REHABILITATING THE *SLAUGHTERHOUSE CASES*

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TABLE OF CONTENTS

INTRODUCTION

The year 2023 marks the 150th anniversary of the decision in the *Slaughterhouse Cases*.[1] In rejecting a constitutional challenge to a Louisiana statute that imposed stringent limitations on the operation of slaughterhouses in the New Orleans area, the *Slaughterhouse* majority gave an extremely narrow reading to the scope of the Privileges or Immunities Clause of the Fourteenth Amendment. As a result, the Court effectively eliminated the possibility that the clause would become a source of significant constraints on the actions of state governments generally.

Most scholars have been extremely critical of the reasoning of the *Slaughterhouse* majority, arguing that the meaning attributed to the phrase "privileges and immunities of citizens" in other contexts during the relevant time period indicated that a more robust interpretation of the Privileges or Immunities Clause would have more aptly reflected the

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1. 83 U.S. 36 (1873).

original meaning of the language of the clause.[2] However, a small number of commentators, such as Kurt Lash and Philip Hamburger, have taken a different view, arguing that only a narrow reading of the concept of "Privileges or Immunities of citizens of the United States" is consistent with the historical record.[3]

Disagreements such as these were at least implicitly anticipated by some of those who were intimately involved in the process of drafting the Fourteenth Amendment. Thus, for example, during the discussions of the proposed amendment on the Senate floor, Democratic Senator Reverdy Johnson of Maryland, who was a member of the Joint Committee on Reconstruction, declared that he supported the Due Process Clause, but argued that the Privileges or Immunities Clause should be removed from Section One because he "d[id] not understand the effect of that."[4] Similarly, Republican Representative George S. Boutwell of Massachusetts, who had also been a member of the Joint Committee, would later recall that the "euphony and indefiniteness of meaning" of the Privileges or Immunities Clause was a "charm" to Republican Representative John A. Bingham of Ohio, the person who authored Section One.[5]

Against this backdrop, no amount of research is likely to provide a clear, unambiguous answer to the question of how one should interpret the Privileges or Immunities Clause from a traditional originalist perspective. Cognizant of this reality, this Essay approaches the analysis of the *Slaughterhouse Cases* from a somewhat different direction. The Essay does not make any effort to examine the historical evidence of the original meaning of the concept of "Privileges or Immunities of citizens of the United States" in the abstract. Instead, after briefly describing the arguments made by both the majority and dissenting opinions in *Slaughterhouse* itself, the Essay focuses on the purposes that the passage of the Fourteenth Amendment as a whole was intended to serve and the circumstances that led to the decision to replace a simple prohibition on racial discrimination with the formulation of Section One that was

2. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 41–261 (2021); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 104–21 (2020). For similar arguments, see the sources collected in Cynthia Nicoletti, *The Rise and Fall of Transcendent Constitutionalism in the Civil War Era*, 106 VA. L. REV. 1631, 1692 nn. 283–88 (2020) (listing sources).

3. Philip A. Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

4. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

5. 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 119 (1902).

ultimately adopted. The Essay concludes by arguing that the position taken by the majority in *Slaughterhouse* reflected a more accurate understanding of the goals that the Fourteenth Amendment was designed to achieve than the more expansive reading advocated by the dissenters in the case.

I. THE DECISION IN THE *SLAUGHTERHOUSE CASES*

In the *Slaughterhouse Cases*, the Supreme Court was confronted with a challenge to the constitutionality of a Louisiana statute that required all butchers to slaughter their animals at a single facility that was to be constructed at a location outside the city.[6] The facility was to be constructed and owned by a single, new corporation that was created for the purpose of implementing the mandate of the statute.[7] However, the corporation was also required to allow other butchers to use the facility for a set fee.[8] Nonetheless, some butchers argued that the limitations imposed by the statute on their ability to engage in their profession violated both the Thirteenth Amendment and several provisions of Section One of the Fourteenth Amendment.[9]

A five-justice majority concluded that none of these challenges had merit. Speaking for the majority, Justice Samuel Miller began his legal analysis by briefly characterizing the conditions and circumstances that had given rise to the decision to add the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[10] While acknowledging the fact that only the Fifteenth Amendment referred explicitly to racial discrimination, Miller also asserted that:

> [I]n the light of [the historical context] . . . and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, . . . [which was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[11]

6. 83 U.S. 36, 38 (1873).
7. *Id.* at 39.
8. *Id.* at 59.
9. *Id.* at 66–67.
10. *Id.* at 67–72.
11. *Id.* at 71–72.

Although he conceded that persons of every race could invoke the principles embodied in the Reconstruction Amendments in appropriate cases, Miller insisted that the judicial interpretation of these amendments should be informed by this "one pervading purpose."[12] Thus, after describing the black codes that had been adopted by a number of the states in which slavery had been legal before being outlawed by the Thirteenth Amendment, Miller asserted that the Equal Protection Clause was designed to invalidate state laws that "discriminated with gross injustice and hardship against [African-Americans] as a class," and that Section Five of the Fourteenth Amendment armed Congress with the authority necessary to enforce this restriction on state power.[13]

However, like the dissenters, Miller devoted most of his attention to the specific claim that the Louisiana statute violated the Privileges or Immunities Clause. In seeking to refute this claim, Miller began by observing that the language of the Citizenship Clause "clearly recognized and established" a distinction between national citizenship and state citizenship and that, by its terms, the Privileges or Immunities Clause spoke only of privileges and immunities of citizens of the United States.[14] Thus, he reasoned, the clause should be seen as establishing protection only for rights that are derived from national citizenship and not for those that are incidents of state citizenship.[15]

In particular, Miller argued that the Privileges or Immunities Clause of Section One was not designed to protect those rights that came within the purview of the Privileges and Immunities Clause of Article IV (the "Comity Clause"), which refers to the privileges and immunities of "citizens of the several states" and had been held to encompass "those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union."[16] Instead, he contended, the strictures of the Privileges or Immunities Clause of the Fourteenth Amendment should be viewed as applying only to a narrow class of rights that were either explicitly mentioned in the Constitution or could be said to have come into being only by virtue of the creation of the federal government.[17]

12. *Id.* at 71.

13. *Id.* at 81. As Maeve Glass has demonstrated, Representative Robert Elliott of South Carolina later argued that this part of the opinion vindicated congressional authority to enact civil rights legislation. Maeve Glass, *Killing Precedent: The* Slaughter-House *Constitution*, 123 COLUM. L. REV. 1135, 1176–80 (2023).

14. *Slaughterhouse*, 83 U.S. at 73.

15. *Id.* at 74–75.

16. *Id.* at 76.

17. *Id.* at 79–80.

Miller sought to bolster his argument by emphasizing the impact that a more expansive reading of the Privileges or Immunities Clause might have on the structure of the federal system. Noting that "[t]he power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States."[18] Miller observed that a broad conception of the scope of the Privileges or Immunities Clause would "subject [these rights] to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation"[19] and would also render the Court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment."[20] While conceding that the framers of the Fourteenth Amendment had "thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation," Miller also insisted that the framers "still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government."[21]

By contrast, four justices argued that the Louisiana statute at issue in *Slaughterhouse* ran afoul of the Privileges or Immunities Clause.[22] Speaking for all of the dissenters, Justice Stephen Field asserted that Section One of the Fourteenth Amendment was designed "to place the common rights of American citizens under the protection of the National government."[23] Like Miller, Field drew heavily on Justice Bushrod Washington's discussion of the scope of the Comity Clause in *Corfield v. Coryell*.[24] However, unlike Miller, Field contended that the set of rights to which Washington had referred in *Corfield* also came within the purview of the Privileges or Immunities Clause of Section One. Field argued that:

> What the [comity] clause . . . did for the protection of the citizens of one State against hostile and discriminating legislation of

18. *Id.* at 62.
19. *Id.* at 78.
20. *Id.*
21. *Id.* at 82.
22. *Id.* at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting); *id.* at 124–30 (Swayne, J., dissenting).
23. *Id.* at 93 (Field, J., dissenting).
24. *Id.* at 97–98; *see also* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

> other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.[25]

Thus, he insisted that "[i]f under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States."[26] Similarly, Justice Swayne asserted that "'[t]he privileges and immunities' of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation,"[27] while Justice Bradley complained that these rights and immunities were byproducts only of state citizenship, not citizenship of the United States, and "evince[d] a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people."[28]

Like the members of the majority, all of the *Slaughterhouse* dissenters clearly understood that an expansive reading of the Privileges or Immunities Clause would, in the words of Justice Swayne, "trench directly upon the power of the States, and deeply affect those bodies."[29] But in sharp contrast to the majority, Swayne argued that just such a change had been contemplated by those who were responsible for drafting and ratifying the Reconstruction Amendments.[30]

Swayne began by observing that the lessons learned from the Civil War had provided the impetus for the adoption of all of those amendments, asserting that "[t]he prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience" and that "[t]he public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members."[31] While implicitly conceding that his conception of the scope of federal power was "novel and large," Swayne insisted that "the novelty was known and the measure deliberately adopted."[32] Thus, after declaring that "[t]he power is beneficent in its nature, and cannot be abused. It is such an [sic] should

25. *Slaughterhouse*, 83 U.S. at 100–01.
26. *Id.* at 101.
27. *Id.* at 126 (Swayne, J., dissenting).
28. *Id.* at 116 (Bradley, J., dissenting).
29. *Id.* at 125 (Swayne, J., dissenting).
30. *Id.* at 128–29.
31. *Id.* at 128.
32. *Id.* at 129.

exist in every well-ordered system of polity."[33] He concluded by declaring that:

> It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective.[34]

In addition to expressing similar sentiments,[35] Justice Bradley insisted that, in any event, "[t]he argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance."[36]

The exchange between Justice Miller and the dissenters reminds us that the *Slaughterhouse* Court was not being called upon to interpret the Privileges or Immunities Clause in the abstract. Instead, in a very real sense, the issue that the Court was asked to resolve was whether the nature of most of the privileges and immunities to which citizens were entitled was to be resolved at the state level or the federal level. Moreover, even Justice Swayne agreed that, prior to the constitutional changes that had been wrought by the Civil War and Reconstruction, the power to make such determinations rested solely with the state governments.[37] Thus, the question was whether Section One of the Fourteenth Amendment as a whole and the Privileges or Immunities Clause in particular were designed to radically change this allocation of authority. A close examination of the historical record reveals that Justice Swayne mischaracterized the goals that the Fourteenth Amendment was designed to achieve.

II. THE FOURTEENTH AMENDMENT IN HISTORICAL CONTEXT

The provisions of the Fourteenth Amendment that gave rise to the constitutional challenge in *Slaughterhouse* had neither been adopted in isolation nor created with an eye toward fundamentally altering the relationship between the federal government and the states generally. Instead, Section One was simply one part of a multifaceted measure that had been drafted by the Joint Committee on Reconstruction, which in

33. *Id.*
34. *Id.*
35. *Id.* at 123 (Bradley, J., dissenting).
36. *Id.* at 124.
37. *Id.* at 129 (Swayne, J., dissenting).

turn had been created for the purpose of "inquir[ing] into the condition of the states which formed the so-called Confederate States of America and report[ing] whether they . . . are entitled to be represented in Congress."[38] Similarly, the report that was designed to explain the rationale for the recommendations made by the Committee made no reference to the possibility that the Constitution might need to be changed in order to allow the federal government to adequately address any problems that might exist in the Northern states. Instead, the report consisted entirely of discussions of the status of the ex-Confederate states and the actions that the Republican majority believed were necessary in order to address any problems and issues that might be associated with reintegration of those states into the Union.[39]

From this perspective, most Republicans viewed Section One as being far less important than the other sections of the Fourteenth Amendment.[40] Without question, mainstream Republicans generally believed that the federal government should take action to protect the rights of the Black people who had recently been released from bondage by the Thirteenth Amendment.[41] However, before the Fourteenth Amendment was even considered, Congress had already created such protections by passing the Civil Rights Bill of 1866 and overriding Andrew Johnson's veto of the bill.[42]

While law professors often suggest that Johnson's veto provided the impetus for the adoption of Section One by raising the specter that the Civil Rights Act might be repealed by a subsequent Congress and calling attention to the possible constitutional objections to the statute,[43] this argument does not withstand close scrutiny. Even prior to Johnson's veto, Republicans must have been aware of the possibility that Democrats might at some point gain control of the federal government and repeal the Civil Rights Act. Moreover, despite any such potential concerns, several months prior to Johnson's veto, the members of the Joint Committee had chosen not to consider a constitutional amendment that would have enshrined a prohibition on racial discrimination into the

38. BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 38 (Negro Univs. Press 1969) (1914), https://babel.hathitrust.org/cgi/pt?id=pst.000017839747&seq=40.

39. *Id.* at 37.

40. Mark Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 640 (2018).

41. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 257 (1988).

42. *See id.* at 250–51.

43. *See, e.g.*, BARNETT & BERNICK, *supra* note 2, at 137; WURMAN, *supra* note 2, at 96–97.

Constitution, thereby implicitly embracing the idea that the issue could be effectively addressed by statutes produced by Congress through the ordinary legislative process.[44]

The suggestion that Johnson's veto alerted Republicans to potential constitutional objections to the Civil Rights Act is equally problematic. This contention ignores the fact that there was nothing novel about the constitutional arguments that were made by Johnson in his veto message.[45] For example, during the congressional debates observing that "the *real aim* of [the Civil Rights Act] is to enlarge, by the Act of Congress, the rights and privileges of negroes . . . as subjects or citizens of the several States,"[46] Democratic Representative Michael Kerr of Indiana had asserted that he found "no warrant in the Constitution" for such a federal statute.[47] Similarly, Democratic Senator Willard Saulsbury of Delaware had declared that the Civil Rights Act "cannot come within the power of Congress either under the Constitution before it was amended, or under the Constitution recently amended abolishing slavery in the United States."[48]

Obviously cognizant of the fact that such arguments might be made, even prior to the initial passage of the Civil Rights Bill on February 4, 1866, and despite the objections of Republican Senator Ira Harris of New York and Republican Representative Roscoe Conkling of New York, the Joint Committee reported a proposal that would have amended the Constitution in a manner that would have removed all doubt about the power of Congress to pass such measures.[49] The proposal, which was the brainchild of Republican Representative John A. Bingham of Ohio,[50] would have vested Congress with the authority 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 [s]tates equal protection in the rights of life, liberty and property."[51] No Republican found any fault with the idea that Congress should be granted the power to secure the privileges and immunities of citizenship.[52] However, the equal protection component of the proposal proved to be far more controversial.

44. KENDRICK, *supra* note 38, at 50–51.
45. The message can be found in CONG. GLOBE, 39th Cong., 1st Sess. 1679–81 (1866).
46. *Id.* at 1268.
47. *Id.*
48. *Id.* at 477.
49. KENDRICK, *supra* note 38, at 61.
50. *Id.* at 60–61.
51. *Id.* at 61.
52. CONG. GLOBE, 39th Cong., 1st Sess. 1064, 1082, 1095 (1866).

During the debates on the floor of the House of Representatives, the members of the New York congressional delegation led the Republican opposition to the proposed constitutional amendment. Thus, for example, Representative Giles Hotchkiss complained that the amendment would give Congress the authority to force all states to grant identical protections to life, liberty and property,[53] while Thomas T. Davis warned that the power that the amendment would grant to Congress "may, in other times, and under the control of unprincipled aspirants or demagogues, be exercised in contravention of the rights and liberties of [the people of the United States]."[54] However, the most detailed Republican critique of the proposed constitutional amendment was delivered by Representative Robert S. Hale of New York. Decrying what he described as "the tendency in this country . . . toward the accumulation and strengthening of central federal power,"[55] Hale asserted that:

> [T]he language [of the proposal] in its grammatical and legal construction . . . is a grant of the fullest and most ample power to Congress to make all laws "necessary and proper to secure to all persons in the several States equal protection in the rights of life, liberty, and property," with the simple proviso that such protection shall be equal. It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty and property, simply qualified with the condition that it shall be equal legislation.[56]

Hale further argued that "this is, of all times, the last when we should undertake a radical amendment of the Constitution, so immensely extending the power of the federal government, and derogating from the power of the states."[57]

A number of other mainstream Republicans also complained that the committee proposal would unduly expand the authority of the federal government.[58] Thus, faced with the specter of impending defeat, on February 28, 1866—the day before the House began debating the Civil

53. *Id.* at 1095.
54. *Id.* at 1087.
55. *Id.* at 1064.
56. *Id.* at 1063–64.
57. *Id.* at 1064.
58. *See, e.g.*, *id.* at 1082 (remarks of Sen. Stewart); *id.* at 1095 (remarks of Rep. Conkling).

Rights Bill—the supporters of the committee proposal joined with its critics in voting to postpone final consideration of the measure.[59] Commenting on this result, the *Springfield Republican* asserted that "no sane man supposes that the states would ratify such an amendment" and that "[t]he people . . . welcome every indication that Congress discards this policy and the leaders who urge it."[60]

Despite the defeat of the federal power amendment, one thing should be clear: even prior to the veto of the Civil Rights Bill, mainstream Republicans were well-aware of the possibility that, if the bill became law, the constitutionality of the statute would almost certainly be challenged in court. However, for a very different reason, Johnson's veto of the Civil Rights Bill did in fact provide the catalyst for the creation of the Fourteenth Amendment.

Prior to the veto, some mainstream Republicans had hoped that they would be able to reach some accommodation with Johnson on the issue of reconstruction.[61] However, the language of the veto message had demonstrated that no such accommodation was possible.[62] Thus, Republicans understood that the conflict over reconstruction policy would be a major issue in the midterm elections of 1866.

The problem that Republicans faced in April, 1866, was that they had not yet formulated a single, coherent plan on reconstruction that could also serve as the party platform in the upcoming elections. While Republicans had been successful in enacting the Civil Rights Act, the effort to pass a constitutional amendment that would have changed the manner by which seats in the House of Representatives would be allocated among the states had failed.[63] Moreover, although the Joint Committee had reported a bill establishing the criteria for the readmission of Tennessee,[64] that bill had not been discussed on the floor of either house of Congress. Thus, at the time that Johnson vetoed the Civil Rights Bill, Republicans lacked a single, easily accessible description of the conditions under which they believed that the ex-Confederate states should be allowed to reenter the Union. The Fourteenth Amendment was designed to fill this void.

59. *Id.* at 1095.

60. *Some Hopeful Signs*, SPRINGFIELD DAILY REPUBLICAN, Mar. 2, 1866, at 2.

61. *See* FONER, *supra* note 41, at 250.

62. See, *e.g.*, MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869, at 163–64 (1974); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 314–15 (1960).

63. CONG. GLOBE, 39th Cong., 1st Sess. 1289 (1866).

64. KENDRICK, *supra* note 38, at 81.

III. THE DRAFTING OF THE FOURTEENTH AMENDMENT

A. The Owen Amendment

The basic template for what was to become the Fourteenth Amendment was a proposal that had been drafted by Republican activist Robert Dale Owen and placed before the Joint Committee by Thaddeus Stevens on April 21, 1866.[65] Section One of the Owen amendment stated simply that "[n]o discrimination shall be made . . . as to the civil rights of persons because of race, color, or previous condition of servitude."[66] In addition, Section Two of the amendment prohibited racial discrimination in voting rights after July 4, 1876, and Section Three provided that, until that date, no person who had been denied the right to vote because of his race would be included in the basis of representation for the House of Representatives.[67] Finally, Section Four of the Owen amendment would have prohibited the payment of the Confederate war debt, while Section Five granted Congress the authority to enforce the other provisions of the amendment.[68]

Without question, Section Two of the Owen amendment would have significantly changed the structure of the federal system by limiting the power of the states to regulate access to voting rights. By contrast, at least if one took the position espoused by most mainstream Republicans, Section One would not have materially altered the balance of power between the states and the federal government at all. To be sure, the adoption of Section One would have removed any lingering concerns regarding the constitutionality of the Civil Rights Act. But as the discussions of that statute in Congress had demonstrated, almost all mainstream Republicans believed that Congress could have derived the necessary authority from the Constitution without the need for additional amendments.[69] Thus, from this perspective, Section One of the Owen amendment would simply have reaffirmed the status quo and would not have provided a plausible basis for a constitutional challenge to the Louisiana statute in the *Slaughterhouse Cases*.

At one point, it appeared that the Owen amendment would be reported to the floor of the House of Representatives and the Senate in

65. *Id.* at 82–83, 296.
66. *Id.* at 83.
67. *Id.* at 83–84.
68. *Id.* at 99.
69. *See, e.g.*, ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 68 (2019) (noting that John Bingham was "virtually alone among Republicans" in viewing the Civil Rights Act as unconstitutional).

its original form.[70] However, at the last moment, the members of the Joint Committee voted to make significant changes to several parts of the proposed amendment.[71] The alteration of the language of Section One was the last of these changes and was the culmination of a particularly long and tortuous process.

B. The Adoption of the Bingham Language and the Structure of the Federal System

Almost immediately after Thaddeus Stevens placed the Owen amendment before the Joint Committee, John Bingham began to press for the inclusion of language that would provide race-neutral protections for civil rights. Initially, he moved to amend Section One to prohibit states from either denying equal protection of the laws or taking property without just compensation.[72] After this proposal was defeated, with both Harris and Conkling absent, Bingham was able to convince the other Republicans on the Committee and Democratic Senator Reverdy Johnson of Maryland to vote for a new section which included the language that would ultimately become the Privileges or Immunities, Equal Protection, and Due Process Clauses.[73]

In an apparent effort to address the objections that had been raised by Republicans during the earlier debate over the federal power proposal, Bingham had reformulated the equal protection component of his proposal. Instead of vesting the federal government with the power to ensure that all people would have "equal protection in the rights of life, liberty and property," the language that was approved on April 21 referred to the "equal protection of the laws"—a formulation that by its terms appeared to reference a distinctively legal concept of relatively limited scope.[74]

Despite this change in phraseology, it initially appeared that Bingham's triumph would be short-lived. On April 25, with Harris and Conkling now participating, the Committee changed course, voting to remove the language that Bingham had championed from the proposal that was being considered by the Committee.[75] Despite this setback, Bingham then joined six other Republicans to create a majority that

70. KENDRICK, *supra* note 38, at 99.

71. *Id.* at 101–03, 106.

72. *Id.* at 85.

73. *Id.* at 87–88. Like Conkling and Harris, Republican Senator William Pitt Fessenden of Maine was absent at the time that this vote was taken.

74. *See, e.g.*, Earl M. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

75. KENDRICK, *supra* note 38, at 98.

approved a motion to report the Owen amendment in the same form in which it had initially been presented for consideration.[76] Immediately thereafter, Bingham made an effort to have his amendment reported as a separate proposal, but was able to attract the support only of the three Democrats on the Committee.[77]

If the Committee itself had taken no further action and Congress had approved Section One in the form that was originally proposed, it would not have been possible to argue that the amendment was designed to fundamentally alter the structure of federal/state relations in the manner envisioned by Justice Swayne and the other dissenters in *Slaughterhouse*. However, before the Committee adjourned on April 25, a ten-member majority that included Bingham and three other Republicans who had voted to report the Owen amendment voted to reconsider the decision to report the amendment.[78] Three days later, the Committee voted to replace Section One of the Owen amendment with the language of the Bingham proposal that the Committee had removed from the amendment on April 25.[79]

To my knowledge, no one has ever suggested that, in general, mainstream Republican dissatisfaction with the original Owen proposal was based in whole or in part on the perception that the constraints imposed on the states should have been more stringent, or that the proposal would not have sufficiently expanded the power of the federal government. Nonetheless, while there is no reason to believe that Justice Swayne was aware of the fact that the Joint Committee had made a conscious decision to reject the Owen language, it was this change that allowed Swayne to claim that Section One had been "deliberately adopted" for the purpose of dramatically altering the structure of the federal system.[80] In fact, however, the historical record indicates that the change was designed to address a very different set of concerns.

C. The New York Proposals

The decision to change the language of Section One was made in the context of a broader reconsideration of the changes in the Constitution that would have been made by the Owen amendment as a whole. Once again, the members of the New York congressional delegation played a major role in shaping the debate. In the evening following the Joint Committee's meeting on April 25, Conkling, Harris, and the other

76. KENDRICK, *supra* note 38, at 99.
77. *Id.*
78. *Id.* at 100.
79. *Id.* at 106–07.
80. *See Slaughterhouse*, 83 U.S. at 129.

members of the delegation came together and were reported to have agreed on a set of proposals that were significantly different from those that were embodied in the Owen plan.[81] The discussions that took place at the meeting did not focus on Section One of the proposed constitutional amendment. Instead, while the New York representatives agreed that the ex-Confederate states should be barred from either honoring the Confederate war debt or paying compensation for the emancipation of slaves, and also argued high-ranking Confederate officials should be permanently barred from holding federal offices, the New York representatives refused to endorse a requirement that states allow African-Americans to vote.[82] Moreover, the New York delegation took the view that, rather than focusing specifically on race, the provision dealing with the basis of representation should instead provide that, with the exception of those who had participated in the rebellion, any group of adult male citizens who were denied the right to vote should be deducted from a state's population for the purpose of determining the number of seats to which the state was entitled in the House of Representatives.[83]

The New York proposals took center stage when the Joint Committee reconvened on April 28. First, over the objections of Jacob Howard and Elihu Washburne, the Committee voted to delete the section of the Owen proposal that required states to allow non-whites to vote.[84] Immediately thereafter, with Thaddeus Stevens joining Howard and Washburne in dissent, the Committee voted to replace the provision of the Owen plan dealing with the basis of representation with the race-neutral language favored by the New York delegation.[85] While commentators generally pay far more attention to the elimination of the suffrage mandate,[86] it was the latter decision that almost certainly paved the way for the alteration of Section One.

D. The Final Draft of Section One

Soon after the language of Section Two had been changed,[87] Bingham once again sought to have race-neutral guarantees of individuals added

81. *Action of the New York Delegation*, N.Y. TIMES, April 27, 1866, at 1.

82. *Id.*

83. *The New York Reconstruction Plan*, DAILY CLEVELAND HERALD, Apr. 28, 1866, at 3; *Reconstruction*, PHILADELPHIA INQUIRER, Apr. 28, 1866, at 1; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 130 (1956).

84. KENDRICK, *supra* note 38, at 101.

85. *Id.* at 102.

86. *See, e.g.*, MCKITRICK, *supra* note 62, at 347.

87. In the interim, the Committee had voted to add a provision that would have barred Confederate sympathizers voting in congressional and presidential elections. *See* KENDRICK, *supra* note 38, at 105–06.

to the amendment that was being considered by the Committee. However, in one crucial respect, the motion that Bingham made on April 28 differed significantly from those that he had made earlier in the Committee's deliberations. The motions that Bingham had made on April 21 and April 25 would not have had any impact on Section One of the Owen amendment. Instead, he had sought to have the Committee endorse the Privileges or Immunities, Equal Protection and Due Process Clauses *in addition* to the prohibition on race discrimination that was included in the Owen plan.[88] By contrast, on April 28, Bingham sought to have his tripartite formulation inserted in the constitutional amendment as a *substitute* for the Owen language.[89]

This change in tactics was almost certainly provoked by the decision to change the wording of Section Two. Although reports of the discussions that took place at the meeting of the New York delegation make no mention of any dissatisfaction with Section One of the Owen amendment, the rationale for the decision to reformulate the provision dealing with the basis of representation also had implications for the debate over the wording of Section One. Several years later, Republican Representative James A. Garfield of Ohio would recall that the language of Section Two had been altered,

> [I]n the spirit of a similar criticism made by Madison . . . that the word "servitude," or "slavery," ought not to be named in the Constitution as existing or as exercising any influence in the suffrage; and hence [the final version of Section Two] was adopted to avoid the use of an unpleasant word.[90]

The difficulty was that, taken alone, the change in the wording of Section Two would not have entirely resolved the problem to which Garfield later referred. If the Joint Committee had reported a proposal that included Section One in its original form, the proposed constitutional amendment would still have included an explicit reference to racial discrimination.

The need to address this problem apparently had a strong influence on the reaction of the Committee to the proposal to change the language of Section One. Five of the seven Committee members who had voted to remove the Bingham language from the proposed amendment three days earlier—all of whom had also voted to change the language of Section

88. KENDRICK, *supra* note 38, at 99.
89. *Id.* at 106.
90. CONG. GLOBE, 42nd Cong., 2d Sess. 82 (1871).

Two—voted in favor of Bingham's motion on April 28.[91] As a result, despite the objections of James W. Grimes, Jacob Howard, and Justin S. Morrill, the motion carried easily[92] and Bingham's proposal became a part of the multifaceted amendment that was reported the same day.[93]

Yet, despite the fact that Republicans such as Grimes, Howard, and Morrill believed that the original form of Section One was superior to that which emerged from the Joint Committee, the decision to adopt a race-blind formulation did not engender the kind of opposition from mainstream Republicans that had doomed the proposed federal power amendment in late February. Other aspects of the Joint Committee's proposal were the subject of intense debates on the floor of both the House and the Senate. The final version of Section Three was adopted in response to Republican criticism of the proposal that was initially reported,[94] and the language of Section Four underwent significant changes in the Senate as well.[95] Moreover, the Committee's formulation of Section Two emerged largely unscathed only after a variety of alternative proposals that were designed to address the same issue had been proposed and rejected.[96]

By contrast, while Democrats and some Republican supporters of Andrew Johnson argued that Section One would, in the words of Democratic Representative George S. Shanklin of Kentucky, "strike down . . . State rights and invest all power in the General Government,"[97] none of the mainstream Republicans whose opposition had doomed the federal power amendment raised similar objections to the formulation of Section One that was ultimately approved by the House of Representatives and the Senate. In response to an objection raised by Republican Senator Benjamin F. Wade of Ohio,[98] Senate Republicans did seek to definitively resolve the long-running dispute over the question of who should be considered a citizen of the United States by adding the Citizenship Clause to Section One.[99] However, no Republican suggested that this action would in any way change the nature of the rights that were embodied in the Privileges or Immunities Clause itself. Instead, with the notable exception of the description of the scope of that Clause

91. KENDRICK, *supra* note 38, at 98, 101–02, 106.
92. *Id.* at 106–07.
93. *Id.* at 114.
94. CONG. GLOBE, 39th Cong., 1st Sess. 2767–68, 2869 (1866).
95. *Id.* at 2897.
96. *See* Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 173–77 (2015).
97. CONG. GLOBE, 39th Cong., 1st Sess. 2500 (1866).
98. *Id.* at 2767–68.
99. *Id.* at 2897.

that was provided by Senator Jacob M. Howard of Michigan at the time that he introduced the Fourteenth Amendment as a whole in the Senate,[100] Republicans typically described the import of Section One in the most general terms, at times punctuated by assertions that Section One would basically constitutionalize the principles that been embodied in the Civil Rights Bill[101] and would not impose any limitations on state authority to regulate voting rights.[102]

The willingness of Robert Hale, Thomas T. Davis, and other like-minded congressional Republicans to accept Section One without even addressing the potential impact of that provision on the structure of federalism was most likely attributable to the change in the formulation of the Equal Protection Clause. But in any event, if, when considered in tandem with Section Five, the language of Section One had been generally understood to create the regime envisioned by Justice Swayne, one would have expected some reaction from those Republicans who had openly expressed their dissatisfaction with the federal power amendment in February. Conversely, the lack of any Republican opposition to the Privileges or Immunities, Due Process, and Equal Protection Clauses provides further evidence that the supporters of the Fourteenth Amendment did not see Section One as a constitutional provision that would fundamentally alter the structure of the federal system. Instead, Republicans saw Section One as simply a part of a plan that was designed to address the problems associated with reconstruction—nothing more and nothing less.

CONCLUSION

Taken as a whole, the circumstantial evidence provides strong support for the position taken by Justice Miller in the *Slaughterhouse Cases*. In order to credit the claims made explicitly by Justice Swayne and implicitly by the other dissenters, one would have to believe that Republicans made a conscious decision to use a measure which was created for the purpose of providing a blueprint for reconstruction as a vehicle to radically transform the relationship between the states and the federal government more generally. Moreover, while the Fourteenth Amendment was intended to describe a set of principles that all Republicans could endorse, a number of Republicans had already declared that they would not be willing to accept a measure that expanded the scope of federal power in the manner described by Justice

100. *Id.* at 2765–66.
101. *See, e.g.*, *id.* at 2451.
102. *See, e.g.*, *id.* at 2766.

Swayne. By contrast, although some Republicans would no doubt have preferred a more radical measure, all would have agreed that the states should be subjected to the constraints described by the majority opinion in *Slaughterhouse*. In short, Justice Miller had the better of the arguments in the *Slaughterhouse Cases*.