THE SUBSTANTIVE ROLE OF CONGRESS UNDER THE EQUAL PROTECTION CLAUSE

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I. INTRODUCTION

The Equal Protection Clause (EPC) was proposed by Congress as part of the Fourteenth Amendment in June of 1866, and was adopted in July of 1868. The clause provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] The aim here is to understand the origi-

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1. U.S. Const. amend XIV, § 1.

nal public meaning of this clause. The last three words of the clause are often overlooked, but they are significant, or otherwise they would have been omitted like this: "no state may deny equal protection to any person within its jurisdiction."[2]

The U.S. Supreme Court has plausibly interpreted the EPC so as to cover matters well beyond just racial discrimination, given that the clause does not mention race. No dictionary in 1868 limited the word "equal" to race alone and the country's specific expectations in that regard were not written into the clause, but rather were deliberately removed.[3] There is a catch, however, and we shall see that the word "laws" is a critical, but widely overlooked, element of the EPC.

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2. Current jurisprudence essentially omits the last three words of the clause. *See, e.g.,* Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU L. REV. 2277, 2280 (2010) ("The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying equal protection to 'any person within its jurisdiction.'"); Steve D. Shadowen, *Personal Dignity, Equal Opportunity, and the Elimination of Legacy Preferences*, 21 GEO. MASON U. C.R. L.J. 31, 38 (2010) ("the Clause prohibits a state from denying equal protection to 'any person' within its jurisdiction."); TONY MAURO, ILLUSTRATED GREAT DECISIONS OF THE SUPREME COURT 144 (CQ Press 2000) ("the Equal Protection Clause . . . prohibits states from denying equal treatment to 'any person within its jurisdiction'"); Sternberg v. U.S.A. National Karate-Do Federation, 123 F.Supp.2d 659 (E.D.N.Y. 2000) (Judge Jack Weinstein wrote: "The Fourteenth Amendment to the United States Constitution provides that no state may deny equal protection to any person within its jurisdiction."). Some congressmen were saying the same thing as early as 1871. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 482 (1871) ("It is just the same as saying in direct language that all persons have the right to be equally protected. . . .") (Rep. Wilson).

3. On April 28, 1866, upon a motion by Congressman John Bingham who was the principal framer of the Equal Protection Clause, the Joint Committee on Reconstruction voted ten to three (with two members not voting) for striking out the following language from the draft Fourteenth Amendment: "No discrimination shall be made by any state, or by the United States, as to the civil rights of persons, because of race, color, or previous condition of servitude." *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 106 (1914). Professor Earl Maltz writes that this decision "conclusively discredits any effort to limit the reach of section one to racial discrimination." Earl Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONSTITUTIONAL LAW QUARTERLY 287, 320 (2015). *Cf.* note 233 *infra* (alleged violation of the EPC may be subject to a lower level of scrutiny if it does not involve race or color, which were the characteristics that the country mainly expected the EPC would address).

The authors of the Fourteenth Amendment deliberately wrote that no state can deny the equal protection "of *the* laws" rather than "of *its* laws."[4] This may seem nowadays like a small difference, but it was important in that era, because it meant that the word "laws" includes both the laws of the state and of Congress. Therefore, Congress is supposed to have a substantive role under this clause, instead of being confined to a mere enforcement role. The emphasis here is on the original meaning of the EPC, and especially on the public understanding of its text when it was enacted. Had the EPC said "of *its* laws" rather than "of *the* laws" then the clause would have been directed only to administration of state laws, rather than their content.

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4. Congressman John Bingham, said: "no state shall deny to any mortal man the equal protection of the laws — not of the laws of South Carolina alone, but of the laws national and State. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 1083 (1867). This statement by Bingham was publicized, well before the Fourteenth Amendment was adopted. *See, e.g., Reconstruction*, NEW PHILADELPHIA OHIO DEMOCRAT 2 (February 22, 1867). Bingham stuck with this point after the amendment's adoption: "No state shall deny…. to any person within its jurisdiction the equal protection of the laws. Not of its laws, but of the laws, and above all other laws, of the law of the Republic. . . . ." CONG. GLOBE, 41st Cong., 3d Sess. 203 (1870). More questionably, Bingham characterized the U.S. Constitution as being among "the laws" within the meaning of the Equal Protection Clause, although the Supremacy Clause draws a distinction between laws and constitutions. *See, e.g.,* CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867) ("no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of every article and section of the Constitution. . . .") (Rep Bingham); *Cf.* U.S. CONST. art. VI, cl. 2 ("…any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). The Joint Committee on Reconstruction issued a widely-publicized report saying that no rebel State should be readmitted to Congress until it "shall have modified its constitution and laws in conformity" with the proposed Fourteenth Amendment. REP. OF THE JOINT COMM. ON RECONSTRUCTION, 39th CONG., xxi (U.S. Government Printing Office, 1866) (notice the distinction between "constitution" and "laws" and also use of the word "its" instead of "the"). *See also, e.g., Report of the Reconstruction Committee*, CAMDEN DEMOCRAT 2 (May 5, 1866). *Cf.* Arthur Miller & Jeffery Bowman, *Toward an Interstate Standard of Equal Protection of the Laws: A Speculative Essay*, 1981 BYU L. REV. 275, 280, 285, 312 (1981) ("The meaning of the word, 'laws,' in the fourteenth amendment has not been subjected to rigorous analysis by scholars. . . . [T]he 'laws' covered by equal protection should have an interstate dimension in those areas considered to be 'fundamental rights'. . . . After all, the fourteenth amendment speaks of 'equal protection of the laws' – but does not define 'laws.'"). From the perspective of an ordinary American, or a state legislator, "the laws" are simply those of his or her state and nation.

The judicial power extends to the EPC, and therefore the Necessary and Proper Clause (NPC) authorizes Congress to make laws for carrying that judicial power into execution, including laws that enable judicial review of state enactments.[5] Those federal laws under the NPC are properly among the "laws" mentioned by the EPC itself. Congress can only enforce the EPC directly against the states pursuant to the Enforcement Clause in section five,[6] but Congress can still legislate under the EPC and NPC by declaring equality rights within the states, quite apart from enforcing that declaration against the states (or against the federal judiciary). Section five grants Congress power to directly enforce the equal protection of the laws, but not power to directly enforce those laws themselves, and so Congress has no plenary power under the EPC.

The basic reason for this subtle structure of the Fourteenth Amendment is that the framers did not want either Congress or the federal judiciary to force upon states whatever equality principles either of them may want. Instead, Congress essentially is supposed to establish outer bounds for the judiciary, then the judiciary decides what constitutes equal protection within those bounds, and either Congress or the judiciary can enforce that equal protection against a state. Accordingly, a state is not required to adopt equality principles that Congress has not stamped with its legislative imprimatur, nor equality principles that the judiciary deems unessential to equal protection.

Purportedly unequal state laws are not supposed to be struck down under the EPC unless (1) courts can find pertinent

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5. U.S. CONST. art. I, §8, cl. 18 ("The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof") (emphasis added). As the Court said long ago, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

6. U.S. Const. amend XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"). The Enforcement Clause thus gives Congress some power that Congress does not already have under the NPC; the NPC does not give Congress any power to enforce the EPC except by carrying into effect the federal judicial power, whereas the Enforcement Clause allows Congress to coerce the states.

equality principles within current federal statutes, and (2) courts then deem those equality principles to be so essential that they apply against the states as well. Current equal protection jurisprudence omits step one and goes straight to step two.

Enforcement statutes pursuant to section five do not affect the scope of section one, but Congress can enact legislation involving section one without engaging in enforcement. The idea that Congress can enact legislation involving the EPC without enforcing the EPC may strike some readers as odd. Nevertheless, it was very common in the mid-nineteenth century to view various provisions of federal law as creating rights and duties but without any federal enforcement mechanism.[7] Obviously, very few federal statutes are entirely about enforcement, and the other parts of those statutes can easily fall within the word "laws" in the EPC. Provisions of law that do not involve enforcement can still offer or enable "protection."[8]

Of course, the EPC by its terms places no limit on the federal government, according to the clause's first three words: "no state shall." If we were to suppose (as modern judges do) that the EPC directly imposes an equality requirement upon the "laws" without any further congressional action, then that would impose a requirement not just upon state laws but upon federal laws too — which is an interpretation that the first three words of the clause ("no state shall") resist.

Central to understanding the EPC is that it provided a firmer and more permanent constitutional basis for the Civil Rights Act of 1866, which was one of the laws enacted by Congress in 1866, and re-enacted in 1870.[9] This is an orthodox un-

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7. *See, e.g.,* MICHAEL CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 63-64 (1986).

8. *See, e.g.,* Jeremy Bentham, THE COLLECTED WORKS OF JEREMY BENTHAM: A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 70 (J.H. Burns and H.L.A. Hart eds. 2008) (1774) ("we must have the whole law to protect us"). I do not suggest that Congress should ever enact a statute that contains no enforcement provisions, but rather that the non-enforcement provisions of a statute may be fully supported by the EPC and the Necessary and Proper Clause without need of the Enforcement Clause.

9. *See generally* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (entitled "An Act to protect all Persons in the United States in their Civil Rights and liberties, and furnish the Means of their Vindication"). The Civil Rights Act of 1866 stated: "[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for

derstanding.[10] As the U.S. Supreme Court has explained, "the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866."[11] All of the equality-related provisions in the Civil Rights Act of 1866 are fully justified by the EPC in combination with the Necessary and Proper Clause, except for the enforcement provisions in the Civil Rights Act of 1866, which are justified by the combination of the EPC together with the Enforcement Clause of section five.

Equal laws are of no use if they are not properly enforced, and that fact amply explains why the word "protection" was used in the Equal Protection Clause ("EPC"). As one congressman put it in 1871, "Unexecuted laws are no 'protection.'"[12] The idea that the word "protection" somehow narrows the scope of the EPC is incorrect.[13] As we shall see, if that word did narrow the scope of the clause, then there would be no other clause in the Fourteenth

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crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." *Id.* § 1. The Civil Rights Act additionally forbade discrimination based upon race or color in punishments inflicted against noncitizens. *Id*. § 2. There was also a declaratory sentence in section 4 of the Civil Rights Act, recognizing "constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted. . . ." *Id*. § 4. That last sentence alluded to the Thirteenth Amendment, which was initially cited (controversially) as authority for Congress to enact the Civil Rights Act. *See generally* U.S. CONST. amend. XIII. Following adoption of the Fourteenth Amendment in 1868, Congress re-explicitly re-enacted the Civil Rights Act of 1866. *See* Civil Rights Act of 1870 (The Enforcement Act), ch. 114, 16 Stat. 140, § 18 (1870).

10. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992) ("Orthodox teachings maintain that the Equal Protection Clause constitutionalizes the Civil Rights Act of 1866."); *Id.* at 1451 ("[R]emarks in the Reconstruction debates suggest[ed] that the Equal Protection Clause constitutionalizes the Civil Rights Act of 1866."). Professor Harrison has disagreed with that orthodox understanding, whereas I agree with it.

11. McDonald v. Chicago, 561 U.S. 742, 130 S.Ct. 3020, 3041 (2010).

12. CONG. GLOBE, 42d Cong., 1st Sess. App. 300 (1871) (Rep. Job E. Stevenson).

13. *Contra* Harrison, *supra* note 10, at 1385.

Amendment that could finish the job of constitutionalizing the Civil Rights Act of 1866, and the role of Congress under the EPC would be much less than the framers and ratifiers intended.

The Court has recognized that its equal protection jurisprudence must be reconciled with the reality that, "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[14] However, the current method of reconciliation is problematic. Justice Antonin Scalia wrote in 2012: "I am not a fan of different levels of scrutiny. . . . That's just a thumb on the scales."[15] Justice John Paul Stevens has likewise protested this multi-layered system, saying: "There is only one Equal Protection Clause."[16] Lower court judges have also objected.[17] The problem is not really the Court's tiers of scrutiny (assuming that they are employed in a reasonable way), but rather the problem is the withered role of Congress. The text of the Fourteenth Amendment could easily have commanded that all state laws be equal − or good or wise − but such a command would have been extremely ambiguous,[18] and such a command would have transferred vast discretionary power to the federal judiciary, contrary to the finely-tuned balance that the Fourteenth Amendment actually struck.

The Court has indicated that Congress has no substantive non-remedial power under the Fourteenth Amendment. In the 1997 case of *City of Boerne v. Flores*, the Court stated: "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."[19] On the contrary, Congress obviously can substantively

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14. Romer v. Evans, 517 U.S. 620, 631 (1996).

15 Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK (October 6, 2013).

16. Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). *See also* James Fleming, *"There is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2306 (2006).

17. *See, e.g.,* Montgomery v. Carr, 101 F.3d 1117, 1122 (6th Cir. 1996) ("The Supreme Court's authority to delineate these different tiers of judicial review is not apparent.").

18. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

19. City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne*, the Court struck down part of a federal statute as exceeding the enforcement powers of Congress under section five of the Fourteenth Amendment. *See* Religious Freedom Restoration Act of 1993 (RFRA), Pub. Law No. 103-141, §3, 107

affect who is covered under the Citizenship Clause by regulating who is naturalized.[20] Even more significantly, section three of the Fourteenth Amendment forbids people who engage in rebellion (in the past or future) from holding public office, and Congress may "remove such disability."[21] Very clearly then, Congress has *some* substantive, non-remedial power under the Fourteenth Amendment, and each clause must be considered individually to see what role Congress has.

As mentioned, the EPC does not narrowly say "of *its* laws," but rather says "of *the* laws." This difference does not merely enable federal courts to do what they already are empowered to do under a modern understanding of the Supremacy Clause.[22] Just as importantly, this difference enables federal courts to take equal protection principles that otherwise are not enforceable against the states and make them enforceable. This is how the EPC (together with the Enforcement Clause) constitutionalized the Civil Rights Act of 1866.

The foregoing interpretation is based on the text of the EPC, rather than being a matter of original intentions or expectations divorced from the text. This interpretation gives Congress less authority than the plenary power it would have had under

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Stat. 1488, 1488-89 (1993), *invalidated in part by City of Boerne*, 521 U.S. at 536. Congress responded by passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* RLUIPA amended RFRA, but did not supercede or affect the Court's constitutional interpretation in *City of Boerne*. Among other things, Justice Kennedy's opinion for the Court in *City of Boerne* stated: "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." *Id*. at 520. The title of the present article refers to that distinction. The Court had previously suggested, in *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966) that Congress has authority under Section 5 of the Fourteenth Amendment greater than that later allowed in *Boerne*. *See generally* Jim Chen, *Come Back to the Nickel and Five:* Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203 (2002). The present article does not dispute that the Enforcement Clause gives Congress no substantive power.

20. U.S. CONST. amend. XIV, § 1, cl. 1 ("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.").

21. U.S. CONST. amend. XIV, § 3.

22. U.S. CONST. art. VI, cl. 2. It is true that the extent of the federal government's supremacy was disputed until the 1860s. *See, e.g.,* Testa v. Katt, 330 U.S. 386, 390 (1947). No doubt, part of the Fourteenth Amendment's purpose was to cement that supremacy.

the rejected first draft of the Fourteenth Amendment,[23] but more than the U.S. Supreme Court currently allows.

Any thorough interpretation of the EPC must come to grips with what the clause would have meant if it had said "of *its* laws" rather than "of *the* laws." The rejected of-its-laws clause would not have limited state legislatures. There are many reasons for this conclusion, and they include the following:

First, a requirement that no state shall deny to any person within its jurisdiction the equal protection of its laws does not sound like a requirement that its laws must be equal.[24] Rather, it is a traditional requirement that whatever equality is in the state's laws must not be withheld, and people must not be put out of the protection of the existing laws.[25]

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23. Here is the first draft, that Congress rejected: "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." CONG. GLOBE, 39th Congress, 1st Sess. 813 (1866) (emphasis added). This first draft of the Fourteenth Amendment was postponed in the House by an overwhelming vote of 110 to 37. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1091, 1095 (1866). Unlike the final version, the first draft departed from tradition by letting Congress enforce its own interpretion of the Fourteenth Amendment via legislation. *See* City of Boerne v. Flores, 521 U.S. 507, 524 (1997). This point is elaborated at the text accompanying note 150 *infra*, in connection with presumptions of constitutionality.

24 *See* Steven Calabresi & Abe Salander, *Religion and the Equal Protection Clause*, 65 FLA. L. REV. 909, 920, 923 (2013) ("the Equal Protection Clause says nothing about equality in the making or implementing of equal laws"). *See also* Kermit Roosevelt, *What If Slaughter-House Had Been Decided Differently?*, 45 IND. L. REV. 61, 71 (2011) ("[T]he most natural reading of 'equal protection of the laws' probably takes it to be about application or enforcement, rather than content"); RICHARD POSNER, OVERCOMING LAW 247 (1995) ("[O]n its face the equal protection clause guarantees not legal equality but merely equal protection of whatever laws there may happen to be. . . ."). *Cf.* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 342 (1949) (the EPC "might appear at first glance to be simply a demand for administrative fairness…[but] early in its career, the Equal Protection Clause received a formulation that it was to be more. . . .").

25. *See, e.g.,* MASS. CONST. of 1780, art. XII ("And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, *put out of the protection of the law*, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.") (emphasis added). Being put out of the protection of the law is also known as being outlawed, and the origin of this prohibition is the Magna Carta. *See* Magna Carta,

Second, the most detailed discussion recorded in the 1860s about the of-its-laws clause confirms that lawmaking would have been unaffected.[26]

Third, an of-its-laws clause that limited the content of state laws would have created a loophole for discrimination by state court judges (both elected and appointed), given that the word "laws" (as defined in the 1860s) excluded judge-made common law.[27] Stretching an of-its-laws clause to limit the content of state "laws" would therefore have been oddly ineffectual.

Fourth, suppose the of-its-laws clause governs the content of both statute and common law; then the words "of its laws" would be surplusage. The clause could just as well read: "no state may deny equal protection to any person within its jurisdiction." The presumption against surplusage is as old as *Marbury v. Madison*.[28]

Fifth, even if it were doubtful whether the of-its-laws clause would limit a state's lawmaking (it would not), nevertheless rules of construction prevalent in the 1860s forbade judges from striking down laws in doubtful cases.[29]

In short, the original understanding was that the EPC would not have created a judicially enforceable limitation upon the laws of the states, if it had said "of *its* laws" instead of "of *the* laws." Thus, federal laws made by Congress are indispensable according to the original meaning of the EPC, in order for that clause to limit lawmaking by the states. Southern laws were often not discriminatory on their face after 1868, and yet state officials continued to discriminate notwithstanding facially neutral

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Ch. 39 (1215) ("No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be *outlawed*, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.")(emphasis added). Professor Tribe has correctly observed that, prior to 1866, "The 'equal protection of the laws' was taken to mean less than the 'protection of *equal* laws.'" LAURENCE TRIBE, THE INVISIBLE CONSTITUTION 116 (2008) (original emphasis).

26. *See* CONG. GLOBE 40th Cong., 2nd Sess. 3604 (1868) (Sen. Edmunds). *See also* note 63 *infra* and accompanying text (quoting Edmunds).

27. *See* Swift v. Tyson, 41 U.S. 1, 18 (1842), *overruled by* Erie v. Tompkins, 304 U.S. 64 (1938).

28. *See* Marbury v. Madison, 5 U.S. 137, 174 (1803).

29. *See, e.g.,* CONG. GLOBE, 40th Cong., 2nd Sess., Supp. 391 (1866) (Rep. Bingham).

laws; in these instances, no federal statutes have been necessary for the federal judiciary to require that those states stop denying equal treatment under the EPC.[30] But in instances where state laws themselves discriminate, inclusion of federal laws within the phrase "of the laws" becomes essential.

Part II of this article discusses why the order of words in the EPC is important, and also criticizes interpretations that change this order of words by putting the idea of equality before or after (instead of between) the words "the protection." For example, "the equal protection of the laws" does not really imply "the protection of equal laws," nor does it really imply "equality with respect to the protection of the laws." The equality at which the EPC aimed is an equality that is embodied in state and federal laws, rather than being an abstract equality.

Part III focuses on the last three words of the EPC, emphasizing the meaning of the word "laws" that was firmly established as of 1868. Lawyers understood the word "laws" (plural) to exclude the decisions of courts, except insofar as courts construe positive laws. The deliberate choice of the words "of *the* laws," instead of the narrower language "of *its* laws," envisioned a pivotal role for laws made by Congress.

Part IV rebuts the theory that the word "protection" has a relatively narrow meaning that would allow a correspondingly narrow substantive role for Congress under the EPC. Because the word "protection" has a broad meaning, there is no need to rely upon (or overstretch) other clauses in the same sentence, to do the equalizing work of the Fourteenth Amendment. Part V deals with rules of construction that were prevalent in the 1860s, and shows that they support a significant substantive role for Congress under the EPC.

Part VI briefly discusses the Privileges or Immunities Clause, and gives some reasons why that clause does not plausibly contain a general anti-discrimination principle that could have independently accomplished what some authors mistakenly think the EPC cannot accomplish. This is further evidence that the scope of the "protection" under the EPC is not narrow, and

30. *See* Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction,* 1983 DUKE L.J. 987, 1013 (1983).

therefore the substantive role of Congress under the EPC is correspondingly broad.

Part VII discusses the whole sentence in which the EPC occurs, including the Due Process Clause. Despite theories to the contrary, the Due Process Clause was included in the Fourteenth Amendment not just to help aliens, and the EPC very likely was not included just to help aliens either.

Finally, Part VIII concludes that judicial decisions striking down statutes under the EPC may legitimately go well beyond matters of race under the original meaning of the EPC. But, such decisions can be legitimate only if corresponding federal statutes already declare (if not require) that those equality principles apply to the states.

II. THE ORDER OF WORDS IN THE EQUAL PROTECTION CLAUSE MATTERS

In the 1886 case of *Yick Wo v. Hopkins*, the Supreme Court discussed the Due Process and Equal Protection Clauses: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of *the protection of equal laws*."[31] In context, this was a reasonable formulation by the Court – not because judges may rearrange words in the Constitution at will, but rather because the word "laws" in the EPC includes federal statutes like the Civil Rights Act of 1866. Such statutes substantially embraced equality as to race, color, and alienage.[32]

In more recent times, the last fourteen words of that sentence from *Yick Wo* have been quoted and relied upon out of context, and without the preceding twenty-eight words.[33] Professor

31. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added).

32. Sen. Henry Wilson (R-MA) praised the Civil Rights Bill for "annulling those black codes and putting those people under the protection of just and *equal laws*." CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (Sen. Wilson) (emphasis added). *See generally* Civil Rights Act of 1866, *supra* note 9 (quoting that Act). *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 219 app. (1866) (Sen. Timothy Howe, Republican of Wisconsin, discussing "protection of equal laws").

33. *See, e.g.,* Skinner v. Oklahoma, 316 U.S. 535, 540 (1942), *quoting* Yick Wo, 118 U.S. at 369. ("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'").

Christopher Green calls the wording in *Yick Wo* "a critical misstep,"[34] but a greater misstep has been the subsequent supposition that the statement in *Yick Wo* was not limited – as it plainly was – to race, color, and nationality.

Another well-known proposal for rearranging words in the EPC is this: "No state shall deny to any person within its jurisdiction equality with respect to the protection of the laws."[35] Scholars such as John Harrison have supported this rearrangement, on condition that the word "protection" narrowly refers to things like physical protection against violence; current equal protection jurisprudence supports this same rearrangement using a much broader meaning of the word "protection." Regardless of the breadth of the word "protection" (an issue to be addressed in more detail below), the rearrangement of words is not a valid interpretation of the EPC for the simple reason that it is very different from what the EPC actually says.

To say that the EPC requires equality with respect to the protection of the laws is to give the federal judiciary vast power to define equality and to impose that definition upon state legislatures that might have a different understanding of equality. In contrast, the actual EPC only allows courts to impose upon the states particular equality principles that are already consistent with the laws, be they federal statutes or laws of the state.

That kind of rearrangement (i.e. "equality with respect to the protection of the laws") represents the same sort of "sleight of hand" that Professor Harrison rejected when performed by the Supreme Court (i.e. "the protection of equal laws").[36] While such rearrangements may be grammatically correct, they alter the original meaning.

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34. *See, e.g.*, Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 3 (2008) ("The Supreme Court thus took a critical misstep in 1886. . . .").

35 Harrison, *supra* note 10 at 1433 ("it is more plausible to conclude that the Equal Protection Clause requires equality with respect to the 'protection of the laws' . . ."). *See also*, John Harrison, "Panel on Originalism and Unenumerated Constitutional Rights" *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 124 (Steven Calabresi ed. 2007) (again writing "equality with respect to the protection of the laws").

36. Harrison, *supra* note 10, at 1390 (discussing the "protection of equal laws"). Various other authors have also rejected the rearrangement of words in *Yick Wo*. *See, e.g.*, Green, *supra* note 34, at 3 (2008) ("The Supreme Court thus took a critical misstep in 1886. . . .").

Abraham Lincoln once said that it is, "but a specious and fantastic arrangement of words, by which a man can prove a horse chestnut to be a chestnut horse."[37] By the same token, generally equating "the equal protection of the laws" to "equality with respect to the protection of the laws" or to "the protection of equal laws" is specious on its face. The order of these words matters.

In the actual EPC, the root word "equal" is placed between the two words "the protection" – not before or after. This order makes a difference, and the order is preserved by an interesting interpretation of the EPC given by the U.S. Supreme Court in the case of *Magoun v. Illinois Trust*: no state may deny to any person within its jurisdiction "the equality of protection of the laws."[38]

Again, three interesting reformulations of the EPC are (1) that it guarantees "the protection of equal laws," (2) that it guarantees "equality with respect to the protection of the laws," and (3) that it guarantees "the equality of protection of the laws." When the root word "equal" slides (1) to the right, or (2) to the left, of the words "the protection," the clause changes into something else entirely. The last of these three rearrangements (3) leaves the root word "equal" in the middle where it belongs, and that renders the *Magoun* formulation more plausible than the other two. Still, the verbatim language of the EPC is brief, and seems self-explanatory without paraphrasing.

When considering what the EPC says, it is worth keeping in mind that even the tiny word "the" can be decisive in the U.S. Supreme Court—a fact firmly established before the 1860s.[39] Those who claim the EPC is a pledge of "the protection of equal

37. *See* Abraham Lincoln, "Lincoln-Douglas Debate at Ottawa" (Aug. 21, 1858) *quoted in* Alfred Avins, *The Equal 'Protection' of the Laws: The Original Understanding*, 12 N.Y.L. Forum 385, 386 (1966).

38. *See* Magoun v. Illinois Trust, 170 U.S. 283, 294 (1898). One might criticize Justice McKenna's formulation in *Magoun* as yet another corruption of the original EPC, but regardless the *Magoun* interpretation is not adopted here. It is merely mentioned here as an interesting alternative. The *Magoun* formulation has been discussed only rarely. *See, e.g.,* Joshua A. Scott, *The Right Thing for the Wrong Reasons - The Incorporation of the Second Amendment in McDonald v. Chicago*, 9 AVE MARIA L. REV. 335, 347 (2011).

39. *See, e.g.,* Otis v. Walter, 24 U.S. 192, 194 (1826) ("We consider the definite article as having been used for a definite purpose…"). The opinion by Justice Johnson in *Otis* was unanimous, although Justice Story did not participate.

laws" have never explained why they do not see it instead as a pledge of "the protection of *the* equal laws." The brevity of the EPC allows even the smallest alteration to have a potentially huge impact, so one must tread carefully.

A natural reading of the clause refers to the equal protection that happens to exist in the laws of a state or the laws of Congress. As we shall see, that is how its authors read the clause. The EPC would be very weak indeed if a state could override it at will, and that is why it is reasonable to infer from the EPC in combination with the Necessary and Proper Clause that Congress can carry into execution a more expansive judicial power.

III. THE LAST THREE WORDS OF THE EQUAL PROTECTION CLAUSE MATTER

Over the years, several scholars and officials have written that the three words "of the laws" are essentially useless in the Fourteenth Amendment.[40] The Court has never clearly expressed any opinion about that, or about whether the word "laws" at the end of the EPC refers to state law only.[41] Nor has the Court apparently said whether the word "laws" at the end of the EPC includes judge-made common law. These are significant issues.

The Supreme Court has said that the laws of a state are important for determining the maximum protection that is re-

40. *See* all of the sources quoted, *supra*, note 2.

41. The Court once stumbled upon this issue, but carried on. *See* United States v. Cruikshank, 92 U.S. 542, 554 (1875) (briefly mentioning "equal protection of the laws of the State and of the United States."). In 1940, the issue almost came up again when Justice Frankfurter wrote for the Court, "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies." Tigner v. Texas, 310 U.S. 141, 147 (1940), *quoted in* Griffin v. Illinois, 351 U.S. 12, 21 (1956); *also quoted in* Safeway v. Oklahoma, 360 U.S. 334, 341 (1959); *also quoted in* Norvell v. Illinois, 373 U.S. 420, 423 (1963). A few months after *Norvell*, the *New York Times* said on its front page what the Court had not quite said: "The 14th Amendment to the Constitution guarantees equal protection of the laws — both state and Federal — to all citizens." Ben A. Franklin, *Court Rules Out White Tuition Aid in 2 Virginia Units*, THE NEW YORK TIMES (December 3, 1964).

quired by the EPC.[42] However, the last three words of the clause are unnecessary to establish that point, given that the prior words in the clause already would validate impartial laws.

A. *The Word "Laws" Was Analyzed in Swift v. Tyson*

Chief Justice John Marshall once said that a repealed clause may, "no longer [be] found in the Constitution; but it aids in the construction of those clauses with which it was originally associated."[43] The same holds true of a decision of the U.S. Supreme Court that was later overturned and a case in point is the 1842 case of *Swift v. Tyson*, which was not overturned until 1938 when *Erie v. Tompkins* was decided.[44]

As of 1868 when the Fourteenth Amendment was ratified, the leading authority regarding the meaning of the term "laws" was Justice Joseph Story's 1842 opinion in *Swift*. Story wrote for the Court as follows:

> In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of law . . . . that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable

42. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 215 (1982) (discussing public school education for children who were not legally admitted into the United States, the Court said that "[Everyone is] entitled to the equal protection of the laws that a State may choose to establish").

43. Fletcher v. Peck, 10 U.S. 87, 139 (1810).

44. Swift v. Tyson, 41 U.S. 1 (1842), *overruled by* Erie v. Tompkins, 304 U.S. 64 (1938).

> and intra-territorial in their nature and character.[45]

Thus, *Swift* excluded judge-made common law from the meaning of "laws." Whether *Swift* did so rightly or wrongly is not the issue here. The people who put the word "laws" into the Fourteenth Amendment certainly knew about and relied upon *Swift*, and they would have clarified if they wanted to say something different. This word "laws" easily encompasses local, state and federal statutes currently in force within a state, together with the interpretations thereof by the courts, but excludes judicial decisions more generally, per *Swift*.[46]

It is uncontroversial that all state action, including every judicial decision, is subject to the broad command of the EPC that "no state shall deny. . . ." The last three words of the clause are more specific, according to *Swift*, and they indicate the type of equal protection that no state can deny. To the extent that the "laws" referenced in the EPC are federal, those "laws" exclude federal court decisions per *Swift*, excepting judicial interpretations of statutes.

In a 1987 case, *In re Asbestos Litigation*, the Third U.S. Circuit Court of Appeals rejected the notion that *Swift* controls the meaning of the word "laws" in the EPC.[47] The court added: "unlike the usual equal protection case that challenges a legislative

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45. *Swift*, *supra* note 44, at 18.

46 The word "laws" in the EPC also easily includes self-executing treaties. *See* Doe v. Braden, 57 U.S. 635, 657 (1854) ("The treaty is therefore a law made by the proper authority. . . ."). For example, an international declaration adopted in 1948 states, "All are equal before the law and are entitled without any discrimination to equal protection of the law." Universal Declaration of Human Rights, G.A. Res. 217A(III) U.N. Doc. A/810 (1948). However, that declaration was a non-binding resolution of the United Nations General Assembly, rather than a binding international agreement. Siderman de Blake v. Republic of Argentina, 965 F. 2d 699, 719 (9th Cir. 1992). Another example is a treaty ratified by the U.S. Senate in 1992 that guarantees and details "equal protection of the law," but it is not self-executing. *See* International Covenant on Civil and Political Rights, Art. 26 (1966), 999 UNTS 277, entered into force Jan. 12, 1951. *See also* United States Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

47. *See In re* Asbestos Litigation, 829 F.2d 1233, 1235 (3d Cir. 1987) ("We determine that a common law precedent announced by a state's highest court is 'law' within the meaning of the Equal Protection Clause").

enactment, this attack is directed at the common law as announced by a state's highest court."[48] The court of appeals did not acknowledge that *Swift* was decided before the EPC was adopted, whereas *Erie* was decided after the EPC was adopted.

The Third Circuit was correct (in my view) to consider "the common law of New Jersey to be within the scope of the Equal Protection Clause," because the common law is within the words "No state shall. . . ." But, in view of *Swift*, the Third Circuit was incorrect to say that common law is within the word "laws" in the EPC. The equality at which the EPC aims is embodied in "the laws," and so the validity of New Jersey's common law (like the validity of all other actions of the government of New Jersey) properly depends upon the equal protection embodied in its enactments and the enactments of the federal government.

This is not meant as any criticism of the Court's opinion in *Erie*. Even if one considers *Erie* to be an entirely correct decision, as Professor Ernest Young has recently argued,[49] still there was no way that the country could have relied upon *Erie* in 1868 unless Thaddeus Stevens and his contemporaries used a time machine. Moreover, relying upon *Swift* for the meaning of the word "laws" in the EPC does not in any way imply that the federal courts should generally have greater authority to make common law than they do now under *Erie*.

As quoted above, the Court's opinion in *Swift* was mainly concerned with "the ordinary use of language" rather than with the specific statutory context in which the word "laws" was used. Whatever may have been ordinary language in 1789, or in 1842, or in 1938, there is very solid evidence that lawyers in 1868 understood the word "laws" as the Court did in *Swift*. Bouvier's legal dictionary stated under the definition of "Law" as follows:

> A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. That which is usually intended by the word "laws" is not coextensive with that which is intended by the word "law". . . . When used in the concrete, the term usually has reference to statutes or expressions of the legislative will. "The laws of a

48. *Id.* at 1237.

49. Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON & POL'Y 1 (2013).

> state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." Hence, he argues, "in the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be the "solemn expression of the legislative will." But, as has already been said, "law" in the abstract involves much more. . . . In the United States, the organic law of a state is termed the constitution, and the term "laws" generally designates statutes or legislative enactments, in contradistinction to the constitution.[50]

Supreme Court Justice Stephen Field objected to following this standard definition with regard to the EPC. In an 1893 dissent, Field wrote:

> The term "laws" in the Constitution and the statutes of the United States is not limited solely to legislative enactments unless so declared or indicated by the context. When the Fourteenth Amendment ordains that no State shall deny to any person within its jurisdiction "the equal protection of the laws" it means equal protection not merely by the statutory enactments of the State, but equal protection by all the rules and regulations which, having the force of law, govern the in-

50. JOHN BOUVIER, 2 A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION, 14 (1868). The 1868 edition of *Bouvier's Dictionary* was obviously not used by the framers in 1866, but rather describes usage during that era. *See also* ALEXANDER BURRILL, 2 A LAW DICTIONARY AND GLOSSARY, 132 (1860) ("the term ['a law'] is quite inapplicable to a decision of a court of justice as explained above."). Previous editions of Bouvier's dictionary were less detailed in the definition of "law." *See, e.g.,* JOHN BOUVIER, 2 A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION 7 (1856). Notice the distinction between "constitution" and "laws" in the title of Bouvier's book, a distinction followed by the Joint Committee on Reconstruction, quoted *supra* note 4.

> tercourse of its citizens with each other and their relations to the public, and find expression in the usages and customs of its people and in the decisions of its tribunals. The guaranty of this great amendment, "as to the equal protection of the laws," would be shorn of half of its efficacy, if it were limited in its application only to written laws of the several States, and afforded no protection against an unequal administration of their unwritten laws.[51]

This argument by Field suggests the heinously ill-formed phrase, "the equal protection by the laws." If Field were correct about the breadth of the term "laws," then the last three words of the EPC would be superfluous, and the clause might just as well say — in the words of Judge Jack Weinstein — that "no state may deny equal protection to any person within its jurisdiction."[52] Nevertheless, the Third U.S. Circuit Court of Appeals followed the same course as Field, in 1987.[53]

B. *The Amendment Says "Of The Laws" Instead of "Of Its Laws"*

If the words "of the laws" only meant the state's laws, then that could have been made very clear by instead writing "*its* laws" (just as the EPC says "*its* jurisdiction"). Then the natural way to read the clause would have been as a requirement of the equal protection that is contained within whatever laws a state chooses to enact − that is, as a requirement of equal administration within the constraints of the state's laws. Indeed, various modern scholars have said that this appears to have been the

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51. *See* Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 398 (1893) (Field, J., dissenting).

52. *See* Sternberg v. U.S.A. National Karate-Do Federation, 123 F.Supp.2d 659 (E.D.N.Y. 2000) (Judge Jack Weinstein wrote: "The Fourteenth Amendment to the United States Constitution provides that no state may deny equal protection to any person within its jurisdiction.") One might speculate that the words "of the laws" might usefully clarify that the EPC somehow limits the clause to state action rather than private action, but the "no state shall" language of the EPC already makes that very clear.

53. *See In re* Asbestos, 829 F.2d at 1235. Raoul Berger made the same error as Field and the Third Circuit made. *See* Raoul Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341, 362 (1979).

thrust of the EPC.[54] The ancient principle of equal enforcement is historically familiar,[55] it has been endorsed and applied by the U.S. Supreme Court,[56] and it is a hugely important requirement.[57] One of the most famous antebellum authorities on that subject was the 1849 opinion of Massachusetts Chief Justice Lemuel Shaw, in which Shaw wrote about the principle of equality before the law:

> [W]hen this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and *protection of the law*, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.[58]

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54. *See* all of the quotations in note 24 *supra* (from Calabresi, Roosevelt, Posner, and Tussman).

55. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. LAW REV. 342 (1949) (describing "the historically familiar assertion that all men must stand equal before the law" as "simply a demand for administrative fairness").

56. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

57. The requirement of equal enforcement of existing laws was very relevant in 1868, for example with regard to lynching, because southern laws were often not discriminatory on their face. *See* Zeigler, *supra* note 30, at 1013.

58. Roberts v. City of Boston, 59 Mass. 198, 206 (1849) (emphasis added). In the infamous case of *Plessy v. Ferguson* in 1896, the U.S. Supreme Court quoted the 1849 opinion of Massachusetts Chief Justice Lemuel Shaw in *Roberts*, but failed to recognize that the last three words of the EPC were meant to help overcome Shaw's notion that the content of laws is unaffected by the equal-

This typical antebellum view can be summarized by saying that "whatever the laws might be, they must be applied and enforced equally," as Professor Laurence Tribe has put it.[59]

If the story ended there, then we would have an accurate interpretation of the EPC, but one that would not address inequalities embodied in the laws themselves. Fortunately, the story does not end there, if we pay close attention to the text. Because the words "of *the* laws" include both state and federal laws, the role of Congress is much greater with respect to the EPC than it would otherwise have been, and goes to the content of state laws rather than just their enforcement and administration. The only type of federal laws that are likely excluded from the last word of the EPC are the laws authorized by section five of the Fourteenth Amendment, namely enforcement provisions, and that leaves plenty of room in the last word of the EPC for all legislative provisions that are not coercive, including ones enacted pursuant to the EPC itself.

C. *The Framers Confirmed the Importance of the Last Three Words*

The foregoing interpretation of the text is supported by public discussions that occurred while the Fourteenth Amendment was pending.[60] Consider what U.S. Senator George Edmunds (R-VT) said about it. Edmunds was an attorney who had voted for the EPC, and he later served as chairman of the Senate Judiciary Committee, a presidential candidate, and lead drafter of the Sherman Antitrust Act.[61] Less than a month before the Fourteenth Amendment took effect, Edmunds spoke to the meaning of the words "of the laws" in the EPC, thus exemplifying how law-

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ity principle. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896). Charles Sumner, who argued against the City of Boston in *Roberts*, and who later argued in the U.S. Senate on behalf of the EPC, "did not have an equal protection clause to help his case" in *Roberts*. Paul Finkelman, "Rehearsal for Reconstruction" *in* THE FACTS OF RECONSTRUCTION: ESSAYS IN HONOR OF JOHN HOPE FRANKLIN, 21 (1991).

59. TRIBE, *supra* note 25, at 116.

60. *See, e.g.,* statements by John Bingham that are quoted at note 4 *supra*.

61. *See* J. Morgan Kousser, *Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J.S. LEGAL HIST. 17, 33 (1980).

yers would reasonably have interpreted this legal text during that era.[62] In particular, Edmunds described what the EPC would have meant if it had referred to *its* laws instead of *the* laws:

> What kind of a constitutional amendment would that be if Congress should propose it in that form; if we had coolly said to the State of Mississippi, with her black code and her unequal suffrage code, "You shall not deprive any person in the State of Mississippi of the equal protection of your laws;" that is to say, "you shall enforce your laws, just as the laws themselves are required to be enforced, upon all your persons according to their respective conditions;" that is, "you shall put your laws in process of execution there fairly and fully." Then she would be bound by such a constitutional provision to exclude the black man from the suffrage, to exclude him from the witness stand, and to hang him upon the testimony of any one white man who might choose to complain; whereas the United States, in order to overcome that very inequality of State laws, differing one from another as to the equal rights of persons, declared in the fourteenth amendment that the states should not deprive any person within their jurisdiction "of the equal protection of the laws." What laws? The laws of the land which the Constitution of the United States declares to be the acts of Congress made pursuant of it. That is what Florida was not to deprive any person of within her jurisdiction — the civil rights bill which was carried through this body by the honorable Senator from Illinois, [Mr. Trumbull.][63]

62. Justice Antonin Scalia has written that statements by the framers are not irrelevant: "To the contrary, they are strong indications of what the most knowledgeable people of the time understood the words to mean." *See* BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 126 (2014).

63. CONG. GLOBE 40th Cong. 2nd Sess. 3604 (June 30, 1868) (brackets surround "Mr. Trumbull." as in original). During this discussion, well over 40 senators were present, while a dozen or fewer were absent. *Id.* at 3602, 3607. This statement by Edmunds not only matched the legal meaning of the text, but

This description by Senator Edmunds matches the legal meaning of the text, while explicitly confirming that the Civil Rights Act of 1866 was within the word "laws" in the EPC. Echoing Chief Justice Shaw of Massachusetts, Edmunds (and the Senators who agreed with him) confirmed that the EPC would have merely required equal enforcement if it had said "of *its* laws" instead of "of *the* laws."

The reason why the U.S. Senate was addressing this subject in June of 1868 is because the State of Florida had just sent notification to Congress of its ratification, and therefore Congress was preparing to readmit Florida to representation in the Senate. Article I, Section 3 of the Constitution requires that the Senate "shall be composed of two Senators from each State,"[64] but rebel States had violated that provision by refusing to maintain state governments that were competent to select senators.[65]

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also echoed the famous opinion of Massachusetts Chief Justice Lemuel Shaw in which Shaw wrote that people's equal entitlement to protection of the law "must depend on laws adapted to their respective relations and conditions." *See supra* text accompanying note 58.

64. U.S. CONST. art. I, § 3.

65. *See, e.g.,* U.S. CONST. art. VI ("the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."). The fact that rebel States like Florida were not represented in the Senate during the Civil War is sometimes cited as a reason to doubt that Congress in that era understood the text of the Constitution in a literal way. *See* Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. REV. 683, 700 (1985). *Cf.* Phillip Bobbitt, *Is Law Politics? Red, White, Blue: A Critical Analysis of Constitutional Law,* 41 STANFORD L. REV. 1233, 1264-65 (1989). However, the violation of Article I, Section 3 was committed not by Congress but by rebel States. *See* First Reconstruction Act, ch. 152-53, § 1, 14 Stat. 428, 429 (1867), *reprinted in RECONSTRUCTION, 1865-1877* at 89-92 (Robert W. Johannsen ed. 1970) ("no legal State government . . . exist in the rebel States… until loyal and republican State governments can be legally established. . . ."). *See generally* Texas v. White, 74 U.S. 700, 727 (1869) ("No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States… representatives elected by her citizens, were entitled to seats in Congress. . . ."). A more difficult issue is whether Congress was behaving constitutionally when it took the extraordinary step of requiring ratification of the Fourteenth Amendment as a condition of restoring representation. Congress reasonably believed the amendment would "place our republican institutions on a more stable foundation." *See* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, AT THE FIRST SESSION, THIRTY-NINTH CONGRESS, xxi (U.S. Government Printing

Along with its notice of ratification, Florida included the text of the Fourteenth Amendment, but that text differed from the text that Congress had proposed, including "of *its* laws" instead of "of *the* laws."[66] That is why Edmunds was concerned. That concern prompted examination of other ratifications, which turned up further errors by other states, some of them substantive.[67] The Senate, therefore, very reasonably decided that ratification in any form would suffice, seeing as how an accurate text had been submitted to the states, and seeing as how ratification did not require any recitation of the amendment being ratified. Among the more than forty senators present, none offered any alternative to the interpretation of the EPC given by Edmunds, and no senator said that his interpretation was wrong.[68]

Office, 1866). *See also, e.g., Reconstruction in Congress,* SPRINGFIELD REPUBLICAN, 2 (June 11, 1866). By analogy, Congress can establish conditions for admission to statehood. *See* Coyle v. Smith, 221 U.S. 559, 568 (1911). Moreover, congressional enforcement of the Republican Form of Government Clause is an inherently political rather than judicial question. *See* Luther v. Borden, 48 U.S. 1 (1849). Put all of that together, and the Fourteenth Amendment seems valid, assuming it is interpreted according to the original meaning of its text, rather than as a blank check for courts to override republican institutions.

66. *See generally* Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 574 (2002).

67. When the Sixteenth Amendment was ratified many years later, the State Department's Office of Solicitor listed trivial errors as well as "substantial errors" in the ratifications for both the Fourteenth and Sixteenth Amendments, concluding that, "the Secretary of State may disregard the errors contained in the certified copies. . . ." *See* OFFICE OF THE SOLICITOR GEN., U.S. DEP'T OF STATE, MEMORANDUM (Feb. 15, 1913), *available at* www.constitution.org/tax/us-ic/ratif/memo_130215.htm. This memorandum did not mention any error in the phrase "of the laws" in Florida's ratification. *Id.* The memorandum was initialed by the Solicitor of the State Department (Joshua Reuben Clark), but was apparently drafted by a subordinate ("PDR"). *See id.*

68. To summarize, Sen. Charles Drake (R-MO) started the discussion by pointing to the "of its laws" error in the message from Florida, and he requested referral to the Judiciary Committee regarding this "very material variance not only in language but in substance." CONG. GLOBE 40th Cong., 2d Sess. 3603 (1868). Sen. Oliver Morton (R-IN) then argued that it was unnecessary for Florida to have recited the amendment, and so any errors were insignificant. *Id*. Likewise, Sen. Jacob Howard (R-MI) said that no "official, authentic copy" was needed from Florida. *Id*. Edmunds then questioned whether the Florida legislators had an accurate text before them, and Howard responded by asking whether those legislators were not bound by the accurate publicized text. *Id*. Edmunds answered that it depends on whether there was a "difference in substance." *Id*. at 3603-04. Edmunds proceeded to make the remarks block quoted

The debate in the Senate about the Florida ratification was not apparently publicized, but those pre-enactment statements from the *Congressional Globe* describe how several well-informed people of that era made reasoned inferences from the proposed amendment's text.[69] Even if one is skeptical that ordinary Americans would have noticed a distinction between "of *its* laws" versus "of *the* laws," still there was widespread sentiment during that era for requiring more than equal enforcement of state laws, and for constitutionalizing the Civil Rights Act of 1866, and the "of the laws" language is much better suited to those purposes. There is very little credible evidence that "of *the* laws" meant the same thing as "of *its* laws."

Senator Jacob Howard (R-MI), who introduced the Fourteenth Amendment in the Senate in 1866, made some remarks that might be interpreted as overlooking the distinction between "of the laws" and "of its laws." The official record shows Howard saying in 1866 that the amendment would prevent a state from denying to any person "the equal protection of *its laws*" and "the equal protection of the laws *of the State*."[70] That language was neither in Howard's prepared text,[71] nor in newspaper accounts

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in the main text above, while clarifying that he was not accusing the Floridians of deception. *Id*. at 3604. Next, Sen. Frederick Frelinghuysen (R-NJ) commented that a sufficient "true copy" had been sent to Florida, the accurate text was "in every newspaper," nothing like "counterfeiting" occurred, and "the law itself will not pay attention to these little insignificant things" (Morton and Howard had agreed that the amendment's text sent by Florida was insignificant). *Id*. After some digression, Sen. Henry Corbett (R-OR) concurred with Drake that this error was "important," agreed that it should be referred to the Judiciary Committee, but anticipated that it would not invalidate the ratification. *Id*. at 3606. Frelinghuysen then reported inaccuracies in the ratifications of four more states, "[s]ome of them material." *Id*. The Senate then voted thirty-one to thirteen for swearing in the new senator from Florida, rather than getting the Judiciary Committee involved. *Id*. at 3607.

69. *See generally* note 62 *supra* (quoting Justice Scalia).

70. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (stating that section 1 includes "a general prohibition. . . .[on] denying to any person within the jurisdiction of the State the equal protection of *its* laws," and that the EPC would "disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of . . . the equal protection of the laws *of the State*.") (emphasis added).

71. *See* Jacob Merritt Howard, *Reconstruction Report of the Committee, 1866 (unpublished manuscript) (on file with the Duke University* Rubenstein Rare Book and Manuscript Library) (stating that section 1 includes "a general prohibition . . . [on] denying to any person the equal protection of the laws" and

afterwards,[72] and Howard probably inserted that language by revising and extending his remarks.[73] These discrepancies make Howard's speech less useful on this particular point.

Use of the words "of the laws" rather than "of its laws" in the EPC was meant to have a substantial impact, as John Bingham said before adoption of the Fourteenth Amendment.[74] After adoption, people were all over the map as to the meaning of the EPC and its companion clauses, no doubt influenced by political considerations as well as judicial decisions; post-adoption evidence is thus entitled to much less weight.

In 1872, for example, Senator Edmunds relied in part upon the Privileges or Immunities Clause as a justification for overturning unequal state laws.[75] In 1873, the Supreme Court decided *The Slaughter-House Cases*, and the Court's opinion indicated that any violation of the EPC is also a violation of the Privileges or Immunities Clause.[76]

EPC would "disable a State from depriving, not merely any citizen, but any person of . . . the equal protection of the laws.").

72. *Thirty-Ninth Congress, First Session, Senate….Wednesday, May 23*, N.Y. TIMES 1 (May 24, 1866) (account of Howard's speech saying nothing about "equal protection of *its laws*" or "equal protection of the laws *of the state*"); *XXXIXth Congress, First Session, Senate….Washington, May 23*, N.Y. TRIBUNE 1 (May 24, 1866) (same); *Thirty-Ninth Congress, First Session, Senate, Washington, May 23*, DAILY AGE 1 (May 24, 1866) (same); *Reconstruction, Speech of Hon. J.M. Howard in the Senate,* HILLSDALE STANDARD 1 (June 5, 1866) (same); *Congressional Reports XXXIXth Congress–First Session, Wednesday, May 23, 1866. Senate,* NATIONAL REPUBLICAN 3 (May 24, 1866) (same); *Senator Howard's Speech*, PHILADELPHIA INQUIRER 8 (May 24, 1866) (same); *Thirty-Ninth Congress*, NATIONAL INTELLIGENCER 3 (May 24, 1866) (same); *Reconstruction: The Debate in the Senate*, BOSTON DAILY ADVERTISER 1 (May 24, 1866) (same).

73. *See* David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 715 (2009). *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (Howard stating that privileges and immunities "are not and cannot be fully defined in their entire extent and precise nature . . . ." though that statement was not in newspaper accounts).

74. *See* statements by John Bingham quoted parenthetically at note 4 *supra*.

75. *See e.g.* CONG. GLOBE, 42nd Cong., 2nd Sess. 900 (1872) (Sen. Edmunds) ("If it is not a privilege and immunity of a citizen, being otherwise equal and otherwise qualified, to stand on an equality irrespective of color, what is a privilege and an immunity of citizenship upon which you can stand?").

76. *See* JACK BALKIN, LIVING ORIGINALISM, p. 433 n. 150 (2011) (citing Slaughter-House Cases, 83 U.S. 36, 83 (1873); *id.* at 118 (Bradley, J., dissenting)) ("All of the justices in the *Slaughter-House Cases* agreed that equal protec-

The Court generally offered a relatively modest interpretation of the Privileges or Immunities Clause,[77] and people generally relied directly upon the EPC much more after *Slaughter-House* than they had before.[78] Post-enactment history needs to be taken with many grains of salt, regardless of whether *Slaughter-House* was decided correctly or not, and there is sufficient pre-enactment evidence to render the post-enactment material unnecessary.

D. *The Last Three Words do not Imply that Federal Laws Must be Equal*

The words "of the laws" refer in the EPC to both state and federal laws. Suppose, as the U.S. Supreme Court says, that the equal protection of the laws is generally a pledge of the protection of equal laws.[79] Then we would have the very odd result that the EPC limits the content of both state and federal laws, even though the clause is phrased as a limitation upon the state laws only ("No state shall. . . .").

That might make some sense if there were a general equal protection requirement already judicially enforceable against Congress. But there is not, despite the Court's reliance upon the misbegotten doctrine of substantive due process to police the other branches for impartiality.[80] As Professor Michael Rappaport has written, "While the Congress likely believed that the federal government should not engage in arbitrary racial discrimination, it allowed

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tion was a privilege or immunity of national citizenship."). The incorporation of the EPC into the Privileges or Immunities Clause does not expand what the EPC accomplishes alone, under an "enumerated rights interpretation" of the Privileges or Immunities Clause. *See generally* LASH, *infra* note 93, at 252-53.

77. Slaughter-House Cases, 83 U.S. 36 (1873). To be precise, this case was decided on April 14, 1873.

78. *See, e.g.*, John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws*," 1972 WASH. U. L. Q. 421, 465 n. 162 (1972). Senator Edmunds apparently joined in that shift. *See Equal Rights,* THE NATIONAL REPUBLICAN 5 (December 22, 1882) (Edmunds arguing that a California tax on corporations violated the EPC).

79. *See, e.g.,* Skinner v. Oklahoma, 316 U.S. 535, 540 (1942), *quoting* Yick Wo, 118 U.S. at 369. ("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'").

80. *See, e.g.,* Andrew T. Hyman, *The Little Word Due*, 38 AKRON L. REV. 1 (2005).

this norm to be enforced solely through a principle of political morality."[81]

Professor Gary Lawson and coauthors have recently argued that there *is* a judicially enforceable equality requirement applicable against Congress, because the Constitution functions as a "great power of attorney."[82] However, James Iredell (upon whom those authors heavily rely) merely *compared* the Constitution to a power of attorney,[83] without taking that comparison so far as to suggest that background fiduciary principles reduce any constitutionally delegated power.[84] He merely made that comparison to emphasize that Congress could not enact statutes beyond its enumerated powers, not beyond any unenumerated fiduciary principles.

Narrowly construing federal statutes that otherwise violate atextual fiduciary principles is plausible.[85] But for judges to *strike down* statutes on such atextual grounds is no more plausible than judges striking them down for flouting the Constitution's preamble. James Iredell's notes from 1792 confirm that he supported striking down acts of Congress only for reasons unconnected to background fiduciary principles:

> All these [acts of Congress] must be justified under the authority granted by the Constitution. Within that authority all their acts are valid and obligatory. Beyond it none of them are so: and however painful such an occasion may be, if in any instance an act of Congress exceeding its authority comes before a Court it must be declared to be void: be-

81. *See, e.g.,* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 73 (2013).

82. *See* Gary Lawson, Guy I. Seidman, & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 419 (2014). These authors are surely correct to say that substantive due process "is not a plausible interpretation of the Fifth Amendment's Due Process Clause." *See id*. at 423-424.

83. *Id*. at 427, n. 66.

84. *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 148, 149, and 166 (Jonathan Elliot ed. 1901).

85. *See generally* Michael McConnell *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, 168 (Jack Balkin ed. 2002) (Congress never "required that the schools of the District of Columbia be segregated.").

> cause upon the very same principle that one act of Congress can repeal a former act, the authority of the Legislature being at all times equal, & therefore the latter act shall supersede the former; so an act contrary to the Constitution must be void, that being contrary to fundamental Law, upon the basis of which the whole Government rests, and unrepealable by any act of Congress acting under it.[86]

Iredell was thus clear that the matter of unconstitutionality must be treated like resolution of any two conflicting statutes, and the latter resolution does not involve constitutional law and therefore does not normally involve any power of attorney.

The framers of the original Constitution could have easily written the Necessary and Proper Clause[87] as an express limitation upon all lawmaking by Congress, but instead they phrased it as an additional power. Chief Justice Marshall explained that the Necessary and Proper Clause "purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."[88] When Congress acts pursuant to other powers, Congress itself is the judge of necessity and propriety, subject to correction by the constituents who cast ballots during elections.[89] Thus, there is no general equality limitation upon Congress that is judicially enforceable, so it makes no sense to construe the EPC as a general

86. James Iredell's Observations on State Suability (Feb. 11-14, 1792), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 83 (Maeva Marcus et al. eds. 1994), *quoted in* Maeva Marcus, *The Effect (or Non-Effect) of Founders on the Supreme Court Bench*, 80 GEO. WASH. L. REV. 1794, 1800-01 (2012). Iredell had made the same point in public on August 17, 1786. *See* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, 148 (1858). *See generally* SNOWISS, *infra* note 148, at 45 *et seq.* (Iredell on judicial review).

87. U.S. CONST. art. I, §8, cl. 18.

88. McCulloch v. Maryland, 17 U.S. 316, 420 (1819), *quoted in* Printz v. United States, 521 U.S. 898, 942 (1997) (Stevens, J., dissenting, Souter, Ginsburg & Breyer, JJ., joining).

89. When James Madison introduced the Bill of Rights on June 8, 1789 he said: "Now, may not laws be considered necessary and proper by Congress, for it is for *them* to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper. . . ." (emphasis added). 1 ANNALS OF CONG. 455, (Joseph Gales ed. 1789).

self-executing equality limitation upon "the laws" (which necessarily include the federal laws).

The search for the EPC's original meaning is not completed by determining what its last three words mean. However, those words do place substantial limits upon the original meaning, and upon what conceptions of equality can legitimately be enforced via the EPC.

IV. THE WORD "PROTECTION" HAS AN ORDINARY BROAD MEANING

Some scholars have argued that the word "protection" in the EPC has a relatively narrow meaning. If so, any substantive role of Congress under the EPC would be correspondingly narrow, and some other constitutional clause would be needed to accomplish many of the things that the federal courts have done under the EPC.

Though it is sometimes misunderstood,[90] Professor John Harrison's theory relies upon the Privileges or Immunities Clause to do much of the equalizing work of the Fourteenth Amendment.[91] Professor Harrison's 1992 article on this subject remains a leading theory about the original meaning of the equality component of the Fourteenth Amendment.[92] That theory is in conflict

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90. *See, e.g.*, JACK BALKIN, LIVING ORIGINALISM 220 (2011) ("John Harrison has argued that the equal protection clause does not regulate legislation at all. . . ."); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (attributing to Harrison the notion that the Equal Protection Clause "says nothing about what laws the legislature can make"). Professor Harrison has addressed this matter as follows: "Some people who believe as I do that the protection of the laws in the Equal Protection Clause is specifically about protection also maintain that the Equal Protection Clause applies only to non-legislative government operations, but I'm not one of them. I suspect that it's not so much that Balkin and Calabresi misinterpreted me as that they got confused about who had said what, mixing me up with those who take a similar but distinct position." Email Correspondence from John Harrison (March 12, 2013).

91. Harrison, *supra* note 10.

92. Michael Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 116 (2013). Professor Rappaport says that the other leading theory is that of Professor Melissa Saunders. *See* Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997). Professor Saunders wrote that the EPC was "intended merely to nationalize, with some modifications, the antebellum state constitutional doctrine against partial or special laws." *Id.* at 300. On the contrary, two antebellum

with the idea that the Privileges or Immunities Clause incorporates only rights that are already enumerated in the Constitution.[93] According to Harrison, the word "protection" has a technical meaning that includes legal remedies (as distinguished from the substantive law of legal rights), and also includes the right of personal security against violence, but does not include much – if anything – else.[94]

Professor Harrison argued that the word "protection" would be superfluous if it truly had the broad meaning urged by the U.S. Supreme Court, rather than a narrower meaning.[95] But, actually, an equality requirement imposed upon the *laws* will not necessarily produce any equality in people's lives, whereas an equality requirement imposed upon *protection* of those laws does require real results. Congressman Job Stevenson put it this way in 1871: "The words 'the laws' imply existing laws; and the benefit secured is the 'protection' of the laws, and this requires their execution. Unexecuted laws are no 'protection.'"[96] Notice that Stevenson also inferred the EPC refers to actual *existing* laws, rather than hypothetical ideal laws.

A. *Enforcement Act of 1870*

Professor Harrison places considerable emphasis upon legislation enacted by Congress *after* the Fourteenth Amendment

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state constitutions had explicit "equal protection" provisions, and both explicitly contemplated "special privileges or immunities" subject to legislative discretion. *See* Kan. Const. of 1859 (Wyandotte), Bill of Rights, § 2, *reprinted in* 4 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 83 (1979); Ohio Const. of 1851, art. I, § 2, *reprinted in* 7 SWINDLER, *supra*, at 558.

93. *See generally* KURT LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP, xi (2014) ("the original meaning of the Privileges or Immunities Clause included only those rights enumerated in the Constitution"). Lash appears to be correct.

94. Harrison, *supra* note 10, at 1449 (1992). Professor Christopher Green takes a similar position: "It refers to a particular discrete entitlement to receive a remedy *and* to be secure against violence. . . ." Green, *supra* note 34, at 47 (emphasis added). Professor Green's other major article on this subject focuses on post-enactment material. *See* Christopher Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 244 (2009).

95. Harrison, *supra* note 10, at 1434 (1992).

96. CONG. GLOBE, 42d Cong., 1st Sess. App. 300 (1871) (Rep. Job E. Stevenson).

was adopted.[97] Such evidence is interesting, and may be worth considering, even though it pales almost to insignificance compared to the history that culminated with adoption of the amendment.

Consider the following statute passed in 1870, part of which is still in force and is codified at 42 U.S.C. § 1981:

> All *persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[98]

Compare that to 42 U.S.C. § 1982:

> All *citizens* of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

> The first quoted sentence, in § 1981, is a bit broader than the language of the Civil Rights Act of 1866, in that it confers some protection upon "persons" rather than just citizens, whereas the quoted sentence in § 1982 is a remnant of the Civil Rights Act of 1866.[99]

Professor Harrison concludes that the latter material (in section 1982) is not about "protection" given that it covers citizens only, which supposedly proves that Congress in those days had a narrow understanding of the word "protection." If that were correct,

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97. Harrison, *supra* note 10, at 1444.

98. *See* Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140, §§ 16, 18 (1870) (emphasis added).

99. *See* Civil Rights Act of 1866, *supra* note 9 (quoting that Act) (emphasis added).

then any substantive role of Congress under the EPC would be correspondingly narrow.

However, it is no less plausible to suppose that Congress enacted *both* of these provisions pursuant to the EPC, and that Congress did so by making a reasonable classification between citizens and aliens.[100] After all, section one of the Fourteenth Amendment explicitly distinguishes between citizens and persons, which supports the reasonableness of that classification. Alternatively, one could view §1981 and §1982 as dealing with citizens under the EPC, while §1981 additionally deals with aliens under international treaties and the foreign affairs powers of Congress.[101] Whichever view one takes, neither section 1981 nor section 1982 depends upon any clause in the first section of the Fourteenth Amendment other than the EPC.[102]

It was common in 1866 for people to believe that the *only* purpose of the Civil Rights Act of 1866 was to guarantee equal protection.[103] And so it was.

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100 The Supreme Court once said that 42 U.S.C. §§ 1981 and 1982 are entirely justified by section 2 of the Thirteenth Amendment, and therefore are applicable against both the states as well as private parties. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). True, the Civil Rights Act of 1866 was initially justified by section 2 of the Thirteenth Amendment, given the urgent need to prevent backsliding toward slavery. But once the slavery crisis passed, the Fourteenth Amendment was needed to constitutionalize the Civil Rights Act. *See* McDonald v. Chicago, 130 S.Ct. 3025, 3041 (2010).

101. *See* Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948) (Congress enacted what is now § 1981 as part of a "comprehensive legislative plan for the nationwide control and regulation of immigration and naturalization").

102. Harrison, *supra* note 10, at 1447.

103 *See, e.g., Nourishing Grievances,* CINCINNATTI DAILY GAZETTE 2 (April 23, 1866) ("The Civil Rights Bill is solely to provide the equal protection of law for classes of persons to whom it is denied by the state laws."); *The Civil Rights Bill Indorsed by the Democracy*, FORT WAYNE DAILY GAZETTE 2 (September 3, 1866) (saying that support for "equal protection in every right of person and property" amounted to support for the Civil Rights Bill). The National Union Convention at Philadelpia in August 1866 had endorsed "equal protection in every right of person and property." *See* LAWANDA COX, FREEDOM, RACISM, AND RECONSTRUCTION 118 (1997). In Congress, prior to adoption of the Fourteenth Amendment, Senator Edmunds explicitly connected the EPC with the Civil Rights Bill. CONG. GLOBE 40th Cong. 2nd Sess. 3604 (1868) ("That is what Florida was not to deprive any person of within her jurisdiction — the civil rights bill . . . ."). Even before Edmunds, Senator Luke Poland stated that the consti-

B. *Blackstone, Bouvier, Hale, Brisbin, and Garfield*

The eighteenth-century English jurist, William Blackstone, wrote that "protection of the law" refers only to the remedial parts of statutes (even if the statutes are "indifferent" to natural rights).[104] Professor Harrison does not agree with Blackstone that the word "protection" in the EPC is limited to remedies *only*,[105] and indeed there was contemporaneous disagreement with Blackstone on that point.[106] On this score, Professor Harrison is undoubtedly correct. And, if equal "protection" is not limited to remedies *only*, then it is hard to see why this word "protection" cannot refer to all legal provisions that contribute to safeguarding a person's liberties and civil rights.

In contrast to Blackstone, the U.S. Supreme Court in 1803 discussed "the protection of the laws" (plural) in connection with remedies but without suggesting that the phrase related to remedies *only*.[107] There does not seem to be any American court case prior to 1868 that insisted upon a narrow or technical meaning of the phrase "protection of the laws" (plural).

Phrases like "protection of the laws" and "equal protection" were often used in their ordinary sense, rather than as idioms or

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tutionality of the Civil Rights Bill would be supported by the EPC but not by the Privileges or Immunities Clause. CONG. GLOBE 39th Cong. 1st Sess. 2961 (1866).

104 *See* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 54-56 (1765-69) ("The *remedial* part of a law . . . is what we mean properly, when we speak of the protection of the law."). The Supreme Court quoted this language of Blacktstone in 1843. *See also* Bronson v. Kinzie, 42 U.S. 311, 317 (1843) (quoting Blackstone).

105. Harrison, *supra* note 10, at 1449. Professor Christopher Green takes a similar position: "it refers to a particular discrete entitlement to receive a remedy *and* to be secure against violence. . . " Green, *supra* note 34, at 47 (2008) (emphasis added).

106. *See* Jeremy Bentham, THE COLLECTED WORKS OF JEREMY BENTHAM: A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 70 (J.H. Burns and H.L.A. Hart eds. 2008) (1774) ("we must have the whole law to protect us"). *See also* John Witherspoon, "Lectures on Moral Philosophy," *in* 3 THE WORKS OF THE REV. JOHN WITHERSPOON 367, 431 (1800) ("The rights of subjects in a social state cannot be enumerated, but they may be all summed up in *protection*. . . .") (emphasis in original).

107. Marbury v. Madison, 5 U.S. 137, 163 (1803) (Chief Justice Marshall wrote: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). The Court did not suggest that "protection of the laws" refers to remedies *only*.

terms of art, in the 1860s; legislators of that era often explained those phrases by simply using their constituent parts, such as the freestanding words "equal" and "protection" and "laws."[108] If the word "protection" necessarily has a narrow technical or idiomatic meaning, then the substantive role of Congress under the EPC would have to be correspondingly narrow, but there is no such necessity.

The notion that the word "protection" in the Fourteenth Amendment excludes things like protecting a citizen's right to public benefits may have existed in the 1860s, but that narrow interpretation was not the primary interpretation back then. For example, lexicographer John Bouvier wrote: "PROTECTION, government. That *benefit* or safety which the government affords to the citizens."[109] Bouvier's was the dominant legal dictionary on the market at that time.[110]

The broad scope of the word "protection" in the EPC is confirmed, for example, by remarks of Congressman Robert S. Hale (R-NY). Hale had previously been a county judge in Essex County, New York for eight years, and also a member of the New York State Board of Regents for many years.[111] In 1866, he voted to override President Andrew Johnson's veto of the Civil Rights Act[112] and later voted for the final version of the Fourteenth Amendment.[113]

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108. *See, e.g.,* Christopher Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 234 (2009) ("Republican supporters of the Act repeatedly stressed the word 'protection' in the Equal Protection Clause….").

109 JOHN BOUVIER, 2 A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION 396 (Sixth Edition, Childs & Peterson, 1864) (original capitalization but italics added). *See also, e.g.,* GILES JACOB, A NEW LAW DICTIONARY (Savey-Lintot, 1750). Jacob begins with this general definition: "Protection . . . [i]s generally taken for that benefit and safety which every subject hath by the King's Laws. . . ."). *Id.* Jacob then follows with several specific definitions. *Id.*

110. As of 1860, this legal dictionary was dominant in the market. *See* Mary Whisner, "Dictionaries Make Strange Bedfellows" *in* LANGUAGE AND THE LAW 93-98 (Marlyn Robinson ed. 2003).

111 *See* 3 LEGAL AND JUDICIAL HISTORY OF NEW YORK 242 (Alden Chester ed. 1911). *See also* Charles Fitch, "Regent Robert S. Hale, LL. D." *in* ANNUAL REPORT OF THE REGENTS 457 (1883).

112. CONG. GLOBE, 39th Congress, 1st Sess. 1861 (1866).

113 CONG. GLOBE, 39th Congress, 1st Sess. 3149 (1866). Hale's vote for the Fourteenth Amendment was on the final version after the Senate amended it.

Hale was a leading opponent of the preliminary version of the Fourteenth Amendment,[114] which contained equal protection language that Hale said would give Congress power to override "*all* State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen. . . ."[115] Hale elaborated that the language of the constitutional amendment would allow Congress "to legislate upon *all matters* pertaining to life, liberty, and property. . . ."[116] Thus, Hale indicated that the word "protection" refers not just to remedial matters, or matters pertaining to violence.[117] His speech, which was published in the *New York Times* for example,[118] shows that the word "protection" did not limit the scope of the clause, and Hale's speech helped to defeat that first draft of the Fourteenth Amendment.[119]

The preliminary version of the EPC limited "protection" to the rights of life, liberty, and property whereas the final version removed that limitation. Removal of the limitation was well-known given that the preliminary version was very widely publicized in newspapers, and so that removal was not merely legisla-

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On a preliminary vote, he was apparently absent. *Id.* at 2545. If proper weight is given to Hale's votes overriding President Johnson's veto of the Civil Rights Bill, and supporting the constitutional amendment that Johnson opposed, he seems moderate rather than conservative. *See, e.g.,* DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 45 (2003) (calling Hale a "moderate").

114. *See supra,* note 23 (quoting the preliminary version of the amendment).

115. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (Rep. Hale) (emphasis added). Hale was not referring here to language in the proposed amendment regarding privileges and immunities, which he regarded as "simply irrelevant to the matter which I here discuss. . . ." *Id.*

116. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (Rep. Hale) (emphasis added).

117. *Id.*

118. *See Amending the Constitution: Federal Power and State Rights. Remarks of Robert S. Hale, of New-York, on the Amendment to the constitution Reported by Mr. Bingham, of the Reconstruction Committee, Feb. 27, 1866*, THE NEW YORK TIMES 2 (March 2, 1866). In a separate editorial, the *Times* called Hale's speech "very able and interesting…an argument of great clearness and force — one which was not affected or weakened in the least by the attempts made to answer it." *Id.* at 4.

119. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 35 (1955). The first draft of the Fourteenth Amendment was postponed in the House by an overwhelming vote of 110 to 37. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

tive history confined to the legislative body, but rather was part of the history of the times.[120] Readers in 1866 may have drawn different conclusions about exactly why this limitation was dropped, and why a different limitation (i.e. "of the laws") was adopted instead, but they likely understood that the final EPC would extend protection not just to laws involving life, liberty, and property but also to things like happiness.[121]

Congressman Bingham defended the proposed constitutional amendment, and disagreed with Hale's analysis.[122] Bingham argued that the right of property refers to property already owned, so that the proposed amendment would not intrude upon state laws about acquisition of property.[123] However, Congressman Thaddeus Stevens (R-PA) believed that the amendment would generally bar discrimination when any two people in the same class are "dealt with" differently, which suggests a broad understanding of the word "protection."[124] Pre-enactment legisla-

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[120] The preliminary version of the EPC is at note 23 *supra.* It was very widely publicized in 1866. *See, e.g.*, the following articles, alphabetized by state: *XXXIXth Congress—First Session,* CONN. COURANT 1 (March 3, 1866) (Connecticut); *XXXIXth Congress—First Session,* DAILY ILL. STATE JOURNAL 2 (February 14, 1866) (Illinois); *Thirty-Ninth Congress—First Session*, NEW ALBANY DAILY COMMERCIAL 3 (February 14, 1866) (Indiana); *Latest From Washington*, TIMES-PICAYUNE 1 (February 14, 1866) (Louisiana); *House,* BANGOR DAILY WHIG AND COURIER 3 (February 27, 1866) (Maine); *Freedmen's Bureau,* ANNAPOLIS GAZETTE 1 (March 1) (Maryland); *Secular News,* BOSTON RECORDER 31 (February 23, 1866) (Massachusetts); *Washington News*, N.Y. TIMES 1 (February 14, 1866) (New York); *Telegraphic*, NEW BERNE TIMES 1 (March 1, 1866) (North Carolina); *Congressional Summary,* CLEVELAND PLAIN DEALER 1 (February 14, 1866) (Ohio); *Will They Never Stop?,* DAILY AGE 2 (February 15, 1866) (Pennsylvania); *From Washington,* DAILY PHOENIX 3 (February 17) (South Carolina); *Proceedings of Congress*, NASHVILLE UNION AND AMERICAN 3 (February 14, 1866) (Tennessee); *Telegraphic,* FLAKE'S BULLETIN 1 (March 3, 1866) (Texas); *Specimen of Democratic Eloquence,* BURLINGTON WEEKLY FREE PRESS 1 (March 9, 1866) (Vermont); *Telegraphic,* THE PROGRESS-INDEX 4 (March 1, 1866) (Virginia); *Congressional Proceedings,* WHEELING DAILY INTELLIGENCER 3 (February 14, 1866) (West Virginia); *Congressional*, DAILY MILWAUKEE NEWS 1 (February 14, 1866) (Wisconsin). Further newspaper citations are omitted for brevity.

121. *See infra* text accompanying note 141.

122. *See* Harrison, *supra* note 10, at 1407 n. 73.

123. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) ("[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?") (Rep. Bingham). *Cf.* Harrison, *supra* note 10, at 1449 n. 256.

124. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (Rep. Stevens).

tive history like this is interesting, certainly more so than post-enactment material, and it suggests a lack of consensus that the word "protection" narrowed the scope of the first draft of the Fourteenth Amendment.[125] More likely, that word was used so the amendment would affect not just legal rights but, also, the actual vindication of those rights.

Do the words "within its jurisdiction" in the EPC tell us anything about the breadth of the word "protection" in that clause? The U.S. Supreme Court has said (correctly in my view), that "the phrase 'within its jurisdiction' was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, *and* to all upon whom the State would impose the obligation of its laws."[126] Therefore, the jurisdictional limit in the EPC is consistent with the notion that the clause broadly covers "protection" of property rights, even if the property owner is currently outside the state's boundaries.[127]

Many people prior to, and during the 1860s, used the word "protection" with reference to an allegiance-for-protection con-

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125. Professor Green includes many quotes in his "pre-enactment" article that are dated *after* 1868. *See, e.g.,* Green, *supra* note 34, at 48-49 (2008). As to pre-enactment things Hale said, Professor Green deems them unreliable, because Hale opposed the preliminary version of the Fourteenth Amendment, and because Hale did not know about an important 1833 case. *Id*. at 20 n. 70. But Hale supported the final version of the Fourteenth Amendment, and even Bingham admitted later that he himself had misunderstood that 1833 case. *See supra* note 113 (Hale on the final version); CONG. GLOBE 42d Cong. 1st Sess. App. at 84 (1871) (Bingham said, "after my struggle in the House in February, 1866 . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall."). Bingham initially believed that the Bill of Rights was binding on the states, but later realized his mistake. *See* LASH, *supra* note 93, at 85. Moreover, "Both before and after *Barron*, even with the decision in place as binding precedent, state courts were free to apply the Bill of Rights to the states." Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 3 (2007). In any event, Hale was only allowed "a few hours' hasty examination" of the proposed amendment. CONG. GLOBE 39th Cong. 1st Sess. 1066 (1866).

126. Plyler v. Doe, 457 U.S. 202, 214 (1982) (emphasis added). One might speculate that the text of the EPC employs the word "jurisdiction" instead of "boundaries" because the former is narrower, but apparently that is not so. *See* CONG. GLOBE 39th Cong. 1st Sess. 2511 (1866) (Rep. Thomas D. Eliot, R-MA, stating that EPC forbids "denying to any persons within the state the equal protection of the laws."). *See also* David Haller, *Within the States' Jurisdiction: Metropolitan, Northeast Bancorp, and the Equal Protection Clause*, 96 YALE L.J. 2110, 2115 n. 18 (1987).

127. *Contra* Harrison, *supra* note 10, at 1449.

tractual theory, but none of those uses suggest that the allegiance-for-protection theory is inapplicable to matters beyond remedies or beyond security against violence.[128] On the contrary, consider the following common sentiment described by Brigadier General James S. Brisbin speaking at a civil rights rally in Lexington, Kentucky on July 4, 1867:

> It is a principle of nations that allegiance and protection go together, the one being the consideration of the other. As we claim allegiance from the blacks, we are bound to accord them full protection in *all their rights* as citizens, both civil and political.[129]

Notice that Brisbin did not view the allegiance-for-protection theory as applying to *some* rights, but rather to "all" rights. Even assuming that an allegiance-for-protection theory was fully embodied in the EPC, still the EPC would apparently not be confined to protecting only a right to be secure from violence, or a right to receive a remedy.

A post-enactment comment in 1871 by Congressman James Garfield (later President of the United States) has been cited for the proposition that the EPC is narrow,[130] which would imply a

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128. *See generally* Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 300 (1992) ("Although the word 'protection' will be described here as a term of art in the state-of-nature or contract theory of government, it hardly requires to be noted that Americans also often used the word in other ways."). *Cf.* Green, *supra* note 34, at 47-48 (2008). Professor Green presents quotations from 1864, 1866, and 1868 exemplifying the allegiance-for-protection contractual tradition, but even assuming that the EPC embodies the allegiance-for-protection theory, none of those quotes suggest that "protection" under the EPC can *only* include protection via remedies and/or protection against violence.

129. *A Significant Extract From a Significant Speech,* STEUBENVILLE WEEKLY HERALD 1 (July 26, 1867)(emphasis added) *quoted approvingly in* CONG. GLOBE, 40th Cong., 1st Sess. 632 (1867) (Sen. Sumner). A treatise by written by John Reeves in 1869 stated: "The *servus*, though he was generally considered as *in potestate domini*, and not *sui juris*; yet, as to life and limb, he was entitled to the protection of the law." 1 JOHN REEVES, HISTORY OF THE ENGLISH LAW 303 (W.F. Finlason ed., 1869) (original emphasis). To be *ín potestate* is the essence of slavery, and Reeves never suggested that free people (much less free citizens) are entitled merely to the protection of the law as to life and limb. *Cf.* Green, *supra* note 34, at 48.

130. *See* Green, *supra* note 34, at 27.

correspondingly narrow substantive role of Congress under the EPC. Garfield said:

> [T]his [first] section of the [fourteenth] amendment was considered as equivalent to the first section of the civil rights bill, except that a new power was added in the clause which prohibited any State from depriving any person within its jurisdiction of the equal protection of the laws.[131]

Modern scholars have taken a different view than Garfield, arguing (correctly in my opinion) that the EPC is intimately related to the Civil Rights Act of 1866.[132] Multiple pre-enactment sources indicate that the EPC rather than the Privileges or Immunities Clause supported the Civil Rights Act of 1866.[133]

It seems at least questionable that Garfield really meant to suggest the EPC did not support anything contained in the first section of the Civil Rights Act of 1866, given that the full title of that legislation explicitly aimed to "protect" people: "An Act to *protect* all Persons in the United States in their Civil Rights and liberties, and furnish the Means of their Vindication."[134] In sum, this post-enactment quote from Garfield is weak evidence for narrowly construing either the word "protection" or the substantive role of Congress under the EPC.

C. *Bradwell, Slaughter-House, and Cummings*

In the 1872 case of *Bradwell v. Illinois*, the issue was whether women had a federal right, enforceable against the states, to practice law.[135] Bradwell's attorney, U.S. Senator Matthew Carpenter, argued as follows:

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131. CONG. GLOBE, 42d Cong., 1st Sess. 151 (1871).

132. *See* Green, *supra* note 34, at 20 ("The Civil Rights Act does cover the central entitlement of a duty-to-protect Equal Protection Clause"). *See also* Harrison, *supra* note 10, at 1448 (1992) ("The Civil Rights Act of 1866 gave blacks the full and equal benefit of all laws and proceedings for the security of person and property. This is critical for equal protection. . . .").

133. *See* note 103 *supra*.

134. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (emphasis added).

135. Bradwell v. Illinois, 83 U.S. 130, 136 (1872).

> [T]he *only provision* in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen." And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.[136]

Some scholars see this statement by Sen. Carpenter as important evidence supporting a narrow view of the word "protection" in the EPC.[137] But for every such piece of post-enactment evidence, it is easy to produce counter-evidence. For instance, in the *Slaughter-House Cases* in 1872, Justice Bradley wrote this in dissent:

> In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted….deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.[138]

Justice Swayne supported this argument by Justice Bradley.[139] Evidently, then, people in that post-enactment era had differing views as to the scope of the word "protection." The best way to resolve those discrepancies is to focus on the text of the Fourteenth Amendment and upon cases and other evidence pre-dating adoption of the amendment in 1868. Accordingly, the judiciary has a sufficient basis for construing the word "protection" in a broad manner, and the substantive role of Congress under the EPC is correspondingly broad, though not plenary.

No U.S. Supreme Court opinion (including dissents and concurrences) ever used the term "equal protection" prior to 1869,

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136. *Id*. at 136 (argument of counsel).

137. *See* Christopher Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO MASON CIV. RTS. L.J., 219, 274 (2009). *See also* Harrison, *supra* note 10, at 1389, 1426-27.

138. Slaughter-House Cases, 83 U.S. 36, 122 (1873) (Bradley, J., dissenting).

139. *Id.* at 128 (Swayne, J., dissenting) (Bradley's opinion was "full and conclusive upon the subject").

which suggests that it was not a well-known term of art.[140] However, in January of 1867, the Court did allude to the then-pending constitutional amendment:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that, in the pursuit of happiness, all avocations, all honors, all positions are alike open to everyone, and that *in the protection of these rights all are equal before the law*.[141]

This suggests that the Court did not view equal protection as a composite term of art, but rather as simply a combination of individual words. It also suggests that they understood equal "protection" as being applicable not just to life, liberty, and property, but also to "happiness."

V. RULES OF CONSTRUCTION HELP DEFINE THE SUBSTANTIVE ROLE OF CONGRESS

The appropriate rules of interpretation to use when interpreting a law are the rules that were employed when the law was made.[142] For construing the EPC, two such rules are particularly important: the presumption of constitutionality and the presumption against surplusage. Both of these rules were taken for granted in the 1860s, and they clarify the substantive role of

140. The first use of the term "equal protection" in a Supreme Court opinion was in 1869, when the Court said the Comity Clause (also known as the Privileges and Immunities Clause) "secures to [citizens] in other States the equal protection of their laws." Paul v. Virginia, 75 U.S. 168, 180 (1869).

141. Cummings v. Missouri, 71 U.S. 277, 321-22 (1867) (emphasis added). This opinion was delivered on January 14, 1867 which was only seven months after the Fourteenth Amendment was sent to the states for ratification. *See id.*

142. *See generally* JOHN MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION, 116 ("Using the enactors' interpretive methods ensures that the provisions have the meaning that the enactors expected. . . .").

Congress under the EPC. After all, rules of interpretation are often used in the process of drafting legislation.[143]

A. *Presumption of Constitutionality*

The principal framer of the EPC, Congressman John Bingham, was vocal in favor of the presumption of constitutionality. For example, during the impeachment trial of President Andrew Johnson, Bingham served as a manager for the House of Representatives, and he said the following on May 5, 1868:

> It has been settled law in this country from a very early period that the constitutionality of a law should not be questioned, much less be adjudged invalid by a Court clothed by the Constitution with jurisdiction in the premises, unless upon a case so clear as to scarcely admit of a doubt....[144]

The U.S. Supreme Court had repeatedly endorsed this rule of construction, for example in 1810,[145] 1819,[146] and 1827.[147] The Court often did so without explicitly restating the rule, as in 1830[148] and 1862.[149] Supporters of the Fourteenth Amendment thus understood that any ambiguity in that amendment would

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143. *See, e.g.,* TOBIAS DORSEY, STATUTORY CONSTRUCTION AND INTERPRETATION, 79 (2010).

144. 2 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS, 425 (Govt. Printing Office 1868). Bingham made that statement on May 5, 1868 at which time the proposed Fourteenth Amendment still needed a few more ratifications.. Bingham did not view *Dred Scott* as an exception to the presumption of constitutionality, because he viewed much of *Dred Scott* as dicta. *Id.* This speech by Bingham was publicized. *See, e.g., Andrew Johnson's Trial*, PHILADELPHIA INQUIRER 1 (May 6, 1868).

145. Fletcher v. Peck, 10 U.S. 87, 128 (1810).

146. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 625 (1819).

147. Brown v. Maryland, 25 U.S. 419, 436 (1827), *abrogation on other grounds recognized by* Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

148. *See* Craig v. Missouri, 29 U.S. 410, 428 (1830) ("It seems impossible to doubt the intention of the legislature in passing this act...."). *Cf.* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION, 161 (1990) ("Marshall, in Craig, ignored the doubtful case rule.").

149 Conway v. Taylor's Executor, 66 U.S. 603, 634 (1862).

not be exploited by the judiciary to overturn statutes, but rather would be left to be dealt with by the political branches.

Applying the rule about doubtful cases to the EPC yields two main conclusions. First, even if one thinks that perhaps the Court might be entitled to strike down state statutes under the EPC without any federal statute adopting a corresponding equality principle in "the laws," the state statute should continue to stand if the question is doubtful. Second, with regard to judicial review of federal statutory provisions that purport to enforce the EPC against the states, those statutes are not entitled to any presumption of constitutionality, because judicial review of such a federal statute actually involves the constitutionality of both that federal statute and an opposing state statute, and so the presumptions of constitutionality cancel each other out. The Fourteenth Amendment does not vest in Congress primary power to interpret what "equal protection" means (as the initial draft of the amendment did).[150]

B. *Presumption Against Surplusage*

If the EPC simply requires the states to provide equal protection as determined by federal courts, then there would be no point to the words "of the laws." The U.S. Supreme Court most famously endorsed the surplusage canon in *Marbury v. Madison* in 1803.[151] If a phrase in the Constitution removes doubts about other material in that document, then the surplusage canon may be satisfied, as Chief Justice Marshall wrote in 1819, but an interpretation that renders words completely useless should be avoided.[152] The Court endorsed the canon many times thereafter, for example in 1821,[153] 1827,[154] 1849,[155] and 1862.[156] The sur-

150. *See City of Boerne*, 521 U.S. at 524 (the first draft of the amendment departed from tradition, "by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation").

151. Marbury v. Madison, 5 U.S. 137, 174 (1803).

152. M'Culloch v. Maryland, 17 U.S. 316, 420 (1819) (discussing the Necessary and Proper Clause).

153. Cohens v. Virginia, 19 U.S. 264, 401 (1821).

154. U.S. v. Gooding, 25 U.S. 460, 477 (1827).

155. Peck v. Jenness, 48 U.S. 612, 623 (1849).

156. Rice v. Railroad Company, 66 U.S. 358, 378-79 (1862).

plusage canon has always been widely respected by the U.S. Supreme Court, even among its most adventuresome members.[157]

This surplusage canon also applies to the word "equal" in the EPC. If a state is required to provide full protection, there would arguably be little point in having the word "equal" in the clause. Nevertheless, some scholars interpret the EPC in a way that requires more protection than the most expansive protection a state already gives to anyone,[158] while other scholars disagree with that interpretation.[159] Such an interpretation would much more deeply involve the federal government in controlling the entire substantive law within a state (especially if the word "protection" has a broad meaning as argued above), and would render the word "equal" useless.

The framers and ratifiers of the Fourteenth Amendment were very much on notice that none of their words would be treated as surplusage if the courts could rationally avoid doing so.[160] It is true that the surplusage canon is not rigid, but "words with no meaning–language with no substantive effect–should be regarded as the exception…."[161] No one during the drafting and ratification period apparently suggested that any part of the EPC is surplusage while another part is not.[162]

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157. *See, e.g.,* Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 77-78 (1946) (Douglas, J.), *quoting* Holmes v. Jennison, 39 U.S. 540, 570-571 (1840) (Taney, C.J.).

158. *See generally* Green, *supra* note 34, at 5 ("All people, citizens and aliens, are to receive protection from violence and a remedy when their rights are invaded."); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 222 (2009) ("a literal duty to protect . . . would require that the state protect all individuals from violence in a minimally adequate way.").

159. Harrison, *supra* note 10, at 1448 (1992) ("Although this is not easy, the best reading is that the clause requires only that whatever protection is given be given to everyone.").

160. *See, e.g.,* Rice v. Railroad Company, 66 U.S. 358, 378-79 (1862) ("the whole statute must be regarded, and, if practicable, so expounded as to give effect to every part.").

161. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 178 (2012). *See also* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1151 (2000) (saying that the Privileges or Immunities Clause should not be treated as surplusage).

162. There was a report in the Massachusetts legislature urging rejection of the proposed Fourteenth Amendment, arguing that section 1 of the Fourteenth Amendment was entirely surplusage. *See* MICHAEL CURTIS, NO STATE

When people of the framing era sought "full protection," they were straightforward about it.[163] Likewise, Americans in the nineteenth century sometimes specified that they wanted "complete and ample protection."[164] Professor Philip Hamburger asserts that they used the modifiers "because the word 'protection' did not, by itself, necessarily refer to an extensive protection."[165] It is commonly understood that a term like "financial protection" does not imply any protection beyond finances, and a term like "nocturnal protection" does not imply any protection beyond nighttime, so it is difficult to see why a term like "equal protection" would necessarily imply any protection beyond equality.

Under current equal protection jurisprudence, the courts do not require full or even basic protection, and instead defer to the states as to what maximum level of protection will exist.[166] That limitation is valuable, and is reinforced by various statements during the drafting era, such as Thaddeus Stevens's explanation that the EPC allows correction of unjust state laws only "so far that the law which operates upon one man shall operate equally upon all."[167] Remarks like these argue against any EPC protection beyond ensuring equality.

SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 150 (1986). Of course, that view did not prevail. Congressman John Farnsworth (R-IL) said that the EPC "is not already in the Constitution," even though he suspected surplusage elsewhere in the proposed amendment. CONG. GLOBE, 39 Cong, 1st Sess., 2539 (1866) (Rep. Farnsworth).

163. *See, e.g.,* HORACE FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 61 (1908) (an early draft of the Fourteenth Amendment used "full protection" instead of "equal protection"). *See also* Republican Party Platform of 1864, §7 *in* KIRK PORTER & DONALD JOHNSON, NATIONAL PARTY PLATFORMS, 1840-1968 at 35 (1970) ("Resolved, That the Government owes to all men employed in its armies, without regard to distinction of color, the full protection of the laws of war. . . ."). Incidentally, no one would ever argue that this 1864 plank sought to change the laws of war, even if the laws of war could have been improved to provide fuller protection.

164. *See, e.g.,* Democratic Party Platform of 1840, §4 *in* KIRK PORTER & DONALD JOHNSON, NATIONAL PARTY PLATFORMS, 1840-1970 at 2 (Univ. of Illinois 1966).

165. *See* Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 371 (1992).

166. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 215 (1982) (everyone is "entitled to the equal protection of the laws that a State may choose to establish").

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

When they proposed the Fourteenth Amendment to Congress, the Joint Committee on Reconstruction said that one of their ultimate goals was "full and adequate protection" for everyone. The committee expected that result not because of the EPC, but rather because of the representation rules established by section 2 of the amendment, "since all would have, through the ballot-box, the power of self-protection."[168] The negative phraseology of the EPC ("No state shall…deny to any person") further reinforces the point that this clause does not ensure full protection; an affirmative phraseology (e.g. "Each state shall provide to every person") would have suggested that the clause helps all people instead of helping only some people (i.e. people harmed by discrimination).

The EPC was written to "place a strong emphasis on impartiality," as Chief Justice Charles Evans Hughes once said in a similar context.[169] It is difficult to see how the EPC could be legitimately applied against the states so long as they behave impartially. The presumption against surplusage weighs against such a thing by requiring that the word "equal" have effect.[170] The presumption also requires that we not dismiss the last three words of the EPC ("of the laws"), which limit the sort of equal protection that is required.[171]

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168 REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, AT THE FIRST SESSION, THIRTY-NINTH CONGRESS, xiii (U.S. Government Printing Office, 1866); *Report of the Joint Committee on Reconstruction*, Vermont Phoenix (July 13, 1866). Section 2 of the Fourteenth Amendment either suggests that the EPC does not cover political rights, or creates an exception to the EPC. *See* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE, 51 (1988).

169. Barrett McGurn, *Slogans to Fit the Occasion*, UNITED STATES SUPREME COURT YEARBOOK, 170-174 (1982). Hughes was referring to the inscription "equal justice under law."

170. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 209 (1997) (criticizing an argument wherein "the qualifying word 'equal' was almost entirely forgotten and 'protection' treated as if it stood alone.").

171. *Cf.* note 2 *supra* (disregarding the last three words of the EPC is commonplace).

VI. PRIVILEGES OR IMMUNITIES CLAUSE DOES NOT GENERALLY PROHIBIT DISCRIMINATION

If the EPC has a narrow scope, then any substantive role of Congress under that clause would obviously have to be narrow as well. One argument for a narrow EPC is that much of the equalizing work of the Fourteenth Amendment can instead be done by another provision of the Fourteenth Amendment, namely the Privileges or Immunities Clause.[172] However, that argument does not work well.

Roughly speaking, there are three primary interpretations of the Privileges or Immunities Clause, in competition with each other among scholars.[173] The first is that the clause resembles the Comity Clause, does not incorporate the Bill of Rights, and is only an anti-discrimination provision (this is the equal rights reading).[174] The second primary interpretation is that fundamental rights that have been afforded equal protection under the Comity Clause are transformed by the Privileges or Immunities Clause into substantive rights (this is the fundamental rights reading).[175] The third primary interpretation is that the Privileges or Immunities Clause protects only rights actually listed in the Constitution including but not limited to the Comity Clause (this is the enumerated-rights reading).[176]

The enumerated-rights reading is probably the most accurate of those three.[177] Thus, if the EPC has the very narrow meaning urged by some scholars (e.g. because the word "protection" is not broad enough to cover government benefits), then nei-

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

173. *See* LASH, *supra* note 93, at 279-80.

174. *Id*. Professor Harrison has written in favor of the equality-only reading of the Privileges or Immuities Clause, and for a very narrow interpretation of the EPC. *See* Harrison, *supra* note 10.

175. *See* LASH, *supra* note 93, at 279-80.

176 *Id*. There was considerable doubt in the 1860s that the Comity Clause was federally enforceable. *See, e.g.,* MICHAEL CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 63-64 (1986); Kentucky v. Dennison, 65 U.S. 66 (1860) *overturned by* Puerto Rico v. Branstad, 483 US 219 (1987).

177 *See* LASH, *supra* note 93, at xi ("the original meaning of the Privileges or Immunities Clause included only those rights enumerated in the Constitution").

ther the Privileges or Immunities Clause nor any other clause can pick up the slack.[178] Properly understood, the EPC is broad enough to avoid this difficulty.[179]

A. *Taney, Washington, and the National "Privileges of the Citizen"*

The enumerated-rights reading of the Privileges or Immunities Clause tends to support a broad scope for the EPC, and consequently a broad substantive role of Congress under the EPC. Instead of repeating what others have already said about the Privileges or Immunities Clause, this article will now focus on some relevant aspects of the *Dred Scott* case,[180] which was definitively overturned by the Fourteenth Amendment in 1868.[181] Chief Justice Taney's opinion for the Court in that 1857 case con-

178. The Supreme Court has said that the EPC merely exists to make more explicit what the Due Process Clause already requires. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (desegregating schools in the District of Columbia). That rationale in *Bolling* is widely seen as flawed. Professor Ryan Williams says that *Bolling* is instead justified by the Citizenship Clause, but Professor Michael Rappaport calls that an "extremely odd" reading. *See* Michael Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 93 n. 89 (2013). Judge — now Professor — Michael McConnell has hit the nail on the head, in my view, with regard to *Bolling*. *See supra* note 85. Alternatively, one could justify the *Bolling* decision under the Civil Rights Act of 1866 which ensured race-neutral personal security nationwide. *See infra* note 225.

179. Professor Christopher Green has suggested that the EPC is inadequate to address discrimination as to migration into a state, because of the clause's jurisdictional limitation. *See* Green, *supra* note 34 at 73. On the contrary, a state can have jurisdiction even outside its borders. *See supra* note 126 and accompanying text. Additionally, per the enumerated-rights interpretation of the Privileges or Immunities Clause, that clause incorporates the Comity Clause of Article IV, thus removing doubts that existed about whether Congress had power to enforce the Comity Clause. *See* LASH, *supra* note 93, at 175. The Comity Clause is not a general anti-discrimination provision, but it does prohibit the states from keeping out citizens from other states. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 66 (1982) ("Justice O'Connor plausibly argues that the right [to travel] predates the Constitution, and was carried forward in the Privileges and Immunities Clause of Art. IV."). This is another reason why there is no need to depart from the enumerated-rights interpretation of the Privileges or Immunities Clause, in order to address in-migration.

180. Dred Scott v. Sandford, 60 U.S. 393 (1857).

181. *See* Slaughter-House Cases, 83 U.S. 36, 73 (1873); Elk v. Wilkins, 112 U. S. 94, 101 (1884); U.S. v. Wong Kim Ark, 169 U.S. 649, 676 (1898); Saenz v. Roe, 526 U.S. 489, 502 n. 15 (1999).

tained some material that was undisputed by the other justices, including this bit:

> [T]he power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and *privileges of the citizen* are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution. . . .[182]

This blockquoted statement was one of the very few uncontroversial parts of the *Dred Scott* opinion, and it supports the enumerated-rights reading of the soon-to-be-adopted Privileges or Immunities Clause; it also echoes language used decades earlier by Justice Bushrod Washington. Washington had written in the 1820 case of *Houston v. Moore* about "the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim."[183] Like Washington and Taney, people of that era often used the word "privileges" as shorthand for "privileges or immunities."[184]

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182. Dred Scott, 60 U.S. at 449 (overruled on other grounds) (emphasis added). Taney went on to give examples of these rights and privileges of citizens: "For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding."

183. Houston v. Moore, 18 U.S. 1, 22 (1820). Justice Bushrod Washington announced the Court's decision, though it is unclear how many justices agreed with Washington's reasoning. *See id.* at 32.

184. *See, e.g.,* CONG. GLOBE, 42d Cong., 1st Sess. app. at 85 (1871) (Congress has power to "make laws to enforce guarantied 'privileges' under the Constitution, as defined therein and assured by the fourteenth amendment.") (Rep. Bingham).

Professor Mark Graber describes the block quoted portion of *Dred Scott* as "the only conclusion Taney reached that enjoyed more support after 1857 than before."[185] According to Dr. Matthew Hegreness, "While constricting the privileges and immunities for free blacks with one hand, he [Taney] vastly extended the privileges and immunities of white citizens with the other."[186]

Taney said in the block quoted excerpt that the national "privileges of the citizen" are all enumerated in the Constitution, and this is significant terminology.[187] Notice that Taney in *Dred Scott* (like Washington in *Houston v. Moore*) excluded federal statutory privileges from the "rights and privileges of the citizen," in line with standard usage during that era.[188]

This block quoted portion of Taney's opinion was undisputed by the other justices,[189] and the Supreme Court would later unanimously rely upon it in 1885.[190] At the time the Fourteenth

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185. MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 60 (2006).

186. Matthew J. Hegreness, *Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities,* 120 YALE L.J. 1820, 1870 (2011).

187. Taney wrote that Congress cannot violate these privileges of the citizen, throughout "the whole territory over which the Constitution gives [Congress] power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States." Dred Scott v. Sandford, 60 U.S. 393, 450 (1857).

188. When the Court wanted to refer to statutory privileges, it did so explicitly. *See, e.g.*, Bloomer v. McQuewan, 55 U.S. 539, 551 (1853) (referring to "privileges which that law has provided"). The Privileges or Immunities Clause conspicuously omitted the comprehensive word "all" that modified "privileges and immunities" in the first draft, and in the Comity Clause. *See supra* note 23 (quoting the first draft).

189. Justice Curtis expressly agreed with Taney on this point, Dred Scott, 60 U.S. at 614, as did Justice McLean, *id.* at 542, and Justice Campbell, *id.* at 505.

190 *See* Murphy v. Ramsey, 114 U.S. 15, 44-45 (1885). The Supreme Court has relied upon other parts of the *Dred Scott* opinion on several occasions. *See, e.g.,* Merrill v. Petty, 83 U.S. 338, 346 (1872) (consent of parties cannot confer jurisdiction); DeLima v. Bidwell, 182 U.S. 1, 196 (1901) (right to acquire territory involves right to govern and dispose of it); Alexander v. Crollott, 199 U.S. 580, 581 (1905) (possibility of void judgment will not prevent reversal upon appeal); South Carolina v. U.S., 199 U.S. 437, 449 (1905), *overruled on other grounds as recognized in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 540 (1985) (meaning of Constitution does not change); Kansas v. Colorado, 206 U.S. 46, 81 (1907) (by the Constitution a nation was brought into being).

Amendment was adopted, no Supreme Court Justice had ever disagreed with this part of Taney's opinion in *Dred Scott,* nor with the corresponding statement by Washington in *Houston v. Moore*.[191]

In March of 1868 (while the Fourteenth Amendment was still pending before the states), the Republican legal reformer David Dudley Field made the following comment to the Supreme Court about the block quoted portion of Taney's opinion: "Let it not be said of this language that the case of *Dred Scott* has been so much criticized as to weaken the authority of every part of it."[192] Taney's well-known statement about the "privileges of the citizen" being "regulated and plainly defined by the Constitution itself" was seldom quoted in Congress during the 1860s, but in those instances it was relied upon rather than criticized.[193]

Professor Lawrence Rosenthal believes that this evidence from *Dred Scott* is "flimsy" because "the best evidence of original public meaning" is in treatises that discussed the Comity Clause.[194] Professor Akhil Amar disagrees, pointing out that "the most widely read (if also reviled) judicial opinion of the era was

191. *See* Selden Bacon, *Territory and the Constitution*, 10 YALE L.J. 99, 108-10 (1901). Taney's notion that the Constitution follows the flag was eventually watered down in "unincorporated" territories. *See, e.g.,* Downes v. Bidwell, 182 U.S. 244 (1901).

192. WILLIAM FORSYTH, CASES AND OPINIONS ON CONSTITUTIONAL LAW, AND VARIOUS POINTS OF ENGLISH JURISPRUDENCE, COLLECTED AND DIGESTED FROM OFFICIAL DOCUMENTS AND OTHER SOURCES 505 (1869). David Field made this comment while arguing the case of *Ex Parte McCardle*, 74 U.S. 506, (1869). *See id.* He opposed slavery, supported Lincoln, and was the brother of Supreme Court Justice Stephen Field. KERMIT L. HALL & DAVID S. CLARK, THE OXFORD COMPANION TO AMERICAN LAW 308-09 (2002). Lincoln's attorney general had written that Taney's opinion in *Dred Scott* was largely dicta, but that the 240 pages of opinions in the case are "entitled to all the respect which is due to the learned and upright sources from which the opinions come…." EDWARD BATES, OPINION OF ATTORNEY GENERAL BATES ON CITIZENSHIP 26 (1862).

193. *See, e.g.,* CONG. GLOBE, 36th Cong., 1st Sess. 111 (1860) (Sen. Graham Fitch was an Indiana Democrat who became a Union officer during the Civil War).

194. Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 56-7 (2009).

Taney's *Dred Scott*, which had explicitly described the Bill of Rights as 'rights and privileges of the citizen.'"[195]

When Senator Jacob Howard introduced the Fourteenth Amendment in his widely publicized speech to the Senate, he said that the privileges and immunities of U.S. citizens went beyond the Comity Clause and included the Bill of Rights as well.[196] This fact strongly suggests that treatises discussing only the Comity Clause are insufficient for interpreting the Privileges or Immunities Clause.[197] Taney's opinion in the *Dred Scott* case was available not just in the compiled reports of the Court's cases, but also in the popular third edition of *Story's Commentaries* published in 1858.[198] Various other treatises focused on that part of Taney's opinion too.[199]

Professor Rosenthal has also urged that this Taney quote from *Dred Scott* be put aside because the "privileges of the citizen" to which Taney referred were only applicable against the federal government and not against the states.[200] Indeed, the federal courts only applied them against the federal government prior to 1868,[201] but that fact does not weigh against wider applicability thereafter. According to Rosenthal, the Comity Clause

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195. AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 387 (2012). To borrow a phrase from Professor Amar, the Fourteenth Amendment used "Simon Says language" in reponse to *Dred Scott*. *See id*.

196. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2764-67 (1866). This aspect of Howard's speech remained consistent from its initial draft, to reports about the speech in newspapers. *See supra note 71 (Howard's initial draft)*; *Thirty-Ninth Congress, First Session, Senate . . . Wednesday, May 23*, N.Y. TIMES 1 (May 24, 1866). *See also supra* note 72 (listing some other newspapers that detailed Howard's speech).

197. *See generally* LASH, *supra* note 93, at 157-59 (discussing Howard's speech).

198. *See* JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 2 (1858) (annotated posthumously).

199. *See* JOHN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 463 (1858); Joel Parker, PERSONAL LIBERTY LAWS, (STATUTES OF MASSACHUSETTS), AND SLAVERY IN THE TERRITORIES, (CASE OF DRED SCOTT), 80 (1861).

200. Lawrence Rosenthal, *New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 370-71 (2009).

201. *Id.* at 369-70 (Those who believed that the Bill of Rights was applicable against the states prior to 1868, "did not represent the prevailing understanding in the framing era.").

"did not include the first eight amendments."[202] The matter is not quite so simple,[203] but in any event the Privileges or Immunities Clause does not refer to the Comity Clause alone.

A few years after his opinion in *Houston v. Moore*, in the 1823 circuit court case of *Corfield v. Coryell*, Justice Washington wrote that the privileges and immunities of citizens in the several states only include rights that have *always* been enjoyed by the citizens of *every* state, in their home states.[204] Thus, *Corfield* excluded any right that any state had ever declined to recognize for its own citizens.[205] Professor Calabresi has written that, "Forty-seven percent of Americans in 1868 lived in states that constitutionally guaranteed equality of some kind, or equal protection," and so the equality right plainly does not satisfy the *Corfield* criteria.[206]

The first version of the Privileges or Immunities Clause, which was rejected by Congress, closely tracked the language of the Comity Clause, whereas the final version did not, and this

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202. *Id*. at 374.

203. However, some states decided to follow provisions in the Bill of Rights, in which case those rights were indeed covered by the Comity Clause. *See* Dred Scott, 60 U.S. 393, 417 (1856) (citizens who visit another state have "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak"). *See generally* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 164 (1765-69) ("privilege of speech"); JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION § 863 (1833) (same).

204. *See* Corfield v. Coryell, 6 Fed. Cas. 546 (E.D. Pa. 1823)(No. 3230). Justice Washington wrote: "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. . . ." *Id*. at 551.

205. For example, in North Carolina from 1838 to 1843, free native-born men of African descent were legally considered citizens while at the same time forbidden to marry white women. *See State v. Manuel,* 20 N.C. 114 (*1838*); JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860, 36-37 (Eric Anderson and Alfred Moss, eds. 1943). *See generally* note 227 *infra* (discussing interracial marriage). Thus, as of 1866, this right of interracial marriage had not at all times been enjoyed by the citizens of every state. *Cf.* David Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CON. LAW QUARTERLY 213 (2015).

206. *See* Steven Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS LAW REV. 7, 95 (2008).

change was very well-known to the public.[207] This change suggests that the final Privileges or Immunities Clause was not merely a repetition of the Comity Clause, and also suggests that the Privileges or Immunities Clause refers to the national "privileges of the citizen" about which Justices Washington and Taney had written, including but not limited to the Comity Clause privilege of a citizen who travels from one state to another.[208] One can analyze privileges and immunities of the citizen according to the *Corfield* criteria, or alternatively according to the uncontroversial standard described in *Houston v. Moore* and *Dred Scott*, and either way the equality right does not qualify. The EPC is thus the primary vehicle in the Fourteenth Amendment for guaranteeing equality.

B. *Other Aspects of the Dred Scott Case*

Professor Rosenthal views ambiguity about the original public meaning of the Fourteenth Amendment as a valid justification for a non-originalist interpretation.[209] He relies upon Taney's opinion in the *Dred Scott* case as precedent for that sort of non-originalist approach.[210] Yet Taney wrote that the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people."[211] If we take that statement seriously, it is no precedent for

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207. *See supra* note 23 (text of first version). *See also* note 120 *supra* (the first version of the amendment was widely publicized). *Cf.* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 66 (2011) ("the Privileges or Immunities Clause echoed the Comity Clause").

208. When Sen. Howard introduced the Fourteenth Amendment, he said of the privileges and immunities (in the Comity Clause) that citizens "have a right to assert them and ask for their enforcement whenever they come from one state to another." *Thirty-Ninth Congress, First Session, Senate . . . Wednesday, May 23*, N.Y. TIMES 1 (May 24, 1866). *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (same statement quoted differently). *See generally supra* note 72 and accompanying text (listing newspapers that covered Howard's speech); *supra* note 73 and accompanying text (regarding discrepancies regarding Howard's speech).

209. Lawrence Rosenthal, *New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 405-08 (2009).

210. *Id.* at 406.

211. Dred Scott, 60 U.S. 393, 426 (1865). Professor Philip Hamburger has written that, "It … is not easy to understand how the [14th] Amendment's

using purported ambiguity in the Constitution to justify a free-wheeling judicial review.[212] Nor is is that case a precedent for anything but its few uncontroversial parts, in view of Taney's widely-recognized failure in that case to correctly discern the original meaning of the Constitution.

Generally speaking, Republicans in the 1860s did not view all parts of Taney's *Dred Scott* opinion as devoid of authority.[213] Consider, for example, this line from that opinion: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing."[214] This line was favorably mentioned several times by Republicans in Congress during 1866 alone, including by Senator Charles Sumner (R-MA),[215] Congressman William Newell (R-NJ),[216] Senator John Henderson (R-MO),[217] Senator Richard Yates (R-IL),[218] and Congressman John Bingham (R-OH).[219]

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guarantee of the privileges or immunities of citizens can be understood to refer to the rights of persons protected by the Bill of Rights." Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 62 (2011). Paradoxically, Professor Hamburger acknowledges that, under the Comity Clause, "the right to enter into contracts belonged to all persons and hence all citizens, and it thus apparently had to be available to visitors." *See* id. at 82 n. 57. Properly construed, the word "citizens" in the Privileges or Immunities Clause increases the amount of rights that the clause protects, beyond what the clause would have protected if it had said "persons," while at the same time the word "citizens" limits the beneficiaries of the clause (although the EPC may allow non-citizens to benefit as well). As for the word "privileges" in the Privileges or Immunities Clause, it excludes natural rights that citizens have not been allowed to vindicate. *See* note 221 *infra*.

212. *See generally* Andrew Hyman, *The Due Process Plank*, 43 SETON HALL L. REV. 229, 244 n. 78 (2013) (concluding that Taney did not rely substantively upon the Due Process Clause).

213. *See* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 171 (2008) (discussing reliance upon *Dred Scott* by framers of Fourteenth Amendment).

214. Dred Scott, 60 U.S. at 404.

215. CONG. GLOBE, 39th Cong., 1st Sess. 1231 (1866) (Sen. Sumner) ("we find confirmation of the true principle where you would little expect it, in that very Dred Scott case, which undertook to blast a race.").

216. CONG. GLOBE, 39th Cong., 1st Sess. 867 (1866) (Rep. Newell).

217. CONG. GLOBE, 39th Cong., 1st Sess. 3032 (1866) (Sen. Henderson).

218. CONG. GLOBE, 39th Cong., 1st Sess. App. 101 (1866) (Sen. Yates).

219. CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866) (Rep. Bingham) ("the majority of the Supreme Court of the United States, even in the Dred Scott decision, were compelled to recognize the principle for which I contend this day.").

There are other examples of limited consensus in the *Dred Scott* case. In his widely admired *Dred Scott* dissent, Justice Curtis agreed with Chief Justice Taney that there are no privileges of citizenship that exist independently of constitutions and laws,[220] which was a fairly standard belief. The *sine qua non* of a "privilege" had long been legal enforceability.[221] To put it another way, people back then often spoke of "natural law" but rarely (if ever) spoke about "natural privilege," because being a natural right did not make something a privilege.

Incorporation of substantive enumerated rights under the Privileges or Immunities Clause is much more plausible than incorporation under the Due Process Clause, as a matter of original public meaning, and dropping the due process approach would constitutionalize the Court's precedents incorporating Bill of Rights provisions. Unlike the EPC, the Privileges or Immunities Clause does not allow Congress any substantive role.

VII. THE FOUR INSTANCES OF THE DUE PROCESS CLAUSE

According to the enumerated-rights reading of the Privileges or Immunities Clause, the two explicit Due Process Clauses in the Constitution are each incorporated via the Privileges or Immunities Clause, for a total of four instances of the Due Process Clause. As with the incorporated version of the EPC, the incorporated version of each Due Process Clause is no broader or narrower than the unincorporated version.

Unlike the EPC, the Due Process Clause had a long and well-established history prior to the 1860s, and there is no compelling reason to think that the Due Process Clause in the Fourteenth Amendment means anything other than the same clause

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220. Justice Curtis wrote: "It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship." Dred Scott, 60 U.S. 393, 584 (1856) (Curtis, J. dissenting). Taney agreed, writing that the Comity Clause "is confined to citizens of a State who are temporarily in another State without taking up their residence there . . . [T]he Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State." *Id*. at 422-23.

221. *See* Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1188 (2009) ("[A]ny privileges a state granted to its citizens in vindication of those [natural] rights had to be extended to visitors").

in the Fifth Amendment.[222] Scholars have long debated why the explicit Due Process Clause was included in the Fourteenth Amendment, given that the Privileges or Immunities Clause already appears to incorporate the Fifth Amendment's Due Process Clause against the states. The primary argument for including an explicit Due Process Clause in the Fourteenth Amendment has been that the framers of the Fourteenth Amendment wanted to provide some basic protection for aliens.[223] That argument is correct as far as it goes, but consider how easy it would have been for the Fourteenth Amendment to have made this point crystal clear, by saying that no state shall deprive any *other* person of life, liberty, or property, without due process of law. In reality, there was another reason for explicitly including a Due Process Clause in the Fourteenth Amendment: the Privileges or Immunities Clause only forbids the making and enforcing of various laws, whereas the Due Process Clause forbids the government from taking actions without any legal authorization at all.[224] So, the explicit Due Process Clause in the Fourteenth Amendment does not just benefit aliens, but also confers upon citizens a unique and important benefit too.

If the EPC had merely been inserted to protect aliens (who obviously are not protected by the Privileges or Immunities Clause), then there does not appear to be any reason why that

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222. *See, e.g.*, see CONG. GLOBE, 39th Cong., 1st Sess. app. at 256 (1866) (Rep. Baker) ("The Constitution already declares generally that no person shall 'be deprived of life, liberty, or property without due process of law.' This declares particularly that no State shall do it . . . ."). *See generally* Hyman, *supra* note 212 (most Republicans of that era rejected the notion of substantive due process). No one in the 1860s suggested that the word "law" in the Fourteenth Amendment's explicit Due Process Clause refers to both state and federal law, or is synonymous with "the laws" in the EPC. The original meaning of the Due Process Clause forbids deprivations of life liberty, or property without the proceedings that are owed according to the "law of the land," which Lord Coke defined as "common law, statute law, or custom." *See* Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45-46 (1797) (1642). Accordingly, the Due Process Clause is satisfied even by an unjust process provided it complies with other provisions of positive law; only when positive law is silent as to procedure does the Due Process Clause require traditional common law procedures. *See* Hyman, *supra* note 212, at 240.

223. *See* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 172 (2008).

224. *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

would not have been made clear, for example by writing "nor deny to any *alien* within its jurisdiction the equal protection of the laws." This observation supports the notion that the EPC protects *citizens* (i.e. not just aliens) in ways that neither the Privileges or Immunities Clause nor the Due Process Clause could do in absence of the EPC.

VIII. CONCLUSION

The Equal Protection Clause will soon turn 150 years old, and it has become encrusted with jurisprudence that has grown up around it. Sweeping away the barnacles, it becomes clear that application of the equality principle to the states is supposed to be an enterprise carefully shared between Congress and the federal judiciary, even though it has not worked out that way so far. To put it a little differently, the U.S. Supreme Court has gradually deemed itself far more superior than the most egalitarian clause of our Constitution postulates.

A weighty preponderance of evidence proves that the EPC only allows the federal judiciary to strike down state laws based upon equality principles that are already embodied in federal laws, and in particular in the non-enforcement provisions of federal statutes. State laws are not supposed to be struck down merely because the judiciary feels they are unequal, or even grossly unequal, without invoking any non-coercive provisions of protective federal statutes.

This article has not thus far explored which Supreme Court precedents might be impacted by the original public meaning of the EPC. Certainly, Congress and the Supreme Court could cooperate to preserve every one of those precedents. Already, the equality provisions of the Civil Rights Act of 1866 largely remain on the books, and those provisions can justify a huge portion of the Court's EPC jurisprudence.[225] That 1866 statute could have

225. The following sentence was removed from the Civil Rights Act during the drafting process: "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of servitude." *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 75-78 (1994). One reason for the removal of this material was that Congress did not want to be understood as protecting political rights. *Id*. As for non-political rights, the Civil Rights Act's main sponsor in the House denied that removal of that sentence would reduce the bill's

been enforced much more fully over the past century and a half; as Justice Robert Jackson once wisely remarked, "even the North never fully conformed its racial practices to its professions."[226] Indeed, the Court's decisions regarding state-sponsored racial discrimination have always been justifiable by the combined effect of the Civil Rights Act of 1866 and the EPC.[227] Even aside from race cases, a state can be required to either enforce laws equally or not at all.[228]

The foregoing interpretation of the EPC admittedly does not bind the present generation as much as some might like, but the generation that fought the Civil War valued political liberty and understood judicial fallibility.[229] They allowed Congress a signifi-

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protection of those rights. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866) (Congressman James Wilson said, "I do not think it materially changes the bill…."). *See generally* Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U. L. REV. 1393, 1446 (2012) (concurring with Congressman Wilson).

226 "Memorandum by Mr. Justice Jackson" *in* I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES, 137 (Mark V. Tushnet, ed. 2008).

227 *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). If two people of different races engage in the same behavior, but only one of them is deprived of personal security by the state, then such discrimination has been forbidden by federal law since 1866. *See supra* note 9 (quoting Civil Rights Act of 1866). *See generally* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 30-64 (2009) (describing court decisions in the 1870s that relied upon the Civil Rights Act of 1866 to strike down laws against interracial marriage, also called racial-endogamy laws); Loving v. Virginia, 388 U.S. 1 (1967) (striking down such laws).

228. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497, 501 (1961) ("The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879… [A] prosecution for its violation seems never to have been initiated, save in *State v. Nelson.*"); Lawrence v. Texas, 539 U.S. 558, 632 (2003) ("[P]rosecutions under Texas' sodomy law are rare"). These prosecutions treated the defendants unequally from people who were not charged.

229. Some supporters of adopting the Fourteenth Amendment wanted to make the Civil Rights Act of 1866 essentially unrepealable. Under the present interpretation, suppose Congress passes a statute, and the judiciary then decides to extend that statute's equal protection against the states, but Congress subsequently repeals the statute; that repeal would overturn the judicial decision. *See generally* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (Congress cannot bind future congresses). Still, the judiciary could continue to ban racially discriminatory administration of facially neutral state laws. Southern laws in 1868 were often not discriminatory on their face, but

cant substantive role beyond a mere remedial power, despite concerns that later congresses might not be sympathetic to equal rights. By putting the Civil Rights Act of 1866 on a solid constitutional footing, the Fourteenth Amendment greatly increased the odds that key parts of that 1866 act would never be overturned by judges or legislators, and that strategy has succeeded. To the extent that the Civil Rights Act prohibited discriminatory administration of facially neutral state laws, the Equal Protection Clause put that prohibition beyond even the power of Congress to overturn.

Opponents of the first version of the Fourteenth Amendment — which was rejected — were not only concerned that it would have given too much power to *Congress*. They were also concerned that it would have given too much discretionary power to the *Supreme Court*. A leading critic of the first version, Congressman Robert Hale (a former judge), put it this way:

> The principle that it is the part of a good judge to amplify his jurisdiction has been not only a maxim of the courts but it also seems to have been the principle and maxim upon which the Federal Government has operated. Now, I put it to the gentleman [Rep. Bingham]. . . .whom I know sometimes at least to be disposed to criticize this habit of liberal construction, to state where he apprehends that Congress and the courts will stop in the powers they arrogate to themselves under this proposed amendment.[230]

It therefore makes little historical sense to imagine that the final version of the Fourteenth Amendment (for which Hale voted

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rather were improperly enforced. *See* Zeigler, *supra* note 30, at 1013. In any event, repeal of the key equality provisions of the Civil Rights Act of 1866 has never gone anywhere. It is true that Republican leaders in 1866 feared such a repeal. For instance, Congressman Thaddeus Stevens said that, "I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Even so, Stevens said the EPC "allows *Congress* to correct the unjust legislation of the States." *Id*. (emphasis added). That is, he acknowledged the more limited effect of the EPC if Congress were to oppose equal protection. How much more limited, Stevens did not say.

230. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866). *See also supra* note 118 (publication of Hale's speech). Hale's view had ample precedent. *See, e.g.,* "Brutus" (Robert Yates) (1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, 296, 297, 305 (Ralph Ketcham ed. 1986).

after it was amended by the Senate) gave the federal judiciary vastly more discretionary power over the states than the first version would have given. Yet, the Court has claimed just that.[231]

As mentioned in the Introduction, the Supreme Court has probably not exceeded its legitimate discretion by applying the EPC to discrimination based upon characteristics other than race. But there is a catch. The legitimacy of such decisions, striking down statutes under the EPC, hinges upon whether the Court can find justification in federal statutes, and the Civil Rights Act of 1866 is archetypal.[232] Even then, the Court can exercise independent judgment about whether to apply those federal principles to the states, for example by judging whether a fundamental right or suspect class is involved, and if so whether the state has narrowly tailored its laws to meet a compelling state interest.[233] And the Court can continue to give zero deference to

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231. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

232. The Supreme Court has said that the Civil Rights Act of 1866 was justified by section 2 of the Thirteenth Amendment. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). But once the slavery crisis passed, the Fourteenth Amendment was needed to constitutionalize the Civil Rights Act. *See* McDonald v. Chicago, 130 S.Ct. 3025, 3041 (2010) ("Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.").

233. There is currently a controversy about how same sex marriage (also called gay marriage) is affected by the EPC. All state laws distinguishing homosexuals from heterosexuals may legitimately be deemed unconstitutional under the EPC *if* federal statutes put Congress in opposition to that distinction, and *if* (additionally) such distinctions violate essential principles of equality. The latter issue would entail analysis involving the judiciary's usual tiers of scrutiny. Factors that could justify a lower level of scrutiny include these: no one in 1868 expected such laws to be invalidated; any technical sex discrimination by the marriage laws is not directed against either gender as such; and, federal jurisdiction over marriage laws is uncertain at best. *See* Steven Calabresi, *The Gay Marriage Cases and Federal Jurisdiction,* NORTHWESTERN LAW & ECON RESEARCH PAPER NO. 14-18 (2014). Another element of the controversy is freedom of speech, according to the Supreme Court of California: "Proposition 8 … carves out a narrow exception applicable only to access to the designation of the term 'marriage.…'" Strauss v. Horton, 207 P.3d 48, 63 (Cal. 2009) (internal citations omitted). This free speech factor could also justify a lower level of scrutiny, even though the EPC was adopted later than the First Amendment. *See generally* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006) (discussing the free speech rights of states). On the other hand, there is clearly no substantive due process right to preferably have

federal legislation under the Enforcement Clause of section five, as to the constitutionality of state laws.

The U.S. Supreme Court once acknowledged that, "the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."[234] Indeed, as an abstract principle, equal rights could demand that a person who commits any crime whatsoever be treated equally to people who do not. Due to its very ambiguity, the EPC was written so as to require more branches of the federal government than just the judiciary in order to overturn purportedly unequal state laws. But, overturning discriminatory administration of facially neutral state laws can be done singlehandedly by the federal judiciary, under the original meaning of the EPC.

When he introduced the Fourteenth Amendment in the Senate, Jacob Howard said, "This abolishes all class legislation in the states, and does away with the injustice of subjecting one caste of persons to a code not applicable to another."[235] But Senator Howard believed that these measures would require action by Congress, "if they are to be effectual and to be enforced…."[236] This is especially true of the EPC, whose very text envisions lawmaking to achieve its ends.

True, the Fourteenth Amendment was viewed differently by different people in the 1860s, but its predominant original public meaning is largely ascertainable today. Although a different meaning of the Equal Protection Clause might well have been preferable, the evidence from the 1860s is solid and ought to be controlling.[237] It is remarkable that such a brief clause can raise so many questions, but its text provides most of the answers.

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a mother and father, given that substantive due process is an invalid doctrine. *See supra* note 222 and accompanying text.

234. Atchison, T. & S.F. R. Co. v. Matthews, 174 U.S. 96, 106 (1899).

235. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)

236. *Thirty-Ninth Congress, First Session, Senate . . . Wednesday, May 23,* N.Y. TIMES 1 (May 24, 1866).

237. *See generally* U.S. CONST. art. VI, cl. 3 (all public officials "shall be bound by Oath or Affirmation, to support this Constitution….").