. Johnson, 17 N.J.L. 129, 146 (1839). For further discussion, see Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1440-43.

89. 13 U.S. (9 Cranch) 43, 50-51 (1815).

90. 27 U.S. (2 Pet.) 627, 657 (1829).

Story's emphasis on "general expressions" matched the interpretive principles of the time. For instance, in *Fletcher v. Peck*, Justice Johnson similarly declared: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things . . . ."[91] General principles like these were also part of each state's positive law. Just as a generic grant of legislative power in Article I would not license one Congress to bind a future Congress, contrary to the common-law rule against legislative entrenchment,[92] so a generic grant of legislative power in a state constitution would be read narrowly in derogation of general fundamental rights.[93] As Justice Chase had explained in *Calder v. Bull*, it would be "against all reason and justice, for a people to entrust a Legislature with such powers" as to make "a law that takes *property* from A. and gives it to B," and therefore "it cannot be presumed that they have done it."[94]

To be sure, there were long-running disputes over the boundaries of state legislative power and the extent to which judges, given institutional considerations, could uphold social-contractarian precepts in the face of expressly contrary legislation.[95] Justices Iredell and Chase in *Calder* had famously debated that question in dicta, with Chase arguing for the application of "the great first principles of the social compact"[96] and Iredell insisting that judicial enforcement of rights should be limited to those that were legally determinate and constitutionally enumerated.[97] But putting the question of

91. 10 U.S. (6 Cranch) 87, 143 (1810) (opinion of Johnson, J.) (capitalization altered).

92. *See* Sachs, *supra* note 20, at 1848-54.

93. *See id.* at 1885; *see also* William Baude & Stephen E. Sachs, Book Review, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 892-93 (2023).

94. 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

95. *See* Campbell, *supra* note 20, at 889. Especially controversial was judicial power to recognize the invalidity of legislation based on corrupt motives. *See Fletcher*, 10 U.S. at 130 (1810); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1795-1812 (2008). Moreover, even when enumerated rights were at issue, jurists differed in their approaches. *See, e.g.*, Eakin v. Raub, 12 Serg. & Rawle 330, 355-56 (Pa. 1825) (Gibson, J., dissenting) (recognizing some role for judicial review but insisting that "this is far from proving the judiciary to be a peculiar organ under the constitution, to prevent legislative encroachment on the powers reserved by the people" (emphasis omitted)). *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (discussing the early history of American judicial review).

96. 3 U.S. at 388 (opinion of Chase, J.) (emphasis omitted).

97. *Id.* at 399 (opinion of Iredell, J.). Iredell's opinion linked written constitutionalism, legal determinacy, and judicial review, making it difficult to disentangle whether his argument against the judicial enforceability of "ideas of natural justice" stemmed from their underdeterminacy, their nonenumeration, or both. *Id.* In separate writings, we have offered differing views. *See* Baude & Sachs, *supra* note 93, at 893 (emphasizing nonenumeration); Jud Campbell, *Determining Rights*, 138 HARV. L. REV. (forthcoming 2025) (manuscript at 46-47) (on file with authors) (emphasizing underdeterminacy).

judicial review to the side, jurists mostly agreed that states were bound by the terms of the social contract.[98] And even those who were skittish about Chase's position still gave effect to those precepts by equitably construing statutes to avoid conflicts with general fundamental rights.[99]

4. Judicial review and federal courts

These complex interactions of general law and constitutional rights may sound strange to the modern ear. Justice Holmes, for example, criticized general law as a weird sort of super-law "outside of any particular State but obligatory within it."[100] In our federal system, these sorts of uber-rules are naturally associated with federal law (as betrayed by *Erie*'s confused reference to a "federal general common law"[101]), and such federal rules are usually enforceable by federal courts. Yet general law was *not* federal law at the time of the Founding or even of the Fourteenth Amendment; any notion of "federal common law" lay far in the future.[102] And general fundamental rights were not *federal* constitutional rights. They were not the "supreme Law of the Land,"[103] with the power to override explicit language in a state constitution; nor, as Justice Chase recognized, was their scope or content a federal question for purposes of arising-under jurisdiction.[104]

98. *See* KRAMER, *supra* note 95, at 42-43 (observing that even Iredell did "not deny that laws against 'great first principles' are void").

99. *See, e.g.*, Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50-52 (1815); *see also* Minge v. Gilmour, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9,631) (Iredell, Circuit Justice) ("All courts . . . being bound to give the most reasonable construction to acts of the legislature, will, in construing an act, do it as consistently with their notions of natural justice . . . as the words and context will admit."). For further discussion of courts' use of "equitable" interpretation to avoid conflicts with fundamental rights, see STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 11-45 (2021); R. H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142-72 (2015); Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 73-80 (2020).

100. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

101. 304 U.S. 64, 78 (1938).

102. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); *cf.* Jay, *supra* note 45, at 1274 ("[N]othing like the theory of jurisdiction just articulated was generally accepted until far into the nineteenth century." (footnote omitted)).

103. U.S. CONST. art. VI, cl. 2.

104. Calder v. Bull, 3 U.S. (3 Dall.) 386, 392-93 (1792) (opinion of Chase, J.); *see also* Sachs, *supra* note 22, at 1264 n.100 (collecting sources). Along similar lines, the Supreme Court suggested that ordinary property-law claims based on the Northwest Ordinance's guarantee of "just preservation of rights and property" would not give rise to appellate jurisdiction under Section 25 of the Judiciary Act of 1789 because the Ordinance merely *recognized* those rights and "did not create or strengthen" them. Menard v. Aspasia, 30 U.S. (5 Pet.) 505, 514-16 (1831); *see also* Shulthis v. McDougal, 225 U.S. 561, 569 (1912).

This jurisdictional feature had significant consequences for the enforcement of general fundamental rights prior to the ratification of the Fourteenth Amendment. If a state court failed to enforce these rights (or misunderstood what they required), that would not count as a denial of *federal* rights within Article III's federal question jurisdiction, much less within the Supreme Court's appellate jurisdiction under Section 25 of the Judiciary Act.[105] Consequently, federal courts were often powerless to enforce such rights in the face of state violations. For example, although the state judges in *Dartmouth College v. Woodward* had full jurisdiction over the case and thus were able to construe the state legislature's powers in light of "the fundamental principles of all government and the unalienable rights of mankind,"[106] the U.S. Supreme Court on writ of error could only determine whether the state statute violated the federal Contracts Clause.[107] Or consider the dispute in *Barron v. Baltimore*. In state court, Barron's lawyers invoked the "social compact" to argue that the City of Baltimore had unlawfully damaged their client's property rights,[108] but on appeal to the U.S. Supreme Court their arguments were strictly limited to whether the City had violated the federal Constitution.[109] For the most part, the Constitution left the enforcement of general fundamental rights to state institutions.

Diversity jurisdiction was an important exception.[110] Federal courts had full jurisdiction over diversity suits, unconfined to review of federal issues. As in *Swift v. Tyson*, this meant that federal courts did not have to follow state *courts*' interpretations of the general law.[111] But it also meant that state *legislative* decisions were occasionally subject to federal judicial review, as in *Fletcher*, with federal courts considering whether state statutes abridged general

105. U.S. CONST. art. III, § 2, cl. 1; Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 86 (codified as amended at 28 U.S.C. § 2104).

106. 1 N.H. 111, 114 (1817).

107. 17 U.S. (4 Wheat.) 518, 625, 644-54 (1819) (opinion of Marshall, C.J.) (applying U.S. CONST. art. I, § 10, cl. 1). In keeping with the limitation of Supreme Court review to questions of federal law, Section 25 of the Judiciary Act specified that "no other error shall be assigned or regarded as a ground of reversal" except those that respected the "validity or construction" of the federal question. Ch. 20, § 25, 1 Stat. 73, 86-87.

108. Transcript of Oral Arguments at 149, Mayor of Baltimore v. Barron (Md. Ct. App. W. Shore Dec. 14, 1830) (on file with authors). Filings in this case were drawn from the Maryland State Archives. *See also* WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: BARRON V. BALTIMORE AND THE FOUNDATIONS OF AMERICAN LIBERTY 128 (2017).

109. *See* Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250-51 (1833); MERCER, *supra* note 108, at 142.

110. *See generally* Ann Woolhander, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997) (emphasizing the importance of diversity jurisdiction for resolving general-law claims).

111. *See supra* note 51 and accompanying text.

fundamental rights.[112] In this way, diversity jurisdiction offered a model for how general fundamental rights could be federally enforced while remaining grounded in general law.

A second instance where federal courts enforced general fundamental rights was under Article IV's guarantee that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[113] General fundamental rights were quintessentially citizenship rights. Natural rights had been "retained" under a social contract, by which individuals had become citizens.[114] Likewise, the terminology of "civil rights" connoted not only that such rights existed in civil society rather than in a state of nature, but also that these rights were for citizens to enjoy.[115] (A society could choose to allow noncitizens to enjoy them,[116] and international law demanded that noncitizens receive certain rights, such as the protection of the laws;[117] but other rights, such as the right to own real property, could be and often were withheld.[118])

In their home states, Americans enjoyed these general citizenship rights by virtue of their state citizenship—as citizens of New Jersey, of Pennsylvania, and so on. Article IV then extended these rights across state lines, ensuring that citizens would enjoy them "in the several States."[119] Among nineteenth-century jurists, the dominant view was that the Clause not only compelled states to extend a common set of general fundamental rights to the citizens of other states but also to maintain equality between in-state and out-of-state citizens when regulating those rights pursuant to local law.[120] In this situation,

112. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 132 (1810); Campbell, *supra* note 88, at 1442, 1445-46; Collins, *supra* note 40, at 1280; Mazzone, *supra* note 82, at 59-64; CHARLES F. HOBSON, THE GREAT YAZOO LANDS SALE: THE CASE OF FLETCHER V. PECK 9-10 (2016).

113. U.S. CONST. art. IV, § 2, cl. 1.

114. *See* Campbell, *supra* note 22, at 634-35, 637.

115. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull) (defining "civil liberty" as "the liberty which a person enjoys in society" and as "the liberty to which every citizen is entitled"); *id.* app. at 157 (statement of Rep. James Wilson) (endorsing "protection for the fundamental rights of the citizen commonly called civil rights").

116. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1836, 1869 (2009).

117. *Id.* at 1847; *see also, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Lyman Trumbull) (discussing the extension of certain civil rights to noncitizens under the law of nations).

118. *See* Lessee of Jackson v. Burns, 3 Bin. 75, 77 (Pa. 1810); Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 155-66 (1999).

119. U.S. CONST. art. IV, § 2, cl. 1.

120. *See* Campbell, *supra* note 22, at 642-51. For further discussion of different readings of the Clause, see GREEN, note 3 above, at 18-19.

the underlying *rights* were grounded in general law, even though *regulations* of those rights were supplied by local law.

By contrast, the Privileges and Immunities Clause did not, on this view, apply to wholly local rights. For example, as Justice Bushrod Washington famously held in *Corfield v. Coryell*, New Jersey did *not* have to grant to out-of-staters the right to harvest state-owned oysters in public waters, even if it granted such a right to its own citizens.[121] That was because the oyster-harvesting-right was grounded in local law and not in social-contractarian precepts running throughout the states.[122] Washington thus drew a distinction between rights secured under Article IV's reciprocal grant of "general citizenship" and those rights derived exclusively from one's state citizenship (whether of New Jersey or of Pennsylvania).[123] *Corfield*'s distinction between *general* citizenship rights and *local* citizenship rights became widely accepted,[124] and it became even more entrenched during Reconstruction, when the Supreme Court held that Article IV would only protect "a privilege or immunity of general, [not] of special, citizenship."[125]

Justice Washington's decision in *Corfield* thus embraced what scholars often call a "fundamental rights" approach to the Privileges and Immunities Clause.[126] These rights, as Washington explained, were perhaps

> more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental.[127]

121. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice).

122. *See id.* at 552.

123. *See* Campbell, *supra* note 22, at 625 (observing that general citizenship rights were linked to state citizenship and general citizenship).

124. *See, e.g.*, *id.* at 645-46.

125. *See, e.g.*, McCready v. Virginia, 94 U.S. 391, 396 (1877).

126. *See* sources cited *supra* note 5.

127. *Corfield*, 6 F. Cas. at 551-52. On Washington's subsequent reference to suffrage, see note 201 below.

That said, the "fundamental rights" label misses half the picture. Washington relied on a crucial distinction between rights grounded in general law and those which states had granted their own citizens under local law,[128] and his core point was that the Clause applied only to rights that were fundamental *under general law*. As Washington explained, Article IV concerned only

> 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.[129]

Thus, although it is accurate to say that *Corfield* embraced a "fundamental rights" approach to the Privileges and Immunities Clause, it would be even more accurate to say that it embraced a "*general* fundamental rights" approach, distinguishing rights grounded in general law from those grounded in local law.

None of this is to dispute that judges faced disagreement and ambiguity regarding the scope of general law and the powers of courts to apply general fundamental rights. While *Swift v. Tyson* was well-rooted and unanimous,[130] some have argued that the decades between *Swift* and the Civil War saw both an upheaval in, and an expansion of, the federal courts' power to disregard state policies in the name of the general law.[131] Other scholars see more continuity in this period.[132] We do not take a position on this debate, just as the drafters of the Fourteenth Amendment did not need to do so. The key point for our purposes is that the idea of general law was well established, whatever its boundaries. As we shall now see, the Fourteenth Amendment did not *resolve* debates about general law so much as it *moved* them to federal institutions.

B. The Fourteenth Amendment and the General-Law Approach

With the antebellum legal landscape in view, we are in a better position to appreciate the role of the Fourteenth Amendment. Crucially, its drafters did not have to *create* any rights against state governments. Those rights already existed. The problem, rather, was the insufficient enforcement of those rights

128. *See* Campbell v. Morris, 3 H. & McH. 535, 537-38, 565 (Md. Gen. Ct. 1797) (showing this to be common ground among opposing counsel); *see also* Campbell, *supra* note 22, at 644 (discussing the general principle); *id.* at 645 n.155 (identifying exceptions).

129. *Corfield*, 6 F. Cas. at 551.

130. TONY FREYER, HARMONY & DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 35, 47-48 (1981).

131. *Id.* at 51-59 (discussing Watson v. Tarpley, 59 U.S. (18 How.) 517 (1855), and Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863), among others); RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 116-18 (1977) (discussing *Gelpcke*).

132. *See, e.g.*, Collins, *supra* note 40, at 1265-67, 1282; BRIDWELL & WHITTEN, *supra* note 131, at 77-78 (discussing *Watson*).

in practice. On the general-law view, Sections One and Five of the Fourteenth Amendment were principally forum-shifting provisions, substituting federal-level rights enforcement for deficient state-level rights enforcement.

1. Shifting the forum

According to the general-law approach, the "privileges or immunities of Citizens of the United States" were grounded in general law that operated throughout the United States. As we have seen, that general law was not federal law as such, so it did not support federal-question jurisdiction except in unusual cases (such as those involving discrimination against out-of-staters).[133] And in suits brought by in-state citizens against their own state's officials, there would be no diversity jurisdiction either.

But once the Fourteenth Amendment provided a constitutional hook to enforce general fundamental rights, it enabled Congress to bring these disputes into federal court. Federal judges and juries were far more sympathetic to the plight of freedmen and loyalists than were Southern state courts.[134] So without needing to define, alter, or even fully agree about the rights at issue, the Fourteenth Amendment greatly increased the odds of their enforcement. It facilitated the federal enforcement of basic rights without nationalizing the rights themselves.

Many other scholars have noticed the forum-shifting dynamics of the Fourteenth Amendment. As is widely recognized, for instance, Section One was designed to guarantee the constitutionality of the Civil Rights Act of 1866, which provided for the federal enforcement of civil rights.[135] Yet scholars have defined this mode of national civil rights enforcement either in terms of the *nationalization* of civil rights,[136] or in terms of nondiscrimination with respect to *state-law* rights.[137]

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133. *See supra* text accompanying note 104.

134. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866) (statement of Sen. James Lane) (expressing concern that "emancipated slaves would not have their rights in the courts of the slave States" and stating that the reason for passing the Civil Rights Act was that "we fear the execution of these laws if left to the State courts"). *See generally* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (2005) (highlighting the importance of federal enforcement during Reconstruction). Members of Congress also expressed worries about state court biases that would result in the mistreatment of "loyal men who never took part in treason." CONG. GLOBE, 39th Cong., 1st Sess. 1265 (1866) (statement of Rep. John Broomall).

135. *See infra* Part II.A.2.

136. *See, e.g.*, Kaczorowski, *supra* note 5, at 940 (referring to this era of civil rights enforcement as "nationalizing citizenship and the natural rights of freemen").

137. *See, e.g.*, Harrison, *supra* note 15, at 1388; WURMAN, *supra* note 15, at 102-03.

The general-law approach recognizes the forum-shifting design of the Amendment without treating the underlying rights as having been "nationalized" and without defining them merely in terms of state law. Instead, by constitutionally securing general-law rights against state abridgment, the Fourteenth Amendment made those rights federally enforceable. Federal courts could then make their own judgments about whether those rights had been abridged. When the Fourteenth Amendment was drafted, the most immediate source of this federal jurisdiction would have been Section 25 of the Judiciary Act, which provided for Supreme Court review of certain state decisions.[138] But it is probably not a coincidence that the enactment of Section One corresponded with other major grants of federal jurisdiction, including the expansion of federal habeas corpus[139] and federal-question jurisdiction over civil-rights cases.[140]

As we will see, the Supreme Court in *Slaughter-House* narrowly rejected the general-law approach. But we can get a feel for how that approach might have worked by considering the Court's decision in *Pennoyer v. Neff*, which looked to general-law limits on a state's judicial power to command the citizens of other states.[141]

Despite the obvious need to avoid jurisdictional conflicts among states, the Constitution's text imposed no rules of personal jurisdiction, leaving the topic to other sources of law.[142] On the international scene, the local or "municipal" law on jurisdiction was a matter for each sovereign's courts to determine,[143] though other courts might question their judgments under principles "of

138. Ch. 20, § 25, 1 Stat. 73, 85-86 (codified as amended at 28 U.S.C. §§ 2104-2106); *see supra* Part I.A.4.

139. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. §§ 2241-2243). The same Act also amended Section 25 of the Judiciary Act, eliminating the proviso that limited the Court's jurisdiction to the federal issue, *see supra* note 107, as well as allowing the Court to award execution without remanding the case. Act of Feb. 5, 1867, § 2, 14 Stat. at 386-87 (codified as amended at 28 U.S.C. §§ 2104, 2105). In light of the role of general law under the Fourteenth Amendment, this may not have been a coincidence. But the year after the *Slaughter-House Cases*, the Supreme Court decided that the elimination of the proviso was basically meaningless and did not expand the Court's jurisdiction. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1874). *But see* Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1345-54 (2010) (criticizing *Murdock*'s reasoning).

140. *See, e.g.*, Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1988); Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986) (incorporating jurisdictional provisions of the Civil Rights Act of 1866).

141. 95 U.S. 714 (1878).

142. Indeed, the text of the Fugitives Clause assumes that one can reliably identify "the State having Jurisdiction of the Crime." U.S. CONST. art. IV, § 2, cl. 2.

143. Rose v. Himely, 8 U.S. (4 Cranch) 241, 276 (1808).

general jurisprudence."[144] (As Chief Justice Marshall put it, every other court would ignore a judgment rendered under "a jurisdiction which, according to the law of nations, its sovereign could not confer."[145]) As to American courts, Justice Story wrote that if a state court claimed jurisdiction beyond what the "principle[s] . . . of . . . universal jurisprudence" allowed, then "the local tribunals might give a binding efficacy to such judgments"—but "elsewhere they would be utterly void."[146] Both state and federal courts therefore rejected judgments contrary to the general law of jurisdiction, as they understood it.[147]

But a state claiming exorbitant jurisdiction offended no *federal* rights, and its judgment was not liable to federal-question review. As Justice Field explained in *Pennoyer*, a judgment issued without personal jurisdiction, as defined by the general law, was in one sense an "absolute nullity" that could not "*legitimately* have any force."[148] Yet in another sense this judgment might be fully effective: The state courts could still enforce it, and absent diversity or some unusual source of jurisdiction,[149] "there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered."[150]

What changed this regime was the Fourteenth Amendment. Under that Amendment, Field explained, "the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[151] On Field's account, the Amendment did not *impose* rules of jurisdiction, subject-matter or personal. Rather, it facilitated the enforcement of rules that had already existed but that the federal courts could

144. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 102 (New York, O. Halsted 1827).

145. *Rose*, 8 U.S. at 276-77; *see also* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136-37 (1812).

146. Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134) (Story, Circuit Justice).

147. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1851); Flower v. Parker, 9 F. Cas. 323, 324-26 (C.C.D. Mass. 1823) (No. 4,891) (Story, Circuit Justice); Banks v. Greenleaf, 2 F. Cas. 756, 757-59 (C.C.D. Va. 1799) (No. 959) (Washington, Circuit Justice); Hart v. Granger, 1 Conn. 154, 169-70 (1814); Rogers v. Coleman, 3 Ky. (Hard.) 413, 417-21 (1808); Bissell v. Briggs, 9 Mass. (9 Tyng) 462, 469-70 (1813); Bartlet v. Knight, 1 Mass. 401, 405-07 (1805) (opinion of Sewall, J.); *id.* at 409-10 (opinion of Sedgwick, J.); Kilburn v. Woodworth, 5 Johns. 37, 41 (N.Y. Sup. Ct. 1809) (per curiam); Hitchcock & Fitch v. Aicken, 1 Cai. 460, 476-77 (N.Y. Sup. Ct. 1803) (opinion of Radcliff, J.); *id.* at 481-82 (opinion of Kent, J.); Sachs, *supra* note 22, at 1273-84.

148. 95 U.S. 714, 732 (1878) (emphasis added).

149. *See, e.g.*, Green v. Van Buskirk, 72 U.S. (5 Wall.) 307, 308-09, 313-14 (1867) (Full Faith and Credit Clause).

150. *Pennoyer*, 95 U.S. at 732.

151. *Id.* at 733.

not have enforced on their own.[152] And practically speaking, state courts would now have to follow the Supreme Court's doctrines on personal jurisdiction—not because the law of jurisdiction was federal law, or because the Due Process Clause explicitly commanded as much, but because the general law was now enforceable in a federal forum. A state judgment depriving the defendant of property, without the sanction of the general law of jurisdiction, would be reversed on federal due-process review. By enabling federal enforcement, the Fourteenth Amendment had *secured* the defendant's general-law rights, not created them.

2. Questions and answers

The essence of the general-law approach is that Section One of the Fourteenth Amendment was similarly designed to secure general-law rights. The Privileges or Immunities Clause protected rights of general citizenship, which Republicans saw as already guaranteed by Article IV, as interpreted by leading cases such as *Corfield v. Coryell*. Some, but not all, of these general-law rights were also secured to noncitizens under the Due Process and Equal Protection Clauses.[153] Notably, however, Section One secured these rights only against state abridgment or denial. Thus, while fraud, battery, and so on were quintessential violations of retained natural rights, the Fourteenth Amendment did not automatically shift those private violations into federal courts or make them the subject of federal legislation.

Instead, all citizens continued to possess certain general-law citizenship rights, which remained compatible with local-law regulations, just as before the Fourteenth Amendment. Now, however, such local regulations were subject to federal scrutiny. A forbidden abridgment of a right would occur when a regulation went beyond the state's regulatory authority, whether by exceeding its broad police powers or by transgressing the more specific limits imposed by general fundamental law. Such abridgments were squarely forbidden by the provisions of Section One, which the federal courts could apply and which Congress could enforce by appropriate legislation.[154]

To be sure, the details could be devilish. Disputes could and did arise over how to define the protected general-law rights, over which regulations went too far, over how these rights related to principles of equality among citizens, and over the relative power of federal courts and Congress. We will say more

152. *Id.*; *see* Sachs, *supra* note 22, at 1298-1306.

153. For example, while only citizens had a general-law right to own and transfer real property, states had to afford due process and the protection of the laws to any property rights that noncitizens *did* enjoy. *See supra* text accompanying notes 116-18.

154. For more discussion of the concept of "abridgment," see Part I.A.2 above and Part III.B.2 below.

about these disputes later,[155] and we do not maintain that the enacting generation—or even just the Republicans in the Thirty-Ninth Congress—shared a single constitutional vision of how to resolve them.

But the general-law approach does allow us to see how Sections One and Five of the Fourteenth Amendment resolved or avoided many of the differences swirling in American legal thought about the nature and federal enforceability of general fundamental rights. In particular:

- Congressmen disagreed about whether the Privileges *and* Immunities Clause of Article IV was purely an antidiscrimination rule or whether it also implicitly recognized an obligation of states to respect the general fundamental rights of their own citizens.[156] The Privileges *or* Immunities Clause resolved this debate by clarifying that states cannot abridge the general fundamental rights of any citizen of the United States.
- Congressmen disagreed about whether the federal government already had the authority to enforce general fundamental rights.[157] Section Five mooted this dispute by specifying that Congress would "have the power to enforce, by appropriate legislation," the limits on state authority and obligations of state protection recognized in Section One.
- Congressmen surely disagreed in innumerable ways about precisely how states should define rights in positive law.[158] By providing merely for federal enforcement of general fundamental rights—rather than "federalizing" the rights themselves—the Fourteenth Amendment avoided any effort to resolve these debates. It did not, in other words, disturb each state's existing authority to define and regulate rights within that state, but neither did it disturb the preexisting limits on that authority.

155. See Part III.A-.C below for further thoughts on these disputes.

156. *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866) (statement of Rep. James Wilson) (treating the Privileges and Immunities Clause as already requiring absolute protection in general fundamental rights), *with id.* at 595-96 (statement of Sen. Garrett Davis) (emphasizing that the Privileges and Immunities Clause only applied in cases of interstate discrimination). It is important to note, however, that those defending a "comity"-based view of Article IV did not necessarily reject the general-law grounding of the rights it secured. Rather, they insisted that those rights were secured in a bounded way—namely, temporarily and only to sojourners from out of state. *See id.* at 595-96 (statement of Sen. Garrett Davis); *id.* at 1268-69 (statement of Rep. Michael Kerr).

157. *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. James Wilson) (embracing such a power), *with id.* at 2542 (statement of Rep. John Bingham) (denying such a power).

158. Our claim is simply that Congressmen did not uniformly agree about state-level questions—what contracts to recognize, what tort liability standards to adopt, what uses of property were a nuisance, and so on.

A historical defense of the general-law approach, in other words, does not rely upon any imaginary Reconstruction-Era consensus about the content of rights or the vertical distribution of power. Nonetheless, the general-law approach provided a reasonably clear framework that addressed Republicans' demand for federal intervention to protect against state violations of general fundamental rights, especially those of black citizens.

II. The Evidence

In this Part, we consider historical evidence for the general-law approach to the Fourteenth Amendment. Of course, the debates over the Amendment were often unclear, even contradictory.[159] In our view, the general-law approach better fits the available evidence than competing alternatives. We begin with evidence from congressional debates showing that the Fourteenth Amendment was designed to secure existing general-law rights rather than to confer them as a matter of federal constitutional law. We then turn in particular to the scope of the Privileges or Immunities Clause, arguing that the general-law approach not only bolsters the "fundamental rights" view but also explains much of the evidence that ostensibly weighs against that view. Finally, we examine how the Supreme Court came to abandon the general-law approach in the 1870s.

A. Congressional Debates

1. Civil Rights Act

After the Civil War, southern states retained or enacted "Black Codes" that provided different punishments, court procedures, and common-law rights for black and white people.[160] Republicans responded by proposing the Civil Rights Act of 1866. The draft bill declared native-born Americans to be citizens of the United States and banned racial discrimination "in civil rights or immunities among the inhabitants of any State."[161] In particular, "inhabitants

159. *See* GREEN, *supra* note 3, at 11 ("There are a *great* many such pieces of evidence, many of them difficult to reconcile with the rest. It is therefore very easy to latch on to idiosyncratic evidence as the key.").

160. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 319-21 (1982); SCHMIDT, *supra* note 59, at 16-18; LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 366-71 (1979). *See generally* THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965).

161. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). This aspect of the bill was eventually dropped over concerns that it might extend to local-law rights, such as voting rights, that were not general-law rights. *See* BARNETT & BERNICK, *supra* note 21, at 120-24.

of every race and color" would have "the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property."[162] The bill also specified criminal penalties for violators and permitted civil cases to be brought in federal court.[163] Consequently, as Senator Lyman Trumbull summarized, "It is a court bill; it is to be executed through the courts, and in no other way."[164]

Republicans supported the bill's aims, but some worried about its constitutionality. Representative Columbus Delano of Ohio, for example, feared that the bill would "render this Government no longer a Government of limited powers," conferring federal "authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property."[165] The bill's proponents maintained that the freedmen were now citizens, that the Constitution already secured the basic rights of all citizens, and that Congress had various powers to enforce those rights (under the Naturalization Clause, the Article IV Privileges and Immunities Clause, and the Thirteenth Amendment's Section Two, among other provisions).[166] Moreover, proponents of the bill denied that the Civil Rights Act would effectively *federalize* these general citizenship rights. According to Representative William Lawrence of Ohio, the bill "does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States."[167] Senator Lyman Trumbull of Illinois expressed the same idea: "Each state, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens," he explained, "it may grant or withhold such civil rights as it pleases."[168]

In making these arguments, Republicans were not merely relying on the fact that the Civil Rights Act barred discrimination, thus leaving state legislatures otherwise free to define citizenship rights however they wished.

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

163. *See* RUTHERGLEN, *supra* note 22, at 59-60.

164. CONG. GLOBE, 39th Cong., 1st Sess. 605 (1866) (statement of Sen. Lyman Trumbull); *see also id.* at 1153 (statement of Rep. Russell Thayer) ("These civil rights and immunities which are to be secured . . . through the ordinary instrumentalities of courts of justice.").

165. *Id.* app. at 158 (statement of Rep. Columbus Delano).

166. *See id.* at 474-75 (statement of Sen. Lyman Trumbull); RUTHERGLEN, *supra* note 22, at 62-69.

167. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (statement of Rep. William Lawrence).

168. *The Civil Rights Bill and the President's Veto, Speech of Senator Trumbull*, BURLINGTON (VT.) FREE PRESS, Apr. 6, 1866, at 1. Some reports of this speech feature more opaque wording. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (statement of Sen. Lyman Trumbull).

Rather, as Senator Trumbull noted, there were "inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something."[169] Or, as Representative Lawrence explained, "there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him"[170]: "fundamental civil rights," neither "political rights nor those dependent on local law."[171] Statements like these were commonplace. Republicans widely believed that being a citizen of the United States carried with it a right to enjoy general fundamental rights in every state, including one's own.[172]

Notably, however, these underlying rights were not distinctively federal-law rights. Indeed, Republicans indicated that these rights were not created by the Constitution. "[E]qual civil rights," Representative Lawrence explained, were ones that the Privileges and Immunities Clause "recognizes or by implication affirms to exist among citizens of the same State."[173] Article IV had enshrined a duty of reciprocal recognition of these rights among the several states, and in this way, it was appropriate to refer to them as rights of all citizens of the United States. But while the federal compact "recognized" and "affirmed" these rights, as Lawrence put it,[174] it had not converted these rights into federal-law rights as such.

2. Bingham's drafting of the Fourteenth Amendment

Representative Bingham was among those who supported the Civil Rights Act as a matter of policy but who questioned its constitutionality.[175] He fully agreed with his colleagues that general fundamental rights existed and that states were obligated to secure these rights, not only for out-of-staters but for their own citizens as well. According to Bingham, "No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal

169. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Lyman Trumbull).

170. *Id.* at 1833 (statement of Rep. William Lawrence).

171. *Id.* at 1836.

172. As David Upham shows, a broad consensus supporting this view had emerged by the eve of the Civil War. *See* Upham, *supra* note 21, at 1159.

173. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866) (statement of Rep. William Lawrence).

174. *Id.*; *cf. id.* at 474 (statement of Sen. Lyman Trumbull) ("What rights are secured to the citizens of each State under [Article IV]? Such fundamental rights as belong to every free person.").

175. *Cf. id.* at 40-41 (statement of Sen. Edgar Cowan) ("I am in favor, and exceedingly desirous that by some means or other the natural rights of all people in the country shall be secured to them, . . . but . . . I think the only way that it can be attained, and securely attained, is by an amendment of the Constitution.").

protection of the laws or to abridge the privileges or immunities of any citizen of the Republic."[176] But the Constitution's recognition of these rights and obligations had not come with a correlative federal enforcement power: "A grant of power," he explained, "is a very different thing from a bill of rights,"[177] precisely as the Supreme Court had held in *Barron v. Baltimore*.[178]

Accordingly, Bingham proposed a constitutional amendment to give Congress power to pass the Civil Rights Act:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several states equal protection in the rights of life, liberty, and property.[179]

Notably, Bingham's draft presupposed the existence of fundamental rights of citizens and persons.[180] Consequently, he insisted, the Amendment would not "interfere with the reserved rights of the States."[181] His proposal did not purport to confer any new rights; it merely gave Congress the power better to *secure* those that already existed. When states defaulted on their obligations, Congress would now be "vested with power to hold them to answer before the bar of the national courts for the violation . . . of the rights of their fellow-men."[182] This is the essence of the general-law approach: federally securing rights without "nationalizing" them.

After an initial debate, Bingham offered, and Representative Thaddeus Stevens introduced, a new draft of the proposed Amendment that closely resembled its final text:

> 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

176. *Id.* at 2542 (statement of Rep. John Bingham); *cf. id.* at 605 (statement of Sen. Edgar Cowan) (responding, "Certainly," when asked by Senator Trumbull whether black people were "entitled to equal civil rights").

177. *Id.* at 1093 (statement of Rep. John Bingham).

178. *Id.* at 1089-90 (statement of Rep. John Bingham) (discussing Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

179. *Id.* at 1034 (statement of Rep. John Bingham) (reading H.R. 63, 39th. Cong. (1866)).

180. *Id.* at 1089 (statement of Rep. John Bingham); *see also Joint Committee, John Bingham, Proposed Amendment Granting Power to Secure the Rights "of Citizens in the Several States" and "to All Persons in the Several States Equal Protection in the Rights of Life, Liberty and Property," reprinted in* 2 KURT LASH, THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 90 (2021).

181. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. John Bingham).

182. *Id.* at 1090. On the role of Congress and the scope of its power, see Part III.C below.

> within its jurisdiction the equal protection of the laws . . . . The Congress shall have power to enforce by appropriate legislation the provisions of this article.[183]

Several aspects of this revised draft are worth highlighting, each corresponding to concerns that Congressmen had previously raised.

First, some Representatives had worried that the initial proposal, as a mere grant of power, would require federal civil-rights legislation that a future Congress could repeal.[184] The second draft, however, made these rights constitutionally inviolable, enabling federal-question review under Section 25 of the Judiciary Act even if the Civil Rights Act of 1866 were later repealed.[185] In the words of Representative and future President James Garfield, it would "lift that great and good law"—that is, the Civil Rights Act—"above the reach of political strife, beyond the reach of the plots and machinations of any part, and fix it in the serene sky, in the eternal firmament of the Constitution."[186]

Second, Bingham's initial Equal Protection Clause might, as Representative Robert Hale put it, have been read to "confer[] upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property."[187] By recognizing a power to protect rights of life, liberty, and property, the proposal might have given Congress authority to enact virtually any criminal statute and legislate about ordinary tort, contract, and property rights.[188] Instead, by reframing Section One as a *limit* on state power rather than as an affirmative grant of federal power, and by conferring through Section Five only a power of enforcing the Amendment's terms, Bingham avoided any suggestion of general federal authority to rewrite criminal law or private law.

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183. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) (statement of Rep. Thaddeus Stevens) (introducing the revised proposal of the Joint Committee on Reconstruction).

184. *E.g.*, *id.* at 1095 (statement of Rep. Giles Hotchkiss) ("[T]his amendment proposes to leave it to the caprice of Congress . . . .").

185. *See* Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L.Q. 287, 308 (2015). As Maltz notes, Bingham's revised draft followed a proposed nondiscrimination amendment that also had self-executing language. *See id.* at 306-07.

186. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (statement of Rep. James Garfield). For similar remarks, see *id.* at 2459 (statement of Rep. Thaddeus Stevens); *id.* at 2465 (statement of Rep. Russell Thayer).

187. *Id.* at 1094 (statement of Rep. Robert Hale). For further comments along similar lines, see *id.* at 1063 (statement of Rep. Robert Hale); *id.* at 1095 (statement of Rep. Giles Hotchkiss); *id.* at 1082 (statement of Sen. William Stewart). In response, Bingham observed that the amendment "confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." *Id.* at 1094 (statement of Rep. John Bingham).

188. *See infra* note 218.

Third and finally, Congressmen had at various times been troubled by potential ambiguities in the phrase "privileges and immunities of citizens *in* the *several* States."[189] That phrase in Article IV had been read by some to cover all state-law citizenship rights (including even local rights like voting) rather than to indicate those citizenship rights grounded in general law.[190] Bingham had clarified in his initial speech that he was concerned only with general citizenship rights—"the privileges and immunities *of citizens of the United States* in the several States"[191]—but the text of his first proposal had not provided that clarifying language. By contrast, the phrase "privileges or immunities of citizens of the United States"[192] more clearly conveyed that only general citizenship rights were covered.

In both drafts, however, the crux of Bingham's proposal was to create federal security for the general fundamental rights that, in his view, the states were already required to maintain. To Bingham, the problem motivating the Amendment was a lack of power "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[193] Substantively, the Amendment "t[ook] from no State any right that ever pertained to it."[194] States were already obliged to respect these rights, so the change was purely remedial. As Bingham observed:

> No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, *although many of them have assumed and exercised the power, and that without remedy.*[195]

189. U.S. CONST. art. IV, § 2, cl. 2 (emphasis added). This concern does not appear in the recorded debates on Bingham's initial draft. But as other contemporary comments revealed, some Republicans recognized the potential ambiguity of references to citizenship rights. *See* Campbell, *supra* note 22, at 679-80; Upham, *supra* note 21, at 1164.

190. Indeed, some nineteenth-century commentators had argued that the Privileges and Immunities Clause secured equality even with respect to local citizenship rights. *See* Campbell, *supra* note 22, at 649; *see also* SCHMIDT, *supra* note 59, at 21-22 (noting a similar view in debates over the Civil Rights Act of 1866). Commentators also debated whether the Privileges and Immunities Clause went beyond providing a right of nondiscrimination with respect to state-law rules. *See supra* note 156.

191. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. John Bingham) (emphasis added); *see also* Campbell, *supra* note 22, at 663-71 (situating Bingham's "ellipsis" theory of Article IV within antebellum debates over citizenship).

192. CONG. GLOBE., 39th Cong., 1st Sess. 2286 (1866) (statement of Rep. Thaddeus Stevens) (introducing the committee's revised draft of the proposed amendment).

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

194. *Id.*

195. *Id.* (emphasis added).

And as Bingham had already clarified, the remedy he sought was "to see the Federal judiciary clothed with the power to take cognizance of the question."[196] In that way "every man in every State . . . may, by the national law, be secured in the equal protection of his personal rights."[197] Once again, this is the general-law approach.

When introducing the Fourteenth Amendment in the Senate, Jacob Howard of Michigan also described it as extending national protection for general fundamental rights. At the time, he explained, the privileges and immunities of American citizenship—"some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution"—were "secured to the citizen solely as a citizen of the United States and as a party in their courts," and did "not operate in the slightest degree as a restraint or prohibition upon State legislation."[198] Under Article IV's Privileges and Immunities Clause, *Corfield* rights were enforceable only by out-of-state citizens; under *Barron*, the rights set out in the first eight amendments were enforceable only against the federal government. Congress thus lacked broader power to secure general fundamental rights against state abridgment. "The great object of the first section of this amendment," Howard explained, "is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[199]

3. Recurring themes

Viewed as a whole, congressional debates over the Civil Rights Act and Fourteenth Amendment display several recurring themes supporting the general-law approach: references to general fundamental rights, claims that those rights already existed as a matter of law, and arguments that the Amendment would not diminish state authority.

First, Republicans constantly referred to the privileges or immunities of American citizenship in terms suggestive of general law—an unwritten, cross-jurisdictional law applicable in the states but not of their own creation. Representative Lawrence, for example, explained that the rights "inherent in every citizen of the United States" were distinct from those "conferred by local law" and that the Civil Rights Act applied only to "fundamental civil rights," not rights "dependent on local law."[200] These rights, he noted, "exist[ed]

196. *Id.* at 158 (statement of Rep. John Bingham). This statement referred to Bingham's initial proposal.

197. *Id.* at 1094 (statement of Rep. John Bingham).

198. *Id.* at 2765 (statement of Sen. Jacob Howard).

199. *Id.* at 2766 (statement of Sen. Jacob Howard).

200. *Id.* at 1836 (statement of Rep. William Lawrence).

anterior to and independently of all laws and all constitutions."[201] Other Republicans spoke about these rights in a similar way. These rights were:

- "common to the humblest citizen of every free State"[202]
- "universal and independent of all local State legislation"[203]
- "[s]uch fundamental rights as belong to every free person"[204]
- "the great fundamental rights which belong to all men" and which are "the inalienable possession of both Englishmen and Americans"[205]
- "the rights that attach to citizenship in all free Governments"[206]

Over and over, Republicans described these fundamental rights in general-law terms,[207] evoking their cross-jurisdictional character. Often they grounded this view in a social-contractarian account of rights,[208]

201. *Id.* at 1833 (statement of Rep. William Lawrence). Howard likewise excluded voting rights on the ground that they were local, rather than general. With regard to Justice Washington's uncertain discussion of suffrage as a potential privilege or immunity of citizenship—"to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised," Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice)—Howard quoted *Corfield* but described suffrage "as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Jacob Howard); *accord* BARNETT & BERNICK, *supra* note 21, at 142.

202. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Russell Thayer) (discussing the Civil Rights Act).

203. *Id.* at 1089 (statement of Rep. John Bingham).

204. *Id.* at 474 (statement of Sen. Lyman Trumbull) (discussing the Civil Rights Act).

205. *Id.* at 1118 (statement of Rep. James Wilson) (discussing the Civil Rights Act).

206. *Id.* at 3031 (statement of Sen. John Henderson).

207. *See, e.g.*, *id.* at 632 (statement of Rep. Samuel Moulton) (referring, during a debate over the Civil Rights Act, to "great fundamental rights"); *id.* at 340 (statement of Sen. Edgar Cowan) (referring, during a debate over the Freedmen's Bureau, to "the great principles of English and American liberty"); *id.* at 744 (statement of Sen. John Sherman) (referring to the Civil Rights Act's protection of "essential incidents of freedom" and "universal incidents of freedom"); CONG. GLOBE, 39th Cong., 2d Sess. 41 (1866) (statement of Sen. Lot Morrill) (referring, during a debate over a voting rights bill, to "common rights of citizenship"); *see also* CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (statement of Sen. John Sherman) ("[T]he great reservoir of the rights of an American citizen is in the common law . . . .").

208. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866) (statement of Rep. James Wilson) ("[C]ivil rights are the natural rights of man . . . . that a citizen does not surrender . . . because he may happen to be a citizen of the State which would deprive him of them . . . ."); *cf. supra* notes 54-62 and accompanying text (discussing natural rights and social contract theory). Along these lines, Republicans frequently invoked the Declaration of Independence as a national social contract. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 536 (1866) (statement of Rep. Thaddeus Stevens) (referring to the Declaration of Independence as "the foundation of our Government"); *id.* at 673-87 (statement of Sen. Charles Sumner) (repeatedly invoking the Declaration of Independence in support of a national obligation to protect general fundamental rights).

including plenty of references to retained natural rights as well as civil rights.[209]

Second, the general-law status of these rights is indicated by Republicans' insistence that they were trying to secure *existing* rights that already limited state authority but which were inadequately enforced. As Representative James Wilson of Ohio had declared in regard to the Civil Rights Act, "[w]e are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen"—with the original Constitution having left the very definition of "citizen" up to "the general law . . . recognized by all nations."[210] The new Privileges or Immunities Clause, Senator Luke Poland argued, "secures nothing beyond what was intended by" the language of Article IV; but "[s]tate legislation [had been] allowed to override it," and without an "express power . . . granted to Congress to enforce it, it became really a dead letter."[211] The only proposed innovation in the constitutional design was to enhance the federal protection of those rights. "That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment," Bingham remarked. "That is the extent that it hath, no more."[212]

Finally, Republicans repeatedly claimed that the Amendment, like the Civil Rights Act, would not restrict any state's legitimate powers.[213] Each state

209. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (statement of Rep. John Broomall) (mentioning "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").

210. *Id.* at 1117 (statement of Rep. James Wilson); *see also id.* at 1760 (statement of Sen. Lyman Trumbull) ("The bill neither confers nor abridges the rights of any one."); *id.* at 1836 (statement of Rep. William Lawrence) ("[T]his bill creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen in every State . . . ."); *cf. id.* at 1089 (statement of Rep. John Bingham) ("[No] State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?").

211. *Id.* at 2961 (statement of Sen. Luke Poland); *see also id.* at 1054 (statement of Rep. William Higby) ("The intent of this amendment is to give force and effect and vitality to that provision of the Constitution which has been regarded heretofore as nugatory and powerless.").

212. *Id.* at 2543 (statement of Rep. John Bingham).

213. *See, e.g.*, *id.* at 1090 (statement of Rep. John Bingham); *id.* at 1088 (statement of Rep. Frederick Woodbridge); *see also id.* at 504 (statement of Sen. Jacob Howard) (making the same point about the Civil Rights Act); *id.* at 632 (statement of Rep. Samuel Moulton) (making the same point about the Freedmen's Bureau Act); *cf. id.* at 1293 (statement of Rep. Samuel Shellabarger) (stating that "except so far as [the Civil Rights Act] confers citizenship, it . . . neither confers nor defines nor regulates any right whatever").

retained the authority to regulate, but not to abridge, civil rights.[214] As Bingham noted, "the care of the property, the liberty, and the life of the citizen . . . is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country."[215] Republicans also made an analogous point about federal power, distinguishing laws that "define or regulate . . . civil rights" in the first instance, which Congress could not pass, from those that merely counteracted state abridgments, which it could.[216] As Representative Thaddeus Stevens put it (in discussing the earlier draft of the Amendment), Congress would merely have authority to "correct" state violations.[217] From a Holmesian standpoint, of course, this distinction is gibberish. But the Republicans were not Holmesians.

In the eyes of Democrats, though, Republicans were usurping state regulatory authority.[218] Notably, these claims sometimes emphasized the local-law dimension of civil rights. Those rights, Representative Michael Kerr of Indiana argued in opposition to the Civil Rights Act, were "attained, if at all, *according to the laws or constitutions of the States*, and never in *defiance* of

214. *See, e.g.*, *id.* at 1832 (statement of Rep. William Lawrence) (explaining that the Civil Rights Act "does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States").

215. *Id.* at 1292 (statement of Rep. John Bingham); *see also, e.g.*, *id.* at 323 (statement of Sen. Lyman Trumbull) (denying any intent in the Civil Rights Act "to consolidate all power in the Federal Government, or to interfere with the domestic regulations of any of the states," except insofar as states were abridging the rights of the freedmen).

216. *Id.* at 1293 (statement of Rep. Samuel Shellabarger).

217. *See id.* at 1063 (statement of Rep. Thaddeus Stevens) (discussing the first draft of the Amendment). In an interesting colloquy, Representative Hale pressed Bingham on this point, asking whether the Amendment "confer[s] upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property." *Id.* at 1094 (statement of Rep. Robert Hale). Apparently misunderstanding Hale's point, Bingham answered that his proposal "certainly does this." *Id.* (statement of Rep. John Bingham). Yet Bingham then immediately described the Amendment in a way that came up far short of granting a federal police power, saying instead that "it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." *Id.* (statement of Rep. John Bingham).

218. *See id.* app. at 133-34 (statement of Rep. Andrew Rogers); CONG. GLOBE, 39th Cong., 1st Sess. 2080 (1866) (statement of Rep. John Nicholson); *see also, e.g.*, *id.* at 598 (statement of Sen. Garrett Davis) (the Civil Rights Act is "centralizing with a vengeance" and "breaks down all the domestic systems of law that prevail in all the States"); *id.* at 1415 (statement of Sen. Garrett Davis) (the Civil Rights Act "assumes the principle, the general power that would as well enable Congress to occupy both of those vast fields of State and domestic legislation which regulate the civil rights"); *id.* at 478 (statement of Sen. Willard Saulsbury) (the Civil Rights Act "positively deprives the State of its police power," and that if Congress could "regulate and govern in one particular, [it] can govern in reference to all the property and all the interests of the States"); *id.* at 1777 (statement of Sen. Reverdy Johnson) ("[T]he result is an entire annihilation of the power of the States.").

them."[219] A state might "confer [them] within its own limits" as a matter of state citizenship, but they were not within the class of rights identified by Justice Story as rights of "general citizenship."[220] Kerr also mocked the notion that federal institutions would be constrained by general law. "Federal courts may, in such cases," he stated, "make such rules and apply such law as they please, and call it *common law*."[221] In both of these respects, Kerr articulated a more Holmesian view of law. Its contrast with the Republican defenses of Section One underscores the dominance of the general-law approach among the Amendment's supporters.

B. The Scope of the Privileges or Immunities Clause

Further historical evidence for the general-law approach comes from its capacity to harmonize contemporary statements about the likely scope of the rights secured in Section One. The Privileges or Immunities Clause was said to constitutionalize the Civil Rights Act of 1866, to protect various rights found in the Bill of Rights, and to be of great practical importance in protecting the rights of freedmen in the South, but not to create any new rights or upend American federalism. There are plausible interpretations of the Clause that could do each of these things; it is hard to find one that does all of them. But the general-law approach may fit the bill.

1. Fitting the evidence

Consider how the general-law approach can explain key pieces of evidence. Randy Barnett and Evan Bernick look to the ratification sources and find five repeated bona fide examples of privileges or immunities of U.S. citizenship:

- Civil rights protected by the Civil Rights Act of 1866;

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219. *Id.* at 1270 (statement of Rep. Michael Kerr); *see also id.* at 1777 (statement of Sen. Reverdy Johnson) ("[W]here the rights of citizens of the United States are *given by State laws* over subjects intrusted exclusively to State legislation, it is the exclusive business of the State to protect them." (emphasis added)). It is again worth noting that Kerr did not necessarily deny that these fundamental rights were in some sense grounded in general law. *See supra* note 156. In his view, however, states were solely responsible for determining their legal content. CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866) (statement of Rep. Michael Kerr).

220. CONG. GLOBE, 39th Cong., 1st Sess. 1268 (1866) (statement of Rep. Michael Kerr) (emphasis omitted); *see* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 674 (Boston, Hilliard, Gray & Co. 1833) (discussing rights of general citizenship); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1777 (statement of Sen. Reverdy Johnson) (describing civil rights as rights of *state* citizenship); *cf. id.* at 1780 (statement of Sen. Reverdy Johnson) (denying that "citizenship of the United States . . . entitles him to the privilege of citizenship within the State where he is born").

221. CONG. GLOBE, 39th Cong., 1st Sess. 1271 (statement of Rep. Michael Kerr).

- Rights protected by the first eight amendments;
- Rights protected by other constitutional provisions, including the right to habeas corpus;
- Rights specifically mentioned in *Corfield*;
- Rights to be free from various kinds of racial discrimination, including exclusion from quasi-monopolistic institutions as well as services like common schools and street cars.[222]

As Barnett and Bernick note, this list includes both enumerated federal constitutional rights and unwritten rights of contract and property; indeed, *Corfield* itself contains some of each. The general-law approach provides the simplest account of how these categories were united in a single phrase. Many basic common-law rights, including contract and property rights, along with many of the personal liberties enumerated in the Constitution and its amendments, might be counted among the rights that were, "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."[223] That is why Republicans repeatedly insisted that the Privileges *or* Immunities Clause "secures nothing beyond what was intended by" the Privileges *and* Immunities Clause.[224]

Barnett and Bernick further catalogue various *criteria* used during the ratification debates to identify the privileges or immunities of U.S. citizenship. They settle on four notable contenders: natural rights, civil rights, equality of civil rights, and "rights that are commonly extended to citizens by the states generally."[225] Like the legs, trunk, and ears of an elephant, these are each aspects of general law. The general law protected any retained natural rights. The general law protected civil rights, both ordinary and fundamental. The general-law privileges of citizenship protected equality of civil rights, as we discuss below.[226] And the general law, being a matter of cross-jurisdictional

222. BARNETT & BERNICK, *supra* note 21, 143-55 (capitalization altered); *see also id.* at 144 (noting that a sixth example, voting and other political rights, was sometimes mentioned, but that it was usually put forth as a bad-faith argument by opponents of the Clause).

223. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice).

224. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (statement of Sen. Luke Poland); *see also* David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 1004 (1985) ("Every speaker who touched on the issue stated that the fourteenth amendment clause was derived from article IV.").

225. BARNETT & BERNICK, *supra* note 21, at 154.

226. *See infra* Part III.B.3.

custom, naturally correlated with those "rights that are *commonly* extended to citizens by the states *generally*."[227]

In essence, other scholars have already laid the foundations for the general-law approach. Christopher Green looks to the rights prevailing generally throughout the Union, operationalizing this as an anti-outlier rule that asks what most states currently do.[228] Barnett and Bernick focus on "fundamental" rights found in the amended Constitution, the Civil Rights Act of 1866, and a thirty-plus-year practice in a supermajority of the states.[229] The general-law approach looks to something very similar: the general law. And it does so by focusing on a legal concept that was itself fundamental to the first hundred years of the Republic, eliminating any need to reinvent the wheel.

At the same time, the similarities between the general-law approach and these more descriptive approaches should not be overstated. In the nineteenth century, the general law was understood as distinct from what most states then did, and identifying it was not the same as identifying the majority rule in a state-by-state survey.[230] As the Supreme Court would later describe in *United States v. Chambers*, the general law would not be changed even if most states abrogated one of its rules by statute, so long as the "statutes themselves recognize[d] the principle which would obtain in their absence."[231] Moreover, even if nearly every state had recognized a particular right of *local* citizenship—say, a right to harvest oysters in public waters—that would not itself transform such a right into one of general citizenship, included among the "privileges or immunities of citizens of the United States."[232] Conversely, many states might violate a general fundamental right without thereby converting it into a purely local one.

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227. BARNETT & BERNICK, *supra* note 21, at 144 (emphasis added).

228. GREEN, *supra* note 3, at 113-17; *see also id.* at 27 (looking to "rights generally enjoyed by citizens of the United States"). Green, however, notes other potential ways of identifying these rights as well. *Id.* at 118.

229. BARNETT & BERNICK, *supra* note 21, 227-60. Other scholars, surely aware of the concept of general law, have written along similar lines without highlighting its importance. *See, e.g.*, Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 71-72, 82-83 (1993) (defending the position that the Fourteenth Amendment secures preexisting rights, though without discussing concepts of "general law" or "municipal law"); *cf.* Andrew T. Hyman, *The Substantive Role of Congress Under the Equal Protection Clause*, 42 S.U. L. REV. 79, 96 (2014) (connecting the notion of "law" articulated in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), to the term "of the laws" in the Equal Protection Clause, but not applying the concept of general law more broadly in construing the Fourteenth Amendment).

230. *See, e.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 845 (1872) (statement of Sen. Lot Morrill) (observing that rights that "belong to all men who happen to be citizens of the United States" might not be rights recognized "in virtue of their citizenship").

231. 291 U.S. 217, 226 (1934).

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

This point is driven home by one of the most central debates of the nineteenth century: Slavery had been present in every state at the Founding, but following the famous King's Bench decision in *Somerset's Case*,[233] the law of slavery was conventionally local law.[234] Only later, in the years leading up to the Civil War—when half the country had already abolished slavery[235]—did proslavery advocates start to claim that it was recognized under general law.[236]

This is not to say that the general law's content, or the proper method of identifying that content, was either uncontested in early America or always easy to find.[237] It is only to say that the concept itself was a familiar one and that it is hardly surprising that the Fourteenth Amendment's enactors would make use of it.

2. Competing views

In a sense, then, the general-law approach is consistent with a "fundamental rights" approach to Section One, positing that the Privileges or Immunities Clause provides substantive protection for certain fundamental rights of citizenship beyond those specifically described elsewhere in the Constitution's text.[238] But the general-law approach also addresses various weaknesses that scholars have previously attributed to the fundamental-rights view. Indeed, recognizing the distinction between general law and local law reverses the implications of some of the evidence that scholars have previously marshaled against the fundamental-rights interpretation.

Consider, for example, Philip Hamburger's argument that Bingham was trying only to protect the "Comity Clause rights" of freedom from interstate discrimination.[239] For evidence, he points to Bingham's interpretation of the Article IV Privileges and Immunities Clause just before the Civil War:

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233. Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 510 (KB).

234. *See* Derek A. Webb, *The Somerset Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America*, 32 LAW & HIST. REV. 455, 475-77 (2014); *cf.* Holly Brewer, *Creating a Common Law of Slavery for England and Its New World Empire*, 39 LAW & HIST. REV. 765, 766 (2021) (challenging the notion of separation between the common law and the law of slavery during the colonial era).

235. *See, e.g.*, SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 243, 247 (2018).

236. *See* Webb, *supra* note 234, at 486-88.

237. *See, e.g.*, Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 555-56 (2006); Fletcher, *supra* note 17, at 1532-33; *see also supra* notes 131-32.

238. *See, e.g.*, GREEN, *supra* note 3, at 109-10 (arguing that if the Privileges or Immunities Clause has an "antidiscrimination aspect," then it "cannot be limited to rights articulated in the federal Constitution"); *see also* BARNETT & BERNICK, *supra* note 21, at 43-44; RUTHERGLEN, *supra* note 22, at 4; Upham, *supra* note 21, at 1125-29; *cf.* Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 9 (1954).

239. Hamburger, *supra* note 15, at 112.

> The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several states." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States."[240]

On Hamburger's reading, Bingham's efforts to distinguish state-law rights from privileges and immunities is evidence that the latter "resulted not merely from state law, but from the U.S. Constitution"[241]—and the only national right to be found in the Article IV Clause is a right against interstate discrimination. But Bingham was not necessarily making a claim about national rights as such. Rather, he was likely distinguishing *general* fundamental rights from purely *local* fundamental rights—a critical distinction because of the widely held Republican view that rights in slavery were entirely local.[242] Separating general and local rights makes better sense of Bingham's argument.

Or consider the "nationalization" critique—namely, that moderate Republicans wanted to preserve American federalism, and therefore they could not have favored the wholesale nationalization of fundamental rights.[243] Accordingly, Kurt Lash argues, the privileges or immunities of United States citizenship must have referred to a narrower range of rights, such as those already enumerated in the Constitution.[244] Along similar lines, John Harrison writes that a fundamental-rights reading would "make it impossible for the Privileges or Immunities Clause to ground the Civil Rights Act," as that Act refused to fix civil rights in amber, leaving the states room to regulate them under state law (in a racially nondiscriminatory manner).[245] Harrison properly criticizes past iterations of the fundamental-rights school for treating the content of the privileges and immunities of citizens as being fully determined by federal law.[246] The general-law approach, however, comports fully with Lash's and Harrison's understandings of Republican goals while offering a

240. CONG. GLOBE, 35th Cong., 2d Sess. 981, 984 (1859) (statement of Rep. John Bingham).

241. Hamburger, *supra* note 15, at 112.

242. *See* WILENTZ, *supra* note 235, at 224-26, 246, 251; *see also supra* note 234.

243. *See* LASH, *supra* note 8, at 251-52; *cf.* Hamburger, *supra* note 15, at 81 (criticizing a fundamental-rights understanding of the Privileges or Immunities Clause as "a strangely rigid and narrow straitjacket," constraining "the diversity and flexibility of state laws" by requiring "each state to provide the same, inelastic range of liberty").

244. *See* LASH, *supra* note 8, at xi (arguing that "the original meaning of the Privileges or Immunities Clause included only those rights enumerated in the Constitution").

245. *See* Harrison, *supra* note 15, at 1395. Because Harrison does not frame these rights in terms of general law, he infers that state legislatures remained wholly free to define citizenship rights however they wished under state law, subject only to a federal antidiscrimination rule. *Id.* at 1422, 1451-52.

246. *Id.* at 1395, 1414-15, 1466.

better textual and contextual fit with the Fourteenth Amendment's text and history.[247] Rather than fixing all fundamental rights in national amber—or even fixing just a limited set of rights, as Lash argues—the Fourteenth Amendment did not nationalize any rights at all. Section One did not convert general fundamental rights into *federal-law* rights, conferring them anew in the federal Constitution. Rather, it offered supplemental federal protection of these rights without supplying a federal definition of their content or disabling states from regulating them.

The same goes for Harrison's and Lash's arguments that fundamental-rights readings of the Fourteenth Amendment overlook Section One's recognition of state citizenship.[248] On our view, the general citizenship rights secured by the Privileges or Immunities Clause include the general fundamental rights secured to state citizens under each state's social contract. Those rights were partly guaranteed to the citizens of other states through the general citizenship created by Article IV—thus becoming "privileges or immunities of citizens of the United States"—but they were rights of state citizenship, too, and they remained the subject of state law.[249] What the Fourteenth Amendment did was to provide an additional means of security for those rights of U.S. citizenship, which were *also*, and not coincidentally, rights of state citizenship.[250] The pairing of state and federal citizenship thus made perfect sense and in no way undermines the general-law view.

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247. The crux of Lash's thesis is that the "privileges or immunities of citizens *of the United States*" was a term of art referring to an entirely different set of rights than those secured in Article IV and in the Civil Rights Act of 1866. *See* LASH, *supra* note 8, at 250-51. To explain the well-established link between the Fourteenth Amendment and the Civil Rights Act, Lash has pointed to other parts of Section One, such as the Due Process Clause and the State Citizenship Clause. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1393 (2018); Kurt T. Lash, *The State Citizenship Clause*, 25 U. PA. J. CONST. L. 1097, 1110, 1123-24 (2023) [hereinafter Lash, *State Citizenship*]. But it is unlikely that Bingham intended this degree of substantive change between his two drafts of the Privileges or Immunities Clause. *See* James W. Fox, Jr., Book Review, *Publics, Meanings & the Privileges of Citizenship*, 30 CONST. COMMENT. 567, 579 (2015). And even prior to that revision, Republicans had regularly described both Article IV and the Civil Rights Act of 1866 as securing the privileges and immunities "of citizens of the United States." *See, e.g.*, Campbell, *supra* note 22, at 674-76, 679.

248. Harrison, *supra* note 15, at 1395; Lash, *State Citizenship*, *supra* note 247, at 1097, 1099. Notably, the first sentence of Section One was added late in the drafting process. CONG. GLOBE, 39th Cong., 1st Sess. 3040 (1866) (statement of Sen. James Doolittle); *id.* at 3041 (adopting the amended version).

249. *See* Campbell, *supra* note 22, at 618 (noting that general citizenship rights "were usually linked to multiple forms of citizenship").

250. To be sure, some Republicans thought that these general fundamental rights were guaranteed in a national social contract, and not merely in the social contracts of the several states. *See id.* at 684-85.

Finally, the general-law view blunts the force of the objection that it is difficult or impossible to know the content of retained natural rights.[251] Federal enforcement of the Fourteenth Amendment did not require any thickly detailed substantive account of contract law, property law, and so on—at least any more than federal courts were already applying in diversity cases. Indeed, to Republican eyes, the Fourteenth Amendment did not federalize substantive rights or diminish state power at all. It left the states' police powers exactly as they were thought to stand previously, constrained only by general fundamental law and by whatever local constitutional restraints that states had voluntarily adopted. State institutions remained, as they had been before, principally in charge of creating and administering state law. All that the Fourteenth Amendment did was provide federal security for rights to which the citizens of the several states were already entitled.[252]

Difficult questions would of course arise about the boundaries of these rights (and of state powers). We will turn to many of these problems shortly. But at least for the most part, those difficulties predated the Fourteenth Amendment. Section One, in other words, did not introduce *new* jurisprudential problems by, say, forcing courts to confront the limits of the police power; the courts were doing that already.[253] The Fourteenth Amendment's principal function was to broaden *which courts* could make those assessments. The security of general fundamental rights was no longer solely within the purview of state institutions (or the occasional diversity suit); it was now a question arising under the Constitution.

C. The Road to *Slaughter-House*

After the Fourteenth Amendment's adoption, Congressmen and commentators continued to invoke the general-law approach.[254] With the rise

251. *See* Harrison, *supra* note 15, at 1395, 1452.

252. *See supra* notes 213-17 and accompanying text.

253. Section Five of the Amendment, on the other hand, did introduce new problems relating to the extent to which Congress could directly enforce the rights secured in Section One, particularly in cases of state neglect. For discussion, see Part III.C below.

254. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Jacob Howard) (explaining that, prior to the Fourteenth Amendment, "there was nothing in the whole Constitution to secure absolutely the citizens of the United States in the various States against an infringement of their rights and privileges under [the Privileges and Immunities Clause]"); H.R. REP. NO. 22 (1871), *reprinted in* 2 LASH, *supra* note 180, at 609 (declaring that the Amendment "did not add to the privileges or immunities before mentioned, but was deemed necessary for their enforcement as an express limitation upon the powers of the States"); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 313-14 (2d ed. 1871) (describing the jurisdiction-shifting effects of the Amendment); Letter from Justice Joseph P. Bradley to Judge

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of the Ku Klux Klan, however, the terms of constitutional debate shifted rapidly, especially with respect to the scope of Congress's power to enforce rights against private actors. Unfortunately, this shift in the debate may have contributed to the Supreme Court's decisions to hamstring Congress, whether in protecting against novel threats like the Klan or in pursuing the Amendment's original purpose of securing citizenship rights against state violations.

Section One was expressly framed in terms of state action. But many general citizenship rights paradigmatically operated against private interference.[255] Murdering a fellow citizen for her speech was not a violation of the First or Fourteenth Amendments, but it was certainly a violation of her retained natural rights, and a principal responsibility of state governments was to protect such rights.[256] The emergence of the Klan thus presented a crucial question: How could Congress respond to *private* conduct that nullified rights of citizenship, especially when state institutions were unable or unwilling to act?[257] Those advocating a broader federal enforcement power began to argue that Section One had profoundly changed the Constitution by creating a new set of national citizenship rights. And those worried about the implications of such a power began to argue that the Privileges or Immunities Clause only secured a narrower set of distinctively national citizenship rights.

In Congress, skeptics of federal power categorically denied any Section Five power to create remedies against private parties.[258] Like the Contracts Clause,[259] they argued, Section One's restrictions on state power were self-

William Woods (Mar. 12, 1871) [hereinafter Bradley Letter], *reprinted in* BARNETT & BERNICK, *supra* note 21, at xiv, xiv-xv (stating that while the right of assembly had previously been secured by the Constitution, but "only as against the action of Congress itself," it was now among "the privileges and immunities of citizens of the United States," which were "undoubtedly those which may be demonstrated *fundamental*," among which "we are safe in including those which in the constitution are expressly secured to the people"); CONG. GLOBE, 42d Cong., 2d Sess. 762-63 (1872) (statement of Sen. Matthew Carpenter) (explaining that there are certain privileges and immunities of U.S. citizens which "were then what they are now," though they are "protected differently now from what they were then"); *id.* (statement of Matthew Carpenter) (suggesting that Section One had not interfered with states' "power to regulate [their] own affairs").

255. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3611 (1870) (statement of Sen. John Pool).

256. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871) (statement of Rep. John Coburn).

257. *See id.* at 475-77 (statement of Rep. Henry Dawes); *id.* at 481 (statement of Rep. Jeremiah Wilson); *id.* at 506 (statement of Sen. Daniel Pratt).

258. *See, e.g.*, *id.* app. at 208 (statement of Rep. James Blair); *id.* at 429 (statement of Rep. Henry McHenry); *id.* app. at 314 (statement of Rep. Horatio Burchard); CONG. GLOBE, 41st Cong., 2d Sess. app. at 473 (1870) (statement of Sen. Eugene Casserly).

259. U.S. CONST. art. I, § 10, cl. 1.

executing;[260] any contrary state legislation could be declared invalid in the course of ordinary litigation, including on Supreme Court review.[261] Most Republicans, however, found it "plainly and grossly absurd" to leave the enforcement of rights to recalcitrant state courts.[262] In the words of Representative Joseph Rainey of South Carolina, the second black representative ever to sit in Congress, "the [state] courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity."[263] As these Republicans saw things, for Section One to secure the rights of general citizenship, Congress must be able—at least in certain circumstances—to provide remedies against private parties who violated them.

To justify federal intervention, Republicans offered a variety of constitutional theories. Some emphasized the states' neglect in offering the protection of the laws,[264] which was not only thought to be among the privileges or immunities of citizenship, but which had been explicitly secured equally to all persons in the Equal Protection Clause.[265] In any given case, however, it might be unclear whether state actors were culpable, or how much state underenforcement would trigger a remedial federal power.

Others made a very different kind of argument, emphasizing the national character of Fourteenth Amendment citizenship rights. Rejecting the Democrats' analogy to the Contracts Clause, they pointed instead to the Fugitive Slave Clause,[266] arguing under the reasoning of *Prigg v. Pennsylvania* that Congress could directly enforce any rights created and not merely secured by the Constitution[267]—including those listed in Section One. This created a strange inversion in the debate, as skeptics of federal power insisted on the declaratory nature of Section One rights,[268] the position the Republicans had

260. CONG. GLOBE, 41st Cong., 2d Sess. app. at 472 (1870) (statement of Sen. Eugene Casserly); CONG. GLOBE, 42d Cong., 1st Sess. app. at 260 (1871) (statement of Rep. William Holman).

261. CONG. GLOBE, 42d Cong., 1st Sess. app. at 86 (1871) (statement of Rep. John Storm); *id.* app. at 259 (statement of Rep. William Holman); *id.* app. at 315 (statement of Rep. Horatio Burchard); *id.* at 578 (statement of Sen. Lyman Trumbull).

262. *Id.* app. at 68 (statement of Rep. Samuel Shellabarger).

263. *Id.* at 394 (statement of Rep. Joseph Rainey).

264. For an insightful discussion, see PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 11-14 (2011); *see also* Bradley Letter, *supra* note 254, at xiv-xv (discussing the possibility of violating Section One through "inaction as well as action").

265. For discussion, see text accompanying notes 116-18 above.

266. U.S. CONST. art. IV, § 2, cl. 3; *see* CONG. GLOBE, 42d Cong., 1st Sess. app. at 69-70 (1871) (statement of Rep. Samuel Shellabarger); *id.* at 375 (statement of Rep. David Lowe).

267. 41 U.S. (16 Pet.) 539, 618-19 (1842). *See* BRANDWEIN, *supra* note 264, at 15, 94-100.

268. CONG. GLOBE, 42d Cong., 1st Sess. app. at 87 (1871) (statement of Rep. John Storm) (stating that "the first clause of the fourteenth amendment enacted nothing new"). For

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taken in 1866 (and that many still maintained).[269] Some Republicans, meanwhile, faced with the pressing need to counteract the Klan, began to describe the Fourteenth Amendment in more transformational terms, arguing that its rights flowed solely from "universal citizenship in the United States."[270]

Yet claims about the distinctly federal character of Fourteenth Amendment rights could also be turned to Congress's disadvantage. In the 1871 debates, Senator Lyman Trumbull of Illinois argued that "the privileges and immunities belonging to the citizen of the United States as such are of a national character."[271] Although Trumbull did not define these rights, he made clear that they did not encompass the sort of general-law rights recognized in *Corfield*: "[T]his national Government," he stated, "was not formed for the purpose of protecting the individual in his rights of person and of property."[272] Indeed, a head-scratching speech by Representative Bingham in March 1871 is often read to sound similar notes, notwithstanding his previously expressed views.[273]

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other examples, see *id.* app. at 152 (statement of Rep. James Garfield); *id.* app. at 188 (statement of Rep. Charles Willard); *id.* app. at 242 (statement of Sen. Thomas Bayard); *id.* app. at 117 (statement of Sen. Francis Blair) (claiming that Section One took "from no State any right that ever pertained to it" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham))).

269. CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872) (statement of Sen. Oliver Morton) (stating that the amendment had not "given new privileges and immunities to the citizens of the United States").

270. CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871) (statement of Sen. George Edmunds); *see also id.* at 693 (statement of Sen. George Edmunds) (same). Senator Frelinghuysen had made similar remarks a few days earlier, emphasizing that the Fourteenth Amendment "asserts, in a manner never before asserted, that the citizen of the United States, as such, has privileges and immunities which the General Government will enforce." *Id.* at 500 (statement of Sen. Frederick Frelinghuysen).

271. *Id.* at 577 (statement of Sen. Lyman Trumbull). Earlier in the same colloquy, however, Trumbull had equated the rights secured in the Privileges or Immunities Clause of the Fourteenth Amendment with those secured in the Privileges and Immunities Clause in Article IV. *Id.* at 576-77 (statement of Sen. Lyman Trumbull).

272. *Id.* at 577 (statement of Sen. Lyman Trumbull).

273. *Id.* app. at 84-85 (statement of Rep. John Bingham). This Bingham speech is widely debated in the literature, *see, e.g.*, BARNETT & BERNICK, *supra* note 21, at 167-69; GREEN, *supra* note 3, at 60-61; Lash, *Enumerated-Rights*, *supra* note 14, at 591, 594, 670-78, with many remarking on its inconsistency both with itself and with prior statements by Bingham. We share both those reactions to some extent. As noted above, we agree that Bingham described Section One in more transformational terms in 1871 than he did in 1866—though considering the speech in context also produces a more nuanced picture, which merits a fuller exegesis than we can give here. For similar arguments that the Fourteenth Amendment had created new federal rights, see CONG. GLOBE, 42d Cong., 1st Sess. app. at 80 (1871) (statement of Rep. Aaron Perry); *see also* CONG. GLOBE, 42d Cong., 2d Sess. app. at 25 (1872) (statement of Sen. Allen Thurman).

In short order, these innovations made their way to the Supreme Court in the *Slaughter-House Cases*.[274] Louisiana's legislature had required slaughterhouse operators near New Orleans to conduct their business in a particular location controlled by a single company.[275] Several operators then challenged the statute's constitutionality. Represented by lawyers who were hostile to Louisiana's multiracial Reconstruction government,[276] the challengers advanced a strikingly nationalistic position, arguing that the Privileges or Immunities Clause embraced *all* general fundamental rights and that these rights were now national rights, separate and distinct from state law.[277] All of the Justices rejected that position in one way or another. But they divided over which part to reject.

The four dissenters embraced the general-law approach.[278] The Privileges or Immunities Clause, Justice Field argued, did not "attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing."[279] Rather, it "protect[s] the citizens of the United States against the deprivation of their common rights by State legislation,"[280] thus "plac[ing] the common rights of American citizens under the protection of the National government."[281] Field did not define this federal protection only in terms of nondiscrimination, but neither did he argue that the Fourteenth Amendment had fully nationalized or constitutionalized these rights. States, he clarified, still had authority to pass "regulations affecting the health, good order, morals, peace, and safety of society"—but they could not, "under the pretence of prescribing a police regulation," grant a monopoly that encroached upon "rights of the citizen, which the Constitution intended to secure against abridgment."[282] This was the general-law approach: States could regulate but not abridge general citizenship rights.[283]

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274. 83 U.S. (16 Wall.) 36 (1873).

275. *Id.* at 38-40.

276. Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868-1873*, 49 CIVIL WAR HIST. 235, 248, 250-51 (2003).

277. *Slaughter-House Cases*, 83 U.S. at 55 (argument of counsel) (denying that "any standard among the States [is] referred to for the ascertainment of these privileges and immunities").

278. For a more extensive discussion, see Campbell, note 85 above, at 1443-45.

279. *Slaughter-House Cases*, 83 U.S. at 96 (Field, J., dissenting).

280. *Id.* at 89.

281. *Id.* at 93.

282. *Id.* at 87; *see also id.* at 108-09.

283. For a later expression of similar views by Justice Field, see *Butcher's Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 759 (1884) (Field, J., concurring) (denying that Section One "transfer[s] to the federal government the protection of all private rights, as is sometimes supposed,"

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Justice Bradley likewise connected the rights of citizens under the Clause to those of general citizenship. "In this free country," he wrote, "citizenship means something."[284] It meant the protection of the "traditionary rights" which the people had "inherited . . . from their ancestors" and "which the government, whether restricted by express or implicit limitations, cannot take away or impair."[285] These were not just local rights, "the privileges of citizens in any particular State," but general rights, "the rights of citizens of any free government."[286] And such rights included the right "to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all."[287]

The majority, by contrast, construed Section One as limited to rights of national citizenship. As some Congressmen had begun to do, Justice Miller sharply distinguished "between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such," arguing that the Clause applied only to the former.[288] *Corfield* rights, he continued, were "rights belonging to the individual as a citizen of a State" and were thus excluded from the guarantee of Section One.[289] The result of this chain of reasoning was an approach to the Privileges or Immunities Clause that remarkably did nothing to support the Civil Rights Act of 1866.[290] Instead, the Clause shielded the freedmen from state interference with their "'free access to [American] seaports'" or with their right to federal assistance "within the jurisdiction of a foreign government" or "on the high seas"[291]—absurdities that, in Justice Swayne's words, turned "what was meant for bread into a stone."[292]

Today, it is widely agreed that "Justice Miller was wrong."[293] But the general-law approach helps explain where he went wrong, and why he (and

but arguing that it "inhibits discriminating and partial enactments—favoring some to the impairment of the rights of others").

284. *Slaughter-House Cases*, 83 U.S. at 114 (Bradley, J., dissenting).

285. *Id.*

286. *Id.*; *see also id.* at 126 (Swayne, J., dissenting) (distinguishing the "fundamental rights as a citizen of the United States" protected by Section One from "certain others, local in their character, arising from his relation to the State," which were not).

287. *Id.* at 119 (Bradley, J., dissenting).

288. *Id.* at 75 (majority opinion).

289. *Id.* at 76.

290. Rather, Justice Miller suggested that the Equal Protection Clause had addressed such concerns. *See id.* at 81.

291. *Id.* at 79 (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1868)).

292. *Id.* at 129 (Swayne, J., dissenting).

293. Harrison, *supra* note 15, at 1415; *see, e.g.*, BALKIN, *supra* note 3, at 191; McDonald v. City of Chicago, 561 U.S. 742, 756-57 (2010) (citing more sources).

four other Justices) could have been so mistaken. Indeed, the Fourteenth Amendment's leading advocates had shared Miller's concerns about preserving traditional principles of federalism, not wishing "to transfer [to the federal government] the security and protection of all the civil rights which we have mentioned" or to "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."[294] The problem is that Miller disregarded any general-law alternative. If the dissenters prevailed, Miller wrote, civil rights would be "subject to the control of Congress whenever *in its discretion* any of them are supposed to be abridged by State legislation";[295] the Supreme Court would thus become "a perpetual censor upon all legislation of the States . . . with authority to nullify such as it did not approve as consistent with those rights."[296] This suspicion of general-law distinctions, and of the courts' or Congress's capacity to apply them neutrally in practice, again prefigures Holmes in spurning the general-law approach.[297]

III. Implications

Our core historical claim is that general law supplied the rights secured by Section One of the Fourteenth Amendment. In this Part, we consider some implications of this view. We start with the scope of the rights secured by the Privileges or Immunities Clause. We then inquire as to when a state has "abridged" those rights, what kinds of regulations of rights are constitutionally permissible, and what sorts of equality principles the Clause might entail. After that, we consider Congress's enforcement power under Section Five. Finally, we discuss how legal changes after the Fourteenth Amendment may complicate attempts to implement it today.

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294. *Slaughter-House Cases*, 83 U.S. at 77.

295. *Id.* at 77-78 (emphasis added).

296. *Id.* at 78.

297. In cases outside of the Fourteenth Amendment context, the Justices still acknowledged the existence of general fundamental rights. Indeed, while sitting in diversity just two years later in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), Justice Miller acknowledged that "[t]here are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* at 663; *accord* Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 677 (1874) (stating, in such cases, that "this court is not bound by the judgment of the courts of the States where the cases arise," but "must hear and determine for itself"); *see also* Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 690 (1873). *See generally* Collins, *supra* note 40 (discussing the Court's invocations of "general law" in diversity jurisdiction cases). Recognizing these rights in diversity cases, however, did not raise the same federalism concerns as in *Slaughter-House*.

A. Scope of Rights

The Privileges or Immunities Clause embraced the rights of general citizenship. First and foremost, these included retained natural rights and common-law rights such as the right to own and transact in property, the right to contract or to engage in work, and the right to travel—the sort of rights mentioned in *Corfield* or in the Civil Rights Act of 1866.[298]

General citizenship rights also included many of the rights enumerated in the Bill of Rights. For instance, the right to keep and bear arms was specifically mentioned by the Freedmen's Bureau Act,[299] reflecting a body of antebellum general law.[300] Rights of free speech and free exercise of religion were also among these general fundamental rights.[301]

But recognizing these enumerated rights as privileges or immunities of U.S. citizens does not mean that the Fourteenth Amendment "incorporated" the Bill of Rights in the modern sense. Under modern doctrine, the Fourteenth Amendment's Due Process Clause applies nearly all of the rights in the Bill of Rights against the states as federal constitutional restrictions on state power.[302] Many originalists who critique this doctrine still ground these rights in the same body of federal law, though as privileges or immunities of citizenship rather than as components of substantive due process.[303] Still, incorporation doctrine is framed in terms of *federal* rights: Whatever is enumerated in the Bill of Rights is then extended against the states.

Under our theory, however, Section One secures rights supplied by *general law*. Enumeration is very good evidence of a right's general-law status. When

298. *See, e.g.*, *supra* notes 54-57 and accompanying text.

299. Ch. 200, § 14, 14 Stat. 173, 176 (1866); *see also* AMAR, *supra* note 11, at 264-66 (collecting other examples); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1330-36 (2009) (discussing this history but emphasizing its limits).

300. *See* Nunn v. State, 1 Ga. 243, 250 (1846); Campbell, *supra* note 67, at 41-48. To be sure, as one of us has argued, it is not always easy to extrapolate from these cases to figure out which arms regulations are permissible. *Id.* at 48-51.

301. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. James Wilson). For antebellum evidence that many parts of the Bill of Rights were understood to be privileges and immunities of general citizenship, see generally Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life after Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000).

302. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 763-66 (2010); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

303. On this view, the privileges or immunities of citizens of the United States are enumerated constitutional rights held against the United States federal government that the Fourteenth Amendment extends against the states. LASH, *supra* note 8, at 13, 52-55; *see also* Michael Stokes Paulsen, *Paulsen, J., dissenting*, *in* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 196, 201 (Jack M. Balkin ed., 2005).

introducing the Amendment, Senator Jacob Howard suggested that some of the privileges and immunities of American citizenship had been secured "by the first eight amendments of the Constitution,"[304] and as Justice Bradley once wrote to Judge Woods, we might "suppose we are safe in including" among the rights of U.S. citizenship "those [rights] which in the constitution are expressly secured to the people."[305] After all, the fundamentality of these rights in Anglo-American constitutionalism was a reason why many Americans in the late 1780s wanted them spelled out in the text, and why many Federalists thought that enumeration was unnecessary.[306]

But this mode of recognizing privileges or immunities of U.S. citizens would be, to use older terminology, "selective" rather than "mechanical."[307] While freedom of speech, the right to bear arms, and the right to compensation for takings are centerpieces of both sorts of rights, it is not so clear that the general-law rights of citizens included every procedural aspect of the Bill of Rights. Indeed, courts and scholars have struggled with the outer limits of incorporating those provisions.[308]

Finally, we note that while the set of privileges or immunities is not enumerated, it is also not unbounded. In the nineteenth century, the general law was something that judges discovered, not something that they made.[309] Contrary to some modern narratives about the ancien regime,[310] this is how federal courts conventionally saw their role in independently interpreting the general law before *Erie*.[311] As we have noted, this is also how proponents of the Fourteenth Amendment maintained that the Amendment enforced existing rights without upending federalism.[312]

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304. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard).

305. Bradley Letter, *supra* note 254, at xv.

306. *See* Campbell, *supra* note 88, at 1437-40; *see also* BARNETT & BERNICK, *supra* note 21, at 239 ("Such rights are not enforceable as fundamental because they were enumerated; such rights were enumerated because they were fundamental.").

307. *See* Amar, *supra* note 12, at 1196, 1227.

308. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (debating, in a split opinion, whether the federal jury unanimity requirement applies to state juries).

309. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197.

310. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938) (claiming that *Swift v. Tyson* held that federal courts "are free to exercise an independent judgment as to what the common law of the state is—*or should be*" (emphasis added)).

311. *See supra* Part I.A.4.

312. We take no view here on whether the Fourteenth Amendment also secures national citizenship rights or local citizenship rights. There is a textual basis for including national citizenship rights, as they were rights of "United States citizens." *See* WILLIAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES ¶ 710, at 181 (New York, Collins & Hannay 1833) (discussing national

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B. Regulation, Abridgment, and Equality

The Privileges or Immunities Clause did not confer general citizenship rights; rather, it recognized a restriction on state power to abridge them.[313] This restriction entailed certain general limits on what sorts of regulations states could impose on citizenship rights—limits that federal courts were expected to enforce. But the details of those limits will matter a great deal, especially with respect to equality principles.

1. Regulation

For the most part, general-law rights were regulable for public purposes. As Justice Washington stated in *Corfield*, rights were subject to "such restraints as the government may justly prescribe for the general good of the whole."[314] By securing for all Americans "the same right[s] . . . enjoyed by white citizens," the Civil Rights Act of 1866 also recognized that rights could be regulated under state law.[315] In the antebellum period, this was a widespread feature of rights discourse generally and of general-rights discourse specifically.[316] And for the most part, regulating rights in the public interest called for legislative judgments at the state and local levels.[317]

Some opponents of the Amendment feared that any such interference with general-law rights would be forbidden.[318] But those who drafted and defended the Fourteenth Amendment rejected this definition, distinguishing between permissible "regulations" of rights and impermissible "abridgments" of those

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citizenship rights); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 81-82 (Philadelphia, H.C. Carey & I. Lea 1825) (same). But they were not emphasized during the 1866 debates, and federal institutions already had authority to enforce them. As for rights of local citizenship, see text accompanying notes 350-51 below.

313. The state-action component of this protection is discussed in Part III.C.2 below.

314. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice); *see also* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 885-90 (1997).

315. Ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1982); *see also* CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (statement of Sen. Lot Morrill) ("The peculiar character, the genius of republicanism is equality, impartiality of rights and remedies among all the citizens, not that the citizen shall not be abridged in any of his natural rights . . . . This principle . . . does not prevent the State from qualifying the rights of the citizen according to the public necessities.").

316. *See supra* Part I.A.2.

317. *See, e.g.*, *Corfield*, 6 F. Cas. at 550-51.

318. *E.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 691 (1869) (statement of Rep. James Beck) ("The very idea conveyed by the term abridge is that existing rights, privileges, or immunities shall not be impaired, taken from, diminished or made less beneficial . . . .").

rights.[319] As Senator George Edmunds of Vermont commented, while the right "to hold property" was a privilege of U.S. citizens, they still could not "acquire it in spite of the State law by an instrument unwitnessed, unsealed, unsigned," but rather they must "conform to the regulation of the local law . . . . [E]verybody knows that a right may be perfectly secure and yet may be subject to regulation."[320]

2. Abridgment

The key question, then, was how to distinguish valid "regulations" from invalid "abridgments."[321] Some of the limits on a state's regulatory authority depended on specific principles of customary fundamental law. The freedom of speaking, writing, and publishing one's opinions in good faith; the rule against prior restraints; the right against self-incrimination; the ban on cruel and unusual punishments—all these customary rights were thought to circumscribe both state and federal power, even if exercised in promotion of the public good. Although these rights were not as central to the Reconstruction-Era debates, the available evidence indicates that politicians and jurists widely recognized them as among the privileges or immunities of citizenship.[322] As discussed above,[323] many of these rights were already enumerated in the Bill of Rights as restrictions on federal power.

The main boundaries on legislative regulation, however, came from more general principles, asking whether states had engaged in arbitrary or partial legislation. For example, the core evil addressed by the 1866 Civil Rights Act and the Privileges or Immunities Clause was the "Black Codes," which diminished a slew of basic rights for black Americans.[324] These race-based rules did not deny basic rights entirely, and the racist legislatures that enacted them claimed that they were consistent with the public good—acting, as one historian put it, under the "guise" of "advanc[ing] and protect[ing] the best interests of this unfortunate race."[325] In other words, some people defended the

319. *See supra* notes 58-69 and accompanying text; Smith, *supra* note 314, at 910-19.

320. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. George Edmunds).

321. Some commentators described the same distinction in terms of the distinction between "regulations" and "prohibitions." *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. William Lawrence). For an extended discussion, see generally COOLEY, note 254 above.

322. *See supra* note 301.

323. *See supra* text accompanying notes 299-301.

324. *See supra* notes 160-61.

325. LITWACK, *supra* note 160, at 366.

Black Codes as permissible "regulations" of basic rights, and some state courts enforced them accordingly.[326]

Yet Republicans found the Black Codes the paradigmatic abridgment of the privileges or immunities of citizens—the product of rank prejudice rather than a regulation in promotion of the public good.[327] And they expected that federal courts would hold them unconstitutional under the Privileges or Immunities Clause, even if the Civil Rights Act were repealed. Given these expectations, federal courts plainly were not expected to defer to state-court judgments upholding the Black Codes. As Senator Henry Lane of Indiana had stated during debates over the Civil Rights Act, "We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the [Thirteenth Amendment]; but because we believe they will not do that, we give the Federal officers jurisdiction."[328] This paradigm case suggests that federal courts, once given jurisdiction by Congress, must review whether legislation exceeds state authority to regulate civil rights.

That role for the judiciary has broader implications. Consider, for instance, the recurring debate about regulations of the right to contract or the right to work. When Louisiana's legislature determined that there should be a monopoly on slaughterhouses (advantaging some butchers over others), the Supreme Court upheld the law in the *Slaughter-House Cases*.[329] Decades later, when New York's legislature determined that there should be various regulations on bakeries (advantaging some bakers over others), the Supreme Court rejected the law in *Lochner*.[330] Throughout these decades there were many more such regulations, subjected to searching federal judicial review, and now widely condemned under the label of the "*Lochner* Era."[331] Yet in some sense the analysis in *Lochner*-era cases was a natural outgrowth of the original obligation to second-guess state legislative determinations in the Black Codes.

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326. *See* Brown v. State, 23 Md. 503, 510-11 (1865). As a notable counterpoint, though, the Ohio Supreme Court construed Ohio's Black Codes narrowly, "unwilling to extend the disabilities of the statute further than its letter requires." KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 39-40 (2021).

327. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866) (statement of Sen. William Fessenden) ("[A] caste exclusion is entirely contrary to the spirit of our Government . . . ."); CONG. GLOBE, 40th Cong., 3d Sess. 939 (1869) (statement of Sen. Henry Corbett); *id.* at 991 (statement of Sen. Oliver Morton) (attributing legislation sponsored by the Democratic Party to "prejudices upon the subject of race").

328. CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) (statement of Sen. Henry Lane).

329. 16 Wall. (83 U.S.) 36 (1873).

330. Lochner v. New York, 198 U.S. 45 (1905).

331. *But see* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

To be sure, one can disagree with particular results. Perhaps the regulation in *Lochner* was actually reasonable, as Justice Harlan argued in dissent.[332] But the general dilemma raised by *Lochner* remains. The more deferential federal courts are toward regulations they believe to be wrong, misguided, or ill-motivated, the more deferential they might also be toward statutes (such as the Black Codes) that they were supposed to hold invalid. To say that courts should ask whether the law treats similarly those who are similarly situated, as Republicans often did,[333] just restates the problem.[334]

There is no shortage of potential answers to this dilemma. Indeed, constitutional theory is full of accounts for why federal courts should recognize the invalidity of statutes like the Black Codes but not statutes like the one in *Lochner*.[335] Which of these accounts is consistent with the general-law view of the Fourteenth Amendment is a separate inquiry, which we might someday undertake. For now, we simply observe that these theories respond to a real ambiguity, one that cannot easily be avoided by the tempting rhetoric of a Justice Holmes.[336]

3. Equality

By its own terms, the Privileges or Immunities Clause applied beyond the single paradigm case of racial discrimination. But Republicans mostly took for granted other forms of discrimination, such as restrictions of rights based on sex and age.[337] So how can we generalize what counts as partial legislation? And what responsibility do judges have for making such determinations?

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332. 198 U.S. at 66-74 (Harlan, J., dissenting); *see also* GREENE, *supra* note 56, at 43, 56.

333. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1001 (1869) (statement of Sen. George Edmunds) ("A citizen is a person in community who, *other things being equal*, is invested with all the privileges that belong to the highest class in community . . . ." (emphasis added)).

334. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543-47 (1982).

335. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

336. *See Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

337. *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 2462-63 (1868) (statement of Rep. John Bingham) ("[The] privileges of citizens of the United States of like age, sex, and residence, shall be equally enjoyed; they shall be equally subject to the same disabilities and to no others."); CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Thaddeus Stevens) ("When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."). Some Republicans, however, questioned whether there was a legally relevant difference between the Black Codes and coverture. *Id.* (statement of Rep. Robert Hale) ("The line of distinction is, I take it, quite as broadly marked between negroes and white men as between married and unmarried women."); *see also id.* at 1782 (statement of Sen. Edgar Cowan) ("Is it intended by this bill that it shall be put in the hands of any judge to decide that this bill confers upon married women the unlimited right to contract?").

Under modern doctrine, equality principles are thought to flow from the Equal Protection Clause, which is read to confer on all persons "the protection of equal laws."[338] But originally, this Clause guaranteed equality in the *protection of the laws*—the remedial devices (such as courts, police, and criminal penalties) that the legal system offered for protecting rights already enjoyed.[339] Any federal guarantee of equality in the rights themselves flowed from other legal sources, the Privileges or Immunities Clause foremost among them.

Fundamental rights and equality principles were clearly linked in the minds of the Clause's supporters, but there are a variety of possible explanations as to how. First, giving everyone the same basket of substantive rights trivially entailed that everyone who had those rights would enjoy them equally. Second, a right to equal treatment was often itself classified as *among* the rights of citizenship. Consider *Corfield*'s reference to "exemption from higher taxes or impositions than are paid by the other citizens of the state,"[340] a principle on which rested many Reconstruction-Era arguments against segregation of tax-supported schools.[341] Or consider the antebellum state-court descriptions of citizenship as carrying a sort of most-favored-nation status, with citizens entitled "to all the rights and privileges conferred by [state] institutions upon the highest class of society."[342] Third, equality principles also flowed from the distinction between regulation and abridgment, which sometimes had to focus, much like equality jurisprudence, on the strength of the reasons for distinguishing among persons. Certain distinctions among citizens might be categorically unjustifiable on public-interest grounds—with racial distinctions, as in the case of the Black Codes, among the most visible examples. To the extent that a civil right could be regulated in the public interest but not abridged, arbitrary or invidious distinctions among persons may have been invalid means of regulation and thus automatically forms of abridgment.

As usual, however, the difficulty lies in distinguishing the grounds which automatically constitute invalid "class legislation" from those which might potentially constitute valid regulation in the public interest. Consider the question of sex discrimination posed by *Bradwell v. Illinois*, decided the day after *Slaughter-House*.[343] Illinois would not allow women to obtain licenses to

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

339. *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1, 5 (2008); *id.* at 5-8 (collecting sources); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 219-20 (2009).

340. 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice).

341. McConnell, *supra* note 3, at 1039-43.

342. *See, e.g.*, Amy v. Smith, 11 Ky. (1 Litt.) 326, 333 (1822).

343. 83 U.S. (16 Wall.) 130 (1873).

practice law, and Myra Bradwell argued that this abridged her privileges or immunities; the Supreme Court disagreed by a vote of 8-1.[344] For those who had joined the majority in *Slaughter-House*, rejecting Bradwell's claim was easy: Practicing law was not a privilege or immunity of national citizenship under Justice Miller's test.[345] But the *Slaughter-House* dissenters had to explain themselves, and Justice Bradley wrote a particularly vehement concurring opinion, joined by fellow *Slaughter-House* dissenters Justices Swayne and Field.[346] A standard account of the case is that Justice Bradley thought the Fourteenth Amendment left sex discrimination in place because women were not similarly situated to men, such that the law was actually a reasonable regulation in the public interest.[347] By contrast, Bradwell argued that women were similarly situated to men in the relevant respects, such as "possess[ing] the requisite character and learning,"[348] and that the regulation was therefore unreasonable.[349] On this picture, whether sex discrimination is consistent with the Fourteenth Amendment today depends on its degree of reasonableness, something on which the judges of today and the judges of the 1870s would fiercely disagree.

But Justice Bradley's opinion also rested on the general law. He argued that women's various legal disabilities existed at common law; the same freedom to choose one's profession was thus not one of the fundamental privileges and immunities of female citizens.[350] Arguably, one could contrast this defense of these restrictions with racial disabilities, which did not exist as a matter of *general* common law and had to be imposed by statute or local custom—just as some authorities said of the law of slavery.[351] On this argument, there would be a core conceptual difference between regulations that were baked into the general law, so to speak, and so were not really abridgments at all, and those which partly abrogated or superseded the general law, and so had to be subject to more searching review. (A similar argument has been put forth to distinguish bans on interracial marriage, which were not part of the general

344. *Id.* at 139.

345. *Id.*

346. *See id.* at 140-41 (Bradley, J., concurring).

347. *See* GREEN, *supra* note 3, at 65, 136.

348. *Bradwell*, 83 U.S. at 136 (argument of counsel).

349. GREEN, *supra* note 3, at 136.

350. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) ("It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.").

351. *See supra* note 234 and accompanying text.

law, from the definition of marriage as the union of a man and a woman, which may have been.[352])

We take no position here on whether this distinction is workable, on whether there was a consensus that this distinction would be observed under the Fourteenth Amendment, or on how the distinction might work if so.[353] For now we simply observe that these arguments, internal to the general law, might supply an important resource for implementing the Privileges or Immunities Clause—and also that the general-law view approach helps us understand why Justice Bradley, Carpenter, Bingham, and others drew some of the distinctions that they did.

And while the discussion above addresses how the Privileges or Immunities Clause secured equality among citizens regarding general fundamental rights, some scholars suggest that the Clause may have secured equality among citizens regarding rights grounded in local law too.[354] By way of comparison, as one of us has noted, Article IV's Privileges and Immunities Clause was interpreted to provide not only general citizenship rights but also, secondarily, a right of equality with respect to local citizenship rights for citizens who moved to a new state.[355] Although we take no position on the issue here, we note that the Fourteenth Amendment's Privileges or Immunities Clause may have primarily secured general citizenship rights while also, secondarily, securing equal treatment among citizens with respect to certain rights supplied by local law.[356]

C. Congressional Enforcement

Together with Section 25 of the Judiciary Act, Section One of the Fourteenth Amendment made general fundamental rights federally enforceable through appeal to the Supreme Court. In this way, the rights were self-executing. But Section Five also gave Congress the power to "enforce" Section One's guarantees.[357] Many of the controversies during Reconstruction

352. *See* David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 221-22 (2015); *cf.* MASUR, *supra* note 326, at 39-40 (Ohio's narrow construction of similar laws).

353. Note that Chief Justice Chase, the dissenter in *Bradwell*, had coined the phrase "Freedom National, Slavery Local" as an abolitionist lawyer. Richard L. Aynes, Bradwell v. Illinois*: Chief Justice Chase's Dissent and the "Sphere of Women's Work,"* 59 LA. L. REV. 521, 521-22 (1999). This suggests that Chase, for one, did not rest on this distinction.

354. GREEN, *supra* note 3, at 117-19; Lash, *State Citizenship*, *supra* note 247, at 1098-99.

355. *See* Campbell, *supra* note 22, at 649.

356. That said, we doubt such a right of equal treatment would extend to all rights under local law; for example, consider Republicans' frequent disclaimers of any effect on voting rights. *See, e.g.*, *supra* note 201 and accompanying text.

357. U.S. CONST. amend. XIV, § 5.

turned on the scope of this enforcement power, along with the parallel enforcement provisions of the Thirteenth and Fifteenth Amendments.[358] Here, we focus on two aspects of the power. First, what freedom did Congress have to reach its own conclusions about the scope of Section One's protections? And second, to what extent could Congress use its Section Five power to regulate the conduct of private individuals?

1. Congressional interpretation

For the most part, members of Congress in the Reconstruction Era seem to have accepted that Congress could identify *abridgments* of the rights secured in Section One, but they denied that Congress had the direct power to regulate or make those rights.

The quintessential example of identifying an abridgment was the Civil Rights Act of 1866, which declared that states had to provide to black citizens the same legal protections for basic rights that they provided to white citizens. Some, such as Representative John Kasson of Iowa, argued (here in the Thirteenth Amendment context) that "in that right of enforcement we have the right to say what falls within the terms of that amendment."[359] At the same time, however, Republicans denied federal authority to *regulate* general citizenship rights. During debates over the Civil Rights Act of 1866, for instance, Representative Samuel Shellabarger of Ohio acknowledged that a Congressional power to "define or regulate these civil rights . . . would . . . be an assumption of the reserved rights of the States and the people."[360] But, Shellabarger clarified, "[i]ts whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery."[361] Republican Senator Charles Sumner of Massachusetts echoed that view several years later, denying that the Fourteenth Amendment embraced a federal regulatory power. "I never have claimed for Congress under the existing Constitution the

358. *See id.* amend. XIII, § 2; *id.* amend. XV, § 2.

359. CONG. GLOBE, 39th Cong., 2d Sess. 345 (1867) (statement of Rep. John Kasson). To be sure, the idea of Congressional constitutional construction was not uncontested. *E.g.*, *id.* at 346-47 (statements of Reps. Russell Thayer and Charles Phelps).

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

361. *Id.* By contrast, politically conservative Unionists and Democrats argued that the Civil Rights Act and Fourteenth Amendment presupposed a federal regulatory power, and they opposed these measures on that basis. *See, e.g.*, *id.* at 1415 (statement of Sen. Garrett Davis); *id.* at 2081 (statement of Rep. John Nicholson).

power to regulate," he declared.[362] Sumner, a frequent champion of broad federal power, instead defended only the power to guard against race-based violations of rights.[363] In this way, Congress stood in a similar position as courts—vested with authority to identify "abridgments" but without direct authority to regulate rights.

On this view, Congress would have no power to create privileges or immunities of U.S. citizenship.[364] The general law, as a form of the common law, was something that could generally be abrogated or superseded by statute, within the scope of a legislature's authority. But Congress could not use its enumerated powers to redefine citizenship rights because statutes in derogation of the general law did not thereby become the general law. Congress might create privileges or immunities of national citizenship by using other enumerated powers, as Justice Miller implied in the *Slaughter-House Cases*.[365] Yet for those new privileges a Section Five enforcement power would be unnecessary; the Necessary and Proper Clause would already provide all the power one could need to "carry[] into Execution" any of the other enumerated powers.[366]

That said, legislation identifying abridgments of existing privileges or immunities might still have significant effect, especially in light of the lack of specificity of Section One.[367] Representative Kasson, in the speech mentioned

362. CONG. GLOBE, 40th Cong., 3d Sess. 986 (1869) (statement of Sen. Charles Sumner). These debates concerned voting rights, which Sumner thought were covered by the Privileges or Immunities Clause. *See, e.g.*, Barnett & Bernick, *supra* note 5, at 577.

363. CONG. GLOBE, 40th Cong., 3d Sess. 986 (1869) (statement of Sen. Charles Sumner) ("I raise no question of the power of the States to regulate suffrage; I [only] go into the question of the meaning of the Constitution of the United States . . . . But I do insist that under the power of making regulations [states] cannot disfranchise a race . . . ."); *see also, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Sen. Samuel Moulton) ("[The Freedmen's Bureau Bill] only proposes that where the black man is unjustly discriminated against, . . . the military commission appointed by this bill shall interfere in his behalf."); *cf. id.* at 1063 (statement of Rep. Thaddeus Stevens) ("[I]s it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality?").

364. *Contra* Lawrence Lessig, *The Brilliance in* Slaughterhouse*: A Judicially Restrained and Original Understanding of "Privileges or Immunities,"* 26 U. PA. J. CONST. L. 1, 18-21, 28-30 (2023); Note [Nikolas Bowie], *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1222-27 (2015); *cf.* Maeve Glass, Essay, *Killing Precedent: The* Slaughter-House *Constitution*, 123 COLUM. L. REV. 1135, 1173 (2023).

365. 83 U.S. at 78-79.

366. U.S. CONST. art. I, § 8, cl. 18.

367. *Cf.* AMAR, *supra* note 11, at 175 n.* ("[M]any congressional architects of Reconstruction envisioned not only judicial enforcement of section 1 but also—and perhaps more centrally—congressional enforcement. Section 1 was thus in part a grant of power to themselves, and they drafted it broadly.").

above, had argued that a law reflecting Congress's constitutional interpretation would receive significant deference from the courts, "vastly strengthen[ing] the grounds on which the United States judiciary might rely."[368] This, too, does not give Congress free rein to determine what counts as an abridgment; the bulk of the evidence suggests that Congress's judgments would still be subject to judicial review.[369] But to the extent that a court was itself uncertain, the considered judgment of a coordinate branch might receive considerable weight. Exactly how far this insight might carry us, and what it might say about subsequent and more controversial enforcement legislation enacted by Congress, we do not attempt to resolve here.[370] But the preexisting traditions of regulating general rights may shed light on this issue.

2. State action

The Privileges or Immunities Clause recognized rights (such as liberty and property) that bound private actors as a matter of general law. Yet the Clause itself restricted only state action. This structure, reaffirmed by the Equal Protection Clause, presupposed that states had a duty to protect basic rights against private interference and that such protection was itself a right of citizenship.[371] Crucially, however, the Fourteenth Amendment did not "nationalize" the underlying rights. Private individuals were capable of violating general-law rights, but only states were capable of violating the Fourteenth Amendment.

The harder questions—and the ones that divided Reconstruction interpreters—were how to understand the states' duty with respect to private action, and how to understand the federal power with respect to both. Under current doctrine, the Fourteenth Amendment's duties are largely negative,[372] and Congress's power to enforce those duties must likewise be "corrective in its

368. CONG. GLOBE, 39th Cong., 2d Sess. 345 (1867) (statement of Rep. John Kasson); *see supra* note 359 and accompanying text.

369. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 345 (1867) (statement of Rep. John Kasson); *see also* CONG. GLOBE, 41st Cong., 2d Sess. 3655 (1870) (statement of Sen. Jacob Howard) (accepting judicial review); CONG. GLOBE, 42d Cong., 1st Sess. 506 (1871) (statement of Sen. Daniel Pratt) (same).

370. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding unconstitutional the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993), as applied to the states); The Civil Rights Cases, 109 U.S. 3, 18-19 (1883) (holding unconstitutional a portion of the Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335, 336).

371. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham); *id.* at 256 (statement of Rep. Jehu Baker); *id.* at 293 (statement of Rep. Samuel Shellabarger).

372. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865-66, 885-87 (1986).

character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers."[373] The Court has gone on to imply that enforcement legislation can never act against private parties, but rather only against those acting under color of state law.[374]

But on another view, put forth powerfully by Pamela Brandwein, the Fourteenth Amendment originally forbade "state neglect" of private violations of rights, and in cases of state neglect it empowered the federal government to punish private actors directly.[375] Or as Justice Bradley put it in his letter to Judge Woods (later his bench-mate in *Cruikshank*[376]), a state's denial of equal protection "includes inaction as well as action"; once the Equal Protection Clause was violated, Congress could act directly on private persons to enforce it.[377] There are other views as well.[378] Congress wrestled with these distinctions in its enforcement debates, as did the Supreme Court in *Cruikshank*[379] and *The Civil Rights Cases*.[380] We take no position on them here. Rather, the key point for now is that the debates make sense only if one starts from the perspective of general-law rights.

D. Legal Change

1. Changing rights

If the Fourteenth Amendment protected rights supplied by general law, as opposed to rights newly created in 1868, that raises new and complicated questions concerning legal change—and, in particular, the *time* as of which such rights are defined.

For example, some take the content of "incorporated" Fourteenth Amendment rights to have been fixed in 1791, upon the ratification of the Bill

373. United States v. Morrison, 529 U.S. 598, 624 (2000) (quoting *Civil Rights Cases*, 109 U.S. at 18).

374. *Id.* at 621, 626.

375. BRANDWEIN, *supra* note 264, at 11-14.

376. *See* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 407 (2014).

377. Bradley Letter, *supra* note 254, at xv.

378. *See, e.g.*, Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1830-35 (2010).

379. 92 U.S. 542, 554-58 (1876), *aff'g* United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897) (Bradley, Circuit Justice).

380. 109 U.S. 3, 10-19 (1883).

of Rights.[381] Others take the content of these rights to have been fixed upon the 1868 ratification of the Fourteenth Amendment.[382] Others express uncertainty on the question.[383]

The general-law approach suggests that the question is framed in the wrong way. Recall that the essence of the general-law approach is that the Fourteenth Amendment recognizes and secures—but does not create or nationalize—rights grounded in general law. The general law is shaped by legally recognized custom and practice; its contours can change as those practices change. The pertinent question for a judge might then be what the general law requires today, not what the content of that law was at a particular moment in the past, whether in 1791 or in 1868. The Fourteenth Amendment was written in an era when it was already well known that the common-law decisions of one age were not always the same as the decisions of a previous age.[384] But nineteenth-century jurists also denied that the common law was judge-made law in any simple sense.[385] One important question, then, is how and upon what showing the general law might recognize new limits on state power.

Depending on how one understands the Bill of Rights, this may mean that the rights secured by the first eight amendments do not move in lockstep with those secured by the Fourteenth Amendment. Perhaps rights enumerated in

381. *See, e.g.*, Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, HARV. J.L. & PUB. POL'Y PER CURIAM, Fall 2022, at 1, 3; *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137-38 (2022) (noting that the Court has "generally *assumed* that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791," but that it "need not address this issue today" (emphasis added)).

382. *See* Amar, *supra* note 11, at 223; *see also* Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 744-48 (2008); Josh Blackman, Response, *Originalism at the Right Time?*, 90 TEX. L. REV. SEE ALSO 269, 275-76 (2012); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022).

383. *See, e.g.*, *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring) (noting that "the Court avoids another 'ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868' or when the Bill of Rights was ratified in 1791" (quoting *id.* at 2138 (majority opinion))).

384. *See* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM 208 (2011); *see also, e.g.*, Livingston v. Jefferson, 15 F. Cas. 660, 663-64 (C.C.D. Va. 1811) (No. 8,411) (Marshall, Circuit Justice) (describing the development of the distinction between local and transitory actions).

385. *See* PARKER, *supra* note 384, at 208; *see also, e.g.*, *Livingston*, 15 F. Cas. at 663-64 (describing "unwritten law" as "human reason applied by courts, not capriciously, but in a regular train of decisions," and requiring adherence to existing rules which had been established "for a long course of time, under circumstances which have not changed").

1791 had some of their content fixed at that time, in which case the content of the Bill of Rights might diverge from the content of the general-law rights secured in the Privileges or Immunities Clause. Or perhaps the first eight amendments themselves referred to general-law principles that were capable of developing over time, through a course of long-standing legal practice.[386] If so, the Fourteenth Amendment would then refer to some of the same rights as those secured in the Bill of Rights, but without the Constitution freezing either set of rights in legal amber.

Alternatively, it may be that Fourteenth Amendment privileges or immunities—and, indeed, many of the first eight amendments—were inherently backward-looking. Justice Washington in *Corfield* described the rights of citizenship as those rights which were, "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."[387] As noted above, this "at all times" language was aspirational at best: It was no secret that states had previously abridged some of these rights, which was precisely why their protection in the Fourteenth Amendment was needed.[388] But the expectation that the states *ought* to comply with such rights had remained, in the view of the Fourteenth Amendment's drafters and supporters, a constant over time since the Founding.

If this latter account is right, then the general-law privileges or immunities the Fourteenth Amendment secures may be a closed set—a somewhat *Washington-v.-Glucksberg*-like category of rights, "deeply rooted in this Nation's history and tradition,"[389] stretching from the Founding through Reconstruction to today. In that case, a new right not previously enjoyed as a privilege or immunity of U.S. citizenship could not be imposed as a requirement of Section One, even if individual state legislatures might choose to protect it on their own (as might Congress, within its other enumerated powers). Perhaps it would be possible for rights to fall out of this protected set as a result of nonuse or desuetude. If so, however, that result would not follow merely because the rights had been widely superseded by statute, but because they were no longer recognized as obtaining in the statutes' default—because Americans no longer "recognize[d] the principle which would obtain in [the

386. For further discussion, see Campbell, note 97 above (manuscript at 55). *See also* McConnell, *supra* note 309, at 196 (suggesting that Founding-era rights discourse featured a "commitment to the idea that the most legitimate source of law is long-standing legal practice, which gradually changes and adapts to new circumstances").

387. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice) (emphasis added).

388. *See, e.g.*, *supra* notes 327-28 and accompanying text.

389. 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

statutes'] absence."[390] Even the freedom of contract described in *Lochner*, though much maligned, might remain the default "at common law" in the absence of a contrary state rule. So too, the general law might retain the longstanding Anglo-American presumption that everything is permitted if not forbidden—a presumption of liberty, so to speak—even as state legislatures use their police powers to forbid more and more.

2. Changing legal frameworks

A further question is posed by the reality that perceptions of the general law have changed. Justice Field, the lead dissenter in *Slaughter-House*, eventually renounced the entire enterprise of "what has been termed the general law of the country."[391] Despite his earlier views, he opined that in practice the general law had become "often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject."[392] And of course after a litany of similar criticisms by Justice Holmes,[393] the Supreme Court in *Erie* overruled *Swift* as unconstitutional.[394] Indeed, the Court later claimed to have "overruled a particular way of looking at law."[395] Since that time, many decades of decisions recognizing unenumerated constitutional rights, combined with the Court's claims to interpretive supremacy over the Constitution,[396] have filled in some of the general-law-shaped hole in

390. United States v. Chambers, 291 U.S. 217, 226 (1934).

391. Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J. dissenting).

392. *Id.* Even then, Justice Field did not deny the prevalence of the general-law view. *See id.* ("I admit that learned judges have fallen into the habit of repeating this doctrine . . . . And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine."). According to Freyer, this was the first time that "the legitimacy of the concept of the general law" had been questioned. FREYER, *supra* note 130, at 70.

393. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting); S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting).

394. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938) (claiming to describe "the unconstitutionality of the course pursued").

395. Guar. Trust Co. v. York, 326 U.S. 99, 101 (1945).

396. *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court."), *and* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (claiming that "the federal judiciary is supreme in the exposition of the law of the Constitution"), *with* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707-09 (2003) (rejecting this view).

American jurisprudence. How (and whether) to pursue a general-law approach in such a world poses significant dilemmas.

Even assuming that the original Fourteenth Amendment remains legally binding until it is lawfully changed,[397] there are at least three ways one might describe the consequences of these subsequent developments.

One possibility is that the general-law view is *now* legally dead. On this view, because general law rested on convention and practice, and because the conventions and practices of the general law are gone—whether as victims of *Erie*, or of the realists, or of changes to legal culture more generally[398]—there simply are no general-law rights of citizenship anymore. On this view, to the surprise and dismay of its drafters, the Privileges or Immunities Clause turns out to incorporate an empty set, not unlike a hypothetical constitutional provision "for the protection of ghosts."[399] This would mean that while the *Slaughter-House Cases* were wrong the day they were decided, they have ironically become correct today, thanks to tectonic twentieth-century shifts in legal thought.

Another competing possibility is that the general law remains alive, despite whatever the Supreme Court has said about it. On this view, the correct "way of looking at law"[400] is a question beyond the jurisdiction of any particular court.[401] And just as particular general-law rules persist in the background when statutes abrogate them—existing as "the principle which would obtain in their absence"[402]—perhaps the general law as a whole persists as background even in the face of today's neglect. Indeed, scholars today have been rediscovering aspects of the general law in many corners of modern legal practice,[403] suggesting that reports of its death may well have been exaggerated.[404]

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397. *See* William Baude & Stephen E. Sachs, Essay, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457-58 (2019). One of us does not take this position.

398. William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1348 (2023) (entertaining without endorsing "the critique that these old ways of thinking are *dead*—an unfortunate casualty of the success of *Erie* and legal realism, and of the destruction of the legal culture that made it possible to talk about general law principles"); *see* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992).

399. ELY, *supra* note 335, at 39.

400. *Guar. Trust Co.*, 326 U.S. at 101.

401. *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 530 (2019) ("If that's what *Erie* declared, then *Erie* is wrong.").

402. United States v. Chambers, 291 U.S. 217, 226 (1934).

403. *See generally* Nelson, *supra* note 33 (discussing the ongoing relevance of general law); Sachs, *supra* note 20, at 1829-31 (same); sources cited *supra* note 20.

404. *See* Sachs, *supra* note 22, at 1255; *cf.* Baude, *supra* note 398, at 1348 ("I am not sure that the old ways of legal culture are entirely destroyed. And even if they were, might it not be our obligation to try to help bring them back?").

A third possibility is one of translation.[405] As noted above, the decline in legal recognition of the general rights of citizenship has corresponded with a rise in the legal recognition of unenumerated constitutional rights. Most importantly, the constitutional doctrine of substantive due process now does much of the work previously done by the general law secured by the Privileges or Immunities Clause. On this view, one might add, it may not be a coincidence that *Glucksberg*'s search for rights "deeply rooted in this Nation's history and tradition"[406] sounds so much like *Corfield*'s account of rights "which have, at all times, been enjoyed by the citizens of the several states which compose this Union."[407] Indeed, recent judicial opinions applying substantive due process have explicitly acknowledged the possibility that the enterprise could and someday should be reassigned to its original owner.[408] In the meantime, the general-law approach might help us both to ground and to redefine substantive due process doctrine.

We take no further position on these possibilities, which pose further questions of methodology, jurisprudence, and legal convention. Regardless, we can state with confidence that the general-law approach helps us better understand how the Privileges or Immunities Clause was originally designed to work, and what judges were originally supposed to do with it. It called for an approach to adjudication that understood Fourteenth Amendment rights neither as complete codes of obligations and permissions (rules that "bind as fetters bind"),[409] nor as the playthings of judges, to be defined and redefined endlessly by courts. As Professor Michael McConnell writes, "we must free ourselves of the modernist misconception, fostered by legal realism, that the common law is simply legislation by judges ('judge-made law'), as well as the

405. *See generally* Lawrence Lessig, Commentary, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997) (discussing the legal problems that arise with changes in dominant jurisprudential worldviews); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing legal change and arguing that interpreters should translate past rules and principles into the present).

406. 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

407. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230) (Washington, Circuit Justice).

408. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 n.22 (2022); McDonald v. City of Chicago, 561 U.S. 742, 756-58 (2010); *cf. id.* at 813-50 (Thomas, J., concurring in part and concurring in the judgment) (applying the Privileges or Immunities Clause); Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2050 (2023) (Alito, J., concurring in part and concurring in the judgment) (describing the Due Process Clause as having "become a refuge of sorts for constitutional principles" that would "otherwise be homeless," "having been exiled from the provisions" in which they were "originally . . . intended to reside"—including, perhaps, the "substantive rights" intended to be "guaranteed by the Fourteenth Amendment's Privileges [or] Immunities Clause").

409. H.L.A. HART, THE CONCEPT OF LAW 139 (3d ed. 2012).

anachronistic conception of the common law as a frozen set of legal doctrines from a simpler past."[410]

However we implement that approach in today's legal world, we cannot begin without understanding the world in which the Amendment was made.

Conclusion

Justice Holmes sparked many transformations in American law. Thanks to his simple reasoning and arresting writing, sometimes these transformations are easy for modern lawyers to overlook. One such transformation was the disparagement of general law.[411] Another was the decline of federal Fourteenth Amendment review with respect to common-law rights of contract and property.[412] It turns out that these two transformations are related—and that together, they make it easy to forget the original meaning of Section One. "In this field, as in so many, the rejection of *Erie* is the beginning of wisdom."[413] Whatever path we take today, we should remember that the Fourteenth Amendment was written for a world of general law.

410. McConnell, *supra* note 309, at 197.

411. *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

412. *See* Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

413. Sachs, *supra* note 22, at 1255.