CONSTITUTIONAL SAFETY VALVE: THE PRIVILEGES OR IMMUNITIES CLAUSE AND STATUS REGIMES IN A FEDERALIST SYSTEM

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ABSTRACT

The American Constitution was born flawed: it failed to provide a mechanism for resolving entrenched differences in the social status regimes between states. This Article argues that part of the purpose of the Privileges or Immunities Clause of the Fourteenth Amendment was to correct that flaw. The Privileges or Immunities Clause was the culmination of a long antebellum debate over whether southern states had to respect the rights of northern black citizens as they traveled. The Clause achieves this goal by requiring states in certain circumstances to respect the status determinations of other states when the citizens of those other states travel. Although this aspect of the Privileges or Immunities Clause has long been forgotten, it survived the Supreme Court's decision in the Slaughter-House Cases.

And there is a good chance it will soon be needed again. The United States is on the verge of an entrenched conflict between states concerning the recognition of the status of marriage for same-sex couples. Although multiple resolutions are possible, the forgotten component of the Privileges or Immunities Clause may provide a more stable and effective framework for determining when states must respect the status determinations of other states. As a structural remedy rather than one based solely on individual rights, the Clause's protection for state status determinations is only triggered when a critical mass of states line up for or against recognizing the

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status at issue. As a result, the Clause's protection for state status determinations is more limited than other rights but potentially more attractive for courts disinclined to greatly expand existing doctrine. If a substantial number of states grant same-sex marriages, the Privileges or Immunities Clause will require the rest of the states to recognize those marriages for travelers.

> *Suppose that Ohio, still further afflicted with her peculiar philanthropy, should determine to descend another grade in the scale of her peculiar humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that "comity" will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions in the scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy?*[1]

1. Mitchell v. Wells, 37 Miss. 235, 264 (1859) (emphasis omitted).

INTRODUCTION

The Fourteenth Amendment was intended to accomplish many things. It set forth a plan under which former Confederate states could rejoin the Union.[2] It continued the work of the Thirteenth Amendment in destroying the racial caste system in the South.[3] More generally, it expanded upon the rights and liberties of Americans by protecting them from incursion by state governments as well as by the federal government.

But the Fourteenth Amendment did something else as well. It resolved a long-running dispute over the obligation of states to respect each other's legal determinations of social status. That is, in the Privileges or Immunities Clause,[4] the Fourteenth Amendment responded to the questions above posed in 1859 by Justice William Harris of the Mississippi High Court of Errors and Appeals. Harris's opinion in *Mitchell v. Wells*, rejecting the claim of a former Mississippi slave who had become a free citizen in Ohio, was one of the last antebellum blows on behalf of the argument that states had unfettered power to refuse to recognize legal statuses bestowed by fellow states on their citizens.[5] That argument was finally and decisively rejected by the Reconstruction Congress; part of the purpose of the Privileges or Immunities Clause was to override arguments like Harris's.

This animating purpose of the Privileges or Immunities Clause has largely been forgotten. But the problem that gave rise to it, although long dormant, is not totally extinct. And in fact, it may erupt again over the issue of same-sex marriage. This Article argues that the Privileges or Immunities Clause may have a role to play in resolving interstate conflicts over the recognition of the marriage rights of traveling same-sex couples. Currently, when two male citizens of Massachusetts, whom Massachusetts has determined to have the social and legal status of marriage, travel to, for example, Louisiana, Louisiana will refuse to recognize Massachusetts's status determination as to those individuals. If a sufficient number of other states join Massachusetts, the situation will become the precise analogue of what the framers of the Fourteenth Amendment tried to prevent: the refusal by southern and western states to recognize the state citi-

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2. Sections 2 through 4 of the Amendment are most clearly directed to this end. It is easy to forget that, while Section 1 is the most important provision for us today, the reconstruction of the Union was by far the most pressing issue in 1866. See, e.g., Daniel A. Farber & John E. Muench, The Ideological Origins of the Fourteenth Amendment, 1 CONST. COMMENT. 235, 272 (1984) ("Most of the debate on the fourteenth amendment concerned the now-forgotten provisions of sections 2 and 3.").

3. This was perhaps the most significant intended purpose of Section 1, as enforced under Section 5.

4. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

5. *See* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 12 (1981).

zenship status of northern black citizens. As I demonstrate below, the Privileges or Immunities Clause was designed to intervene at that point, and require recognition of a contested status granted by the travelers' home state.

This aspect of the Fourteenth Amendment is hardly the only one to have fallen by the wayside over time. The broad language of Section 1 of the Fourteenth Amendment[6] is famously difficult to interpret with precision. As a result, it has provided overlapping solutions to many of the problems the Amendment was designed to address. Even after the Supreme Court in the *Slaughter-House Cases*[7] drastically reduced the role of the Privileges or Immunities Clause, the Court later jury-rigged constitutional protections for equality out of the Equal Protection Clause[8] and for fundamental individual rights out of the Due Process Clause.[9] Although scholars continue to be very interested in the precise textual basis for both of these programs, the Supreme Court has, until recently, shown little interest in revisiting the matter.[10]

Despite its desuetude in the courts, the Privileges or Immunities Clause has been the subject of a considerable amount of scholarship. The vast bulk of that scholarship has focused on what the Privileges or Immun-

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6. "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." U.S. CONST. amend. XIV, § 1.

7. 83 U.S. (16 Wall.) 36 (1873).

8. The process began with *Strauder v. West Virginia*, 100 U.S. 303 (1879), which applied the Equal Protection Clause to overturn, not a failure by a state to enforce its law equally, but an unequal law—namely, a law barring blacks from jury service. This reading was made explicit seven years later in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886): "[T]he equal protection of the laws is a pledge of the protection of equal laws."

9. As early as 1897, the Supreme Court struck down a state law that took land for public use without just compensation, as would have been required under the Fifth Amendment, as violative of the Due Process Clause. *See* Chi., B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226 (1897). Beginning in the 1920s, the Court began finding elements of the Bill of Rights reflected in the liberty interests protected by the Due Process Clause. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

10. A spark of interest was demonstrated in the October 2009 term when the Supreme Court granted certiorari in *McDonald v. City of Chicago*, and set down as the question presented "[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses." Petition for Writ of Certiorari at i, McDonald v. City of Chicago, 130 S. Ct. 48 (2009) (No. 08-1521), 2009 WL 1640363, at *i. But that was explained by the fact that one vote—Justice Thomas's—depended on whether incorporation was accomplished via the Privileges or Immunities Clause rather than the Due Process Clause. *See McDonald*, 130 S. Ct. 3020, 3058–59 (2010) (Thomas, J., concurring); *see also Saenz v. Roe, 526 U.S. 489, 528 (1999)* (Thomas, J., dissenting) (expressing willingness to reconsider meaning of Privileges or Immunities Clause in an "appropriate case"); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989). The plurality in *McDonald* rejected the opportunity to revisit *Slaughter-House* out of hand. *See McDonald*, 130 S. Ct. at 3030–31 (opinion of Alito, J.).

ities Clause was originally intended to accomplish in relation to the two other clauses in the same sentence: the Due Process Clause and Equal Protection Clause. Many scholars have taken the position that the Privileges or Immunities Clause was intended to set substantive limits on state actions, namely by protecting a fixed set of "privileges" and "immunities," specifically those belonging to "citizens of the United States."[11] Rather sharp disputes have arisen over what that list of privileges and immunities might consist of: the first eight Amendments to the Constitution,[12] some subset of that,[13] a superset of that,[14] the provisions of the Civil Rights Act of 1866,[15] or something else entirely.[16] Other scholars have asserted that the entire enterprise of coming up with a fixed list of privileges and immunities is misguided, and that the Privileges or Immunities Clause was actually an antidiscrimination provision, not a substantive provision, intended only to prohibit states from discriminating in whatever "privileges [and] immunities" they might accord their own citizens.[17] It was, in other words, what we now believe the Equal Protection Clause to be. Finally, some scholars have simply given up, despairing of the possibility that any

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11. Just one of many interpretive difficulties is the precise way to read "privileges or immunities of citizens of the United States." Is the phrase "of citizens of the United States" intended to limit the set of privileges and immunities at issue, or merely describe them? *See* Christopher R. Green, McDonald v. Chicago*, the Meaning-Application Distinction, and "Of" in the Privileges or Immunities Clause*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 24 (2010) (identifying six possible meanings).

12. This was Justice Hugo Black's proposal for how to accomplish incorporation. *See* Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964). Some subsequent scholars have taken the same view. *See, e.g.*, William Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 5–6 (1954).

13. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (setting forth theory of "refined incorporation"); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863–1869 (1990) (opining that the Clause protected a limited set of civil rights); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

14. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (stating that Clause incorporated Bill of Rights and various other rights against states); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) (stating that Clause empowers the national government to protect rights of U.S. citizens).

15. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

16. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980) (stating that most plausible interpretation of Clause is "that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding").

17. *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 342–51 (1992). Somewhat related is Philip Hamburger's argument in a forthcoming article that the Clause was intended only to ensure equal treatment of black citizens from other states. *See* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. (forthcoming 2011). In either case, the Clause is devoid of any substantive content.

determinate meaning for the Privileges or Immunities Clause will ever be found.[18]

Given that we now have most of the evidence that we will ever have, that debate seems unlikely to be definitively resolved.[19] The problem is that the Fourteenth Amendment was drafted by a committee[20] and then debated by politicians. The sweeping terms of the second sentence of Section 1 bear the hallmarks of language that achieves compromise by embracing multiple possibilities, to be sorted out later. The debates in Congress reflect this; the proponents of each of the interpretations mentioned above is able to find some, but not conclusive, support for their positions. Recent scholarship has therefore sought meaning, not in the framing debates, but in the way the language of Section 1 may have been understood by the contemporary public.[21] Even there, however, the results so far are inconclusive.[22] Fortunately, it's not clear that any of this makes any prac-

18. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (describing Privileges or Immunities Clause as inscrutable, as if it had been obliterated by an "ink blot"); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE, at 1297 (The Oliver Wendell Holmes Devise: The History of the Supreme Court of the United States, vol. 6, 1971) (citing Reverdy Johnson's statement that he did not "understand . . . the effect" of the Clause as indication that it "did not have a definite meaning.").

19. *See* ELY, *supra* note 16, at 25 ("[P]eople are coming to realize that this is an argument no one can win.").

20. Earl Maltz has offered a persuasive account of the committee compromises that led to the second sentence of Section 1 being placed in the proposed Amendment. *See* MALTZ, *supra* note 13, at 79–92 (1990). Most of the text of the Amendment emerged from secret debates by the Joint Committee on Reconstruction, a committee of fifteen members from the House and Senate. Rep. John Bingham of Ohio proposed adding the language that became the second sentence of Section 1, but it was voted down by many of his fellow Republicans in favor of language that more directly outlawed discrimination on the basis of race. Maltz argues that some of the Radical Republicans on the committee eventually changed their minds because they "also had to consider the problem of drafting an amendment that would pass." *Id.* at 91. Maltz argues that in order to serve this purpose, the rights protected by the language must have been more narrow, *id.* at 92, but it seems just as likely that the language was simply more vague.

21. One increasingly popular method of constitutional interpretation is to look at the original public meaning of the text of a constitutional provision at the time of adoption. *See, e.g.*, Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–73*, 18 J. CONTEMP. LEGAL ISSUES 153 (2009). *But see* Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201 (2009); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009). Although currently in vogue, the method is not without precedent. *See, e.g.*, Eisner v. Macomber, 252 U.S. 189, 219–20 (1920) (Holmes, J., dissenting) ("I think that the word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.' For it was for public adoption that it was proposed.") (quoting Bishop v. State, 48 N.E. 1038, 1040 (Ind. 1898)); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406 (1st ed. 1833) ("Nothing but the text itself was adopted by the people.").

22. *See, e.g.*, David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–68*, 30 WHITTIER L. REV. 695 (2009); George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323 (2009).

tical difference. Other than some amount of doctrinal purity,[23] there is reason to believe that little has been lost by locating antidiscrimination norms and fundamental rights protections in the Equal Protection Clause and Due Process Clause, respectively.[24]

A more practically significant inquiry would be whether anything would be lost by ignoring the Privileges or Immunities Clause that cannot easily be located in some other provision of the Constitution. One right that is at least partially within the scope of the Privileges or Immunities Clause is the right to travel. But that right—or rather, collection of rights[25]—is actually protected by a surfeit of constitutional provisions; the difficulty has been correlating each component of the right with a particular provision.[26]

That brings us back to the problem identified at the beginning of this Article. The American Constitution was born flawed, not only in its protection of slavery, but also in a related but far more subtle way: it failed to provide for a certain uniformity of social status in the United States. These flaws were no accident. The framers, still suspicious of a strong centralized government, established a system of dual, partially overlapping sovereignties: the national government would be wholly responsible for some matters, the state governments for others, and the two would share respon-

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23. For example, Akhil Amar argues that the most natural reading of the Privileges or Immunities Clause is that it incorporates rights of citizens found in the Bill of Rights against the states. *See* Amar, *supra* note 13, at 1220–23. Reading the Clause that way would avoid the need to interpret a clause about process as having something to do with substance. *See* ELY, *supra* note 16, at 18 ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"). John Harrison argues that the Clause is the only logical home for Congress's intended constitutionalization of the Civil Rights Act of 1866, which forbade racial discrimination. *See* Harrison, *supra* note 17, at 1402–10.

24. *See* Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1243 (1998) ("Overruling *Slaughter-House* would solve so few of the problems in modern Fourteenth Amendment jurisprudence that it's not clear that a textualist revival would be worth the trouble.").

25. The Supreme Court in *Saenz v. Roe*, 526 U.S. 489(1999), found "at least three different components" of the right to travel: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Id.* at 500. Only the third component was explicitly connected to the Privileges or Immunities Clause. *See id.* at 502–03.

26. The textual basis for the right to travel has been located in the Commerce Clause, *see* Edwards v. California, 314 U.S. 160, 172–73 (1941); the Privileges and Immunities Clause of Article IV, *see* Toomer v. Witsell, 334 U.S. 385, 395 (1948); the Privileges or Immunities Clause of the 14th Amendment, *see* Twining v. New Jersey, 211 U.S. 78, 97 (1908); the Equal Protection Clause, *see* Shapiro v. Thompson, 394 U.S. 618, 630, 633 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974); the Due Process Clause, *see* Zemel v. Rusk, 381 U.S. 1, 14 (1965); or some combination thereof, *see* Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986) (Privileges and Immunities Clause of Article IV, the Commerce Clause, and the Privileges or Immunities Clause). On several occasions the Court has refused to specify a textual source, stating that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." United States v. Guest, 383 U.S. 745, 758 (1966); *see also Saenz*, 526 U.S. at 500.

sibility for the remainder. Among the questions left entirely to the states were almost all determinations of legal and social status,[27] such as family law, criminal law, citizenship, suffrage, and—most controversially, then and now—slavery.

This division of responsibilities assumed that a certain amount of similarity in the social status hierarchies in each state would persist. That assumption proved ill-founded, however. Societies evolve, sometimes in unexpected ways, and the new states were no exception. The invention of the cotton gin, and improved transportation links, cemented and expanded slavery's role in the economic and social structure of southern states, while the development of a manufacturing economy in the North led to slavery's gradual abolition there.[28] These differences sparked repeated conflicts, beginning in 1820 and continuing up through the Civil War, over individuals caught between the two systems: free blacks. Blacks were regarded as citizens by some northern states but increasingly as agents of subversion in southern (and western) states. This conflict flared up repeatedly as the improvements in transportation and commerce that allowed the cotton trade to boom also allowed travelers, including black citizens, to roam around the nation.

That conflict eventually bloomed into a legal conflict between lawyers and politicians in the northern and southern states over the issue of whether the rights of northern black citizens had to be respected as they travel.[29] In the antebellum period, northern advocates argued that the failure of southern and western states to recognize the rights of northern black citizens violated the Privileges and Immunities Clause of Article IV. Southern apologists responded that Article IV required only that black northern citizens be treated the same as similarly situated *black* residents of their states, not similarly situated *citizens*.[30] In other words, they argued that in recognizing the status of citizenship, a host state could discriminate on the basis of qualities that the granting state did not. These arguments were expressly invoked by Republicans in Congress when they declared that one

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27. This Article uses "status" to refer to two related concepts: social status and legal status. "Social status" is a collective judgment about how much respect or honor to bestow upon a particular person; put differently, a determination of a person's social status governs what rules of behavior others believe it is appropriate to apply to that person. Social status is usually enforced informally, through cultural education and social sanctions. "Legal status" refers to the placement of a person within a certain standing legal category (e.g., bankrupt). The purpose of this placement is to determine which *legal* rules should apply to that person. In some cases legal statuses formalize social statuses (e.g., marriage, conviction, or slavery). For more on the difference between legal and social status, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2324–26 (1997).

28. *See* ANGELA LAKWETE, INVENTING THE COTTON GIN: MACHINE AND MYTH IN ANTEBELLUM AMERICA 187 (2003).

29. *See* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 334–46 (1988).

30. *See id.* at 342–46.

purpose of the proposed Fourteenth Amendment was to "enforce" the Privileges and Immunities Clause.[31]

This Article is one of the first to study the intellectual history of the Privileges or Immunities Clause in order to recover this lost component.[32] The conflict that occurred in the antebellum period is a potential issue for *any* federalist system. Whenever a nation places an upper bound on how far certain issues can percolate up through its legal system, that constraint risks allowing differences to persist unresolved, causing pressure to build around volatile issues. That is, a federal system is particularly susceptible to the emergence of an entrenched conflict between social status regimes contained in the subsidiary political units—the states. The framers of the Fourteenth Amendment attempted to provide a solution for this problem in the Privileges or Immunities Clause. Their solution only becomes apparent by placing the clause in the historical context as the culmination of a long-running debate over the rights of traveling state citizens.[33]

That solution, however, has long been forgotten as the issue has lain largely dormant. The Fourteenth Amendment in many ways has made the resolution of interstate conflict moot, as constitutional law directly regulates status enforcement made through racial, gender-based, or a small number of other "suspect" classifications. That is, the particular status regime conflict that emerged prior to the Civil War could not recur, as the Equal Protection Clause makes it illegal for a state to discriminate against its *own* citizens on the basis of race, let alone those from another state.

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

32. Philip Hamburger, in a forthcoming article that will emerge in press contemporaneously with this one, argues for the interpretive significance of much of the same history that I review below. However, the conclusion Hamburger draws from that history is starkly different: that the Privileges or Immunities Clause had only one originally intended purpose, and that that purpose was the rather narrow one of enforcing an antidiscrimination rule for traveling black citizens. *See* Hamburger, *supra* note 17. Other scholars have previously examined some of the same history but have not found in it any special meaning for the Privileges or Immunities Clause. *See* Lash, *supra* note 31; Maltz, *supra* note 29, at 334–46; Akhil Reed Amar, *Race, Religion, Gender and Interstate Federalism: Some Notes from History*, 16 QUINNIPIAC L. REV. 19, 20–23 (1996); Roderick M. Hills Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 285.

33. Several legal scholars and historians have long argued that the agenda of the Republicans in Congress has to be considered through the lens of abolitionist ideology, which motivated many of them. *See, e.g.*, JACOBUS TENBROEK, EQUAL UNDER LAW 232 (1965); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (2d ed. 1995); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977); Farber & Muench, *supra* note 2, at 241; Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1987); 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 (1997); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* (Georgetown Pub. Law Research Paper No. 10-06, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538862. This work is enormously important. None of these scholars have focused directly on the traveling status problem, however, perhaps because it has faded from modern view.

But not all status conflicts raise an equal protection issue, as equal protection doctrine is currently understood. An issue falling in the gap between suspect classifications might elude a definitive national resolution, thus producing interstate conflict.

Same-sex marriage presents just such a status conflict. Same-sex marriages are currently granted in six jurisdictions.[34] Three other states recognize foreign state same-sex marriages.[35] Same-sex marriage is the legal manifestation of changing social norms regarding the core statuses of sexual orientation and, even more critically, gender. Other states have attempted to buttress their existing status regimes by forbidding recognition of same-sex marriages by statute[36] or even constitutional amendment,[37] while Congress has passed a law declaring that same-sex marriages will be of no effect outside the ceremonial state.[38] Such attempts at de-recognition

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34. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); An Act Relative to Civil Marriage and Civil Unions, N.H. REV. STAT. ANN. § 457:1-a (Supp. 2009); VT. STAT. ANN. tit. 15, § 8 (2009); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Code § 46-401(a) (Supp. 2010). California briefly granted same-sex marriages before its law was repealed in a voter initiative. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); CAL. CONST. art. I, § 7.5 (amending constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California"). That initiative has been declared unconstitutional, *see* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), but the order in the case has been stayed on appeal, *see* Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010). Maine's legislature likewise passed a statute allowing same-sex marriages, only to have it repealed in a referendum before it could take effect. *See* An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws 150-51 (abrogated by people's veto). Three states currently grant civil unions to same-sex couples, but two of those measures have been repealed in the face of pending same-sex marriage laws. *See* N.J. STAT. ANN. § 37:1-31 (2009); CONN. GEN. STAT. ANN. § 46b-38oo (2009), *repealed by* 2009, P.A. 09-13, § 21 (effective Oct. 1, 2010); N.H. REV. STAT. ANN. § 457-A:1 (2009), *repealed by* 2009, 59:9 (effective Jan. 1, 2011). Several other states grant other forms of recognition to same-sex relationships. *See* CAL. FAM. CODE § 297.5 (West 2009); COLO. REV. STAT. ANN. §§ 15-22-101–111 (West 2010); HAW. REV. STAT. §§ 527C-1–7 (2009); NEV. REV. STAT. §§ 122A.010-090 (2009); Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300-340 (2009); WIS. STAT. §§ 770.001-18 (2009).

35. *See* CAL. FAM. CODE § 308 (West 2009) (providing recognition of foreign same-sex marriages "with the sole exception of the designation of 'marriage'"); 95 Op. Atty. Gen. 3 (Md. Feb. 23, 2010), 2010 WL 886002; Godfrey v. Spano, 13 N.Y.3d 358 (2009).

36. *See* DEL. CODE ANN. tit. 13, § 101 (2009); HAW. REV. STAT § 572-1 (2009); 750 ILL. COMP. STAT. ANN. 5/212 (2009); IND. CODE ANN. § 31-11-1-1 (2009); MD. CODE. ANN., FAM. LAW. § 2-201 (West 2009); MINN. STAT. § 517.03 (2008); N.C. GEN. STAT. § 51-1.2 (2009); 23 PA. CONS. STAT. § 1704 (2009); WASH. REV. CODE § 26.04.020 (2009); W. VA. CODE ANN. § 48-2-104 (2009); WYO. STAT. ANN. § 20-1-101 (2009).

37. *See* ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. ANN. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art, XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

38. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended in scattered sections of 28 U.S.C.).

only exacerbate the conflict. They raise the spectre of a patchwork of fundamental social understandings where marriages appear and disappear according to which state a traveler happens to be in, or in which court the marriage is raised as an issue. The official recognition of same-sex marriages in a growing number of states, and the declaration of those marriages as anathema in a number of others, indicates that a status regime conflict is emerging. The question is ripe for resolution at the national level.

The Privileges or Immunities Clause was tailor-made for this sort of situation. Other constitutional provisions, such as the Equal Protection Clause or the Full Faith and Credit Clause, provide a more awkward fit, at least as currently understood. Current Equal Protection doctrine provides no ready method for extending the reach of the clause to *new* status regime conflicts, by postulating a new "suspect classification"—something that has not occurred for several decades.[39] Likewise, the Full Faith and Credit Clause applies uncertainly to marriages, which are not clearly within the scope of the clause, and would also generally have a destabilizing effect by nationalizing *any* change in a formalized social status such as marriage, in any state, the moment it occurred.[40]

The Privileges or Immunities Clause offers a structural remedy to the problem, based on how similar the conflict is to the one over black citizens prior to the Civil War. Thus, if a status conflict between states reaches a kind of critical mass, similar to the division between states prior to the Civil War, the Privileges or Immunities Clause would be triggered as to that dispute; it would require states to classify travelers for purposes of making legal status determination as they would be classified by their home states. In other words, if same-sex marriages are granted by a significant number of states, are declared anathema in a significant number of others, and that conflict appears to be stable and unresolvable, the Privileges or Immunities Clause weighs in on the side of status recognition. The history of that clause shows that the Reconstruction Congress was crucially concerned that the rights of a class of citizens in one state, denigrated as a subordinate caste in another state, nevertheless receive equal respect as those citizens traveled. This aspect of the Clause survived the *Slaughter-House Cases*.

Part I of this Article explains in more detail the general nature of the problem federalism has with status regime conflicts. Part II then examines the antebellum conflict over the rights of free blacks, a conflict that be-

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39. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding alienage to be suspect classification).

40. *See* Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191 (1996) (full faith and credit not required for marriages).

came the intellectual history of the Privileges or Immunities Clause. Part III then considers the evidence that the Privileges or Immunities Clause was intended to address that problem. Part IV applies the analysis to the emerging conflict over same-sex marriages, arguing that same-sex marriage poses the same potential for entrenched status conflict that black citizenship once did. The Article then concludes.

I. THE ORIGINS OF THE FEDERALIST PROBLEM

The framers of the original Constitution were well aware that the states had different legal and social systems, and they sought to preserve a certain amount of heterogeneity through the architecture of federalism. At the same time, however, the framers realized that too much heterogeneity would lead to exactly the situation they sought to escape: the Articles of Confederation. The object was therefore to unify the formerly separate states without unifying them too much. Primarily this was achieved through delegating different powers to different levels of government—the national government would have power to do many things, but legal protections for status regimes were left to the states. The framers foresaw that even this division might not preserve sufficient heterogeneity: some status judgments were walled off from national debate entirely, such as the rule allowing the slave trade until 1808 and the rule providing for the return of fugitive slaves. When it came to unity, however, the Constitution was less specific. Unable to foresee exactly how the states would develop differently, the Constitution calls for unity with vague protections of the "Privileges and Immunities of Citizens,"[41] "Full Faith and Credit,"[42] and "republican government."[43] No robust mechanism was elaborated in the Constitution to ensure that the minimum amount of similarity between state societies would be preserved.

Instead, the framers presumed that the social unity of the new states would persist. For all the differences between the colonies, the framers were correct in perceiving a large amount of cultural similarity. They hoped that affinity between the colonies would fill in where national authority was lacking. As John Jay stated, the Constitution was received and debated by

> one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and ef-

41. U.S. CONST. art. IV, § 2.
42. *Id.* § 1.
43. *Id.* § 4.

> forts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.[44]

While the framers were anxious to improve upon the decentralized Confederation, they also wished to avoid the perceived evils of the King-in-Parliament they had just left behind. They were sensitive to the charge of the Anti-Federalists that no nation as large as the thirteen states combined could remain unified enough to preserve its republican character. Drawing on Montesquieu, the Anti-Federalists argued that any nation with the "varieties of climate, economic interests, religion, manners, and habits of the vast and scattered American population" would contain so many different interests and opinions that a single government would be unable to obtain a consensus on any issue without resorting to the use of force.[45] The solution the framers arrived at was to give the national government power only over certain issues that crossed state boundaries, such as interstate and foreign trade, the postal system, war, and the military.[46] The regulation of everyday life was largely left to the states, which had smaller societies more closely bound together.[47]

Reluctant as they were to create a strong national government, however, the framers recognized that some provision was necessary within the Constitution to ensure that the states did not grow apart rather than together; that is, to compel the states to retain roughly consistent societies. Two preventative measures were inserted, as well as a number of largely hortatory calls for unity. While the new Constitution did not define citizenship, it did prevent the most extreme changes in citizenship status from occurring through the Bill of Attainder and Titles of Nobility Clauses.[48] The first of these helped to ensure that no subject classes could be created in America; the Bill of Attainder prohibition ensures that no single person, or

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44. THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961) [hereinafter all page references to *The Federalist* will be to this edition]; *see also* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 284–85 (1978). It is possible that this unity of "manners and customs," combined with the community spirit, existed for a relatively narrow time period. For an argument that a rising consumer market in British manufactured goods helped gel and standardize the political ideology of the Revolutionary era, see T.H. Breen, *"Baubles of Britain": The American and Consumer Revolutions of the Eighteenth Century*, 119 PAST & PRESENT 73 (1988).

45. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 348 (enlarged ed. 1992); *see also id.* at 344, 349.

46. *See* Madison's treatment of these powers in THE FEDERALIST NOS. 41–44 (James Madison).

47. *See* Bailyn, *supra* note 45, at 360.

48. There are two Bill of Attainder Clauses, U.S. CONST. art. I, section 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."), and U.S. CONST. art. I, section 10, cl. 1 ("No State shall . . . pass any Bill of Attainder"); the first prohibits the federal government from passing such bills, the second prohibits the states. There are also two Titles of Nobility Clauses, U.S. CONST. art. I, section 9, cl. 8 ("No Title of Nobility shall be granted by the United States"), and U.S. CONST. art. I, section 10, cl. 1 ("No State shall . . . grant any Title of Nobility."), for the same reason. For discussions of these clauses, *see* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996) (Bill of Attainder Clauses); Balkin, *supra* note 27, at 2349–52.

no identifiable group of people, could be singled out for punishment for the crime of being themselves.[49] The prohibition against granting titles of nobility ensured that the opposite would never occur either—that a ruling class would be created that could receive special benefits from the government for no just reason.[50]

The calls for unity were placed in Article IV. Most of the clauses of Article IV were designed, at base, to preserve the feelings of mutual attraction between states—that is, a degree of similitude in social status judgments.[51] But the provisions were little more than promises. The Republican Guaranty Clause[52] only prohibited extreme departures from a republican form of government.[53] The Privileges and Immunities Clause was declared in the Federalist Papers to be "the basis of the Union,"[54] but no provision was made for its enforcement. The Full Faith and Credit Clause[55] contained a provision authorizing Congress to prescribe the "effect" of proving acts, records, and judicial proceedings, but it was unclear what the underlying obligation of "full faith and credit" required.[56] Beyond providing for some form of interstate *res judicata*, the framers offered no specific ideas for how the Clause might work.[57]

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49. As with everything, it is obvious that the framers only meant that no persons or group of people could be made outcasts relative to the status quo; obviously, given the existence of slaves, such a class already existed.

50. *See* Balkin, *supra* note 27 at 2350–51.

51. As Bruce Ackerman has observed, the framers were aware that the feelings of attraction were at an all-time high just after the Revolution; it was all downhill from there. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 179 (1991) ("Publius [was] engaged in a grim race against time.").

52. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

53. As Madison noted in *Federalist* No. 43, the clause only gave the states the "right to insist that the forms of government under which the compact was entered into should be *substantially* maintained." THE FEDERALIST NO. 43, at 274 (James Madison).

54. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton). The full text of the Privileges and Immunities Clause reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

55. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). The second sentence of the Full Faith and Credit Clause is also known as the "Effect Clause."

56. Supreme Court Justice Robert Jackson once reported, "I find no satisfactory evidence that the members of the Constitutional Convention or the early Congresses had more than a hazy knowledge of the problems they sought to settle or of those which they created by the faith and credit clause." ROBERT JACKSON, FULL FAITH AND CREDIT: THE LAWYER'S CLAUSE 10 (1944).

57. *See* THE FEDERALIST NO. 42, at 271 (James Madison) ("The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction."). Two recent articles examining the Full Faith and Credit Clause have argued that the obligation to provide "full faith and credit" was simply an evidentiary obligation, no different from the obligation in many treaties; it was only by the Effect Clause that the provision would impose any substantive obligations on states, through congressional legislation. *See* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009).

The framers believed, or at least hoped, that the inchoate provisions of Article IV would prove sufficient to keep the states in a close orbit. But the Revolution unleashed social changes far beyond what the framers anticipated. While they had thrown off the shackles of the British Empire, the framers had no intention of changing the structure of society in the colonies. The Revolution was fought, in part, because the gentry in America were shut out of the most lucrative and prestigious colonial government posts.[58] The aim of the framers, then, was to throw off as much of the status hierarchy as existed above them—but no more. Yet, between the end of the Revolution and about 1830, this process of de-emphasizing the privileges of status became generalized throughout the nation. Yeomen and laborers throughout the states took phrases such as "all Men are created equal"[59] to mean not only that the colonial elites deserved an equal share of the political pie as British elites, but that commoners and elites were on the same political and social level.[60]

Within a generation the first status conflict became clear. Some states developed into societies that prohibited certain fundamental divisions between residents, most notably between slaves and free people; other states' societies increasingly required strict social and legal classifications along racial lines. In expanding the United States into new territories, and in identifying who qualified as "We the People,"[61] the national community was pressured more and more to adopt one principle as to the ideal citizenship status of blacks, both slave and free. The direction the debate took was shaped, and perhaps prolonged, by the federal structure the framers had established—before the nation could determine what rule to adopt, it first had to determine *who* could prescribe such rules under the legal system. That is, politicians and judges of the time argued over the issue of which community had the authority to prescribe the necessary status regulations: the community where the free or slave black originated, the community where such an individual traveled, or whether some national rule could be found to govern all situations. The debate over black citizenship thus fell into the gap of the vague unification clauses of Article IV.

What the framers had failed to anticipate was the emergence of a status regime conflict. A status regime conflict is a long-term dispute between two or more communities over the proper way to accord social status to individuals. It is a particular challenge for federalist societies that

58. *See* BAILYN, *supra* note 45, at 99–100, 102, 204. As Bailyn has shown elsewhere, this concern with status on the part of colonial elites had deep roots in colonial history. *See* Bernard Bailyn, *Politics and Social Structure in Virginia*, *in* SEVENTEENTH-CENTURY AMERICA 90 (J.M. Smith ed., 1959).

59. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 271–86 (1991); ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995).

61. U.S. CONST. pmbl.

apportion ultimate decision-making authority for status regulation to states. Social status is a core component of a person's identity and self-worth. It is the measure of the amount of "prestige, esteem, standing, [or] distinction" accorded by a community to a person or group.[62] Status is a collective judgment as to how one is performing in one's various roles—citizen, friend, neighbor, law professor, mother, black woman. Because it is a collective judgment, it relies on some amount of uniformity within the community in making status determinations—in other words, a status regime.

A conflict between status regimes is particularly destabilizing because status regimes are, despite their importance, fragile. While cultural change is ordinarily glacial, once it reaches a critical tipping point, a community's norms and status determinations might shift in a landslide. That is because of "network effects" in social practices such as norm enforcement: the value of outwardly espousing and enforcing a given norm depends heavily on how many other people in the community support the same norm.[63] The result is that, while there is a large amount of inertia in any status regime, once it does begin to change it will likely do so in a cascade.[64] Even the possibility of such a fundamental shift will drive groups that identify with the current status hierarchy to become hypersensitive to deviant status determinations, particularly those determinations that distinguish them from groups and persons with lesser status.[65] Those with the

62. Elvin Hatch, *Theories of Social Honor*, 91 AM. ANTHROPOLOGIST 341, 341 (1989); *see also* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 12 & n.20 (1998).

63. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 160–61 & fig. 3 (1984). This phenomenon is also known as the "bandwagon effect." The concept has been popularized recently in MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2002). A "tipping point," cascade, or bandwagon effect takes place when individuals place a high value on group cohesion relative to the benefits of a particular choice, and the number of individuals choosing an alternative crosses a certain threshold. *See generally id.*

64. *See* Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997); *see also* Natalie S. Glance & Bernardo A. Huberman, *The Dynamics of Social Dilemmas*, SCI. AM., Mar. 1994, at 76, 78–79; Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992). In Glance and Huberman's metaphor, a cultural belief that is held only because of the attraction individuals feel toward holding the same belief as others is in an unstable state, like a ball in a small rut halfway down a hillside. If the ball is given a sufficiently large nudge, i.e., if a sufficient number of people are willing to switch beliefs, the others may follow and the ball may overcome the rut and roll all the way to the bottom of the hill, a preferable and more stable state. *See infra* figs. 1 & 2, p. 175.

65. *See* Balkin, *supra* note 27, at 2328, 2334; Pat Lauderdale et al., *External Threat and the Definition of Deviance*, 46 J. PERSONALITY & SOC. PSYCHOL. 1058 (1984); Sabine Otten et al., *Intergroup Discrimination in Positive and Negative Outcome Allocations*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 568, 573, 578 (1996); A. Wade Smith, *Racial Tolerance as a Function of Group Position*, 46 AM. SOC. REV. 558 (1981). As Balkin observes, this leads to "the paradox of status": "The paradox of status is that intense social conflict between status groups emerges not at the height of a system of social stratification but during its decline." Balkin, *supra* note 27, at 2334. When upper-level groups no longer feel the need to prove their dominance, their attention to status distinctions lags, and a more fluid intercourse between status groups is possible. When one side is clearly dominant, it can easily laugh at the other side. *See* JAMES H. MERRELL, THE INDIANS' NEW WORLD:

most to lose will feel the most threatened by the challenge and will take the greatest action.[66]

One of the most destabilizing types of conflicts that can emerge is a difference between coequal sovereigns as to whether to formally recognize a person's social status in law. A *legal* status, unlike a social status, does not simply disappear if it is disregarded within a certain community. As a result, the very *presence* of an individual with a contested socio-legal status undermines an inconsistent status regime.[67] That is what drove the conflict over free blacks in the antebellum era, and what is driving the conflict over same-sex marriage now.

II. THE FAILURE OF THE ORIGINAL CONSTITUTION

Despite the fact that the framers failed to perceive the devastating potential of a status regime conflict, their plan worked for several decades. Interpreters largely approached such phrases as "We, the People," "all men are created equal," "full faith and credit," "privileges and immunities," and "citizens" from the same vantage point and gave them consistent meanings.[68] As the decades progressed, however, profound changes in the underlying structure of American society[69] both obliterated the presumed interpretive unity of the founding generation and, at the same time, required more of it. Americans simultaneously became one national community and two sectional societies, with southerners becoming increasingly attached to an economic system based on slavery and a status hierarchy based on race,[70] while northerners thrived in an economy based increa-

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CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL 46–47, 225 (1991).

66. *See* Balkin, *supra* note 27, at 2334; Lauderdale et al., *supra* note 65, at 1067.

67. *See* RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW, xii, 3 (1996) (noting disruptiveness of "hybrids"); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305, 324 (1990) ("[W]hat is there about a continuum that is unsatisfying? frightening? Why must life—and we—be seen in either 'black' or 'white,' with no shades in between?").

68. As Bruce Ackerman has noted, this sort of interpretive uniformity is a common feature of, and problem with, founding generations. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 179 (1991).

69. *See* WOOD, *supra* note 60, at 287–305. For a perceptive overview of the role of religious ideology in the beginnings of the antislavery movement in America, see DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (1975). For an attempt to locate the causes of the rise of antislavery in the 1820s and '30s, see RONALD G. WALTERS, THE ANTISLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830 (1976). As Eric Foner has noted, however, the rise of antislavery, and its exact connection to general societal changes in the North, has yet to be explained. *See* ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 23–24 (1980).

70. The classic work is WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 (1968); *see also* George M. Fredrickson, *Masters and Mudsills: The Role of Race in the Planter Ideology of South Carolina*, *in* THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM AND SOCIAL INEQUALITY 15 (1978); JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 129–33 (1990).

singly on wage labor and in a society where no one owned slaves.[71] As their realities changed, so did their interpretive frameworks, putting sharp tensions on the application of their inherited principles—and therefore on the nature of the union itself. The conflict came to a head in a dispute over one set of individuals that pulled hardest at all of the assumptions: black Americans.

The conflict over slavery is well-known. Throughout the nineteenth century, American politics was in turmoil over the continued existence and extension of slavery throughout the United States, leading to profound debates over the conditions for admitting new states and territories and the status of slavery therein. Some of the most famous political episodes of the time concerned these issues: the Missouri debate, the Compromise of 1850, the Kansas-Nebraska Act, the *Dred Scott* decision. The issue was definitively resolved when slavery was abolished by the Thirteenth Amendment, ratified in 1865.[72]

But there was another aspect of the debate, salient at the time, which is crucial to understanding the history of the Fourteenth Amendment: the rights of free black citizens of Northern states. It was this aspect of the debate that formed a crucial part of the historical background for the Fourteenth Amendment. As noted below, the debate shows all of the hallmarks of a status regime conflict, demonstrating patterns that will recur in the 1990s debate over same-sex marriage. Four elements of the antebellum debate are considered here. The rights of traveling Northern black citizens were a prominent part of the Missouri debate in 1820–1821; the issue cropped up again regularly thereafter in response to Southern state laws restricting the movements of black seamen.[73] Similarly, the furor over the apprehension of alleged fugitive slaves in the North without legal process focused attention on the rights of black Northern citizens. That issue grew in importance as the Supreme Court and then Congress strengthened the rights of Southern slaveholders to act with impunity in the North. Finally, Northern demands for respect for the rights of free blacks were an important component of the demise of comity between state courts that occurred just prior to the Civil War. The Supreme Court, in the *Dred Scott* decision, attempted to resolve the question in 1857 by essentially declaring Northern black citizens to be without enforceable rights outside their home states—a holding that was directly addressed by the Fourteenth Amendment.[74]

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71. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR xv, xvii, xxiv (2d ed. 1995) (free labor ideology began to develop in the 1830s).

72. *See* U.S. CONST. amend. XIII

73. *See* MARTHA S. PUTNEY, BLACK SAILORS: AFRO-AMERICAN MERCHANT SEAMEN AND WHALEMEN PRIOR TO THE CIVIL WAR 13 (1987).

74. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

A. The Presumption of Comity

For several years after the Founding, the differences between the states concerning the rights of black Americans were largely ignored. Racial status determinations involving citizens had yet to be formalized in either northern or southern states. So long as the disputes over the rights of blacks seemed to have only a minor impact on the society of the forum state, judges granted a great deal of comity to the laws and determinations of other states. Indeed, where popular ideologies did not forbid it, judges avoided interstate conflict whenever possible. Once states began to perceive a threat in these laws and determinations, however, judges were no longer free to pretend that granting comity made no difference.

Courts in the northern states were initially aided in their effort to avoid the question by the ambiguous state of slavery in that region. In 1787, only one state, New Hampshire, explicitly prohibited slavery in its constitution;[75] Massachusetts had apparently abolished slavery through a judicial interpretation of its constitution.[76] Another three states, Connecticut, Pennsylvania, and Rhode Island, had passed statutes providing for a gradual emancipation of all slaves in their territories. Still, slavery was hardly being extirpated from the northern states.[77] Pennsylvania, one of the most antislavery states, is an instructive example.[78] In 1783, Pennsylvania adopted a statute for gradually abolishing slavery. Slaves then held within the state could be retained for the rest of their lives, and their children indentured until age 21—after that, the children would go free. The law prohibited any further importation of slaves, and provided for one of the strictest "sojourn laws" in the nation at the time—southern travelers could remain with their slaves within the state for no more than six months per visit, unless they were members of Congress.[79]

Northern state courts followed this legislative policy of showing little immediate concern for the freedom of blacks. In general, courts upheld the claims of southern slaveholders to their fugitive slaves or slaves held while traveling. The only exception to this policy was for slaveholders

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75. *See* N.H. CONST. pt. I, art. 1, § 1 (1783).

76. *See* FINKELMAN, *supra* note 5, at 41. Vermont also prohibited slavery in its constitution, but in 1787 was not yet part of the Union. *See id.*

77. For recent historical accounts, *see, e.g.*, DAVID N. GELLMAN, EMANCIPATING NEW YORK: THE POLITICS OF SLAVERY AND FREEDOM, 1777–1827 (2006); JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780–1860 (1998). Even slavery's status in the South was in some degree of flux. *See* EVA SHEPPARD WOLF, RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION (2006).

78. *See generally* GARY B. NASH & JEAN R. SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH (1991).

79. An Act for the Gradual Abolition of Slavery § 10, 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 249–50 (M. Carey & J. Bioren eds., 1803).

who showed some inclination to reside permanently in a free state.[80] Southern state courts likewise displayed a willingness to entertain claims that the laws of northern states had freed southern slaves.[81] Southern courts, like northern courts, drew a distinction between masters who had brought slaves to northern states with an intention to reside there, and those who had only brought their slaves with them during visits to the North. Only in the former cases were slaves freed.[82] Thus both southern and northern state courts, through the first decades of the nineteenth century, were operating under the same legal rules for slaves: masters could retain their slaves in any state in the union, so long as they did not manifest a permanent intention to reside in a free state.[83] As much as possible, state courts attempted, through their slavery decisions, to draw the states together into one unified legal community.

The cases existing before 1820 are either suits by slaves for freedom or contests of property devises. Free black travelers from northern states are notable by their absence from the judicial records. This was not because there were no northern free blacks visiting the South; black sailors, for instance, had been a fixture on northern ships since at least the eighteenth century, and had been traveling through southern states with federal passes (given out to guard against impressment) since 1796.[84] While these sailors no doubt met with legal problems in southern states, the transferability of their status as northern free citizens was not the subject of much litigation before 1820.

The unifying clauses of the Constitution were, thus, not put to the test in the early years of the Republic. This was the result more of accidental alignment of state societies than because the national government was acting to control their centrifugal tendencies. Federal law and federal authority were, in the early years, conceptually very distant from the problems of slavery and uniform citizenship rights. The federal government in these years maintained a shadowy existence over the states; there were few fed-

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80. *See, e.g.*, Commonwealth v. Chambrè, 4 Dall. 143 (Pa. 1794) (holding French citizen dislodged by revolt in Saint Domingo not entitled to hold slaves in Pennsylvania until finds new residence).

81. *See* Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467 (1820); Winny v. Whitesides, 1 Mo. 472 (1824); Lunsford v. Coquillon, 2 Mart. (n.s.) 401 (La. 1824).

82. *See Rankin*, 9 Ky. (2 A.K. Marsh.) at 467. Virginia courts held only that a mere sojourn in a northern state was not enough to free a slave, without going so far as to hold that intent to reside would be sufficient. *See* Lewis v. Fullerton, 22 Va. (1 Rand.) 15 (1821). Louisiana courts adopted the French rule that any residence in a free state, no matter how brief, freed a slave. *See* Marie Louise v. Marot, 8 La. 475 (1835).

83. This was a rejection of what the common law rule of *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.), was believed to be: a slave became free as soon as he or she "breathed the air" of a free state. Only a few states, all of them in the South, showed any inclination to follow this rule before 1830. *See* FINKELMAN, *supra* note 5, at 70.

84. *See generally* W. Jeffrey Bolster, *"To Feel Like a Man": Black Seamen in the Northern States, 1800–1860*, 76 J. AM. HIST. 1173 (1990).

eral laws and no enforcement agencies. Rarely did federal authority impact the life of the ordinary citizen. Federal courts met infrequently and in a sparse number of locations; blacks and slaveholders from a foreign jurisdiction were unlikely to be willing to wait around for the next session.[85] Constitutional law was little studied and little reported; the common law, inherited from England, was believed to be the most important source of legal authority.[86] The key document on the transferability of slave status through most of the antebellum period was thus not the Full Faith and Credit Clause, or the Privileges and Immunities Clause, but the British case of *Somerset v. Stewart*.[87]

This began to change around 1820. At that time, questions of constitutional law and the citizenship rights of blacks burst upon the national scene. The format for this discussion was the issue of admitting slave states from newly acquired territory—the debate over the admission of Missouri. The debate forced Congressmen to attempt to reconcile the increasing need for a single national policy, encouraging or discouraging slavery, with the social order of each section. It proved to be impossible.

B. Free Black Travelers

For thirty years, Congress had little opportunity to engage in a divisive debate over slavery. Since the states regulated most legal determinations of status, the national government had little authority over such matters. Congress provided for the existence of slavery within the District of Columbia, and, after 1808, it prohibited the slave trade. In only a few areas did Congress even have indirect authority over slavery. One of these areas was in the admission of new states and territories.[88] Still, no significant controversies over the use of this authority occurred until 1820. Most states formed after the adoption of the Constitution had been admitted without much comment on their status as "slave" or "free" states. By 1819, however, the question of whether a state was slave or free was assuming increasing ideological importance. The problem was not necessarily that more people disliked slavery in 1819 than had in 1787; most northerners, and perhaps many southerners, had always abstractly disapproved of the institution. Slavery was now assuming a place in the conceptual frameworks of Americans where its mere existence or non-existence

85. *See* FINKELMAN, *supra* note 5, at 238.

86. *See* Amar, *supra* note 13, at 1205; *see also* DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 52–53 (Don E. Fehrenbacher ed., 1976).

87. 98 Eng. Rep. 499. For more about the *Somerset* case, see William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

88. *See* Potter, *supra* note 86, at 53.

was being perceived as a threat, or an insult, or both.[89] Issues surrounding slavery, such as the admission of new territories, or the rights of free blacks under the Constitution, began to assume increased importance as symbols of the social order that would govern the United States as a whole. Those symbols mattered more and more deeply to each side of the debate, as one side came to see slavery as a threat to the emerging workers' republic, and the other side came to see attempts to restrict slavery as attempts to destroy the basis for white equality. Congress finally entered the fray in 1820, in the debate over the admission of Missouri as a state.

1. The Missouri Debate as a Status Regime Conflict

The Missouri debate featured several hallmarks of what I am calling a status regime conflict—that is, an entrenched dispute between different segments of a larger polity over how to accord a given set of social statuses. Four signals of such a conflict are present here. First, the Missouri debate involved an attempt to extend universally accepted general principles—the rights of citizens and that "all men are created equal"—beyond their tacit boundaries.[90] Second, the debate featured claims that alterations to the status regime would lead to an extremely slippery slope. Southern congressmen argued that a rule requiring respect for the rights of free black citizens would not only undermine the ability to draw racial classifications among travelers, but that it would undermine the ability to draw *any* status distinctions.[91] Those arguing in favor of the extension of slavery and restrictions on free blacks claimed that their opponents' reasoning would eliminate the justification for laws banning interracial marriage and the norms keeping blacks from being elected members of Congress.[92] In what would be a frequent theme for antebellum defenders of the Southern status regime, Southern congressmen argued as a *reductio ad absurdum* that distinctions between men and women would fall as well.[93]

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89. The reasons for this transformation are still not clear. *See, e.g.*, FONER, *supra* note 69, at 23–24.

90. 35 ANNALS OF CONG. 338 (1820) (speech of Sen. Roberts) (quoting Declaration of Independence). The response of southern legislators was to appeal to original intent. *See id.* at 301 (speech of Sen. Van Dyke) (explaining that intent of Declaration was only "that these united colonies are, and of right ought to be, free and independent States"); *id.* at 1004 (speech of Rep. Smyth) (limiting Declaration of Independence to original intent); *id.* at 1071 (speech of Rep. Hardin) (same); *id.* at 350 (speech of Sen. Johnson) ("The meaning of th[e] sentence [was] that all communities stand upon an equality; that Americans are equal with Englishmen, and have the right to organize such government for themselves as they shall choose . . . ."); *see also id.* at 225 (speech of Sen. Macon) (arguing that the Founders would not have supported universal emancipation); *id.* at 325–26 (speech of Sen. Barbour) (same).

91. *See id.* at 309 (speech of Sen. Van Dyke).

92. *See id.* at 227 (speech of Sen. Macon); *id.* at 1154–55 (speech of Rep. McLane).

93. For example, Senator William Pinkney of Maryland asked antislavery northerners, if a republican government requires absolute equality of civil rights, then "why not all the *women*? . . . Why is it that their exclusion from the power of a popular Government is not destructive of its republican

A third hallmark of a status regime conflict is the perception that a challenge to a status regime represents an "insult." A restriction against slavery imposed on Missouri, southern congressmen proclaimed, would be an intolerable insult to Missouri's honor and integrity, as well as to that of the entire South. The restriction would "fix on Missouri the badge of inequality and degradation," Senator James Barbour of Virginia proclaimed.[94] It would separate the American people into "castes," pure and impure, said another—not the obvious castes of slave and free, but the castes of those states that could choose to admit slavery and those that could not.[95] Senator Barbour asked his northern colleagues:

> Can you bring your minds to believe that we shall sit quietly under this act of iniquity, as insulting as it is injurious? . . . [T]here is a point where submission becomes a crime, and resistance a virtue. . . . Our people are as brave as they are loyal. They can endure any thing but insult.[96]

The final hallmark of a status regime conflict follows from the first three. In response to such an insult, and the prospect of "anarchy" resulting from a loss of status determinations,[97] extreme measures may be justified as "self-defense." It was unlikely, southern congressmen claimed, that the framers of the Declaration of Independence had intended a wide application of the rights language of that document—that is, that they had intended to "dissolve the bonds of social order throughout the States . . . . Self-preservation—a regard for their own personal safety and that of their families, and a regard for the best interests of the nation—forbade those sages to do such an act."[98] In the end, the Congress was not able to agree on a single national rule on slavery. Instead, a "checkerboard solution"[99] was arrived at: the Louisiana Purchase was arbitrarily divided, with slavery prohibited in one section and permitted in the other.

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character?" *Id.* at 413.

94. *Id.* at 104.

95. *Id.* at 89 (speech of Sen. Smith); *see also id.* at 93 (speech of Sen. Lloyd) (declaring question to be decided is whether "Maine and Missouri [should] be admitted into the Union on an equal footing with the original States").

96. *Id.* at 328–29; *see also id.* at 175 (speech of Sen. Walker) ("I behold the father armed against the son, and the son against the father. I perceive a brother's sword crimsoned with a brother's blood. I perceive our houses wrapt in flames, and our wives and infant children driven from their homes, forced to submit to the pelting of the pitiless storm . . . with nothing to sustain them but the cold charity of an unfeeling world.").

97. *Id.* at 968–69 (speech of Rep. Holmes). John Holmes of Massachusetts (and later Maine) was one of the few Northern congressmen who sided with the Southerners on the Missouri question.

98. *Id.* at 301–02 (speech of Sen. Van Dyke).

99. On checkerboard solutions, see RONALD DWORKIN, LAW'S EMPIRE 185–86 (1986) ("Integrity holds within political communities, not among them, so any opinion we have about the scope of the requirement of coherence makes assumptions about the size and character of these communities.").

2. The Missouri Debate and the Privileges and Immunities Clause

The most interesting feature of the Missouri debate came near its close. Shortly after the second session began, Missouri presented its new constitution to the Congress for approval. As its elected representatives sat in the wings, waiting to be seated, both houses furiously debated whether the constitution was in accord with the U.S. Constitution. At issue was Article III, Section 26 of the proposed constitution: "That it shall be the duty of the General Assembly of the State, as soon as may be, to pass such laws as may be necessary . . . to prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever."[100] Northern congressmen claimed that the clause violated the Privileges and Immunities Clause by abridging the privileges of black citizens of their states.[101] Southern congressmen predictably reacted with horror and dismay at the suggestion that Missouri or any other state was obligated under the Constitution to recognize the privileges and immunities of black citizens. "[I]f the policy imputed was really to be acted on," Representative William Archer of Virginia stated, "every man must perceive that the Union was gone."[102]

The prospect of nationalizing the rights of free blacks threatened the southern status hierarchies nearly as much as adopting a national principle hostile to slavery would have. By 1820, southern societies, and the individuals that comprised them, were increasingly being defined according to racial castes.[103] The keys to the development of such a system were the assignation of low status to free blacks as well as slaves and the punishment of any blacks who exceeded the role assigned to them.[104] Such punishments would be informal where possible, but were reinforced with laws where enforcement was difficult. A national legal rule forbidding formal discriminatory sanctions against free blacks from other states would trump the local social order, however. The application of the Privileges and Immunities Clause to northern blacks meant that they could bring the social and legal status accorded them in other states with them as they traveled in southern states. Southern communities would be unable to follow the law of the national community and to apply their social judgments; either the law or the judgments would have to go. Following a national rule of according equal status to black travelers would therefore

100. 37 ANNALS OF CONG. 47 (1820) (speech of Sen. Burrill) (quoting proposed Missouri constitution).
101. *See id.*
102. *Id.* at 595.
103. *See* JORDAN, *supra* note 70, at 403–26.
104. Although showing its age, the classic survey of the lives of free blacks in the antebellum South remains IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974).

have meant the destruction of southern societies. Free black citizens were mobile nuclear warheads to the southern social order.

Faced with this threat, southern politicians protested vehemently against the idea that the Missouri constitution violated the Privileges and Immunities Clause. To admit otherwise would be to "place all the States at the mercy of a dissolute, heterogeneous population of any one" state.[105] Once the states developed inconsistent social orders, which they had, the unifying clauses of Article IV, read broadly, forced states to accept human time bombs within their communities: persons who, by their very presence, could suddenly and radically reorganize the social order.[106] Objections to the broad reading of Article IV were rife with the language of compulsion: "If it was the wish of any of the States to have colored citizens, [Rep. William S. Archer of Virginia] said, that he felt neither wish or authority to derogate from their right to do so. The proposition he denied was, that such citizens could be imposed on other States, who had no participation in the wish."[107]

The threat that free black citizens posed in a society based on a racial caste system was that they were what Ruth Colker has called "hybrids," persons who did not easily fit any extant niche in the existing social hierarchy.[108] As with all hybrids, either they would have to be made to fit, or the hierarchy would have to be changed to accommodate the new social reality. The threat that they posed was apparent in the responses of Southern congressmen: "We in the Southern States," Representative Philip P. Barbour of Virginia declared,

> consider this description of population the most dangerous to the community that can possibly be conceived. They are just enough elevated to have some sense of liberty, and yet not the capacity to estimate or enjoy all its rights, if they had them—and being between two societies, above one and below the other, they are in the most dissatisfied state.[109]

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105. 37 ANNALS OF CONG. 622 (1820) (speech of Rep. McLane).

106. These persons could reorganize the social order suddenly and radically, but not necessarily immediately. Such individuals posed a threat as long as they went unchecked; but of course, a community could go through many ideological gymnastics in order to justify enforcing important local status rules. Only outside intervention, or serious internal doubts about the existing status hierarchy, would bring it down without a fight.

107. 37 ANNALS OF CONG. 584 (1820); *see also id.* at 84 (speech of Sen. Holmes) ("forced, against our will"); *id.* at 550 (speech of Rep. Barbour) ("no power to refuse"); *id.* at 558 (speech of Rep. Smyth) (state will have "no authority to exclude some persons dangerous to her peace and happiness"); *id.* at 626 (speech of Rep. McLane) (Missouri will be "compel[led] . . . to receive a population which cannot assimilate with her citizens").

108. *See* COLKER, *supra* note 67, at xii.

109. 37 ANNALS OF CONG. 549 (1820).

In a revealing analogy, Alexander Smyth of Virginia compared free blacks to lepers. Suppose, he asked, an outbreak occurred in Philadelphia, and 10,000 people were infected: "would the corporation of Philadelphia, or the Legislature of Pennsylvania, have a right to send those lepers into Delaware; and would they have a right of 'settling' there, as one of the privileges of citizens of the United States, against the will of the government of Delaware?"[110] No, Smyth concluded; the "right of self-preservation" precluded such a result.[111] If lepers could not settle in Delaware, then neither could free blacks enter Missouri, for they too were "dangerous to [the] peace."[112] No state could be forced to receive citizens it did not want, Southerners argued. Only Congress could make "citizens in the General Government," and then only through the power of naturalization.[113] As regarded native-born persons, Southern spokesmen concluded, each state retained the right to determine for itself who could reside in its territory and who could receive the rights of citizenship there.[114]

Northerners turned this argument right back around, however. If each state had the right to determine which of its inhabitants were its own citizens, then no other state could interfere with that determination by "disfranchis[ing]" those citizens when they traveled.[115] To hold any less would be to obliterate the federal union and replace it with the old confederation of sovereign republics. Each state could determine its own citizens according to its own interests, and "[w]hatever inconveniences may be supposed to result from . . . this power, in relation to the other States, must be attributed therefore to that principle of our Union, without which our National Government would retain as little perhaps of permanency as utility."[116] Furthermore, Northerners argued, while traitors or carriers of disease could be forbidden from entering a state, black citizens could not be excluded merely because they were black. Individual citizens could be excluded only after a legal determination of their harmfulness, but such a judgment could not be generalized to include an entire group.[117] The

110. *Id.* at 558.

111. *Id.* at 557. The "right of self-preservation" was traditionally invoked not only by Southerners wishing to defend the racial caste system, but by vigilante groups seeking to justify extralegal violence against persons violating their social role. *See* RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 115–16 (1975). In such contexts, it appears that "self-preservation" refers to social rather than physical self-preservation.

112. 37 ANNALS OF CONG. 558 (1820).

113. *Id.* at 623 (speech of Rep. McLane).

114. *See id.* at 549 (speech of Rep. Barbour); *id.* at 580 (speech of Rep. Archer).

115. *Id.* at 629–30 (speech of Rep. Mallary).

116. *Id.* at 537 (speech of Rep. Storrs); *see also id.* at 48 (speech of Sen. Burrill). More recently, Max Radin has said much the same thing: "That a state policy on moral as well as economic issues is subject to this qualified frustration is, it has been well said, one of the prices we pay for the maintenance of our Federal system." Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 29, 32 (1944).

117. *See* 36 ANNALS OF CONG. 601 (1820) (speech of Rep. Hemphill); *see also id.* at 566 (speech of Rep. Strong).

Northern social order simply did not require the same color barrier that the Southern order did.

As with the debate over slavery, the debate over the rights of black citizens was not easily resolved by reference to the intentions of the founders. The framers of the Constitution had obviously intended that the states be bound closer together; their attention was focused on the problem of discrimination against worthy citizens of another state (i.e., men like themselves) as they traveled, not the problem of one state declaring native-born persons to be citizens that other states would regard as harmful. They had some dim awareness that there might be problems with too much uniformity;[118] a balance would have to be struck between the too-loose confederation of the Articles and a single national community where the states became vestigial. The framers did not articulate exactly where this balance should lie, however. They seem to have presumed continued harmony over the question of who the citizens of each state were.

The ideology of the founding generation was clear, however, that the (legal) status of "citizenship" allowed no gradations: persons were either citizens, or they were not. During the controversy with Britain surrounding the Revolution, a new ideology of citizenship was developed in America, one that replaced older notions of subjectship and allegiance with notions of contract and consent: the people, not the government, were the basis of all authority.[119] This implied that one could choose which country one belonged to, and once that choice had been made, one was an equal part of the sovereign; there were no "estates" in America. This ideology had obvious use in a situation where colonists wanted to reject their old government as having usurped its authority and to choose to become an independent nation; however, it also removed the legal basis for distinguishing between different grades of citizens. Social hierarchies would from then on have to be enforced informally or through Ptolemaic exceptions to the principle of uniform citizenship.

Southern congressmen once again argued that the national political culture, as it had been handed down from the Revolutionary generation, should be interpreted in light of the specific context in which it was originally formed. Although the framers had specified no particular principles concerning the rights of free blacks, supporters of the Southern social orders felt justified in assuming what those principles might have been had

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118. Increased uniformity, the framers realized, would have made the old Privileges and Immunities Clause of the Articles particularly troublesome, since it gave the "inhabitants" of one state the privileges of "citizens" in another. *See* ARTS. CONFED. art. IV (1777). The language was changed so that states would have to recognize inhabitants as citizens in their own territory before they could be vested with the rights of citizenship elsewhere. It seems not to have occurred to them that even this could be deeply problematic, if notions of who should be a citizen diverged in the several states.

119. For an excellent history of the changing conception of citizenship in the colonies and early American republic, see KETTNER, *supra* note 44.

the framers been asked. The Constitution, Senator John Holmes of Maine observed, provided that any citizen of a certain age and born in the country could be elected to federal office.[120] "That the framers of the Constitution intended that blacks and mulattoes might be members of Congress or Presidents," Holmes exclaimed, "is a supposition too absurd to be for a moment entertained."[121] The Constitution was framed by an "association . . . of white people—Europeans and their descendants,"[122] with "a view to the liberty and rights of white men."[123] The protections of the Privileges and Immunities Clause were only intended for whites. Representative Charles C. Pinckney of South Carolina, a delegate at the Philadelphia Convention, rose from his seat late in the debate to confirm this view. After claiming that he wrote the Privileges and Immunities Clause, Pinckney explained, "[A]t the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could ever have existed in it . . . ."[124] Southerners thus appealed to the "passive intentions" of the framers to argue that, when it came to their statements of principles, "[b]road as they appear, every one knows they were limited."[125]

As with the Declaration of Independence, however, constitutional principles had gotten more general as they had gotten older. Interpreted strictly, the Constitution did not bar anyone from its protection on the basis of color; Northern congressmen therefore argued that the "passive intentions" of the framers worked in exactly the opposite way Southerners had intended. "To justify the inference of gentlemen," Rep. William Eustis of Massachusetts complained, "the preamble ought to read, We the *white* people."[126] Eustis claimed such a phrase never would have been assented to by delegates "from the Middle and Northern States," who knew that thousands of free blacks lived in their states.[127] Other congressmen pointed out that black soldiers had served in the Revolutionary War.[128]

The key argument was over who determined what rights Northern black citizens would receive. Southerners argued that the Privileges and Immunities Clause did not allow blacks to carry their status determinations with them as they traveled. Free blacks, under this theory, were entitled only the privileges that free blacks had at their destination, not to the pri-

120. *See* 37 ANNALS OF CONG. 85–86 (1820).
121. *Id.* at 86.
122. *Id.* at 616 (speech of Rep. McLane).
123. *Id.* at 550 (speech of Rep. Barbour).
124. *Id.* at 1134 (1821).
125. *Id.* at 618 (1820) (speech of Rep. McLane).
126. *Id.* at 636–37.
127. *Id.* at 637.
128. *See, e.g.*, *id.* at 572 (speech of Rep. Strong); *id.* at 598 (speech of Rep. Hemphill).

vileges of all citizens.[129] The intention of the Clause was only to prevent discrimination based on state origin;[130] otherwise, the state's ability to regulate status would be obliterated. Representative William Archer of Virginia brought this home with a hypothetical: Suppose women were, in one of the states, "admitted to all the privileges of citizenship," including suffrage.[131] Under the Northerners' theory, Archer contended, women would, under the Privileges and Immunities Clause, be able to bring their status as voters with them as they traveled to a new state.[132] Archer believed his hypothetical made his point: "Constructions of this kind were no subjects for discussion."[133] Citizens traveling from state to state could not gain more privileges in new states than "indigenous inhabitants of the same class and description," and certainly could not gain more rights than they had had at home.[134] Otherwise, incompatible social systems would come into irresolvable conflict.

Northerners protested that such an interpretation of the Privileges and Immunities Clause placed Northern and Southern societies too far apart. If every state could place restrictions on any persons they considered "odious and pernicious" without control from some national rule, then anyone could be barred from traveling, whether on account of color, size, or profession.[135] Each state would essentially "become a distinct nation of people, of peculiar habits, of separate interests, and singular character. Not only the laws, but the passions of the people of each State would soon be in martial array against one another."[136] In other words, the incompatibility between the states' societies would only get worse if Article IV were to be interpreted as loosely as Southerners were proposing. Black citizens had to travel with their Northern status judgments intact in order to keep the Union on an even keel.[137]

At the end of the debate over Missouri, Northern and Southern congressmen were unable to resolve their differences and agree on a single national rule with respect to black citizenship. The most they could agree on was to require Missouri to pass a resolution that the controversial provision in its constitution would not be interpreted to authorize any law "by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such

129. *See id.* at 87 (speech of Sen. Holmes). Put differently, if the public policy of the destination state was to restrict black freedom, then such a policy could override the Privileges and Immunities Clause.
130. *See id.* at 581–82 (speech of Rep. Archer).
131. *Id.* at 582.
132. *Id.*
133. *Id.*
134. *Id.*; *see also id.* at 622 (speech of Rep. McLane).
135. *Id.* at 634–35 (speech of Rep. Mallary).
136. *Id.* at 989 (1821) (speech of Rep. Butler).
137. *See id.* at 533–36 (1820) (speech of Rep. Storrs); *id.* at 571 (speech of Rep. Strong).

citizen is entitled under the Constitution of the United States," whatever *those* were.[138] Determinations of social status depend for their strength on the support of the underlying culture. If that culture only weakly or ambivalently supports certain status determinations, those determinations are objectively completely arbitrary. That is, they will depend on continued voluntary support from members of the community; force of logic alone will not compel members to support the rules. The voluntary support for agreement over the status of blacks in America was fast disappearing by 1821.

3. Negro Seamen Acts

The divergence between the states that was apparent in Congress soon affected the courts, both federal and state. In the wake of the Missouri debate of 1820–21, Southern states began passing laws or handing down court decisions that restricted the rights of free blacks. The inability to decide on a political rule at the national level soon became more general and more entrenched; the states could not agree on a single legal rule either. Yet their situation increasingly demanded one. Southerners traveled with their slaves into Northern states, sometimes for long periods of time; Northern blacks traveled to Southern ports on merchant ships; Southerners claimed that blacks living in the North were fugitive slaves. Remaining one community required adopting a rule that would accord with the social systems of every state. When this proved to be impossible, courts began interpreting the laws of other states as purposefully trying to overthrow their social and legal orders. Civil war was not far behind.

Several states, following South Carolina's lead, passed laws restricting free black seamen after Denmark Vesey's planned rebellion was discovered in 1822.[139] South Carolina's "act for the better regulation of free negroes and persons of color," passed in 1822, provided that any blacks arriving on board a ship would be "seized and confined in gaol until such vessel shall clear out and depart from this state"; if the captain of the vessel did not pay the costs of confinement, the prisoners could be sold into slavery.[140] It did not take long for the law to wind up in federal court, in

138. *Id.* at 1785 (quoting Presidential Proclamation of Aug. 10, 1821). Hamburger suggests that the South got the better part of this compromise. *See* Hamburger, *supra* note 32, at 24 n.67.

139. *See* Bolster, *supra* note 84, at 1192–93. Vesey himself was a former sailor who evidently drew from Charleston's maritime community in organizing his conspiracy. *See* W. JEFFREY BOLSTER, BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL 193–94 (1997). There is some controversy over whether Vesey's conspiracy was real. *Compare* Michael P. Johnson, *Denmark Vesey and His Co-Conspirators*, 58 WM. & MARY Q. 915 (2001) (conspiracy was fabricated), *with* Robert L. Paquette, *From Rebellion to Revisionism: The Continuing Debate About the Denmark Vesey Affair*, 4 J. HIST. SOC'Y 291 (2004) (conspiracy existed).

140. Elkison v. Deliesseline, 8 F. Cas. 493, 493 (D.S.C. 1823) (No. 4366).

the case of *Elkison v. Deliesseline*.[141] The plaintiff in *Deliesseline* was a British seaman who had been imprisoned by Charleston's sheriff under the law; Justice Johnson therefore avoided the Privileges and Immunities Clause altogether and found that the law was unconstitutional because it conflicted with Congress's power to regulate commerce and make treaties.[142]

As interesting as the holding, however, was the defense of the law. The attorney general of South Carolina did not argue the case in defense of the law; in fact, the state itself seemed to have removed itself from its enforcement.[143] Rather, as Johnson noted, "prosecutions under this act were discontinued, until lately revived by a voluntary association of gentlemen, who have organized themselves into a society to see the laws carried into effect."[144] Such a "voluntary association" might have been called, in later years, a "Vigilance Committee": a group of local elites seeking to maintain the current social order through extralegal means.[145] The representatives of the voluntary association argued that it if the Act contradicted the Constitution, so much the worse for the Constitution.[146] The right to control free blacks was "a right of vital importance" to the sovereignty of the state, one that could not have been yielded to the national government.[147]

The association's fear of free black seamen was understandable. Serving on board a merchant ship, whaler, or warship was an unparalleled opportunity for Northern free blacks, who signed up in Northern ports in disproportionately high numbers.[148] Ships' crews had traditionally been drawn from the "mob" of poor urban dwellers; once on board, race mattered less than ability and length of service.[149] Ships therefore had a relatively egalitarian culture that tended to wash out shoreside racist norms.[150]

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141. *See id.*

142. *See id.* at 495. United States Attorney General William Wirt came to the same conclusion the following year. *See* Validity of the South Carolina Police Bill, 1 U.S. Op. Att'y Gen. 659 (1824). South Carolina, however, refused to acquiesce in the decision, and the Negro Seamen Acts continued to be a diplomatic embarrassment for the United States for decades. *See* Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J. S. HIST. 3 (1935).

143. *See Elkison*, 8 F. Cas. at 494.

144. *Id.* The group in question called itself the South Carolina Association. *See* Alan F. January, *The South Carolina Association: An Agency for Race Control in Antebellum Charleston*, 78 S.C. HIST. MAG. 191 (1977).

145. *See generally* BROWN, *supra* note 109, at 95–143. *Compare* enforcement of the Negro Seamen Act *with* enforcement of the laws, spurred by private factions, in New Mexico or Arizona later in the century. *See* ROBERT M. UTLEY, HIGH NOON IN LINCOLN: VIOLENCE ON THE WESTERN FRONTIER (1987); PAULA MITCHELL MARKS, "AND DIE IN THE WEST": THE STORY OF THE O.K. CORRAL GUNFIGHT (Simon & Schuster 1990) (1989); LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999).

146. *See* January, *supra* note 144, at 196.

147. *Elkison*, 8 F. Cas. at 494.

148. *See* Bolster, *supra* note 83, at 1176 tbl.1.

149. *Id.* at 1174.

150. *See id.* at 1178.

Worse still, from the point of view of Southern societies, blacks could attain high ranks on board a ship, including authority over white crew members.[151] The opportunities for high status on board a ship made free black crew members dangerous indeed to Southern societies.

Over the next twenty years, similar laws were enacted in North Carolina, Georgia, Florida, Alabama, and Louisiana.[152] Louisiana's law, passed in 1842, spurred black Bostonians to petition their government to look into the matter.[153] In 1843, at the urging of Massachusetts Representatives, the House Commerce Committee looked into the matter and produced a report declaring the Seamen's Acts unconstitutional under the Privileges and Immunities Clause.[154] In 1844, the Massachusetts legislature authorized the governor to appoint two delegates to go to New Orleans and Charleston and collect information about Massachusetts citizens being detained with an eye toward challenging the practice in federal court.[155] The governor appointed Samuel Hoar to go to Charleston, and Henry Hubbard to New Orleans.[156] Both delegates were forced to leave those cities, however, under threat of mob violence.[157] Indeed, the South Carolina legislature ordered Hoar's expulsion within days of his arrival, and he barely escaped being lynched.[158] Hoar's treatment, in particular, caused an uproar in Massachusetts on his return.[159]

The treatment of Northern black sailors in Southern ports continued to be a cause célèbre throughout the remainder of the antebellum period. For example, much like Missouri's restriction on free blacks three decades earlier, Southern restrictions on sailors became a coda to the heated debate over the Compromise of 1850. If the North was going to be forced to recognize the status of slavery in its territory through the operation of the Fugitive Slave Clause,[160] Senator Robert Winthrop of Massachusetts argued, then shouldn't South Carolina be obligated to recognize the privileg-

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151. *See id.* at 1180.
152. *See id.* at 1192.
153. *See id.* at 1193.
154. THE IMPRISONMENT OF FREE COLORED SEAMEN, H.R. REP. NO. 27-80 (1843), *reprinted in* ROBERT C. WINTHROP, ADDRESSES AND SPEECHES ON VARIOUS OCCASIONS 341, 343 (1852) ("The committee have no hesitation in agreeing with the memorialists, that the acts of which they complain, are violations of the privileges of citizenship guaranteed by the Constitution of the United States.").
155. *See* Hamer, *supra* note 142, at 22.
156. *See id.* at 22–23.
157. *See id.*
158. *See* 1 HORACE GREELEY, THE AMERICAN CONFLICT: A HISTORY OF THE GREAT REBELLION IN THE UNITED STATES OF AMERICA, 1860–'65, at 180–85 (1877).
159. *See* Hamer, *supra* note 142 at 22–23. Although Hoar's mission was to investigate the maltreatment of black Massachusetts, no doubt part of the explanation for the reaction to his own treatment is explained by shock that a white Massachusetts citizen would be treated with similar disrespect.
160. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

es and immunities of black Massachusetts citizens?[161] The arguments had not changed in thirty years.[162] Defenders of the Seamen's Acts responded that blacks were not citizens since they were deprived of certain rights in Massachusetts and everywhere else; or, even if they were citizens, their citizenship status could not travel with them: "I insist, sir, that they have no right to make a black man a citizen in Massachusetts and send him to South Carolina . . . ."[163] Northerners objected, as before, that the Constitution made no distinction between citizens and that neither could Southern states.

What had changed was that the threat to Southern institutions had apparently increased greatly since 1820. Southern congressmen defended the Seaman's Acts as police regulations which were necessary to prevent murder and other horrid crimes. Even questioning the acts in Congress was tantamount to declaring "a war upon southern safety."[164] With their status as slaveholders and as whites in a racial caste system, Southern congressmen became very attentive to the symbols of status in the national government. Their status was being challenged daily, and it did not seem they could effectively punish the challengers. The longer this continued, the more it hurt the Southern social order's claim to rule in the relevant community. Senator John Berrien of Georgia finally exasperatedly declared,

> [I]f this incessant war is to be kept up *de die in diem*; if it is to be arrayed against our institutions; if we are within this Hall and elsewhere to be constantly denounced and assailed by remarks calculated to wound and irritate the feelings of slaveholders; . . . [then] you are forcing upon us the conviction . . . that we cannot much longer be considered fit associates for the people of the non-slaveholding States.[165]

These conflicts over the privileges and immunities of Northern black citizens were a crucial part of the antebellum history that the Radical Republicans had in mind as they debated the Fourteenth Amendment in the Reconstruction Congress. The restrictions on black travelers imposed by Missouri and, later, Oregon, as well as the Seaman's Acts, including most

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161. *See* CONG. GLOBE, 31ST CONG., 1ST SESS. app. at 1655 (1850).

162. Indeed, some would be recycled. Serving as U.S. Attorney General in 1832, Roger Taney drafted an opinion defending South Carolina's Negro Seamen Act on grounds similar to those he would use 35 years later in his opinion in *Dred Scott*: that blacks could not be citizens and therefore were not entitled to the protections of the Privileges and Immunities Clause. *See* H. Jefferson Powell, *Attorney General Taney & the South Carolina Police Bill*, 5 GREEN BAG 2D 75, 101 (2001), *available at* http:// papers.ssrn.com/ sol3/ papers.cfm? abstract_id=824906.

163. CONG. GLOBE, 31ST CONG., 1ST SESS. app. at 1654 (speech of Sen. Butler); *see also id.* app. at 1659 (speech of Sen. Soule).

164. *Id.* app. at 1662 (speech of Sen. Berrien).

165. *Id.*

prominently the Hoar expedition, were cited repeatedly by Republican congressmen.[166] The goal, then, was to resolve once and for all the federalist stalemate that had emerged in the antebellum period.

C. The Rights of Alleged Fugitive Slaves

Free black travelers were not the only residents of Northern states put in jeopardy by Southern status regimes. Another significant issue that increasingly divided Northern and Southern states was the ease or difficulty of identifying and recapturing fugitive slaves. Article IV of the Constitution specifically provided for an obligation on the part of states to assist residents of other states in returning fugitive slaves. But like the other provisions of Article IV, no mechanism was identified to achieve this goal. Southern slaveowners took to simply capturing those they believed to be slaves and returning them to slavery. The situation presented a conundrum: if the person really was a slave, then he or she had no legal rights that needed to be respected. But if he or she was not, then that person was a state resident deserving of legal process.

The Fugitive Slave Act of 1793 was passed in an effort to mitigate this conflict.[167] It empowered slaveowners or their agents to seize fugitive slaves anywhere in the country and prohibited interference with them. It also provided a procedure by which the slaveowner could appear before a state or federal judge or magistrate and prove ownership.[168] However, there was no penalty for failing to do so, and in fact the procedural requirement was often ignored.

The failure to provide for the protection of Northern black residents became a significant issue by the 1830s. In *Prigg v. Pennsylvania*, the Supreme Court invalidated a Pennsylvania law that made it a crime to remove blacks from the state without taking them before a state judge for a hearing.[169] Such a law, the *Prigg* Court held, interfered with slaveholders' rights under the Fugitive Slave Clause: slaveholders had the right of "recaption" and could take their escaped slaves wherever they might find them without answering to any court.[170] The *Prigg* decision seemed to hold that only the federal government could enforce the Fugitive Slave Clause; states were not to interfere.[171] Several Northern states interpreted *Prigg* to

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166. *See* Amar, *supra* note 13, at 1277 & n.357. Even a decade later, the Hoar expedition was cited prominently in accounts of the causes of the Civil War. *See* GREELEY, *supra* note 158, at 178–85; 1 HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 578–86 (1872).

167. *See* Fugitive Slave Act of 1793, 1 Stat. 302 (1793).

168. *See id.*

169. *See* 41 U.S. (16 Pet.) 539, 543 (1842).

170. *Id.* at 579.

171. The actual holding was far from clear; Northern states interpreted the decision this way, however. *See* Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Uses of*

mean that they had no obligation to enforce the clause, either, and passed "personal liberty laws," prohibiting state officials from aiding in the recapture of slaves.[172] At a time when the federal government barely existed outside of Washington, D.C., this was a serious impediment to enforcement of the Fugitive Slave Act of 1793.

In 1850, after the conclusion of the Mexican–American War, yet another prolonged debate erupted in Congress over the status of slavery in the newly acquired territories. This debate was even more vituperous than the 1820 debate over Missouri.[173] Eventually, another compromise was reached: California was admitted as a free state; New Mexico was added as a territory with no restrictions on slavery; New Mexico's boundary with Texas was settled; the District of Columbia retained slavery but abolished the slave trade; and a new Fugitive Slave Act was passed. The "compromise" was not a true compromise, however. Again, no governing national principles were agreed to; even the compromise itself was not passed as one package, but as individual pieces, supported by one section or another and a small corps of swing voters.[174]

The new Act attempted to ease the difficulties by providing for a large number of federal commissioners throughout the states whose sole duty was to make a preliminary finding on the claims of slaveholders to their alleged slaves.[175] Just to make sure they decided the right way, the commissioners were to be paid ten dollars if they found for the master, but only five if they denied the claim.[176] As several Northern congressmen pointed out, however, such a system presumed that a claimed person was an escaped slave and not a citizen entitled to a full-blown trial before his or her rights could be restricted.[177] Southerners claimed that extensive procedural safeguards would render the Fugitive Slave Clause nugatory in the face of Northern resistance.[178] The Act that finally passed had no provision for any formal trials.[179]

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a Pro-Slavery Decision, 25 CIVIL WAR HIST. 5, 9 (1979).

172. *See generally* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861 (1974).

173. The debate lasted through four sessions of Congress and sparked many side issues. It took the House of Representatives six weeks to decide on a speaker; one week was spent debating the election of the doorkeeper and his views on slavery. *See* CONG. GLOBE, 31ST CONG., 1ST SESS. app. at 396 (1850) (speech of Rep. Ashmun); *id.* at 115–16 (speech of Sen. Clay).

174. *See* POTTER, *supra* note 86, at 113. Potter calls the Compromise of 1850 "a truce perhaps, an armistice, certainly a settlement, but not a true compromise." *Id.* In being decided by a small group of swing voters, the Compromise was as much a unified decision as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

175. *See* POTTER, *supra* note 86, at 131–34.

176. *See id.* at 134.

177. *See, e.g.*, CONG. GLOBE, 31ST CONG., 1ST SESS. 524 (speech of Sen. Hale).

178. *See, e.g.*, *id.* app. at 630–31 (speech of Sen. Soule).

179. POTTER, *supra* note 86, at 134; *see generally* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860 (1970).

The new Fugitive Slave Act hardly resolved the issue, however, and only drew the federal government deeper into the conflict. By 1850, Northern and Southern states alike were becoming increasingly recalcitrant. A notable example of the Northern reaction to the Fugitive Slave Act occurred in the case of *Ableman v. Booth*.[180] *Ableman* arose from the efforts of a Missouri slaveowner to recapture a fugitive slave in Wisconsin.[181] The owner's agents found the former slave in Racine, Wisconsin, and apprehended him. Before they could present him to a federal magistrate in Milwaukee, however, a mob stormed the jail and freed him. The U.S. Attorney then arrested and prosecuted a leader of the mob, Sherman Booth. The Wisconsin Supreme Court issued a writ of habeas corpus, declaring the Fugitive Slave Act unconstitutional and ordering the U.S. Marshal to free Booth. Ableman, the Marshal, petitioned for a writ of certiorari to the U.S. Supreme Court, which it granted—and which the Wisconsin Supreme Court ignored. The Wisconsin Supreme Court simply refused to certify the record.[182] The U.S. Supreme Court eventually heard the case, and held that a state court cannot intervene in a federal prosecution by issuing a writ of habeas corpus to a federal officer.[183] But the Wisconsin Supreme Court ignored *that* order as well and refused to retract its decision.

D. The Breakdown of Comity

As the case of *Ableman v. Booth* illustrates, by 1859, the rule of law was disintegrating in the United States. One of the essential features of a federal government is the principle of "comity"—the amount of respect one jurisdiction pays to the laws of another.[184] Comity is possible in a heterogeneous, but consistent, legal system. That is, it is possible in a system where the differences that exist do not matter greatly. Then it is possible to hold, with Stephen Douglas, that "'[i]t is neither desirable nor possible . . . that there should be uniformity in the local institutions and domestic regulations of the different states of this Union. . . . Diversity, dissimilarity, variety in all our local and domestic institutions is the great safeguard of our liberties.'"[185] Such toleration of difference in the social

180. 62 U.S. (21 How.) 506 (1859).

181. For recent accounts, see H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (2007); Jeffrey Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007).

182. Although it has come to mean simply granting leave to appeal, a writ of certiorari is technically an order to a lower court to send the record in the case to the Supreme Court. *See* "certiorari," BLACK'S LAW DICTIONARY 241–42 (8th ed. 2004).

183. *Ableman*, 62 U.S. at 523–24.

184. For an excellent history of the decline of antebellum comity, *see generally* FINKELMAN, *supra* note 76.

185. POTTER, *supra* note 86, at 341 (quoting Stephen Douglas, speech at Chicago, July 9, 1858).

orders of the various states was possible so long as those differences were compatible; that is, where the perception of difference did not seem to threaten the very existence of the social order in another state. Perceptions slowly began to change in the North and South in response to the economic and social changes described above.

The breakdown in comity began in the 1820s, after the Missouri debate. The same year the South Carolina Negro Seamen Act was passed, Kentucky adopted the Southern position on free blacks into its common law. In 1822, the Court of Appeals of Kentucky decided the case of *Amy v. Smith*,[186] in which a slave, Amy, sued for her freedom, claiming she had been freed under the laws of Pennsylvania or Virginia several years previously. The defendant responded that Amy was barred from making a claim under those laws by an act of the Kentucky legislature prohibiting all such claims from being made after 1810. Amy claimed this violated her privileges and immunities as a citizen of either Pennsylvania or Virginia. The court drew a distinction between citizens and "subjects": citizens, it held, were only those native-born persons who were entitled to "all the rights and privileges conferred . . . upon the highest class of society."[187] As for the obvious objection that white women and children did not hold these rights, yet were still citizens, the court claimed that women and children "partake of the quality of those adult males who belong to the same class and condition in society."[188] The court simply ignored the dissent's observation that not all white men had all the rights and privileges of the "highest class of society."[189]

If Southern courts were adopting the argument expressed by Southerners in the Missouri debates, Northern courts eventually began adopting the other side. That is, in a series of decisions following *Commonwealth v. Aves*,[190] Northern courts began removing all the support they could from the institution of slavery. *Aves* involved a twelve-year-old girl named Med, who was brought to Boston from Louisiana by her owner for a stay of several months. The question was whether Med could be held as a slave during her stay in Massachusetts, which had no law recognizing slavery. Chief Justice Lemuel Shaw, deciding the case, phrased the question carefully: it was not whether entering the state "works any alteration in [the slave's] *status*, or condition, as settled by the law of his domicil"; it was, rather, whether there was "authority on the part of the master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into

186. 11 Ky. (1 Litt.) 326 (1822). (Until 1976, the Court of Appeals was Kentucky's highest appellate court.)
187. *Id.* at 333.
188. *Id.*
189. *Id.*
190. 35 Mass. (18 Pick.) 193 (1836).

custody in order to [effect] his removal."[191] Shaw decided that there was no such authority under Massachusetts law: while other states were free to adopt laws that placed some persons in the state of slavery, the laws of Massachusetts would not support the enforcement of those laws by permitting the forcible detention or removal of a slave brought to that state.[192] Although in general states owed comity to each other's laws, the enforcement of Louisiana's slavery laws, Shaw declared, would not be consistent with the social order of Massachusetts: "[S]uch an application of the law would be wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles, and is therefore inadmissible."[193]

Reaction to *Aves* in the South was harsh—one Southern newspaper called it an "'outrage upon Southern Rights.'"[194] Nevertheless, by 1845, almost every Northern state had adopted *Aves* as its law.[195] Southern courts responded in kind, holding that the laws of Northern states could not free Southern slaves. For example, dismissing a claim that travel to Ohio had instantly emancipated a slave, the Kentucky Court of Appeals held that if the laws of Ohio had worked such an emancipation, Kentucky had no obligation to respect the laws of a state that had paid "so little respect" to Kentucky's own status-enforcing laws.[196] Similarly, reviewing an emancipation of a slave performed in Ohio, the Mississippi High Court of Errors and Appeals rejected its validity, holding that "[n]o state is bound to recognise or enforce a contract made elsewhere, which would injure the state or its citizens; or which would exhibit to the citizens an example pernicious and detestable."[197] The laws of Ohio were thus entitled to no deference on the matter; to do so would be to allow Mississippi citizens to "defraud[ ]" the laws "of their operation."[198]

Although Southern states were thus taking steps to remove the badges of status from Northern free blacks traveling to their states, and Northern states began removing the support of their laws from the enforcement of Southern slave status, state courts had yet to hold that the laws of other states were by themselves threatening to their societies. The Northern states were putting into law what had only been expressed in debate in

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191. *Id.* at 208.
192. *See id.* at 215, 217.
193. *Id.* at 218. Interestingly, the lawyers in *Aves* only debated the principles of international comity, *Somerset*, and the Fugitive Slave Clause; no one seems to have considered either the Privileges and Immunities Clause or the Full Faith and Credit Clause. This allowed Shaw to announce, "The constitution and laws of the United States, then, are confined to cases of slaves escaping from other States and coming within the limits of this State without the consent and against the will of their masters . . . ." *Id.* at 224. This lack of legal attention to the unifying clauses of Article IV was typical in the antebellum period. *See* FINKELMAN, *supra* note 76, at 30–34.
194. FINKELMAN, *supra* note 76, at 125.
195. *See id.* at 126–27.
196. Graham v. Strader, 44 Ky. (5 B. Mon.) 173, 182 (1844).
197. Hinds v. Brazealle, 3 Miss. (2 Howard) 837, 842 (1838).
198. *Id.* at 843.

Congress in 1820: that social orders based on slavery were intolerable and should be restricted at every opportunity. As long as such "self-purification"[199] remained confined to Northern states, the threat to the South was not that severe. The real danger to the South was that the self-purification would become national, and that the principle of freedom, combined with the North's growing political strength and the closer ties between the two sections, would override and overturn the Southern social order.[200] In 1836, those fears were slowly rising to fever pitch.

By 1850, state courts were reaching the same conclusion. The Missouri Supreme Court, in finding for the slaveholder in the *Dred Scott* case, overturned three decades of precedents holding that long-term residence in a free state or territory frees a slave. Justifying this reversal in the law, the court noted that "[t]imes are not now as they were when the former decisions on this subject were made."[201] Not only were the laws of free states inconsistent with Missouri's social order, they were now regarded as positively hostile:

> [N]ot only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.[202]

Several years later, the Mississippi High Court of Errors and Appeals agreed, overruling several precedents that upheld the validity of emancipations performed in free states. The fact that Ohio regarded free blacks as citizens, the court wrote, was proof not only that Ohio's laws were undeserving of comity in Mississippi, but that Ohio had actually violated the principle of comity and the law itself.[203] "[I]t seems to me that comity is terminated by Ohio," Justice Harris argued, "in the very act of degrading herself and her sister States, by the offensive association, and that the rights of Mississippi are outraged, when Ohio ministers to emancipation and the abolition of our institution of slavery, by such unkind, disrespectful, lawless interference with our local rights."[204] Ohio, and by implication, all of the Northern states, had become societies gone mad. They were so alien, their social orders so incompatible, that Mississippi had no

199. DAVIS, *supra* note 69, at 520.
200. *See id.* at 520–22; OAKES, *supra* note 70, at 167–72.
201. Scott v. Emerson, 15 Mo. 576, 586 (1852).
202. *Id.*
203. Mitchell v. Wells, 37 Miss. 235, 263 (1859)
204. *Id.*

obligation even to recognize the rights of their citizens in court. To do so would be to disrupt and "degrade" Mississippi society as well.[205]

Northern courts too began reaching the decision that they had no obligation to recognize statuses inconsistent with their societies. This went further than Justice Shaw's decision in *Aves*; the holding of *Aves* was not that the status of a slave would change upon entering a free state but merely that the master could not use force to enforce it.[206] Justice Wright of the New York Court of Appeals, concurring in the case of *Lemmon v. People*,[207] noted that when it came to recognizing the status of a visitor to the state, only compatible statuses would be tolerated. "[N]o further than they are consistent with her own laws, and not repugnant or prejudicial to her domestic policy and interests, is the State required to give effect to these laws of the domicil."[208] The rule emerging in the North was, quite simply, zero tolerance for slavery.

The Supreme Court eventually attempted to create a national principle on the status of free blacks where politics had failed. It did so in the case of *Dred Scott*.[209] Chief Justice Taney's majority opinion adopted, in its entirety, the position Southerners had been arguing for the past thirty-seven years: blacks could not be citizens because they had been deprived at the time of the Founding of the rights that were essential to citizenship. Taney's argument ran like a replay of the Southern position in the Missouri debates: he cited the laws in several states barring blacks from voting or serving in the militia;[210] he noted the Massachusetts and Rhode Island prohibition on interracial marriages as proving "the degraded condition of this unhappy race";[211] and he distinguished the universal principles expressed in the Declaration of Independence.[212] Taney admitted that individual states could have made blacks citizens some time after the Founding, but claimed that such "state citizenship" did not entitle them to any of the benefits of the Constitution.[213] And if they were not national citizens at the time of the Founding, then they could not be citizens now; only Congress could create new citizens, and then only by naturalization. States could not force citizens on other states that those other states did not ap-

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205. *Id.*
206. The holding is thus reminiscent of *Shelley v. Kraemer*, 334 U.S. 1 (1948).
207. 20 N.Y. 562 (1860).
208. *Id.* at 631–32 (Wright, J., concurring).
209. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
210. *See id.* at 415–20.
211. *Id.* at 409; *see also id.* at 413, 416.
212. *See id.* at 410–11. Taney argued that the context made it clear to contemporaries that the phrase "all men are created equal" was only meant to have a limited application: "They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race . . . . They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them." *Id.* at 410.
213. *See id.* at 405.

prove: "[N]o law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory."[214]

Part of Taney's argument attempted to bootstrap his conclusion: blacks were not national citizens, and thus entitled to the protection of the Privileges and Immunities Clause, because of the bad results that would follow if they *were* entitled to privileges and immunities. If Northern free blacks were citizens, Taney argued, they would have the power to disrupt Southern societies merely by appearing in those states; they would have

> the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation . . . ; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; . . . and to keep and carry arms wherever they went.[215]

The reason why this was intolerable was clear: "[A]ll of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State."[216] The Privileges and Immunities Clause, far from protecting blacks' freedoms, divested blacks of them. The Clause "guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State . . . ."[217]

Dred Scott has generally been vilified as the worst decision in Supreme Court history.[218] Most commentators think that this fact derives from more than its patent racism or its role in producing the Civil War. Justice Scalia has suggested that the decision's badness is the result of its attempt to resolve a question that the politicians could not;[219] yet, those same politicians had been practically begging the courts to decide the constitutional issue of black status for decades. Furthermore, the Court had no choice: having been presented with a claim for diversity jurisdiction by

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214. *Id.* at 418.
215. *Id.* at 417.
216. *Id.*
217. *Id.* at 423.
218. *See, e.g.*, William P. Gary, Jr., *"We the People" or "We the Judges": A Reply to Robert R. Baugh's Response*, 49 ALA. L. REV. 607, 609 (1998) (describing the Court's opinion as "tyrannical"); Robert G. Schwemm, Strader v. Graham*: Kentucky's Contribution to National Slavery Litigation and the* Dred Scott *Decision*, 97 KY. L.J. 353, 433 (2009) (describing the decision as one of the Court's worst).
219. *See* Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

black individuals,[220] the Court had to decide whether blacks were citizens for the purpose of Article III. Professor Robert Burt has suggested that *Dred Scott*'s badness came from the fact that it avoided answering the central question: "whether, in view of the intense conflicts between [the states], it was necessary or even possible for them to remain members of the same political community."[221] This is closer to the truth. *Dred Scott* was a bad decision, not because it chose one side of the debate, but because it adopted the rules of a social order that was obliterated by the following war. If the arguments of the dissenting justices had been adopted instead, war would have, if anything, occurred sooner. With the Supreme Court enforcing a hostile status regime, Northern voters returned a president at the next opportunity who was committed to the eventual abolition of slavery. Secession followed.

III. REPAIRING THE DAMAGE

A. The Purpose of the Privileges or Immunities Clause

Once the Civil War ended, Congress began the task of fixing the problems that had led to the conflict. Foremost among those was the gulf that had emerged between the status regimes used in the states. The first and most obvious step was to abolish the institution of slavery, which Congress did by passing the Thirteenth Amendment. But, as the Republicans in Congress were well aware, that still left substantial differences in state societies. The goal of Reconstruction was to ensure that nothing like the sectional division that led to the Civil War could happen again.

To accomplish that goal, Congress passed several measures intended to provide a check on legal codifications of social status. In March 1866, relying on its authority under the Thirteenth Amendment,[222] Congress passed the Civil Rights Act of 1866. The Civil Rights Act declared "all persons born in the United States . . . to be citizens of the United States," having equal rights "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 . . . ."[223] The goal of the Civil Rights Act was to eliminate gradations of citizenship on the basis of race.

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220. The individuals were Dred Scott and the rest of his family: his wife Harriet, and daughters Eliza and Lizzie. For an analysis of the freedom claims of the entire family, *see* Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

221. Robert A. Burt, *What Was Wrong with* Dred Scott*, What's Right About* Brown, 42 WASH. & LEE L. REV. 1, 16 (1985).

222. Section 2 of the amendment provided that "Congress shall have power to enforce this article by appropriate legislation."

223. Civil Rights Act of 1866, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2008)).

But it was not entirely clear whether Congress had the authority to take such measures under the Thirteenth Amendment.[224] In order to rectify that situation, Republicans in Congress began work on what would become the Fourteenth Amendment. Mindful of their antebellum experience, the framers of the Fourteenth Amendment intended, among other things, to resolve the debates over the rights of citizens once and for all.

Exactly how they intended to accomplish that remains shrouded in mystery.[225] The various members of Congress who debated it did not have a clear, shared conception of how the words used in the Amendment related to its goals. The role of the Privileges or Immunities Clause is particularly unclear.[226] Several members viewed the Privileges or Immunities Clause as especially important in the protection of "fundamental rights,"[227] such as those listed in the first eight amendments to the Constitution;[228] others claimed not to know what it meant at all.[229] Still others pointed primarily to the Equal Protection Clause as the critical source of protection for blacks in the South.[230]

The potential role of the Privileges or Immunities Clause as a broad protection for fundamental rights in the states was foreclosed seven years later in the *Slaughter-House Cases*.[231] After *Slaughter-House*, the static list

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224. The Supreme Court finally confirmed Congress's authority to pass the Civil Rights Act of 1866 more than one hundred years later in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

225. *See, e.g.*, WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 90 (1988) (Fourteenth Amendment was "vague charter for the future"). The literature on the Fourteenth Amendment is vast. Even the Privileges or Immunities Clause, which has been moribund for well over a century, has a substantial body of academic commentary. *See supra* notes 13–24 and sources cited therein.

226. The final text of Section 1 of the Fourteenth Amendment begins much as the Civil Rights Act did, by defining United States citizenship and then providing for protection of the rights of U.S. citizens: "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 . . . ." U.S. CONST. amend. XIV, § 1. The definition of citizenship was added relatively late in the debate, after the proposed amendment had already passed the House.

227. CONG. GLOBE, 39TH CONG., 1ST SESS. 1263 (1866) (speech of Rep. Broomall).

228. *See, e.g.*, *id.* at 1090 (speech of Rep. Bingham); *id.* at 474 (speech of Sen. Trumbull); *see also id.* app. at 133 (speech of Rep. Rogers) (opposing congressional protection of privileges and immunities as massive federal intrusion into state protection of rights).

229. *See id.* at 3039 (speech of Sen. Hendricks); *id.* at 3041 (speech of Sen. Johnson).

230. Thaddeus Stevens in the House and Jacob Howard in the Senate relied more heavily in their defense of the proposed amendment on its provision of equal protection of the laws to all persons, regardless of race, and less on equal citizenship rights. *See id.* at 2459 (speech of Rep. Stevens); *id.* at 2765–66 (speech of Sen. Howard). Indeed, Howard voted in the Joint Committee on Reconstruction several times to reject Rep. Bingham's attempt to add protection for privileges and immunities to the resolution.

231. 83 U.S. (16 Wall.) 36 (1873). Gerard Magliocca has convincingly argued that *Slaughter-House* did not end the debate over incorporation of the Bill of Rights against the states; the final nail in incorporation's coffin occurred twenty-seven years later, in *Maxwell v. Dow*, 176 U.S. 581 (1900). *See* Gerard Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102 (2009). However, the tenor of *Slaughter-House* clearly weighs against the Fourteenth Amendment intruding in any significant way on the authority of states to govern their own citizens, or what *Slaughter-House* calls the states' "police power," *see* 83 U.S. at 56, at

of substantive rights protected by the Clause was sharply limited to those implicit in the unamended Constitution, such as the right to sue in federal courts and the right to use navigable waterways. But the *Slaughter-House* decision left untouched the Clause's more dynamic protection for traveling citizens.[232] And the legislative debate is clear that members of Congress viewed that protection as particularly important in light of recent events.[233]

The inclusion of the Privileges or Immunities Clause in the Fourteenth Amendment clearly hearkened back to antebellum debates over traveling Northern citizens. This is evident from two strands of the debate. First, a large number of the amendment's supporters voiced the view that the purpose of the amendment was merely to enforce the existing Constitution, specifically the Privileges and Immunities Clause of Article IV.[234] Some of these statements were made in reference to the Bingham version of the amendment, which mimicked the wording of Article IV and the Fifth Amendment.[235] But members of Congress persisted in describing the proposed amendment this way even after it took its modern form.[236]

Such descriptions may seem to make little sense today, when the Article IV Privileges and Immunities Clause and the Fourteenth Amendment are viewed as having vastly different purposes. Indeed, in a recently published article, Kurt Lash argues that contemporary usage of the phrase "privileges and immunities" in 1866 clearly distinguished between the privileges and immunities arising from state citizenship and privileges and immunities arising from national citizenship.[237] Under this view, therefore, the difference in wording between Bingham's first version of the amendment, introduced in February 1866, and the second version, reported out of the Joint Committee on Reconstruction in May, is tremendously significant. Lash argues that the "privileges and immunities of citizens of the

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least outside of the context of racial discrimination. That makes *Maxwell* a logical, if not inevitable, follow-up to *Slaughter-House*.

232. *Slaughter-House*, 83 U.S. at 72–75 (1872). (14th Amendment Privileges and Immunities Clause extends to national citizens in all locations throughout the United States, regardless of original state of citizenship).

233. *Id.* at 71–72.

234. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 1082 (speech of Sen. Stewart); *id.* at 1089, 1095 (speech of Rep. Bingham); *id.* at 2539 (speech of Rep. Farnsworth); *id.* at 2542 (speech of Rep. Bingham); *id.* at 2961 (speech of Sen. Poland); *id.* at 3031, 3034 (speech of Sen. Henderson).

235. The original version of the Fourteenth Amendment, drafted by Rep. Bingham and reported out of the Joint Committee on Reconstruction, read: "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." *Id.* at 1034 (speech of Rep. Bingham). The most notable difference between this proposal and Section 1 of the Fourteenth Amendment is its structure: it grants Congress power to legislate on certain subjects, instead of enacting a prohibition on states backed by Congressional power to enforce. After three days of debate in the House, further consideration of the Bingham proposal was suspended; months later the Joint Committee on Reconstruction reported a proposal much closer to the final product.

236. *See supra* note 234 and sources cited therein.

237. *See* Lash, *supra* note 31, at 1280.

United States" would have been understood as referring to a much narrower set of rights, akin to those few identified by Justice Miller in his *Slaughter-House Cases* opinion.[238]

There are at least two significant difficulties with this argument, however. One is that some of the evidence of contemporary meaning that Lash presents is drawn from the somewhat different context of a treaty promising foreign subjects all of the "privileges, rights, and immunities of United States citizens."[239] But the framers of the Fourteenth Amendment would not have had international treaty usage foremost on their minds; they would have been thinking of the antebellum debates over the rights of Northern citizens.[240] And that history, as detailed above, did not distinguish sharply between state citizens and national citizens; indeed, that was what the whole debate was about. Second, and relatedly, there is no evidence, at least in the congressional debates over the Fourteenth Amendment, that lawyers in 1866 made a clear distinction between the privileges and immunities of citizens in the several states and the privileges and immunities of citizens of the United States. Bingham himself saw no difference; nor did any participant in the 1866 debates identify one. In fact, opponents of the amendment seemed to believe that the Privileges and Immunities Clause went too far in denying states the ability to regulate activities that they always had, a view that is inconsistent with Miller's view of the narrowness of the Clause. The closest members of Congress came to asserting that privileges and immunities of citizens of the United States had an alternative meaning was to assert that they did not understand what it meant.

There is a danger of overstating the clarity of the ideas swirling throughout the debate over the Fourteenth Amendment in Congress. But the Republicans, at least, seem to have seen the references to privileges and immunities in the proposed amendment—both versions of it—as resolving the longstanding debate over the ability of individual states to determine who qualified for the socio-legal status of "citizen" and what rights accompanied that designation.[241] For example, several members declared that the purpose of the Privileges or Immunities Clause was to guarantee the rights of Northern citizens traveling in Southern states. Representative John Bingham described his proposal as requiring "that South Carolina, and that Ohio as well, shall be bound to respect the rights of the humblest citizen of the remotest State of the Republic when he may he-

238. *Id.* at 1243.
239. *Id.* at 1285.
240. Although his article is not in final published form at the time of this writing, it appears that Philip Hamburger will emphasize this point in response to Lash as well. *See* Hamburger, *supra* note 16, at 42–43.
241. *See id.* at 1282–84 .

reafter come within her jurisdiction."[242] Bingham's choice of states was not accidental; one of the causes of the war, in Republicans' view, was that Southern states had not respected the rights of Northern citizens. The Privileges or Immunities Clause was an attempt to fix that, by bolstering the Article IV Privileges and Immunities Clause.[243]

One of the specific concerns of the framers was in preventing the abuse experienced by antislavery activists in the South. "[F]or the last thirty years," lamented Rep. Hiram Price of Iowa, it "has not been the case" that Northern citizens were accorded equal treatment under the Privileges and Immunities Clause.[244]

> A citizen of a slave State could come into a free State at any time during the last quarter of a century and express his opinion on any subject connected with State rights or any other which agitated the public mind; but if a citizen of a free State visiting a slave State expressed his opinion in reference to slavery he was treated without much ceremony to a coat of tar and feathers and a ride upon a rail.[245]

The goal of the Privileges or Immunities Clause, therefore, was to rectify this situation by giving the federal government the power to stop such abuses. As Rep. John Broomall of Pennsylvania noted:

> [S]trange as it may seem, while the Government has been always held competent to protect its meanest citizen within the domain of any European potentate, it has been considered powerless to guard the citizen of Pennsylvania against the illegal arrest, under color of State law, of the most subordinate officer of the most obscure municipality in Virginia. Strange as it may seem, while the Government of the United States has been held competent to protect the lowest menial of the minister of the most obscure prince in Europe, anywhere between the two oceans, and from the Lakes to the Gulf, it had no power to protect the personal liberty of the

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242. CONG. GLOBE, 39TH CONG., 1ST SESS. 158 (1866); *see also id.* at 1066 (speech of Rep. Price) ("I understand [the Bingham amendment] to mean simply this: if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years."); *id.* app. at 293 (speech of Rep. Shellabarger) (arguing that bill to protect privileges and immunities would protect travelers' rights).

243. *Id.* at 1054 (speech of Rep. 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.").

244. *Id.* at 1066. (statement of Rep. Price).

245. *Id.*

> agent of the State of Massachusetts in the city of Charleston, or enable him to sue in the State courts.[246]

Broomall's last hypothetical was a veiled reference to the Hoar expedition,[247] a common theme in the debates over the Privileges or Immunities Clause. Both John Bingham and Lyman Trumbull, leaders of the effort to pass the amendment in the House and Senate, referred explicitly to the Hoar incident as something barred by the Privileges and Immunities Clause.[248] The citation to the Hoar expedition is significant, because it was not only Judge Hoar's rights that were allegedly violated; the entire purpose of Hoar's trip was to assert the rights of black Massachusetts citizens. Bingham explicitly noted Hoar's "peaceful mission of asserting . . . the rights of American citizens" in condemning South Carolina's "utter[ ] disregard[ ]" for the Privileges and Immunities Clause.[249]

The rights of black Northern citizens were at the heart of the meaning of the Privileges or Immunities Clause. As discussed above, the argument had been made throughout the antebellum period by Northerners that the status of state citizenship, once bestowed, required fellow states to accord that state citizen full citizenship rights as he or she traveled through their jurisdictions. In other words, if Massachusetts recognized a black man as a citizen, South Carolina could not refuse to treat that man as a citizen under the Privileges and Immunities Clause. Southerners argued that the Privileges and Immunities Clause only required states to grant individuals the same status as resident individuals of that class received. If South Carolina did not recognize resident free blacks as citizens, then it did not have to recognize Massachusetts free blacks as citizens either.

It seems to have been almost universally agreed that the Privileges or Immunities Clause would change that. The purpose of protecting the privileges and immunities of United States citizens was to succeed where the Article IV clause had failed: by preventing states from refusing to recognize the citizenship status accorded by other states. Even in the antebellum era, Senator John B. Henderson of Missouri argued that federal citizenship could not "be given or taken away by State action. . . . [O]nce the character of citizen of the United States attaches, no State, I apprehend, can take it away."[250] Henderson cited as authority Chief Justice Taney's opinion in *Dred Scott*:

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246. *Id.* at 1263 (statement of Rep. Broomall).
247. *See supra* text accompanying notes 154-159.
248. *See id.* at 158 (statement of Rep. Bingham) (proposing Bingham amendment); *id.* at 474 (statement of Sen. Trumbull) (defending Civil Rights Act as enforcement of Article IV).
249. *Id.* at 158 (statement of Rep. Bingham).
250. *Id.* at 3032 (statement of Sen. Henderson).

> If persons of the African race are citizens of a State and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the constitution and laws of the State notwithstanding.[251]

Other members of the Thirty-Ninth Congress similarly viewed the Article IV Privileges and Immunities Clause as prohibiting discrimination against foreign state citizens who happened to be black. Sen. William M. Stewart of Nevada argued that the Privileges and Immunities Clause already prohibited state restrictions on the travel of free blacks.[252] Senator Luke Poland of Vermont agreed, but noted that the clause had been unenforceable—and remained unenforceable—due to the

> radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, [which] led to a practical repudiation of the existing provision on this subject . . . .[253]

Rep. John M. Broomall of Pennsylvania argued that the amendment was necessary to protect "the rights and immunities of citizens" as they traveled in Southern states: "the right of speech, the right of transit, the right of domicil, the right to sue, the writ of *habeas corpus*, and the right of petition."[254]

Even opponents of the Amendment argued that it would require states to recognize citizenship status determinations made outside the state. For example, in opposing the protection of the privileges and immunities of United States citizens, Rep. Michael C. Kerr of Indiana argued that doing so would "defy and set aside the right of each State, in the exercise of its

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251. *Id.* (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 423 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

252. *See id.* at 1082 (statement of Sen. Stewart).

253. *Id.* at 2961 (statement of Sen. Poland). Rep. William Higby of California argued that had the Privileges and Immunities Clause been enforced, "a citizen of New York would have been treated as a citizen in the State of South Carolina; a citizen of Massachusetts would have been regarded as a citizen in the State of Mississippi or Louisiana." *Id.* at 1054. South Carolina and Louisiana were notorious in the antebellum period for restricting the travel of Northern black sailors from seaboard states like Massachusetts and New York.

254. *Id.* at 1263 (statement of Rep. Broomall). Indeed, as Broomall noted, more was at stake than the rights of travelers; black northern citizens were not even accorded due process if apprehended in northern states by southern slaveowners. *See id.*

own judgment, to exclude certain persons from its boundaries, or to withhold from them certain civil rights."

> The people of the State may be convinced, no matter how firmly, that such classes are unfit to be admitted to live with them or to share full civil rights with them, or that their presence will tend to demoralize or to destroy their society and ultimately their institutions. But all this makes no difference. They have no right to have any opinions on these subjects. The sacred right of self-defense is to this extent surrendered by them and by the States to Congress.[255]

Kerr argued instead that the supporters of the Fourteenth Amendment had interpreted the Article IV Privileges and Immunities Clause incorrectly. Citizenship status, he argued, did not travel. A person "may have all the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges in any other State. . . . Such a citizen, removing to another State, is then entitled only to such privileges as are accorded by the laws of that State to persons of the *same class*."[256]

Kerr's argument identified a difficult line-drawing problem for Republicans. As in the antebellum period, the question of *which* classifications among foreign state citizens were forbidden was difficult to answer. The *reductio ad absurdum* posed repeatedly to Republicans was to explain how the amendment would not eliminate all distinctions drawn between women and men. For example, Rep. Robert S. Hale of New York challenged his fellow Republicans to explain how the amendment would permit Congress to abolish race discrimination but not sex discrimination:

> Take the case of the rights of married women; did any one ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women?[257]

Thaddeus Stevens responded that, as long as a state regulated within a certain classification equally, the amendment would not apply, but Stevens offered no principle that distinguished the two situations. If the Equal Protection Clause, Hale noted, means only that

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255. *Id.* at 1268 (statement of Rep. Kerr).

256. *Id.* at 1268–69 (statement of Rep. Kerr). Kerr's remarks occurred during debate over the Civil Rights Act of 1866.

257. *Id.* at 1064. Hale raised his objection in response to the Equal Protection Clause, but it applied equally to the understanding many legislators had of the Privileges and Immunities Clause, which among other things was intended to prohibit unequal treatment of foreign state citizens.

> [Y]ou shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.[258]

John Bingham, the drafter of the Privileges or Immunities Clause, offered a similar response to Hale: "[W]ho ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither?"[259] In other words, the ability of married women to own property was subject to state law. As long as the state law operated equally within all of the classifications it drew, there was no equal protection problem.[260]

None of the Republicans identified any principled way of determining which classifications were permitted and which were not. But Bingham's response hints at one possible answer for resolving the issue under the Privileges or Immunities Clause. The antebellum debate over Article IV focused on whether black northern citizens had to be accorded full citizenship rights in southern states, or could be given the rights that black southerners would get. In other words, the debate was about whether Massachusetts's decision to grant citizenship status to blacks traveled with them or was localized to Massachusetts. Bingham's response suggests that the prevalence of such state status determinations might determine whether a determination travels. Where a contrary status determination is rare or novel, then other states may be free to ignore it when individuals with that status visit the state, as a hypothetical property-owning married woman might have been in 1866. But if the contrary status is accorded by a substantial number of states, and that number is stable, then it is more akin to black citizenship. At that point, fellow states are no longer free to apply their own subclassifications and ignore the state status determination.

B. After Slaughter-House

The most vigorous debate today over the Fourteenth Amendment's Privileges or Immunities Clause concerns whether it was intended to be

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258. *Id.*

259. *Id.* at 1089.

260. Senator Howard responded to a similar question later in the year, concerning whether the extension of suffrage to blacks would lead to suffrage for women, that "there [i]s such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children were not regarded as the equals of men." *Id.* at 2767. But of course, many contemporaries said the same thing about blacks and whites.

the vessel by which Congress overturned *Barron v. Baltimore*[261] and made the protections in the Bill of Rights directly applicable against the states. Scholars, lawyers, and judges have long debated the mechanism by which some or all of the Bill of Rights have been "incorporated" into the restrictions imposed on states in Section 1 of the Amendment, and how to determine which rights are incorporated. Whatever the answer to those questions, the Supreme Court long ago took a different path.[262] In the *Slaughter-House Cases*,[263] the Supreme Court considered a claim by New Orleans butchers that a state-mandated slaughterhouse monopoly violated their privileges and immunities—specifically, the privilege of carrying on their trade as butchers. This presented exactly the situation that opponents of the Fourteenth Amendment warned about: the Privileges or Immunities Clause was being used to override ordinary state legislation.[264]

To avoid that conclusion, the majority opinion in *Slaughter-House* focused on the use of the phrase "citizens of the United States" in the Clause. The Privileges or Immunities Clause, Justice Miller noted, applied only to "citizens of the United States," not to citizens generally.[265] Miller held that this was a crucial distinction.[266] The court bifurcated American citizenship between state and national citizenship, each with its own rights and, presumably, obligations.[267] The core freedoms arose from state citizenship, not national citizenship.[268] The Fourteenth Amendment protected only such privileges and immunities that "owe their existence to the Federal government, its National character, its Constitution, or its laws."[269] As examples, the Court suggested the right to go to the seat of the national government, free access to seaports and navigable waterways, access to courts, and the writ of habeas corpus. "[F]or all the great purposes for which the Federal government was established," Justice Miller concluded, quoting Chief Justice Taney, "we are one people, with one common country, we are all citizens of the United States."[270]

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261. 32 U.S. (7 Pet.) 243 (1833).

262. The Court shows no signs of retracing its path any time soon. In *McDonald v. City of Chicago*, only one justice showed any interest in reversing *Slaughter-House*; the others brushed the suggestion aside. *See* 130 S. Ct. 3020, 3030–31 (2010) (plurality op. of Alito, J.) ("We see no need to reconsider that interpretation here."). In general, this Article assumes a common law approach, rather than an originalist approach, to constitutional interpretation. Although it is not dispositive, history matters, and *Slaughter-House* is settled law.

263. 83 U.S. (16 Wall.) 36 (1873).

264. That is, the court held that the Louisiana law, which was ostensibly passed as a health and safety measure for the regulation of the slaughtering trade in a large city, was a core exercise of Louisiana's "police power." *Id.* at 62. The "police power" would soon become a key component of litigation over economic regulations.

265. *Id.* at 74.

266. *Id.* at 73–74.

267. *Id.* at 74.

268. *See id.* at 77.

269. *Id.* at 79.

270. *Id.*

The *Slaughter-House Cases* marked a turning point in the history of Reconstruction; they were the first in a series of decisions in which the Supreme Court scaled back the potential reach of the Reconstruction Amendments. *Slaughter-House* was the beginning of Reconstruction's Thermidor. Within the next several years, the Court held that the Fourteenth Amendment did not reach private actions that denied civil rights,[271] including conspiracies to use violence,[272] and the Compromise of 1877 ended congressional efforts to enforce Reconstruction in the South.[273] The Fourteenth Amendment remained largely dormant as a protector of individual rights until the 1930s.[274]

The *Slaughter-House Cases* certainly blunted the effectiveness of the Privileges or Immunities Clause as a tool in the later Civil Rights struggle. When that struggle began, litigants and the courts looked instead to the Equal Protection Clause and the Due Process Clause as doctrinal avenues for the protection of rights that had not been closed off. But there still remains some content to the Privileges or Immunities Clause after *Slaughter-House*. Although it has only been successfully invoked twice since 1873,[275] it still prohibits states from interfering with certain privileges of national citizenship, including a component of the right to travel: the right of migrants from other states "to be treated like other citizens of that State."[276]

The component of the Privileges or Immunities Clause discussed above fits into this residual category of rights still protected by the Clause. Preventing states from imposing idiosyncratic classifications on foreign state citizens not only protects those citizens as they travel, it also addresses the fundamental federalist problem of entrenched inconsistent status determinations. That is, it enforces the notion that "we are one people, with one common country,"[277] and one common citizenship. The death of the Privileges or Immunities Clause in *Slaughter-House* has therefore been exaggerated.

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271. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

272. *See* United States v. Cruikshank, 92 U.S. 542 (1876).

273. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 582 (1988) ("Among other things, 1877 marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens.").

274. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938) (failure to provide law school for black students violated duty to provide "equality of the privileges which the laws give to the separated groups within the State").

275. *See* Colgate v. Harvey, 296 U.S. 404 (1935) (differential taxation of in-state and out-of-state loan income violated Privileges or Immunities Clause), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940); Saenz v. Roe, 526 U.S. 489 (1999).

276. *Saenz*, 526 U.S. at 500. Philip Hamburger has recently concluded, as I do, that the antebellum debate over the rights of traveling free blacks is significant in determining the meaning of the Privileges or Immunities Clause. *See* Hamburger, *supra* note 17. However, Hamburger concludes that equality for travelers was *all* the Clause was intended to do—an interpretation *Slaughter-House* itself rejects by giving some (although slight) substantive content to the Clause.

277. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

IV. THE REEMERGENCE OF A STATUS REGIME CONFLICT

The resurrection of the Privileges or Immunities Clause could not come at a more opportune time. Another status regime conflict—over same-sex marriages—is beginning to emerge. Like the Missouri debate before it, the debate over same-sex marriages bears the hallmarks of an emerging status regime conflict. It comes as a postrevolutionary generation works out the full implications of the universalistic statements of the recent past. In our case, the recent revolution is the Civil Rights Movement. The Civil Rights Movement is likely the single most important development in American political and legal culture in the twentieth century. Certainly the most famous Supreme Court case during the past century is *Brown v. Board of Education*.[278] If the antebellum debates over slavery primarily concerned whether states could maintain a caste system that stripped Americans of the privileges of citizenship according to race, *Brown* and the Civil Rights Movement stood for the principle that states could not even indirectly enforce such subordination through the operation of the law.

Still, when the Civil Rights Movement began, it was not immediately anticipated that its principles would spread far beyond its original contextual bounds: equality under the law for southern blacks. Since *Brown*, however, a web of egalitarian principles has been spun of uncertain dimension. Once restricted to blacks and to education, the principles have stretched to embrace women, Hispanics, Indians, employment opportunities, the rights of the accused, matters of privacy, and much more. The key principle in this cultural revolution has been individual and group equality, as encoded in law by the Equal Protection Clause and the Due Process Clause. Important fights have therefore occurred over exactly which persons and rights are covered by these clauses, and to what extent.[279]

As Americans have moved beyond the original generation that experienced the Civil Rights Movement, they have met difficult and unanticipated problems in applying formal, legal equality to all groups while maintaining an effective status regime. As free blacks were in the antebellum period, so gays and lesbians are now—people who, by their very existence, challenge existing structures and test the limits of universalistic principles. At the same time, the ability of the federal system to absorb

278. 347 U.S. 483 (1954).

279. Women, for example, are covered, but only to the extent that discriminatory laws fail to have a substantial relationship to an important governmental interest. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). Homosexuals, so far, are only covered inasmuch as anyone else is covered—against irrational classifications. The Court has held that mere dislike of homosexuals is not a rational basis for legislation. *See* Romer v. Evans, 517 U.S. 620 (1996); *see also* Bowers v. Hardwick, 478 U.S. 186, 196 n.8 (1986) (declining to consider Equal Protection question).

small disturbances in status judgments has decreased over time. The federal government is now a major factor in the lives of ordinary citizens, much more so than state or local governments; federal courts stand ready in nearly every city to pronounce the rights of citizens anywhere and, consequently, everywhere. Informal structures have also become more intertwined: a tight national community has emerged, unified by fast travel, extreme mobility, and mass media. The result is that a change of status in one of the states would spread with the next flight out of the local airport. If that status is supported by the laws of the state, and the unifying clauses of Article IV are read strictly, a collision between the law and the social structures of other states could happen instantaneously.

The legal system is, thus, presently perched on a narrow point of compromise between broad legal principles and social reality. Like the Founders who recognized, theoretically, only one class of citizen, yet wished to distinguish between citizens, modern Americans avow that all groups should have formal equality under the law, yet still wish to preserve the law's support for the most important discriminating aspects of the social system under which they live. Explicit judgments encoding social norms concerning gender, for example, are recognized to contradict the principle of formal group equality.[280] As a result, the system has no principled bases on which to uphold the more central discriminating norms. This means that the legal system will be perpetually challenged to defend weak claims until the discrepancy is resolved. And, as with the antebellum debate over the rights of free blacks, the debate over same-sex marriages will take refuge, at least for a time, in the nebula of federalism.

In this Part, the first Subpart identifies the possible reemergence of a status regime conflict over same-sex marriages. Unlike the first status regime conflict, however, this time the Constitution contains a potential work-around for the problem: the Privileges or Immunities Clause. The second Subpart explains how the Privileges or Immunities Clause, more than any other provision in the Constitution, addresses the problem of status regime conflicts, despite limiting decisions such as *Slaughter-House*.

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280. *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971). The *Diaz* court held:

> "While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices [Title VII] was meant to overcome."

Id. at 389. Ironically, prisoners' "preferences and prejudices" get more deference from the federal courts than customers' do. *See* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) ("There would . . . be a real risk that . . . inmates . . . would assault women guards because they were women.").

A. Same-Sex Marriage and Gender Norms

Like the antebellum debate over free blacks, the debate over same-sex marriage is occurring at a time of flux in the way status is accorded. The early nineteenth century was the time period when the racial caste system flourished in the South and adamant opposition to slavery swept the North. The norms challenged by same-sex marriages—and by acceptance of gays and lesbians in general—are traditional gender norms.

Gender is of critical importance in making status determinations. Of all categories humans use to classify each other, gender is the single most salient class. Studies have shown that subjects will remember the gender of an individual they encountered more often than any other trait, such as age, race, occupation, or name.[281] Not only do people notice an individual's gender, but they will make immediate judgments based on that gender and have been trained to do so since infancy. From the moment a person is born, he or she is trained to exhibit and recognize the appropriate behaviors for his or her gender.[282] Parents and others impart this knowledge without even realizing it.[283] Children quickly pick up on these cues; by age two, although only having a vocabulary of roughly twenty-nine words and relatively primitive cognitive functioning, children can correctly describe their own gender and "can select gender-associated toys and future occupations at greater than chance levels."[284]

By the time children reach adulthood, gender-based norms are a pervasive and critical part of their self-identity. As one psychologist has explained, "If one had to predict a person's life course on the basis of a sin-

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281. *See* Alan Page Fiske et al., *Confusing One Person with Another: What Errors Reveal About the Elementary Forms of Social Relations*, 60 J. PERSONALITY & SOC. PSYCHOL. 656 (1991); Kathleen E. Grady, *Androgyny Reconsidered*, *in* PSYCHOLOGY OF WOMEN 172 (J.H. Williams ed., 1979).

282. *See* Phyllis A. Katz, *Gender Identity: Development & Consequences*, *in* THE SOCIAL PSYCHOLOGY OF FEMALE-MALE RELATIONS 21, 41 (Richard D. Ashmore & Frances K. Del Boca eds., 1986); Eleanor E. Maccoby & Carol Nagy Jacklin, *Gender Segregation in Childhood*, *in* 20 ADVANCES IN CHILD DEVELOPMENT & BEHAVIOR 239, 239–88 (Hayne W. Reese ed. 1987); LISA A. SERBIN ET AL., THE DEVELOPMENT OF SEX TYPING IN MIDDLE CHILDHOOD (1993). As one researcher has concluded, "It is inarguable . . . that gender is one of the earliest and most central components of the self concept and serves as an organizing principle through which many experiences and perceptions of self and other are filtered." Janet T. Spence, *Gender Identity and Its Implications for Concepts of Masculinity and Femininity*, *in* NEBRASKA SYMPOSIUM ON MOTIVATION: PSYCHOLOGY AND GENDER 59–96 (T.B. Sonderegger ed., 1985).

283. For example, in one well-known study, subjects were asked to evaluate the videotaped reactions of a nine-month-old child startled by a jack-in-the-box. Half the subjects were told the child was male, the other half female. More of those who were told that the child was male believed its reaction to the jack-in-the-box to be "anger;" more of those told the child was female believed the child to be "frightened." *See* John Condry & Sandra Condry, *Sex Differences: A Study of the Eye of the Beholder*, 47 CHILD DEV. 812 (1976); *see also* John C. Condry & David F. Ross, *Sex and Aggression: The Influence of Gender Label on the Perception of Aggression in Children*, 56 CHILD DEV. 225 (1985). This may explain the discomfort and confusion many adults experience when interacting with a child whose gender is not immediately apparent. *See* Katz, *supra* note 282, at 30.

284. *See* Katz, *supra* note 282, at 22; *see also id.* at 34–35.

gle attribute, the best choice would probably be gender."[285] Gender norms prescribe how one is supposed to act, dress, and talk; who one should associate with, and how; and where one's talents should lie.[286] Those norms are enforced in the same way as other social norms: through primarily informal sanctions meant to increase or decrease the target's status according to how well the target plays by the rules.[287] While not everyone may be active in policing gender boundaries, individuals who are more strongly attached to the existing status regime in a group or community will tend to be more active in enforcing it, including norms against homosexuality.[288] Enforcement techniques can range from gossip, insults, and other nonphysical shaming mechanisms, to physical violence.[289]

An important part of gender norms governs appropriate behavior in interacting with other individuals of either the same sex or the opposite sex. Part of what it means to be male under the current status regime is to be attracted to females, and not males, and vice versa for women. Some of these relationships receive formal recognition from the state in the form of marriage. Homosexual men and women, just by their very existence, challenge that structure. Two developments have exacerbated that tension in recent years, both the result of the changes wrought by the Civil Rights Movement in the twentieth century. First, gender norms in general have

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285. *Id.* at 21.

286. Gender is not necessarily the basis for ascriptions of high or low status per se; rather, gender norms prescribe rules, with high status as a reward for following the rules. *See* Richard D. Ashmore et al., *Gender Stereotypes*, *in* THE SOCIAL PSYCHOLOGY OF FEMALE-MALE RELATIONS, *supra* note 280, at 69, 99–101; Frances K. Del Boca et al., *Gender-Related Attitudes*, *in* SOCIAL PSYCHOLOGY OF FEMALE-MALE RELATIONS, *supra* note 280, at 121, 124–25.

287. Status is accorded by both members of the same sex and members of the opposite sex. For cross-sex harassment, see the activities described in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); for same-sex enforcement, see *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).

288. *See* L.A. Kohlberg, *A Cognitive-Developmental Analysis of Children's Sex-Role Concepts and Attitudes*, *in* THE DEVELOPMENT OF SEX DIFFERENCES 82 (E.E. Maccoby ed., 1966); Deborrah E.S. Frable, *Sex Typing and Gender Ideology: Two Facets of the Individual's Gender Psychology that Go Together,* 56 J. PERSONALITY & SOC. PSYCHOL. 95 (1989); Alan Taylor, *Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals*, 9 J. HOMOSEXUALITY, no. 1, 1983 at 37.

289. In extreme situations, norm-enforcing, extra-legal violence can reach ritualistic proportions. Victims of anti-gay violence are "more apt to be stabbed a dozen or more times, mutilated, *and* strangled[, and i]n a number of instances stabbed or mutilated after being fatally shot." Brian Miller & Laud Humphreys, *Lifestyles and Violence: Homosexual Victims of Assault and Murder*, 3 QUALITATIVE SOC. 169, 179 (1980); *see also* GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 47 (1991) (quoting Miller & Humphreys). As Kenji Yoshino has noted, there seems to be more to such violence than a desire to do simple physical harm. "The lesson of the body that needs to be stabbed even after such stabbings have rendered it a corpse is that homosexuality, like a disease, may leave its traces in the body even after life has passed out of it . . . ." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1825 (1996). Such attacks resemble those against blacks in the post-Civil War era, described in Charles L Flynn, Jr., *The Ancient Pedigree of Violent Repression: Georgia's Klan as a Folk Movement*, *in* THE SOUTHERN ENIGMA: ESSAYS ON RACE, CLASS, AND FOLK CULTURE 189 (Walter J. Fraser Jr. & Winfred B. Moore Jr. eds., 1983).

undergone significant change in the last forty years; women are now much more economically independent and are prevalent, if still underrepresented, in many workplaces in positions of authority. The norms governing appropriate behavior for men and women have similarly shifted enormously and are still in flux. Second, the ideal of the Civil Rights Movement, that all groups should be treated equally and have equal opportunities, is driving both the longstanding push for gender equality and the more recent effort to eliminate discrimination based on sexual orientation, which is the source of the same-sex marriage effort.

Same-sex marriages, where they are recognized, formalize a new and starkly different status regime from the one described above: one in which homosexual relationships are formally accorded as much respect by the state and society as heterosexual relationships. This undermines norms and status determinations that rely on the low status of homosexuality and on certain norms of behavior for interactions between members of the same or opposite sexes—for example, that romantic behavior is appropriate only towards certain members of the opposite sex in certain situations.[290] Although same-sex marriage is not the most direct challenge possible to these norms,[291] it still threatens a large shift with attendant uncertainty about the consequences.[292] The endorsement of the state makes this change not only more visible but potentially irreversible.

B. The Defense of Marriage Act

The emergence of same-sex marriage as a status regime conflict can be detected, as it was before, in an extended congressional debate that occurred as tensions began to rise. That debate occurred in 1996, when Congress attempted to stem the tide of legalized same-sex marriage in the United States by passing the Defense of Marriage Act (DOMA). The law was a response to a 1993 Hawaii decision holding that the state's refusal to

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290. There is a large and complex web of norms governing romantic relationships, only some of which deal with gender.

291. Although far-fetched, an even more direct challenge would be to simply ban, or informally shame, opposite-sex relationships altogether.

292. The uncertainty comes from any shift in a status regime. *See* Natalie S. Glance & Bernardo A. Huberman, *The Dynamics of Social Dilemmas*, SCI. AM., Mar. 1994, at 76, 78–79. Part of the fear of uncertainty stems from the fact that norm adoption is a long-term investment, which deters even liberally-minded parents from teaching their children nonstandard gender norms. Parents do not want their children to become early adopters of a status regime that fails. *See* Katz, *supra* note 280, at 49. To put it in terms of technology adoption, parents considering whether to teach their children a nonstandard gender ideology do not know in advance whether they are investing in DVDs or 8-track cassettes. Opponents of same-sex marriage in Maine appear to have successfully tapped into this uncertainty with advertisements claiming that if same-sex marriage became legal, homosexuality would be taught in schools. David Sharp, *Gay Marriage Foes Win With Message About Schools*, VENTURA COUNTY STAR, Nov. 6, 2009, *available at* http:// www.vcstar.com/ news/ 2009/ nov/ 06/ gay-marriage-foes-win-with-message-about-schools/.

grant same-sex marriages was sex discrimination which needed to pass strict scrutiny.[293] The prospect that Hawaii would soon grant marriages to same-sex couples exposed an assumed, but not formalized, norm governing marriage—that it was available only for heterosexual relationships.

The prospect that the Supreme Court of Hawaii would compel the state to recognize same-sex marriages set off a storm of anxiety throughout the rest of the nation. If same-sex marriages became legal in one state, they could potentially "travel" to other states by way of the unifying clauses of Article IV—in this case, the Full Faith and Credit Clause. The mere possibility of legally recognized homosexual relationships sent states scrambling for legal cover by passing statutes that affirmatively declared that marriage in their states could only take place between men and women.[294] Congress joined in the scramble by considering a law that would restrict the impact of the Full Faith and Credit Clause. Under the portion of the Clause giving Congress the power to prescribe the "Effect" of full faith and credit, Congress has decided it has the power to prescribe no effect at all for same-sex marriages.

The debate over DOMA in Congress bears all of the hallmarks of a status regime conflict. First, it involved an attempt to apply universal rhetoric beyond implied boundaries. Second, there were claims that the ability to draw all status distinctions would disappear. Third, the challenge to the existing status regime was portrayed as an insult. And finally, resistance to the change was justified as self-defense.

First, the debate over same-sex marriage reveals a conflict between the rhetoric of equality that emerged from the Civil Rights Movement and a presumption of privileged heterosexual status. That presumption explained the fact that many states did not formally limit marriage to heterosexual couples. Members of Congress in 1996 revealed the assumptions underlying the prevailing status regime by expressing their surprise that same-sex marriage was even conceivable. "It is incomprehensible to me," Senator Robert Byrd of West Virginia declared, "that federal legislation would be needed to provide a definition of two terms that for thousands of years have been perfectly clear and unquestioned."[295] Not only was it incompre-

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293. *See* Baehr v. Lewin, 852 P.2d 44, *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). On remand, shortly after DOMA passed, the lower court held that Hawaii could show no compelling government interest in denying same-sex couples the right to marry. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The decision was appealed, and the Hawaii Supreme Court would likely have upheld the Circuit Court's decision. However, in 1998 Hawaii's voters ratified a constitutional amendment giving the state legislature the power to reserve marriage to opposite-sex couples. *See* 1997 Haw. Sess. Laws H.B. 117 § 2, at 1247 (proposing HAW. CONST. art. I, § 23). The Hawaii Supreme Court then rejected the challenge to the state marriage law. Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Dec. 9, 1999).

294. Forty states have passed such laws, either as statutes or as constitutional amendments. *See supra* notes 36–37.

295. 142 CONG. REC. S10,108 (daily ed. Sept. 10, 1996); *see also Defense of Marriage Act: Hear-*

hensible, it was threatening. "It is a sign of the times," Senator Dan Coats of Indiana railed, "and an indication of a deep moral confusion."[296]

Proponents of the bill were more than puzzled by same-sex marriage; they were indignant that any state was considering granting the status of marriage to gay and lesbian couples. That is, they found the concept insulting. Representative Bob Barr declared that if someone had told him that the 104th Congress would have to pass a law defining marriage, "I probably would have said they were crazy. This is America. This is America."[297] Senator Jesse Helms of North Carolina attributed the problem to the weakness of courts and legislatures in the face of advocacy groups. "[I]nch by inch, little by little," Senator Helms grumbled, "the homosexual lobby has chipped away at the moral stamina of some of America's courts and some legislators, in order to create the shaky ground that exists today that prompts this legislation . . . ."[298] Senator Byrd argued that the push for same-sex marriages had taken the notion of equality too far; in his view, it

> reflect[ed] a demand for political correctness that has gone berserk. We live in an era in which tolerance has progressed beyond a mere call for acceptance and crossed over to become a demand for the rest of us to give up beliefs that we revere and hold most dear in order to prove our collective purity. At some point, a line must be drawn by rational men and women who are willing to say, "Enough!"[299]

As Senator Byrd's words indicate, there was also a strong undercurrent in the debate, evident in the title of the bill, that something like the Defense of Marriage Act was necessary as a matter of self-defense. Like adherents of many challenged status regimes before them, members of Congress argued that stopping same-sex marriage was essential for "self-

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ing on S. 1740 Before the S. Comm. on the Judiciary, 104th Cong. 18 (1996) (statement of Gary L. Bauer, President, Family Research Council); *Defense of Marriage Act: Hearing on H.R. 3396 Before the H. Comm. on the Judiciary*, 104th Cong. 90 (1996) (statement of Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College); 142 CONG. REC. S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Faircloth); *id.* at H7442 (daily ed. July 11, 1996) (statement of Rep. Hutchinson).

296. 142 CONG. REC. S4948 (daily ed. May 9, 1996); *see also id.* at S10,068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms); *id.* at S10,114 (daily ed. Sept. 10, 1996) (statement of Sen. Thurmond); *id.* at S10,104 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles); *id.* at S10,114 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

297. *Id.* at H7444 (daily ed. July 11, 1996).

298. *Id.* at S10,068 (daily ed. Sept. 9, 1996). At least one Supreme Court Justice takes a similar view. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.").

299. 142 CONG. REC. S10,110 (daily ed. Sept. 10, 1996).

preservation for our society."[300] Proponents supported the bill as a reasonable response to "force"—being forced, that is, to recognize status judgments incompatible with the current regime.[301]

Finally, DOMA's supporters argued, much like the defenders of exclusion of free blacks in 1821, that norms discouraging same-sex relationships were a lynchpin of the existing status regime. Remove it, several members of Congress suggested, and the entire system will collapse—not just the system of gender norms, but, as Robert Byrd claimed, *all* norms.[302] Several members stated their belief that allowing married homosexuals to enter their states would destroy marriage in their states. And "if marriage goes," Representative Jim Talent of Missouri continued, "then the family goes, and if the family goes, we have none of the decency or ordered liberty which Americans have been brought up to enjoy and to appreciate."[303] Similarly, Senator Byrd argued that if legal codes were not able to reinforce line-drawing between same-sex and opposite-sex couples, it would "make a mockery of those codes themselves."[304] It would force, in the words of one advocate before the Senate Judiciary Committee, those who wished to retain the old status hierarchy to operate "outside the civil

300. *Id.* at S4948 (daily ed. May 9, 1996) (statement of Sen. Coats); *id.* at H7275 (statement of Rep. Barr) ("We have a basic institution, an institution basic not only to this country's foundation and to its survival but to every Western civilization, under direct assault by homosexual extremists all across this country, not just in Hawaii."); *id.* at H7444 (daily ed. July 11, 1996) (statement of Rep. Barr) (similar); *see also id.* at S10,068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms) (suggesting that DOMA necessary to defend America against homosexuals bent on its destruction).

301. Almost every supporter of the bill claimed some version of "resisting force" as a reason in favor of the bill. *See, e.g.*, *id.* at H10,114 (daily ed. Sept. 10, 1996) (statement of Sen. Thurmond) ("I can say without reservation that the fine people in my home State of South Carolina should not face the possibility of being forced to legally recognize same-sex marriages."); *id.* at S10,101 (daily ed. Sept. 10, 1996) (statement of Sen. Lott) ("To force upon our communities the legal recognition of same-sex marriage would be social engineering beyond anything in the American experience."); *id.* at H7445 (daily ed. July 11, 1996) (statement of Rep. Barr) ("It simply says, this is the status quo and no one State of the Union can have its decision of its people overridden, run roughshod by people from judges from another State."); *id.* at H7446 (daily ed. July 11, 1996) (statement of Rep. Talent) ("We are saying that the States should not be forced to give the imprimatur of legal sanction to those kinds of relationships . . . ."). Even some opponents of the bill stated that they only did so because they thought the existing status hierarchies could be enforced without recourse to federal legislation. *See id.* at S10,118 (daily ed. Sept. 10, 1996) (statement of Sen. Feinstein) ("I would be the first to say, that, if one State decides to recognize same-sex marriages, and if any other State is forced to recognize same-sex marriages against their own public policy as a result, then Federal legislation would be a reasonable course of action."). For the equivalent antebellum position, see *supra* note 107.

302. *See* 142 CONG. REC. S10,111 (daily ed. Sept. 10, 1996). Then-Senator John Ashcroft even implied that, if same-sex marriages were recognized, there might be no children in the future. *See id.* at S10,121 (daily ed. Sept. 10, 1996) ("[I]f you don't have children who grow up to be in the work force, who pays for the retirement of those who have already retired?").

303. *Id.* at H7446 (daily ed. July 11, 1996).

304. *Id.* at S10,110 (daily ed. Sept. 10, 1996).

law."[305] It would prevent the law from enforcing the "sign posts . . . for responsible behavior" under the current regime.[306]

Any heated debate over a policy matter features florid rhetoric by legislators. What is significant in the debate over the Defense of Marriage Act is the use of not just heated rhetoric but heated rhetoric of a certain kind, deploying the same tropes that were used in the antebellum debate over free blacks. Then, as now, those debates occurred in the midst of changing norms governing the behavior of individuals of a certain type—blacks and whites then, men and women now—and the emergence of increasing polarization between state societies as a result.

Unlike the debates over Missouri in 1820–1821, there was little opposition to the Defense of Marriage Act. It passed by overwhelming majorities in both houses, 85–14 in the Senate and 342–67 in the House, and was signed into law by President Clinton. Although attitudes toward same-sex marriage have shifted somewhat since 1996, many of the most vocal participants in the debate are still in Congress, and there has been little change in the *substance* of the arguments against same-sex marriage recognition. Quite apart from Congress, there is still deep resistance in many states to recognizing such marriages as valid. Spreading acceptance of same-sex marriages in some states accompanied by vehement rejection in other states threatens to create another status regime conflict irresolvable at the national level.

C. The Privileges or Immunities Clause Rides Again

The Reconstruction Amendments were passed to ensure that the sociolegal status of citizenship followed black Americans wherever they went. Status determinations by and large remained the province of the states, not the federal government,[307] but boundaries were set beyond which no state could travel. Thus, slavery was abolished, ending forty-five years of debate, and, overruling *Dred Scott*, all persons born in the United States were made citizens of both their state of residence and of the United States.[308] In a final resolution of the Missouri and Seamen's Act controversies over free blacks, the Fourteenth Amendment prohibited any state from abridging "the privileges or immunities of citizens of the United States."[309] The Reconstruction Amendments also prohibited any state from denying

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305. *Defense of Marriage Act: Hearing on S.1740 Before the S. Comm. on the Judiciary*, 104th Cong. 18 (1996) (statement of Gary L. Bauer, President, Family Research Council).

306. 142 CONG. REC. S4947 (daily ed. May 9, 1996) (statement of Sen. Coats); *see also id.* at H7447 (daily ed. July 11, 1996) (statement of Rep. Canady).

307. *See* Civil Rights Cases, 109 U.S. 3, 11 (1883).

308. *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV, § 1.

309. U.S. CONST. amend. XIV, § 1.

any person due process of law, the equal protection of the laws, or the right to vote.

Despite the evident goal of the Reconstruction Amendments in resolving the debates that produced the Civil War, the Supreme Court and legal commentators still underestimate the importance of the Amendments' role in governing status regulations. The conventional view is that the function of the Reconstruction Amendments, in particular the Equal Protection and Due Process Clauses, is to protect individuals, by barring certain types of government actions—those that make suspect classifications or that abridge fundamental rights—rather than provide the unification method only hinted at in Article IV.

But that view of the amendments misses the way in which the amendments, through the Privileges or Immunities Clause, address a crucial structural flaw in the original Constitution. It is the Privileges or Immunities Clause, more than any other provision, that prevents the very sort of conflict that led to the Civil War: a status regime conflict between states. Since states still govern (for the most part) the status of individuals through laws covering marriage, the family, education, crimes, and so on, and since the Equal Protection Clause has been held to apply strict or intermediate scrutiny (which is to say, practically speaking, any scrutiny)[310] only to a set list of possible targets of discrimination, a serious status regime conflict over a group not on the list will escape the Court's equal protection radar.

The Privileges or Immunities Clause is not the exclusive solution to such a conflict. An alternative solution might be simply to add sexual orientation to the list of suspect classifications under the Equal Protection Clause. The problem with this solution, however, is that the Court lacks a theory of change in equal protection. That is, there are no standards telling the Court how to determine if the number of suspect classifications has increased or decreased over time as a result of changes in society. The Court's only version of such a theory was expressed in a footnote over seventy years ago: the famous footnote 4 in *United States v. Carolene Products Co*.[311] Ostensibly, the *Carolene Products* footnote offers a theory: the Equal Protection Clause combats discrimination based on "immutable characteristics" that identify "discrete and insular minorities."[312] As characteristics wax and wane as the target of discrimination, or as various minorities become more or less "discrete and insular," the classifications subject to heightened review under the Equal Protection Clause should also shift.

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310. *But see* Romer v. Evans, 517 U.S. 620 (1996) (overturning a state constitutional amendment on rational basis review).

311. 304 U.S. 144, 152 n.4 (1938).

312. *Id.*

But the *Carolene Products* theory, as is well known, is inadequate in explaining the actual content of equal protection doctrine. First, while often cited, the factors set out in *Carolene Products* are underinclusive. For example, religious classifications are suspect, but religion is hardly an "immutable characteristic." Even sexual orientation is not as immutable as might initially appear, regardless of whether it is genetically determined or not. As discussed above, the most visible aspects of sexual orientation are behaviors—behaviors directed at other individuals. Behavior can be masked in a way that other characteristics cannot—gay and lesbian individuals can, with effort, "cover" their identities.[313] A theory of change based on "immutable characteristics" might not reach sexual orientation no matter how much social change occurs.

Second, the Court has demonstrated its reluctance to add classifications to the list or to revisit the decisions it has made in the past. The Court's hesitancy to engage in a direct assessment of the propriety of a status injury is understandable, if much lamented. The Equal Protection Clause cannot protect against all status injuries, just as it cannot protect against all classifications. There are just too many, and most are legitimate. Thus, there must be some way of distinguishing between proper status determinations resulting from state action and improper status determinations, and if the line moves over time, there must be some way of determining when a given set of status determinations has crossed the line from proper to improper. Although the Fourteenth Amendment was intended by its framers to be anti-caste legislation, and although castes change, there appear to be few nonsubjective ways of determining when change has occurred. In fixating on classifications based on characteristics that it seems unfair to ask an individual to change, the Court has adopted a set of *proxies* for unfair status injuries. But it has no way of stepping behind the curtain to evaluate the harm of the status injury itself.

At least initially, the Court showed some inclination to engage in such an analysis. The status impact of state-mandated school segregation was the basis for the decision in *Brown v. Board of Education* and the specific ground on which *Plessy v. Ferguson* was overruled. *Loving v. Virginia*,[314] which struck down laws banning interracial marriages, depended on a similar finding. Virginia defended its law on the theory that there was in fact no disparate treatment under the law: both blacks and whites were equally punished for marrying each other.[315] The Court rejected this argument, holding that Virginia could not escape the obvious social meaning of its law: "[T]he racial classifications must stand on their own justification, as

313. *See generally* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).
314. 388 U.S. 1 (1967).
315. *See id.* at 10.

measures designed to maintain White Supremacy."[316] The high-water mark of conducting a contextual assessment of the status impact of state action probably came early on, in *Hernandez v. Texas*:[317]

> [C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.[318]

The *Hernandez* inquiry relegates all questions of whether equal protection has been denied to "a question of fact," thus providing very few constraints on the judge or jury making that decision.[319]

Since the mid-1970s, however, the Court has been increasingly reluctant to conduct a highly particularized inquiry into whether an alleged status injury is improper or not. Instead, the inquiry has hardened into a set of rules for identifying situations in which status determinations are likely improper—suspect classifications.[320] As Justice Powell explained in *Bakke*,

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316. *Id.* at 11. Although the Court may be reluctant to admit it, Title VII sexual harassment law appears to similarly depend on such considerations of context and status. The Court has declared that a Title VII plaintiff need not demonstrate "economic" or "tangible" discrimination, *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986), nor does such a plaintiff have to show a detrimental effect on his or her "psychological well-being," Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). The Court has not specified what injury *is* necessary, but seems to have left one remaining possibility: harassment is illegal when it creates an intolerable status injury to women, one that "'alter[s] the conditions of the victim's employment.'" *Id.* at 21, (quoting *Meritor*, 477 U.S. at 67). This conclusion is supported by the Court's repeated reference to the fact that the harm of sexual harassment results from "'discriminatory intimidation, ridicule, and insult'"—actions intended to injure a person's honor, to decrease that person's status in the community. *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 65).

317. 347 U.S. 475 (1954).

318. *Id.* at 478.

319. *Id.*

320. Outside of such a classification, the Court has been hesitant to recognize equal protection violations. *See, e.g.*, City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) (city's decision to close street connecting racially segregated neighborhoods a mere traffic regulation that constitutes one of the "routine burden[s] of citizenship"); Allen v. Wright, 468 U.S. 737, 755 (1984) (plaintiffs lacked standing to challenge segregation effects of granting tax-exempt status to racially discriminatory private schools when they were not "personally denied equal treatment") (quoting Heckler v. Mathews, 465 U.S. 728, 40 (1984)).

In *Paul v. Davis*, 424 U.S. 693 (1976), the Court rejected the plaintiff's § 1983 claim that his reputation had been injured by government action. The Court held that the plaintiff had no liberty or property interest in his status and therefore a mere status injury could not state a claim under § 1983. The Court did so despite clear language to the contrary in *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971):

> The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of

the Court has been unable to find a "principled basis" for determining, on a rolling basis, which groups have suffered the requisite "prejudice and consequent harm" and which have not.[321] "The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable."[322] Making such heavily context-based determinations as the *Hernandez* Court seemed to approve would, Powell worried, cause "judicial scrutiny of classifications" to "vary with the ebb and flow of political forces."[323]

Indeed, the Court has recently backed away even from examining the effect of a classification to determine which side bears a status injury—the sort of analysis that was crucial to the holdings in *Brown* and *Loving*.[324] The presumption has instead been that *anyone* deprived of a benefit based on a suspect classification suffers not only the loss of that benefit, but also an improper status injury as well.[325]

In response to the growing challenge of equality for gay and lesbian individuals, and stymied by the hidebound nature of equal protection jurisprudence, the Court has tried to jury-rig a solution without disturbing the existing doctrinal framework. In *Romer v. Evans*,[326] the Court used the Equal Protection Clause to strike down a Colorado constitutional amendment banning local governments from prohibiting sexual-orientation discrimination, not because it discriminated against a suspect class, but because it displayed irrational animus toward a target group—which ostensi-

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> disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

Justice Rehnquist, writing for the majority in *Davis*, found implausibly that this language in *Constantineau* referred primarily to the plaintiff's deprivation of the ability to buy beer. *Davis*, 424 U.S. at 708–09.

321. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 296–97 (1978) (Powell, J., dissenting).

322. *Id.* at 297 (footnote omitted).

323. *Id.* at 298.

324. As Herbert Wechsler once noted, the Equal Protection Clause must require such a determination, or the Court's decision in *Brown* becomes inexplicable. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) ("Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?").

325. In *Adarand Constructors, Inc. v. Pena*, the Court struck down a federal program requiring minority set-asides in government contracting, holding that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U.S. 200, 229–30 (1995). And in recent Voting Rights Act cases, the Court has recognized an injury to white voters placed in a majority black district resulting from the use of race as a predominant factor in drawing the district. *See* Miller v. Johnson, 515 U.S. 900 (1995). "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 911–12 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

326. 517 U.S. 620 (1996).

bly could have been any group and just happened to be homosexuals. In *Lawrence v. Texas*,[327] the Court found that a Texas statute banning homosexual sodomy violated a liberty interest protected by the Due Process Clause—the interest in conducting consensual sexual activity between adults in the privacy of one's own home.[328]

It is possible that the Court could resolve some disputes involving sexual orientation discrimination by further extending the reasoning in these two cases. But it would be difficult to extend them far enough to resolve disputes over a formalized social status such as marriage. The long history of granting marriages only to heterosexual couples means that, without a theory of social change, it would be hard to explain how such a longstanding practice became suddenly irrational. And while the private nature of sexual activity was the focus in *Lawrence*, it seems unlikely that that liberty interest extends to legal recognition of the status of marriage.[329] It is the public nature of the status of marriage that is most beneficial to the recipients[330] and most disruptive to inconsistent status regimes.

Another possible resolution of the conflict would rely on the Full Faith and Credit Clause of the original Constitution. There are two conceivable outcomes under this clause: either ensuring that same-sex marriages travel or ensuring that they don't. Congress and several states have attempted to achieve the second outcome by passing state or federal Defense of Marriage Acts. The purpose of the state laws is to attempt to take advantage of a purported exemption to Full Faith and Credit where a foreign state act violates an important state public policy. In the federal DOMA, Congress attempted to use its power under the Full Faith and Credit Clause to "prescribe . . . the effect" of state "public acts, records, and judicial proceedings" by providing that same-sex marriages shall have no effect at all.[331]

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327. 539 U.S. 558 (2003).

328. *See id.* at 578.

329. *See id.* (case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"). Justice Scalia disagreed, *see id.* at 604 (Scalia, J., dissenting), and there is some support for extending *Lawrence* to same-sex marriage in the majority opinion, *see id.* at 573–74 (decision in *Bowers v. Hardwick* undermined by *Casey v. Planned Parenthood*, which "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . [and] family relationships"). However, if a choice of marriage partners is a fundamental right that cannot be overcome by any state interest in legislating morality, then Justice Scalia's criticism that *Lawrence* "effectively decrees the end of all morals legislation," including laws against bigamy, *id.* at 599 (Scalia, J., dissenting), has considerably more bite. The deprivation seems to be more related to the fact that same-sex couples cannot marry, rather than a broad-based interference with marriage choice.

330. Obviously living together in a home as a family is also beneficial—but marriage is no longer a prerequisite for such conduct.

331. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738C (2006). A different portion of the Act is under challenge in two lawsuits, *Massachusetts v. Dep't of Health & Human Serv.*, No. 1:09-11156-JLT (D. Mass. filed July 8, 2009); and *Gill v. Office of Pers. Mgmt.*, No. 1:09-cv-10309 (D. Mass. filed Mar. 3, 2009).

The Full Faith and Credit Clause has not been the subject of an excessive amount of litigation in the more than 200 years it has been in existence, and there are several unanswered questions concerning its correct interpretation. The Supreme Court has interpreted the Clause in a somewhat inconsistent way: that the Clause imposes a self-executing "iron law" of full faith and credit for foreign state judgments but imposes a considerably more flexible rule for "public acts"—that is, statutes.[332] The deference accorded "records" is unresolved, as are the boundaries of Congress's power under the Effects Clause.

Some scholars argue that neither state DOMAs nor the federal DOMA avoid the requirement to give full faith and credit to same-sex marriages performed in other states.[333] The full contours of this argument are beyond the scope of this Article. But briefly, some scholars claim that the "iron law" of full faith and credit was originally intended to apply to statutes[334] as well as judgments, or at least that there is no public policy exception for full faith and credit to statutes. The Full Faith and Credit Clause therefore overrides state laws and constitutional amendments that attempt to block enforcement of foreign state marriages. As for the federal Defense of Marriage Act, some argue that the first sentence of the Full Faith and Credit Clause sets a floor that Congress, in specifying the "effect" of an act, record, or proceeding, cannot go below.[335] That is, while Congress could legislate under the clause to provide some effect for same-sex marriages, it has no authority to specify *no* effect.

There are some difficulties with this line of argument. First, there is a long line of scholarship that suggests that the framers of the original Constitution understood the first portion of the Clause—requiring that "Full Faith and Credit . . . be given in each State to the Public Acts, Records, and judicial Proceedings of every other State"—to refer only to proving the content of foreign state judgments, records, and acts, which might seem trivial now but was a real problem in the eighteenth century.[336] Far from setting a floor, these scholars argue, the original design of the Full Faith and Credit Clause was to leave it entirely to Congress's determination what the substantive *effect* of a foreign state action might be on fellow

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332. *See, e.g.*, Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n of California, 306 U.S. 493, 500 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935).

333. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

334. There is some question whether marriage is more akin to an act, judgment, or record for purposes of the Full Faith and Credit Clause. When a foreign same-sex marriage is presented to a state's authorities, arguably that is a request to give recognition and effect to the foreign state law making same-sex marriages valid; it can also be a request to recognize and give effect to the marriage certificate issued by the foreign state's executive authorities.

335. Scott Rusky-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1461 (1997).

336. U.S. CONST. art. IV, § 1.

states through the Effects Clause.[337] The antebellum history of conflicts over traveling status determinations—both for free blacks and for slaveholders—provides some ambiguous support for this argument, at least insofar as the original meaning of the Full Faith and Credit Clause is important. There is little evidence that anyone argued that the Full Faith and Credit Clause operated as a self-executing requirement of interstate recognition during the antebellum period. Instead, the public policy exception to the norm of comity emerged during the antebellum era as an antislavery argument in the North and an anti-black-rights argument in the South. Part of the reason for the dearth of discussion of full faith and credit is probably due to the fact that federal constitutional law generally was an obscure and unfamiliar area of the law in the nineteenth century.[338] But, that is not by itself a sufficient explanation; as we have already seen, the Article IV Privileges and Immunities Clause was often invoked in such situations. It seems rather to have been the case that few presumed that the Full Faith and Credit Clause required adherence to foreign state actions.[339]

There is another problem with relying on the Full Faith and Credit Clause to require recognition of a new, and widely reviled, socio-legal status. The problem is that such a rule makes the system unstable. As participants in the congressional debate over DOMA noted, if the Full Faith and Credit Clause is self-executing and applies to same-sex marriages (or any other similarly boundary-pushing grants of legal status), then a change in the law of just one state creates, in effect, a new national rule, at least when residents of that state travel. The effect of such a rule would be that once one state grants a status other states find objectionable, it immediately becomes national.[340] Under most theories of constitutional interpretation, the effect of a rule should not have much formal significance in determining what the rule is.[341] But a rule that creates instability will lead decision-makers, such as judges, to attempt to find ways of mitigating its effect, such as recourse in other doctrines—for example, a "public policy" exception to full faith and credit.[342] That, combined with the historical and doctrinal difficulties noted above, may make full faith and credit for same-sex marriages a long, hard slog.

The constitutional concern in all of the above cases is that making the Equal Protection Clause, the substantive Due Process Clause, or the Full

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337. *See* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 264 (1998).

338. *See, e.g.*, Finkelman, *supra* note 76, at 237–39; Amar, *supra* note 13, at 1205.

339. This is not to rule out an argument that full faith and credit requires recognition of valid foreign-state same-sex marriages; it just makes the argument difficult under one popular mode of constitutional interpretation, that of originalism.

340. In other words, as Massachusetts goes, so goes the nation.

341. *See* Rusky-Kidd, *supra* note 334, at 1452–53.

342. *See* Kramer, *supra* note 333.

Faith and Credit Clause broad enough to reach changing status determinations such as same-sex marriage would have much wider ramifications—either it would open up potentially all status regulation to constitutional review or it would make a single state's social experiment effectively national. A dynamic system where small perturbations can produce large, even catastrophic changes is unstable.[343] Consider the two hillsides diagrammed below, each with a ball at rest halfway down the slope. In each case, the ball is perched at the same height above the valley below. But in Figure 1, the amount of force needed to push the ball over the small rise to the right is minimal, and the resulting change in its position would be drastic. By contrast, the ball in Figure 2 is much more insulated from small or even medium-sized disturbances; its resting point is therefore a much more stable position.

TWO HILLSIDES

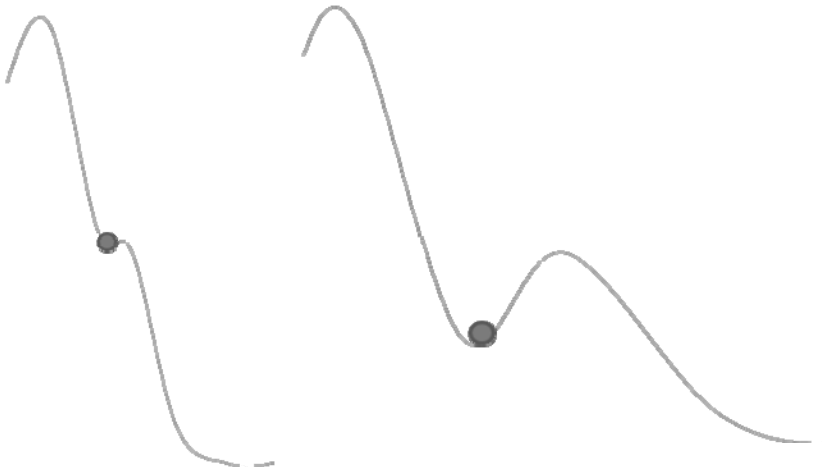

Figure 1: Unstable

Figure 2: More stable

Unlike a natural system, however, a legal system is run by intelligent agents who can respond to instability by making changes to the system. Thus, the most likely effect of a doctrine that introduces instability into the system is that judges and legislators will act to limit its reach. This response can be seen in both Equal Protection Clause and Full Faith and Credit Clause doctrine. The Equal Protection Clause is, for the most part, limited to a recognized set of suspect classifications. The Full Faith and Credit Clause has similarly been interpreted broadly when it comes to

343. In the language of complexity theory, such a system has achieved "criticality." M. MITCHELL WALDROP, COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS 304–05 (1992).

judgments—which involve the behavior of the particular parties before the court—but narrowly when it comes to laws, which can formalize status determinations that then travel to different states.

The framers of the Fourteenth Amendment provided a solution for this problem: the Privileges or Immunities Clause. One purpose of the Clause was to resolve the antebellum debate over the privileges and immunities to be accorded to black northern-state citizens as they traveled—privileges and immunities such as the right to enter a state, the right to do business there, or the right not to be thrown in jail arbitrarily. Those privileges and immunities were denied to black northern citizens on the basis of the state's refusal to recognize blacks as having the socio-legal status of state citizen—a distinction the state drew with respect to its own black residents. The Privileges or Immunities Clause bars that maneuver and requires recognition, at least where the refusal to recognize a foreign state status determination is similar to the entrenched antebellum conflict over free blacks—that is, a status regime conflict.

The Privileges or Immunities Clause thus acts as a sort of safety valve that activates when pressure in the federalist system reaches a certain threshold. Based on the history of the debates leading up to the clause, three interrelated factors will trigger this sort of Privileges or Immunities Clause protection. First, the conflict must involve citizens traveling between states. Second, the conflict has to involve a basic socio-legal status recognized throughout the United States. Third, that conflict must have produced a federalist crisis, with a significant number of states lining up on either side—that is, both granting the status and expressly refusing to grant the status to the affected group. With respect to same-sex marriage, the first two conditions for application of the Privileges or Immunities Clause are present, and the third is building to a boil.

First, the conflict must involve citizens traveling between states. That is because, post-*Slaughter-House*, the clause does little to regulate how a state treats its *own* citizens, but merely protects the rights of national citizenship at the residual core of the Privileges or Immunities Clause, such as the right to travel.[344] Like the Privileges and Immunities Clause of Article IV, the Fourteenth Amendment Privileges or Immunities Clause pro-

344. Most of the early cases raising the Privileges or Immunities Clause, including *Slaughter-House* itself, involve state citizens suing their own state for violation of their privileges and immunities. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). Such cases present most starkly the issue of the separation of powers between national and state governments. Even if *Slaughter-House* were someday to be overruled, the difficult line-drawing exercise that the *Slaughter-House* Court avoided would still need to be confronted: namely, providing federal oversight of fundamental freedoms without upending federalism entirely. One likely result if *Slaughter-House* is overturned is to limit the expansion of privileges or immunities of United States citizens to those listed in the Bill of Rights.

tects the right of U.S. citizens to be treated with respect as equal citizens in the states as they travel throughout the nation.[345]

The Supreme Court in *Saenz v. Roe* recently confirmed the relationship of the Privileges or Immunities Clause to the right to travel. The *Saenz* Court identified "*at least* three different components" to the right to travel, protected under different aspects of the Constitution.[346] The right to "cross state borders," expressly mentioned in the Articles of Confederation, the Court found to be at least implicit in the constitutional structure.[347] Second, under the Article IV Privileges and Immunities Clause, state citizens have the right not to be unjustly discriminated against when they travel to another state on the basis of their residence in another state.[348] Third, "newly arrived citizen[s]" in a state have a right to "the same privileges and immunities enjoyed by other citizens of the same State," protected by the migrant's "status as a citizen of the United States" under the Privileges or Immunities Clause.[349] A state cannot make distinctions among its citizens based on prior state residence.

The aspect of the right to travel under consideration here does not squarely fit within any of *Saenz*'s explicitly identified categories, but it is consistent with them. Article IV's right to travel protects the right of travelers from State A to be treated just like equivalently situated residents of State B. *Saenz*'s Fourteenth Amendment right to travel requires that recent immigrants from State A be treated just like long-term residents of State B. But an additional purpose of the Privileges or Immunities Clause was to prevent State B from refusing to recognize the legal status of certain citizens from State A, even when State A refused to apply that status to similarly situated State A residents. That is, in some circumstances, the Privileges or Immunities Clause limits the categories states can apply to travelers from other states. When the Radical Republicans in Congress suggested that the purpose of the Privileges or Immunities Clause was to bolster the Article IV Privileges and Immunities Clause, they had in mind controversies like the one over southern Seamen's Acts. The Fourteenth Amendment Privileges or Immunities Clause therefore bars, as part of its protection of the right to travel, states in certain circumstances from applying categories to travelers that they deploy against their own citizens.

The circumstances in which this additional protection is triggered are limited. Only a refusal to recognize a legal status awarded by another state would qualify. This is because only statuses "travel" with an individual. Behavior is localized in time and space, and laws or state actions govern-

345. *See* Saenz v. Roe, 526 U.S. 489, 501–02 (1999) (describing aspects of right to travel).
346. *Id.* at 500 (emphasis added).
347. *Id.* at 500–01.
348. *See id.* at 501–02.
349. *Id.* at 502.

ing such behavior are similarly rooted in certain spatio-temporal contexts.[350] Actions taken in State A that do not affect State B do not travel with a person when he or she passes through State B, and do not thereby suddenly change in valence. Statuses, however, are attached to persons, not events. A legal status granted to a person by State A *does* change as that person passes through State B where it is not recognized; the status is effectively nullified.

The privileges and immunities of citizens include the privileges and immunities associated with certain fundamental legal statuses that citizens are entitled to. Certainly such rights qualify under the definition of privileges and immunities propounded in *Corfield v. Coryell*,[351] accepted in 1866 as the leading authority on the meaning of "Privileges and Immunities of Citizens in the several States."[352] Under *Corfield*, the privileges and immunities mentioned in Article IV are the rights and freedoms that are universally accorded to citizens in every state:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[353]

The right to marry the person of one's choice qualifies under this definition. The fundamental "privileges and immunities of citizens in the several states" include generally rights to "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess proper-

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350. This is not to ignore the fact that behaviors can have "spillover effects," such that an act taken by a person in State A at time t has effects in State B at time $t+1$. Spillover effects can generate enormously complex conflicts of law and personal jurisdiction questions. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998). But even if it is true that a certain action or set of actions has cognizable effects in more than one jurisdiction, still those effects do not travel around with the actor herself. Nor is travel necessary for such spillover effects to occur. The regulation of behavior by states is thus importantly different from the regulation of legal statuses when it comes to travel.

351. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

352. U.S. CONST. art. IV, § 2; *see e.g.* Amar, *supra* note 13, at 1229; Harrison, *supra* note 17, at 1411. Kurt Lash has recently argued that a Maryland case, *Campbell v. Morris*, 3 H. & McH. 535 (Md. Ct. App. Gen. Ct. 1797), should be viewed as having established the more definitive antebellum reading of "privileges and immunities," one that is narrowly focused on equality and does not include any substantive component. *See* Lash, *supra* note 32, at 1250. However, as Richard Aynes has subsequently demonstrated, *Campbell v. Morris* is not nearly as strong an authority as *Corfield*, which among other things was cited numerous times during the congressional debate over the Fourteenth Amendment. *See* Richard L. Aynes, *Article IV and* Campbell v. Morris*: Wrong Judge, Wrong Court, Wrong Holding, and Wrong Conclusion?* (Univ. of Akron Legal Studies, Working Paper No. 09-13, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510809.

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

ty 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."[354] Marriage is a legal status granted by the state that enables both legal protection of a family unit and "the right . . . to pursue and obtain happiness and safety . . . ."[355] Furthermore, it is a right that is common to all states; the socio-legal status of marriage is both universally recognized and is given very similar substantive effect throughout the country.[356] Nor would such a reading of the phrase "privileges and immunities" anachronistically revive a historical relic; modern Supreme Court case law supports the notion that the right to choose who one wants to marry is a fundamental right protected by the Constitution.[357]

Slaughter-House and its progeny, of course, famously distinguished between privileges and immunities supported by state law and thus attributable to state citizenship, and privileges and immunities supported by federal law or the Constitution and thus attributable to United States citizenship. Only the latter, according to *Slaughter-House*, were protected by the Fourteenth Amendment. And that meant that the vast bulk of legal rights, defined and protected as they were by state laws, were beyond the scope of the Privileges or Immunities Clause. But, there is a federal component to this protection that persists even if most privileges and immunities are established by state law. Even if most privileges and immunities arise from state law, the right of travelers from other states to expect generally similar treatment as they travel is a right that "owe[s] [its] existence to the Federal government, its National character, its Constitution, or its laws."[358] That is, the *recognition* of citizens' privileges and immunities as they travel from state to state is itself a privilege of United States citizenship. There is a certain minimum amount of uniformity in the federal system, and the Privileges or Immunities Clause acts as a backstop when social change moves the system toward that threshold.

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354. *Id.* at 551–52.

355. *Id.*

356. Aside from the issue of same-sex marriages, there are minor differences in the qualifications for marriage, the procedures for getting married, and the rights and responsibilities that result. But to describe these differences as reflecting tremendous variations "in substance, procedures, and structures," *see* LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 27 (2d ed. 2006), ignores the enormous amount of similarity in marital status across the United States, or even throughout most democratic societies. No state recognizes three-person marriages, or requires dowries, or applies the doctrine of coverture. None require the slaughter of animals or certain dances as part of the ceremony. All recognize some obligation of support within, and after, the marriage, and all provide for relatively liberal divorce laws.

357. *See e.g.,* Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942).

358. *Slaughter-House*, 83 U.S. (16 Wall.) 36, 79 (1873). As Justice Jackson once noted, "it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing." Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

This aspect of the Privileges or Immunities Clause makes eminent sense given its historical context. The experience of the Civil War demonstrated that inherent in the federal system is a certain minimum amount of similarity in social systems. That general similarity between states is a privilege or immunity of being a United States citizen—the fact that the legal status determinations of one state will be respected in another. For example, suppose Texas abolished all recognition of marriages for Texans and visiting out-of-state residents alike. Even if Texas could do this for its own citizens, denying recognition of such a vital legal and social status would not only deter travel through Texas, it would threaten the social fabric of the nation. The Privileges or Immunities Clause was intended to address precisely this sort of situation. It would require recognition of the marriage rights of out-of-state citizens as part of their right to travel through the state.

Obviously there can be variations between the states; that is what it means to have a federal system. But when those variations threaten the stability of the overall system, as they did prior to the Civil War, the Privileges or Immunities Clause would be available as a remedy by placing an upper limit on the amount of divergence. This constitutional remedy is limited in scope. First, the conflict has to involve the privileges and immunities associated with some sort of legal status, one commonly recognized throughout the United States. As noted above, only a legal status can cause the requisite level of disruption when the rules for granting or recognizing it vary significantly. Furthermore, not just any legal status will do; in order to rise to the level of a privilege or immunity of United States citizens, the status in conflict must be one that would be significant to travelers. State citizenship, the subject of the antebellum conflict over privileges and immunities, would be one example; marriage is another.

There is an additional limit, consistent with the Clause's history, that can be placed on the Privileges or Immunities Clause to alleviate the *Slaughter-House* Court's concern. The federal right of status uniformity should apply only if a federalist crisis is imminent. Thus, even if a fundamental legal status is involved, not all variations in the rights associated with that status will trigger the Privileges or Immunities Clause. In the same way that the Equal Protection Clause offers the greatest protection against "suspect" classifications, and the Due Process Clause similarly protects fundamental rights, the Privileges or Immunities Clause operates at greatest force in the event of a status regime conflict, such as the one in the antebellum period. That is, the Privileges or Immunities Clause requires a state to refrain from applying in-state classifications with respect to a fundamental legal status to travelers when the legitimacy of that classification is the subject of a profound dispute between the legal systems of the various states.

This limitation would require courts to assess when a status regime conflict exists. Some of the factors used above to determine the presence of such a conflict are imprecise and prone to subjective interpretation.[359] But, there are objective manifestations of such a conflict. Status regime conflicts show up in the law of the states on both sides—in statutes, and in court decisions. If such a conflict exists, it will produce a substantial body of statutes and cases granting a legal status to a novel group, on one side, and laws or decisions refusing to recognize those grants, on the other. The antebellum period saw this sort of conflict emerge with personal liberty laws, northern court resistance to recapture of alleged fugitive slaves, states embracing or rejecting the doctrine of *Somerset v. Stewart*,[360] southern Seamen's Acts, state constitutional restrictions on free blacks, and the like. Similar manifestations of conflict are beginning to emerge now, with some states granting the legal status of marriage to same-sex couples and other states formally declaring such a status anathema to their laws.

More than a few states must be involved on each side before a conflict becomes a federalist crisis. A single state's decision to award a fundamental status to a new group would not by itself produce a status regime conflict. Nor would the existence of sparse opposition in the form of a few holdouts qualify as a crisis justifying an overriding national rule under the Privileges or Immunities Clause. Rather, there must be a significant body of both support and opposition. In the antebellum period, northern states generally protected the rights of their black residents through citizenship status and through attempts to impose procedural protections for accused slaves. Southern and western states similarly adopted measures either banning traveling free blacks entirely or restricting their movements. That conflict was slow to develop and appeared to be fairly static by the time of the Civil War, meaning that evolution out of the conflict appeared unlikely. The prospect that confronts us now is a similarly stable divide emerging between states granting same-sex marriages and those refusing to recognize them.

This method of counting states to determine when the conflict has reached threshold significance provides a relatively familiar and content-neutral basis for assessing the existence and extent of social change—one that has eluded the Court in other areas. Under the Equal Protection Clause, as noted above, the Court has been hesitant to alter the governing legal standard to account for changing social context for fear of making it amorphous. Under the Due Process Clause, the Court has similarly hesitated to expand the number of fundamental rights applicable against states, not even extending them to the limits of the Bill of Rights. The Privileges

359. *See supra* text accompanying notes 90–99.
360. *See* (1772) 98 Eng. Rep. 499 (KB).

or Immunities Clause, measuring the existence of a status regime conflict to circumstances structurally similar to those prior to the Civil War, contains built-in checks against limitless expansion.

First, it would apply whenever a status regime conflict over applying a common legal status to a new group emerged. For example, suppose that instead of same-sex marriages that some other status determination was at issue—one more controversial among law professors. Take Justice Harris's hypothetical in *Mitchell v. Wells*[361] literally, and suppose that in twenty years Ohio's legislators, impressed by the animal rights movement and by research into the cognitive capacities of higher-order primates, pass a law declaring orangutans, chimpanzees, and gorillas to have the status of personhood under Ohio law—making them citizens of Ohio as well. In the absence of a broader social movement pressing for primate rights, that isolated change alone would not invoke the Privileges or Immunities Clause, no matter how many states opposed it.[362] But if a significant number of states followed Ohio's lead—say, twenty—the refusal to recognize that status in other states would produce a federalist crisis. The Privileges or Immunities Clause would require states to recognize the personhood of traveling orangutans.

This mechanism of tallying state legal regimes is both relatively objective and within the competence of federal courts. Indeed, the Supreme Court does it in other areas of the law.[363] In criminal law, the Court has most notably calibrated the availability of the death penalty by whether there is a trend of states embracing or rejecting its application in certain circumstances.[364] The Court has also recently experimented with tentative expansions of due process liberty rights using state-counting techniques.[365] The development of an entrenched conflict over granting a status to a hitherto unthinkable group could be similarly measured by how many states line up on either side. The number of states need not be a majority, but it would need to be a significant and stable number on both sides with little

361. 37 Miss. 235, 264 (1859); *see supra*, note 1. Although Justice Harris's analogy was intended as a slur against the capacities of black Americans, given the vibrant animal rights movement, the comparison between primates and humans of any color is no longer unthinkable. *See, e.g.*, Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (1999).

362. By contrast, there is no threshold number of states to invoke Full Faith and Credit Clause protection for applicable acts, records, or judgments. *See supra* text accompanying notes 340–342.

363. As one scholar has recently argued, although the Court is most famous for using state counting in its Eighth Amendment jurisprudence—*see, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2023–24 (2010)—the technique is far more widespread than that, including equal protection and due process cases, and First, Fourth, and Sixth Amendment cases. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365 (2009).

364. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564–65 (2005) (30 states prohibit execution of juveniles); Atkins v. Virginia, 536 U.S. 304, 314–16 (2002) (30 states prohibit execution of mentally retarded). In each case, the Supreme Court noted that it was not simply the number of states that evidenced a changing national consensus, "'but the consistency of the direction of change.'" *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315).

365. *See* Lawrence v. Texas, 539 U.S. 558, 575–77 (1991).

sign of drastic alterations. The isolated conflict would not trigger traveling status recognition. But neither would broad and universal social change that sweeps through all of the states at different rates. The example there is divorce. In the 1940s, significant tensions emerged when a few states—most famously, Nevada—relaxed their divorce laws, which, when combined with liberal residency requirements, made it relatively simple to dissolve a marriage. The trend sparked a considerable amount of controversy, like now, over the obligation of full faith and credit.[366] However, that conflict was due only to the differential speeds at which a broad social change was sweeping through the states. Resolution of the conflict through a uniform national rule ultimately proved unnecessary.

With respect to same-sex marriage, the conditions for triggering the protection of such marriages under the right to travel component of the Privileges or Immunities Clause have not yet been fulfilled. Six states now grant such marriages, a few more recognize them, and forty ban them entirely by statute or state constitution. There are too few states recognizing such marriages at this point to produce an entrenched status regime conflict. But if those numbers should change, the Privileges or Immunities Clause provides a resolution to the persistent questions that are likely to arise when married couples travel.

CONCLUSION

The Privileges or Immunities Clause was originally intended as a critical component of Section 1 of the Fourteenth Amendment. Although subsequent judicial interpretation drastically reduced its original anticipated scope, several pieces of the clause remain vibrant. The Privileges or Immunities Clause prohibits states from abridging rights inherent in a federal system, such as aspects of the right to travel. One aspect of that right that has hitherto lain dormant is the right to travel with fundamental state status determinations intact: legal statuses such as citizenship, parenthood, and marriage.[367] This principle was one of the primary motivations for the Privileges or Immunities Clause, as demonstrated by the repeated references to strengthening the Article IV Privileges and Immunities Clause to require recognition of state citizenship rights.

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366. *See, e.g.*, Estin v. Estin, 334 U.S. 541 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 325 U.S. 226 (1945); Williams v. North Carolina, 317 U.S. 287 (1942); Haddock v. Haddock, 201 U.S. 562 (1906); Radin, *supra* note 116; JACKSON, *supra* note 56. From 1901 to 1957, the Supreme Court heard seventeen divorce cases.

367. Interstate recognition of custody judgments is required under legislation passed pursuant to Congress's authority under the Full Faith and Credit Clause. *See* 28 U.S.C. § 1738a (2006). But for most parents, parental status is not confirmed in a judgment issued by a state court; rather, it arises through passive operation of state law.

The Privileges or Immunities Clause thus fills a crucial gap in our constitutional structure. With few exceptions, the federalist structure continues to leave most determinations of status to states. But national unity requires a broad amount of similarity in the social structures of states, particularly with respect to status. Without some mechanism for ironing out differences that emerge, state societies could evolve in separate directions, making such differences even more entrenched.

The Privileges or Immunities Clause provides that mechanism. It thus serves as a sort of backstop for inconsistencies in social change. That sort of change can occur in a variety of ways, only some of which pose the potential for grave harm to the system. If a widespread consensus emerges that the classification at issue is itself illegitimate for states to use against their *own* citizens, then the result might be an expansion of the Equal Protection Clause, as happened with respect to sex discrimination.[368] Alternatively, social change might sweep the nation without need for a national legal rule, as in the case of a divorce. Interstate conflicts may simply be the result of tension between the leading edge of change and the mass of states following behind. Occasionally, however, status regime conflicts may become static and entrenched. The Privileges or Immunities Clause intervenes in just those situations.

From 1873 to the present, courts have expressed concern that a vague constitutional protection of all state status determinations would lead to wholesale obliteration of the distinctions between national and state authority. But drawing from the antebellum conditions that underlay the Privileges or Immunities Clause, the protection for status determinations is inherently limited. It would apply only in what I have called a "federalist crisis," where a substantial number of states begin granting a fundamental status to a group considered anathema in a large number of other states. It is in such an entrenched status regime conflict that the conditions that led to the antebellum crisis over the rights of free blacks are replicated.

Obviously there are two national rules that could be invoked in such a situation: one forcing recognition of the new status determination, the other barring it. The antebellum history of free black northern citizens appears to support recognition. Indeed, one of the most infamous decisions of the Supreme Court, *Dred Scott*, attempted to impose the opposite rule. However, flip the moral valences and the attractiveness of recognition becomes less clear. The antebellum period also featured a sustained conflict over the increasing refusal of northern states to recognize the status of slave and slaveowner.[369] In that case, *non*-recognition was clearly the morally superior policy.

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368. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

369. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984); FINKELMAN, *supra* note 5.

Nevertheless, requiring recognition is the path the Reconstruction Congress took. Other aspects of the Reconstruction Amendments rule out certain statuses entirely. The Thirteenth Amendment forbids the status of slavery. The Equal Protection Clause bars racial and certain other classifications from being used in the statuses that remain. But for all other status determinations, states are free to do as they wish in the absence of a status regime conflict. In such cases, recognition serves the purpose of the Privileges or Immunities Clause in maintaining the uniformity of state societies more than nonrecognition, which would permit evolution in opposite directions to continue unabated.[370] As the Court noted in its last Privileges or Immunities Clause case, *Saenz v. Roe*:

> The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[371]

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370. The Equal Protection Clause works in a similar way. *See* Wechsler, *supra* note 324, at 34.

371. Saenz v. Roe, 526 U.S. 489, 511 (1999) (quoting Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935)).