CONGRESSIONAL ENFORCEMENT OF CIVIL RIGHTS AND JOHN BINGHAM'S THEORY OF CITIZENSHIP

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In the Twentieth Century, Congress' power to enact civil rights legislation, and make it privately enforceable against states and private parties, became widely recognized as one of the most important functions of the federal government. Yet in recent years, the Supreme Court has greatly restricted this function with its rulings restricting Congress' commerce power[1] and its power to enforce the Equal Protection Clause under Section five of the Fourteenth Amendment.[2] Cases such as *United States v. Morrison*,[3] *Board of Trustees of the University of Alabama v. Garrett*[4] and *Kimel v. Florida Board of Regents*[5] have left Congress in a vacuum, without any clear source of power to enact civil rights legislation that is enforceable against the

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1. *See* United States v. Morrison, 529 U.S. 598 (2000) (striking down the civil rights provision of the Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zone Act of 1990).

2. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress lacks the power to abrogate state's immunity to suit for violations of the Americans with Disabilities Act); *Morrison*, 529 U.S. 598 (striking down the civil rights provision of the Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that Congress lacks the power to abrogate state's immunity to suit for violations of the Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as applied to states and establishing a "congruence" and "proportionality" test to measure the validity of Section 5 legislation).

3. 529 U.S. 598 (2000) (deciding Civil rights provision of the Violence Against Women Act was beyond both Congress' commerce and Section 5 enforcement powers).

4. 531 U.S. 356 (2001) (holding provision of the Americans with Disabilities Act that abrogated states' sovereign immunity was beyond Congress' Section 5 enforcement power).

5. 528 U.S. 62 (2000) (holding provision of the Age Discrimination in Employment Act that abrogated states' sovereign immunity was beyond Congress' Section 5 enforcement power).

states or private parties. These rulings have many scholars wondering where Congress can turn when it wants to enact civil rights legislation in the future.[6] Largely overlooked in this discussion is a possible solution to the problem. This solution is another clause of the Fourteenth Amendment—the Citizenship Clause—and the rights of federal citizenship,[7] which its Framers intended to be a broad font of federal rights that would be enforceable by Congress.

John Bingham, the chief author of Section one of the Fourteenth Amendment, had a broad vision of national citizenship and the rights that adhered thereto. This essay argues that the Citizenship Clause of the Fourteenth Amendment reflects his view and provides a source of congressional power to define and protect civil rights against infringement by states and private parties. Congressional debates about one of the most contentious issues leading up to the Civil War, the status of fugitive slaves and the rights (if any) of free people of color, reflect fundamental disagreements between Northern and Southern members of Congress over the existence and meaning of the federal rights of citizenship. After the Civil War, the Fourteenth Amendment and the Reconstruction era, civil rights statutes reflect the fact that the Thirty-ninth Congress adopted an expansive vision of the rights of federal citizens and that Congress embraced its role as protector of those rights.

Unfortunately, after Reconstruction, Congress' expansive vision of the rights of federal citizenship faded. In the civil rights era of the 1960s, Congress relied on other sources of power such as the Commerce Clause and the Equal Protection Clause. In upholding the Civil Rights Act of 1964, the Court relied solely on Congress' commerce power, tying its legislation to economic theory rather than principles of equality

6. *See*, *e.g.*, James G. Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law 1921-1957*, 102 COLUM. L. REV. 1, 6-7 (2002) (arguing that as a result of *Morrison*, enacting human rights protections may now fall outside the scope of congressional power altogether); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Anti-Discrimination Legislation after* Morrison *and* Kimel, 110 YALE L. J. 441, 502 (2000) ("[T]he decisive question raised by *Morrison*'s appeal to federalism is whether the nation has retreated from the view that a central mission of the federal government is to protect individuals against discrimination by public and private actors.").

7. *But see* Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002) (advocating congressional enforcement of the privileges or immunities of citizenship); James W. Fox, *Re-readings and Mis-readings: Slaughter-House, Privileges or Immunities and Section 5 Enforcement Powers*, 91 K.Y.L.J. 67 (2002) (discussing congressional enforcement of the privileges or immunities of citizenship).

and human rights.[8] In retrospect, Congress' choice to rely on the commerce power was arguably unfortunate because it raised the specter of unlimited federal police power without any significant limiting principles.[9] The breadth of the Court's Commerce Clause rulings has come back to haunt Congress now, with the Court placing new limits on the commerce power in *Lopez* and *Morrison* primarily because it saw that power as overly threatening to state sovereignty.[10] At the same time, in *Kimel* and *Garrett* the Court limited Congress' power to enforce the Equal Protection Clause because the Court felt that its judicial power was threatened by congressional interpretation of that Clause.[11] Finally, this essay will explain why the Citizenship Clause and the rights of federal citizenship may enable Congress to get around the roadblocks to civil rights legislation erected by the Court in *Morrison*, *Kimel* and *Garrett*.

I. BINGHAM'S VISION OF THE RIGHTS OF CITIZENSHIP

John Bingham envisioned federal citizenship as a guarantee that certain fundamental rights of citizens should be uniform throughout the United States, and that states should be unable to deprive federal citizens of those rights. Bingham also had a broad vision of the substantive rights encompassed in the concept of federal citizenship. Well before the Reconstruction era, Bingham stated that the rights of citizenship included:

> [T]he equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil . . . the charm of that Constitution lies in the great democratic ideals which it embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or state may rightfully take away.[12]

The Fourteenth Amendment reflects Bingham's expansive view of federal citizenship rights and gives Congress the power to protect these rights. However, prior to the Civil War, this view was quite

8. *See, e.g.*, Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964); Pope, *supra* note 6. *But see* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L. J. 619 (2001) (critiquing the false dichotomy between women's rights and economic rights).

9. Pope, *supra* note 6. *But see* Resnik, *supra* note 8 (noting the link between economic empowerment and women's empowerment).

10. *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598.

11. Post & Siegel, *supra* note 6, at 457.

12. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

controversial and gave rise to heated congressional debates over the relationship of citizenship between the state and federal governments. Although there was widespread agreement about what it meant to be a "citizen," the disagreement centered around the question of who could become a citizen[13] and the role, if any, that the federal government played in defining and protecting citizenship rights.

Prior to the Civil War, Bingham's vision of the rights of federal citizenship was a minority view. Congressional debates during the antebellum era reveal that the meaning of citizenship rights was extremely controversial, repeatedly sparking disputes between northern and southern representatives. These disputes centered on the status of free blacks and the question of whether or not Blacks could become citizens. Bingham and other antislavery constitutionalists believed that the federal Constitution authorized northern states to bestow citizenship upon free blacks, and provided for those rights to be protected by the federal government.[14] On the other hand, other members of Congress, primarily from slaveholding states, adamantly believed that only states could bestow citizenship rights, and that the federal government played absolutely no role in this arena. Lurking behind these debates was the problem of fugitive slaves. While representatives from slaveholding states were happy to use federal power to force northern states to return fugitive slaves, they resisted any interpretation of federal power that might allow northern states to free fugitive slaves and immunize them from southern laws.[15]

A. Pre-Civil War Congressional Debates Over the Meaning of Citizenship

Prior to the Civil War, Congress did not play any role in the definition and enforcement of individual rights. In *Barron v. City of Baltimore*,[16] the Supreme Court held that the Bill of Rights did not limit state governments. This ruling recognized a sphere of autonomy for the states in the area of individual rights.[17] Equally important was that the

13. Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 691 (1997).

14. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 71 (1993).

15. *See* Paul Finkelman, *States Rights North and South in Antebellum America*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125 (Kermit L. Hall & James W. Ely, Jr., eds. 1989).

16. 32 U.S. 243 (1833) (holding that the Fifth Amendment Takings Clause applied only to the federal government).

17. During Reconstruction, some members of Congress, including John Bingham, did not

Constitution did not expressly give Congress the power to legislate in the area of individual rights. The Bill of Rights does not include any congressional enforcement provisions.[18] With the possible exception of the 1789 Judiciary Act,[19] the only major piece of federal legislation affecting individual rights enacted by Congress during this era was the Fugitive Slave Act of 1793.[20] The Fugitive Slave Act prohibited non-slave states from freeing slaves and required them to return fugitive slaves to their owners in slave states.[21] The Court upheld congressional power to enact the Fugitive Slave Act in the case of *Prigg v. Pennsylvania*,[22] notwithstanding the fact that the Fugitive Slave Clause has no enforcement provision, in part because the Court saw the Clause as protecting the fundamental right to own slaves.[23]

Thus, prior to the Civil War, congressional authority in this area was *not* exercised to champion civil rights. Instead, Congress used its power to prohibit free states from conveying minimal human rights to the enslaved people that lived within Congress' jurisdiction.[24] A review

believe that *Barron* was good law, and argued that the Bill of Rights *did* apply to the states. *See* Aynes, *supra* note 14, at 69; MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 83 (1986) (Republicans rejected *Barron v. Baltimore* during the debates over the Fourteenth Amendment); AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 145-62 (1998) (discussing the "*Barron* contrarians").

18. This was a major concern of John Bingham who supported the Fourteenth Amendment in large part because it would empower Congress to enact legislation protecting the rights of federal citizens. See *infra*, notes 120-26 and accompanying text.

19. 1 Stat. 73 (1789). The Judiciary Act of 1789 created the federal courts and bestowed diversity jurisdiction upon them, creating a federal forum for the vindication of rights. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (arguing that the diversity jurisdiction in Article III reflected a view of the federal government as the protector of some citizenship-based rights).

20. 1 Stat. 305 (1793).

21. This statute was based on Congress' power to enforce the Fugitive Slave Clause U.S. CONST. art. IV, §2, cl. 3.

22. 41 U.S. (16 Pet.) 539, 615 (1842). *Prigg* was one of the Court's broadest readings ever of congressional power, owing to the fact that the Fugitive Slave Clause lacked a congressional enforcement mechanism. *See* Akhil R. Amar, *The Supreme Court, 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 69 (1999). Congress later enacted an even more broadly sweeping Fugitive Slave Act in 1950, which the Court upheld in *Ablemon v. Booth*, 21 How. 526. Congress relied on *Prigg* when it enacted the later, broader, law. Amar, *supra* at 70.

23. *Prigg*, 41 U.S. at 569. *See* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L. J. 605, 608 (1993).

24. Although some members of Congress considered freed slaves to be citizens, see *infra* notes 25-28 and accompanying text, the Supreme Court found that they were not United States citizens, and that indeed no people of African descent could be United States citizens, in the infamous case of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The Citizenship Clause of the Fourteenth Amendment was intended in part to overturn the Court's ruling in *Scott*. See *infra*, notes 49-51 and accompanying text. Ironically, in the case of *Prigg v. Pennsylvania*, the Court identified a fundamental right of slaveholders to recover their fugitive slaves as one of the sources

of congressional debates during that time reveals two conflicting visions. On one hand, some members of Congress believed that citizenship rights were determined by states, without any national character. Paradoxically, those same members of Congress supported federal power in the Fugitive Slave Act of 1850, which enlisted federal magistrates to aid states in denying rights of citizenship to free blacks as well as slaves.

On the other hand, some members of Congress believed that the rights of citizenship had a national character, guaranteed by the Privileges and Immunities Clause of Article IV of the Constitution. They understood that Clause, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States," to prohibit states from taking away from people the rights of citizenship that had been bestowed upon them by other states. These members of Congress were influenced by opponents of slavery such as Joel Tiffany, an abolitionist lawyer from Ohio. In his influential 1849 book, called *Treatise on the Unconstitutionality of Slavery,*[25] Tiffany argued that "the *object* of the national government was to protect the natural and inalienable rights of each citizen."[26] Moreover, in his influential treatise, *Kent's Commentaries*, Chancellor Kent defined free blacks born in the United States as citizens.[27] Many Republicans in the 39th Congress expressed views similar to those expressed by Tifanny and Kent when they debated the Fourteenth Amendment and the Civil Rights legislation.[28] But even at the time that those books were published, well before the Civil War, some members of Congress agreed with them. In their view, the fact that a person was a citizen of one state meant that his basic rights could not be taken away from him by another state.

1. Mr. Hoar's Journey

The role of federal citizenship and the rights that inhered therein, were central to congressional debates over the so-called "Negro

of congressional power to enact legislation assisting them to do so. *Prigg*, 41 U.S. at 581-83.

25. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849). *See* CURTIS, *supra* note 18.

26. *See* CURTIS, *supra* note 18, at 43 (citing TIFFANY, *supra* note 25, at 55).

27. 2 CHANCELLOR KENT, KENT'S COMMENTARIES, (1840). John Bingham quoted Chancellor Kent in support of this proposition in the debates over the admission of Oregon. *See* CONG. GLOBE, 35th Cong., 2d Sess. 892 (1859). *See also* TIMOTHY WALKER, INTRODUCTION TO LAW 131 (Da Capo Press 1972) (2d ed. 1844) (indicating that "all" people born in the United States since the Declaration of Independence were citizens).

28. CURTIS, *supra* note 18, at 42.

Seamen's Acts," laws which southern port states enacted in the late 1840s to authorize the arrest of free blacks that entered their states. In 1849, Representatives Charles Hudson and George Ashmun, whigs from Massachusetts, decried two such laws, enacted by the states of South Carolina and Louisiana.[29] The laws were enacted in response to the arrest of Denmark Vesey in Charleston, a free black man from the North who allegedly came to Charleston in order to foment a rebellion.[30] Hudson and Ashmun were particularly concerned about those laws because their state, Massachusetts, had a large shipping industry that employed many sailors.[31] They argued that the South Carolina law violated the Privileges and Immunities Clause of Article IV because it authorized the imprisonment of free citizens from their state.[32]

"In the state of Massachusetts the black man was as much a citizen as a white man," said Hudson, complaining that if one of those citizens of color were to go to South Carolina, "his person, and perhaps his life, may be in danger" solely because of the color of his skin.[33] Similarly, Ashmun explained that his problem with the South Carolina law was that it was enforced against "our citizens."[34] Thus, even as they recognized that the rights of the freed citizens of color adhered to state, not federal, citizenship, they articulated a national view of citizenship that would protect the rights of state citizens, once those rights were bestowed upon them, against interference by other states. They believed that the Privileges and Immunities Clause of Article IV required comity between the states, comity that included respecting the rights that each state bestowed on its own citizens.

Representative Hudson believed that the South Carolina law violated the U.S. Constitution. He wanted the Supreme Court to decide whether it was constitutional or not, but South Carolina had resisted federal review.[35] Hudson accused South Carolina of avoiding Supreme Court review through the doctrine of interposition, a belief that states could decide for themselves whether or not a law was constitutional.[36]

29. CONG. GLOBE, 30th Cong., 2d Sess. 418 (1849).

30. *See* CONG. GLOBE, 30th Cong., 2d Sess. 418 (1849) (statement of Representative Robert Rhett of South Carolina).

31. *See* CONG. GLOBE, 31st Cong., 1st Sess. (1850) (statement of Senator Davis of Massachusetts).

32. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.") *See* CONG. GLOBE, 30th Cong., 2d Sess. 418-19 (1849).

33. CONG. GLOBE, 30th Cong., 2d Sess. 418 (1849).

34. CONG. GLOBE, 30th Cong., 2d Sess. 419 (1849).

35. CONG. GLOBE, 30th Cong., 2d Sess. 419 (1849).

36. CONG. GLOBE, 30th Cong., 2d Sess. (1849). In the case of *Elkison v. Deliesseline*, 8 F.

This concern was shared by a number of members of Congress, who supported federal intervention in this area. Some articulated their concern by telling the story of Samuel Hoar, a minister from Massachusetts who traveled to South Carolina for the purpose of challenging the constitutionality of the South Carolina law.[37] Rather than arrest Mr. Hoar and his companions, which could have set up the possibility of a legal challenge, South Carolina officials ordered Mr. Hoar to leave town.[38]

Members of Congress who advocated a broad view of federal citizenship rights often mentioned the story of Mr. Hoar to illustrate their concerns about southern laws that they believed violated the constitutional principles of citizenship.[39] Mr. Hoar's journey serves as a powerful metaphor for what northern advocates of national citizenship rights did not like about the treatment of their citizens by southern states—that northern citizens could have their most basic human rights taken away from them by southern states solely due to the color of their skin.[40] They also resented the disrespect for the northern states' conveyance of citizenship rights that this practice reflected.[41]

In response to the citizenship based advocacy of their northern colleagues, southern members of Congress argued that the Constitution did not protect people of color from other states because those people were not, and could not be, citizens of the United States. For example, Senator Andrew Butler of South Carolina stated that "colored persons . . . are a species of persons having such rights only as may be conferred upon them by state jurisdiction; they have no federal eligibility, or federal recognition, as citizens of the United States."[42]

Cas. 493 (1823), Justice Johnson, riding circuit, declared the South Carolina Act unconstitutional. However, South Carolina defied that decision and continued to enforce the law. *See* Finkelman, *supra* note 16.

37. *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess. (1850) (statement of Senator John Davis of Massachusetts).

38. *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess. (1850) (statement of Senator Henry Clay of Kentucky).

39. *See, e.g.*, CONG GLOBE, 39th Cong., 1st Sess. 475 (1866) (Trumbull); CONG. GLOBE, 31st Cong., 1st Sess. App. 123 (1850) (Davis); CONG. GLOBE, 31st Cong., 1st Sess. 1654 (1850) (Winthrop); CONG. GLOBE, 30th Cong., 2d Sess. 419 (1849) (Ashmun); CONG. GLOBE, 30th Cong., 2d Sess. 418 (1849) (Hudson).

40. *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess. 1654 (1850) (statement of Senator Robert Winthrop of Massachusetts).

41. CURTIS, *supra* note 18, at 45–46. The main difference between radical abolitionists and most Republicans was that the radicals thought that slaves were citizens. *Id.* During the civil war, more and more Republicans started believing that slaves were citizens and the line between the two all but disappeared. *Id.*

42. CONG. GLOBE, 31st Cong., 1st Sess. App. 288 (1850).

Butler explained that his understanding was that a state can give a colored person a "status" of being free. However, that "status" would not govern in other states and instead would depend on the local law of the state. "Their condition must be assimilated under the law that operates on them."[43]

That the southern view of citizenship dominated in Congress prior to the Civil War was evident from the fact that shortly after Hudson's and Ashmun's dissertation on the rights of citizenship, Congress refuted them by enacting the Fugitive Slave Act of 1850. The 1850 Act responded to reluctant northern officials who often refused to enforce the federal law and to some state legislatures that enacted state laws prohibiting the implementation of the 1793 Act.[44] The 1850 Fugitive Slave Act provided for the appointment of a federal commissioner in every county of the nation to enforce it, and authorized federal marshals and, federal troops if necessary, to aid in the capture of fugitive slaves. "The law created exclusive federal power to enforce the Fugitive Slave Clause and placed the prestige of the national government behind the rendition of fugitive slaves."[45]

The Fugitive Slave Act of 1850 not only deprived the northern states of the power to shelter fugitive slaves, but, in a blow to the sovereignty of the northern states, also superceded reluctant northern officials and enlisted federal "help" to ensure that the task would be carried out. As a result of this federal law, northern free people of color were in danger not only when they traveled to southern states, but also in the north, because the weak evidentiary standards of the Federal Act placed them in danger of being kidnapped in the northern state in which they lived.[46] The Fugitive Slave Act of 1850 dramatically illustrates the fact that the proponents of strong rights of citizenship were a distinct minority in Congress prior to the Civil War.

2. The Oregon Debates

Like the majority of those in Congress at the time, the Supreme Court adopted the southern view of the Privilege and Immunities Clause of Article IV. In *Dred Scott v. Sanford*,[47] the Court held that the clause did not require a slave state to recognize the laws of a non-slave state

43. CONG. GLOBE, 31st Cong., 1st Sess. App. 288 (1850).

44. *See* Finkelman, *supra* note 23, at 664.

45. *Id.*

46. *Id.* at 623. Such a scenario happened leading up to the case of *Prigg v. Pennsylvania*. 41 U.S. (16 Pet.) 539 (1842). *See* Finkelman, *supra* note 23, at 613.

47. 60 U.S. (19 How.) 393 (1856).

which purportedly had freed Mr. Scott from slavery. Significantly, the Court articulated a broad view of the rights that federal citizens enjoy.[48] However, the Court excluded all African Americans from enjoying those rights, ruling that no person of color *could* be a citizen of the United States.[49] In his majority opinion, Justice Taney differentiated between state and United States citizenship, and held that being a citizen of one state does not entitle one to the rights and privileges of another state.[50] The *Dred Scott* ruling deprived northern states of the power to bestow meaningful citizenship rights on freed blacks because those rights would only extend as far as that state's borders. Notwithstanding the *Dred Scott* ruling, the broad vision of federal citizenship rights expressed by Hudson and Ashmun survived and flourished among other members of Congress in the years approaching the Civil War. During this period, Bingham was a strong proponent of an expansive approach to the rights of federal citizenship.

In 1858, members of Congress debated whether or not to admit the territory of Oregon into the Union as a state. At issue was a provision of the Oregon State Constitution that would have allowed Oregon to exclude free people of color, and prohibit them from owning property, entering into contracts, and filing suit in Oregon state court.[51] Some members of Congress opposed Oregon's admission because they believed that the provision of the Oregon Constitution violated the Privileges and Immunities Clause of Article IV.[52] Central to this debate was a dispute over the meaning of citizenship and the extent to which the Privileges and Immunities Clause of Article IV limited the power of some states to take away rights of citizens of other states. This debate, which occurred shortly before the Civil War, foreshadowed the congressional debate over the rights of citizenship during Reconstruction.

John Bingham was chief among advocates of national citizenship

48. *Id.* at 417 (describing the rights of citizenship as "the right to enter every other State whenever they pleased, singly or in companies, without pass or passport . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.").

49. *Id.* at 404. Indeed, Justice Taney listed the rights of citizenship to illustrate his point that Blacks could not possibly be entitled to so many rights, and thus could not be citizens. *Id.* at 416-17. *See* James W. Fox Jr., *Citizenship, Party and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 484 (1999).

50. *Scott*, 60 U.S. at 405.

51. CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858) (Bingham). Some other northern states already admitted into the Union, including Illinois and Missouri, also had constitutional provisions prohibiting the entry of free blacks into the state. ERIC FONER, RECONSTRUCTION (1988).

52. U.S. CONST. art. IV, §2, cl. 1.

rights. In 1858, he explained, "[i]t has always been understood that the citizens of each state of the Union are *ipso facto* citizens of the United States."[53] Like those before him, Bingham believed that the fact that one state had recognized a person as its citizen triggered the Privileges and Immunities Clause of Article IV, preventing any other state from taking away the rights of citizenship, conveyed to him by his home state.[54] Of the Privileges and Immunities Clause, he opined, "this guaranty of the Constitution of the United States is senseless and a mockery, if it does not limit state sovereignty and restrain each and every State from closing its territory and courts of justice against citizens of the United States."[55] This reading of the Privileges and Immunities Clause directly conflicted with the U.S. Supreme Court's reading of the Clause in *Dred Scott*.[56] However, like a number of other Republicans at the time, Bingham simply disregarded the *Dred Scott* ruling as being incorrect.[57]

Along the same line, Senator William Fessenden, a Republican from Maine, explained that his state had free colored citizens and that he could not agree to admit Oregon as a state because Oregon would not allow citizens of his own state to visit.[58] Fessenden said:

> By the laws of Maine, and under the constitution of the state of Maine, free Negroes are citizens . . . just as much citizens of the state of Maine as white men. . . . I cannot vote for the admission of any State with a constitution which prohibits any portion of my fellow citizens of my own state from the enjoyment of the privileges which other citizens of

53. CONG. GLOBE, 35th Cong., 1st Sess. (1858). Similarly, Representative Fessenden of Maine expressly disavowed the validity of the *Dred Scott* decision, stating that he did not believe that *Dred Scott* accurately stated the law. CONG. GLOBE, 35th Cong., 1st Sess. (1858).

54. CONG. GLOBE, 35th Cong., 1st Sess. 984 (1858).

55. CONG. GLOBE, 35th Cong., 1st Sess. 984 (1858).

56. *Scott*, 60 U.S. at 405.

57. For example, criticizing the *Dred Scott* decision in a speech before Congress in April, 1860, Bingham defiantly exclaimed:

> With Jefferson, I deny that the Supreme Court is the final arbiter on all questions of political power, and assert that the final arbiter on all such questions is the people . . . While I could condemn *armed resistance* to any decision of the Supreme Court . . I would claim for myself, in common with my fellow-citizens, the right to question their propriety, to denounce their injustice, and to insist that whatever is wrong therein shall be corrected.

CONG. GLOBE, 36th Cong, 1st Sess. 1839 (1860). *See also* CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858) (Fessenden) (stating that he did not believe that the *Dred Scott* opinion "accurately stated the law.").

58. CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858). Representative Clark Cochrane of New York also argued that the exclusion provision of the Oregon Constitution violated the privileges and immunities clause. CONG. GLOBE, 35th Cong., 1st Sess. 1964 (1858).

the state have.[59]

To Bingham, national citizenship meant more than simply the right to enter the borders of other states. The concept of national citizenship was a central component of Bingham's ideology.[60] Bingham believed that the Privileges and Immunities Clause of Article IV protected the rights of national, rather that state, citizenship. In a speech during the debate over the admission of Oregon, Bingham explained that the Privileges and Immunities of Article IV belonged to citizens "in" the several states, not "of" the several states.[61] This interpretation of Article IV "implies the existence of substantive national rights which states may not deny."[62]

Bingham and others were especially concerned about Oregon's provision that would have denied people of color access to state courts. Bingham explained that he could not consent to "mutilate and destroy . . . the Constitution of my country" by supporting a bill which allows a state to deny "the right to a fair trial in the courts of justice."[63] Echoing Bingham's concerns, Senator Henry Wilson, Republican of Massachusetts,[64] protested that the prohibition on access to the courts would have prevented a free citizen of color from Massachusetts from filing suit if he was injured in Oregon.[65] Others agreed that the bar on access to the courts violated the Privileges and Immunities Clause.[66]

Of course, Bingham's view of the rights of citizenship did not go unopposed. Some opponents simply cited *Dred Scott* to refute his

59. CONG. GLOBE, 35th Cong., 1st Sess. 1964 (1858).

60. *See* Aynes, *supra* note 14, at 69. According to Dean Aynes, the other components of Bingham's ideology included the belief that the Privileges and Immunities of Citizens protected by Article IV included all of the rights in the Bill of Rights, that the Bill of Rights were enforceable against the states even prior to the ratification of the Fourteenth Amendment, but that Congress lacked the power to enforce the Privileges and Immunities of Citizenship because Article IV lacked a congressional enforcement provision. *Id.*

61. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859); *see also* Aynes, *supra* note 14, at 69.

62. Aynes, *supra* note 14, at 70.

63. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

64. Wilson, Henry, 1812-1875, Biographical Directory of the United States Congress 1774-Present, *available at* http://bioguide.congress.gov/ (last visited Jan. 30, 2003). Wilson served as a senator from January 31, 1855 to March 3, 1873, when he resigned to become Vice President under President Ulysses S. Grant. *Id.*

65. CONG. GLOBE, 35th Cong., 1st Sess. 1966-67 (1858).

66. *See, e.g.*, CONG. GLOBE, 35th Cong., 2d Sess. 974-75 (1859) (Representative Dawes arguing that the provision preventing people of color from entering contracts, owning property and suing in courts violated the Privileges and Immunities Clause); CONG. GLOBE, 35th Cong., 2d Sess. at 980 (1859) (Representative Clark Cochrane arguing the same). *See also* CONG. GLOBE, 35th Cong., 1st Sess. 1966-67 (1858) (Senator Wilson), CONG. GLOBE, 35th Cong., 2d Sess. 974-75 (1859) (Representative Dawes).

points.[67] Others pontificated that states had the power to exclude whomever they chose, and that the Privileges and Immunities Clause did not prevent them from doing so.[68] For example, Representative Linus Comins, a Republican from Massachusetts, while stating his "regret" about the exclusion provision, argued that the exclusion provision was not a reason to prohibit Oregon from becoming a state because it was consistent with the west's treatment of free blacks.[69] Along the same vein, Senator Steven Douglas, a Democrat from Illinois who later ran against Abraham Lincoln in the presidential campaign of 1860, pointed out that Illinois had a similar provision excluding free people of color, and argued that Illinois, like Oregon, had a sovereign right to do so.[70] "Whether she does so or not is a question for herself, and not for any other state to interfere with."[71] Democrats continued to articulate a cramped reading of the rights of citizenship in the Privileges and Immunities Clause during the debate over the ratification of the Fourteenth Amendment.[72]

Bingham's and Fessenden's views are significant because of the role that those men played in drafting the Reconstruction Amendments. Both were members of the Joint Committee on Reconstruction in the 39th Congress and Bingham was the principle draftsman of the first section of the Fourteenth Amendment. Moreover, by 1866 most Republicans shared Bingham's and Fessenden's view that free blacks were citizens[73] and "believed in a body of national rights that states were required to respect."[74] These views on national citizenship and the rights that adhere thereto were reflected in the Fourteenth Amendment and the Civil Rights legislation that Congress enacted during Reconstruction.

67. *See*, CONG. GLOBE, 35th Cong., 1st Sess. (1858) (Representative Clark, of Missouri, relying on *Dred Scott* as authority for his position that blacks are not, and cannot be citizens of the United States).

68. *See* CONG. GLOBE, 35th Cong., 1st Sess. 1965 (1858) (Senators Trumbull and Douglas); CONG. GLOBE, 35th Cong., 1st Sess. 974 (1858) (Representative Comins).

69. CONG. GLOBE, 35th Cong., 2d Sess. at 974 (1859).

70. Other northern states also excluded free Blacks, including Ohio.

71. CONG. GLOBE, 35th Cong., 1st Sess. 1965 (1858).

72. CONG GLOBE, 39th Cong., 1st Sess. 1122-23, 1156 (1866) (Rogers). They argued that the Privileges and Immunities Clause of Article IV merely protected citizens of each state while temporarily visiting any other state. *See* CONG GLOBE, 39th Cong., 1st Sess. 1269 (1866) (Kerr). *See* CURTIS, *supra* note 18, at 81. ("Republican speakers supported the bill on grounds of a paramount national citizenship and a national body of fundamental privileges and immunities; the Democratic doctrine was more in keeping with accepted Supreme Court doctrine.").

73. CURTIS, *supra* note 18, at 46.

74. *Id.* at 48.

B. The Citizenship Clause of the Fourteenth Amendment

The themes of the congressional debate over the meaning of citizenship in some way played themselves out during the Civil War. Central to that War was the question of "whether a citizen owed his primary allegiance to the national or state government."[75] When the Confederate states seceded from the Union, they asserted their sovereign right to treat people as they chose, regardless of any protections in the United States Constitution that might otherwise have existed, in the most dramatic fashion possible. The conflict between state autonomy and federal power was resolved in favor of federal power to bestow national citizenship rights when the Union won the War.[76] Following the War, Bingham's vision of national citizenship and the rights that adhered thereto became an animating force behind the Reconstruction Amendments and the Civil Rights statutes of the Reconstruction Era.[77]

The Citizenship Clause of the Fourteenth Amendment provides that "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."[78] Its companion, the Privileges or Immunities Clause, provides further that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[79] The Framers intended the Citizenship Clause to clarify the fundamental relationship between the state and federal governments at the end of the Civil War and to serve as the font of civil rights that inhered from that relationship.[80] The Citizenship Clause states strongly

75. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 872 (1986). *See also* Daniel A. Farber & John E. Muench, *The Idealogical Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 263 (1984) ("Both the expansion of national power and the growing significance of national allegiance became evident early in the war.").

76. *See* Kaczorowski, *supra* note 75, at 873. *See also* Farber & Muench, *supra* note 75, at 277 (asserting that after the Civil War, "the concept of national citizenship became triumphant"); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1097 (2001) ("The Reconstruction Amendments were designed to create a new constitutional order in which state sovereignty would be limited by federal civil rights protections.")

77. *See* CURTIS, *supra* note 18, at 54 ("To Republicans the great objects of the Civil War and Reconstruction were securing liberty and protecting the rights of citizens of the United States."). *See also* SMITH, *supra* note 19, at 286 (arguing that the three constitutional amendments and six major civil rights statutes of the Reconstruction Era "compromised the most extensive restructuring of American citizenship").

78. U.S. CONST. amend. XIV, § 1, cl. 1.

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

80. *See* James W. Fox Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 145 (2002) ("[S]upporters understood the Fourteenth Amendment to enable Congress to enforce equality in a wide range of

and unequivocally that there is only one class of United States citizens; the Privileges or Immunities Clause clarifies that those citizens have certain rights that cannot be denied to them due to the very nature of their federal citizenship.[81] The Clauses also reflect the re-structuring of the federalist system during Reconstruction, shifting the balance of power in favor of the federal government and away from the states, and making Congress the primary protector of civil rights.[82]

Interestingly, the version of the Fourteenth Amendment that was approved by the House of Representatives did not contain the Citizenship Clause, which was added only upon debate in the Senate. After Senator Howard introduced the Amendment, Senator Benjamin F. Wade suggested an amendment to identify those whose privileges and immunities were protected. That amendment was the Citizenship Clause.[83] However, the Citizenship Clause was added late, not because it was not important, but because it reflected the understanding of the framers so widespread that those in the House felt that it was not necessary.[84] For example, as discussed above, Bingham believed that

public activity because such activities were themselves privileges of national citizenship."). The framers also intended the citizenship clause to overrule the Court's decision in *Dred Scott* that freed slaves could not be citizens, and to establish birthright citizenship.

81. Prior to the ratification of the Fourteenth Amendment, Congress attempted to enforce federal civil rights through the Civil Rights Act of 1866. However, some proponents of the Act feared that they lacked constitutional authority to enforce those rights. The debate over Congress' constitutional authority to enact the Civil Rights Act led to the drafting and ratification of the Fourteenth Amendment as a sound constitutional basis for the Act. In effect, therefore, the Fourteenth Amendment constitutionalized the Civil Rights Act. *See* Farber & Muench, *supra* note 75, at 275 ("The general theory of the Civil Rights Act [of 1866] was that Congress had the same power to protect citizens at home [as abroad] . . . . [The framers] believed that the fourteenth amendment supplied the missing authority to protect basic human rights.").

82. *See* Kaczorowski, *supra* note 75, at 866-67; Farber & Muench, *supra* note 75, at 277. *See also* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2347 (1997) ("The citizenship clause is a second Declaration of Independence, announcing that equal citizenship would henceforth be available to all regardless of race or prior condition of servitude."); Fox, *supra* note 49, at 425 ("The framers of Reconstruction believed that, by making a clear statement about citizenship, federalism could assume its proper role in the service of citizens."); *see also* Farber & Muench, *supra* note 75, at 236 ("The fourteenth amendment was intended to bridge the gap between positive law and higher law by empowering the national government to protect the natural rights of its citizens.").

83. CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

84. *See* CURTIS, *supra* note 18, at 91 ("So for Republicans the amendment was simply declaratory of existing constitutional law, properly understood. They rejected *Dred Scott* and instead believed that all free persons born in the United States were citizens of the United States."); SMITH, *supra* note 19, at 306 (The architects of the Civil Rights Act and Attorney General Edward Bates believed that native-born blacks were already citizens). *See also* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 649 (arguing that the Citizenship Clause was "added in

the freed slaves were already citizens of the United States, notwithstanding the Court's ruling in *Dred Scott*, and did not need a constitutional amendment to make them so.[85]

The Citizenship Clause was most likely added by the Senate as a result of a debate over whether Congress had the power to declare freed slaves as citizens in the Civil Rights Act of 1866. A number of Senators questioned whether Congress had the power to make such a declaration in light of the Court's ruling in *Dred Scott*. For example, Senator Peter Van Winkle of West Virginia, and a member of the Unconditional Unionist Party, asked where Congress had the power to make Africans citizens of the United States.[86] Similarly, Senator Johnson of Maryland argued that Congress lacked the authority to create birthright citizenship because in slave states, slaves were not considered citizens even if they were born there.[87] Other oppoenents of Reconstruction countered that "enfranchisement of those unfit for republican citizenship" were antithetical to republicanism.[88] The Citizenship Clause rejects this argument and firmly overrules *Dred Scott*, establishes birthright citizenship, and makes it clear that Congress has the power to protect the rights of federal citizens.

Even though the Citizenship Clause was added late, its importance is reflected in the fact that it is the first clause of the Fourteenth Amendment. This is not surprising, given that early congressional discussion of the newly proposed Fourteenth Amendment emphasized the rights of citizenship.[89] For example, Senator Fessenden of Maine, speaking for the Joint Committee on Reconstruction, stated that the goal of the Fourteenth Amendment was the equal participation of all in the rights of citizenship.[90] Others wanted it to protect "the rights and privileges of citizens,"[91] "the personal and natural rights of citizens,"[92]

the Senate at the last moment to write into the Constitution the antislavery view that the Thirteenth Amendment granted citizenship along with freedom").

85. *See generally*, CURTIS, *supra* note 18, at 91.

86. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

87. CONG. GLOBE, 39th Cong., 1st Sess. 1777 (1866) (Johnson) ("[W]hat doubt can there be but that if a State possessed the power to declare who should be her citizens before the Constitution was adopted that power remains now as absolute and conclusive as it was when the Constitution was adopted?").

88. *See* SMITH, *supra* note 19, at 296.

89. CURTIS, *supra* note 18. ("In proposing his amendment, Bingham wanted to ensure that the provisions of article IV, section 2, were respected in each state.").

90. *Id.*

91. CONG. GLOBE, 39th Cong., 1st Sess. 868 (1866) (Newell).

92. CONG. GLOBE, 39th Cong., 1st Sess. 1032 (1866) (McClurg).

the "fundamental rights of citizens,"[93] and the civil rights of citizens.[94] The primary function of the Fourteenth Amendment is defining and protecting the rights of federal citizens.

C. The Importance of Congressional Enforcement

Perhaps most important to John Bingham was the change in the 39th Congress' vision of its own institutional role, in protecting the rights of its citizens, that is reflected in the Fourteenth Amendment. Prior to the Reconstruction Amendments, the Constitution did not contain a single provision assigning this role to Congress. Additionally, the Bill of Rights does not contain any congressional enforcement provision. In contrast, all of the Reconstruction Amendments contain congressional enforcement provisions, as does every post-Reconstruction Amendment that expands individual rights.[95] The Framers of the Reconstruction Amendments intended to bestow broad power on Congress to define and protect the rights of national citizenship by enacting civil rights legislation.[96] The Fourteenth Amendment thus represents a major departure from the constitutional protections for individual rights prior to the Civil War in two significant respects—it protects those rights from infringement by the states and it names Congress as the principle enforcer of those rights.[97]

Congressional power to enforce the rights of its citizens was a crucial component of Bingham's theory of citizenship.[98] Prior to the

93. CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866) (Wilson).

94. CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (Pomeroy).

95. *See* U.S. CONST. amends. XIII (abolishing slavery and giving Congress the power to "enforce this article by appropriate legislation"); XIV; XV (prohibiting the federal government and states from denying the right to vote on account of race and giving Congress the power to "enforce this article by appropriate legislation"); XIX (prohibiting the denial of the right to vote on account of sex and giving Congress the power to "enforce this article by appropriate legislation"); XXIII (bestowing the right to vote for president on residents of the District of Columbia and giving Congress the power to "enforce this article by appropriate legislation"); XXIV (prohibiting the use of poll taxes as a voting qualification and giving Congress the power to "enforce this article by appropriate legislation"); XXVI (lowering the voting age to eighteen and giving Congress the power to "enforce this article by appropriate legislation").

96. *See* Julius Chambers, *Protection of Civil Rights: A Constitutional Mandate for the Federal Government*, 87 MICH L. REV. 1599, 1604-05 (1989) ("The thirteenth and fourteenth amendments to the Constitution created a national citizenry, defined the rights of citizenship, and authorized the national government to protect those rights. . . . The framers of the Reconstruction amendments meant to vest the federal government the authority necessary to secure civil rights and to provide federal remedies when those rights were denied.").

97. *See* Fox, *supra* note 49, at 512 ("Congress saw itself, and not the Court or the states, as the governmental branch best suited to define the particulars of citizenship.").

98. Aynes, *supra* note 14, at 71.

Fourteenth Amendment, Bingham believed that the rights of federal citizenship had a substantive component, including the Bill of Rights, and that those rights were enforceable against the states.[99] To Bingham, the problem was that those rights lacked a remedy because Congress lacked the power to enforce them.[100] Two years before the Fourteenth Amendment was ratified, Bingham made his theory of enforcement clear, speaking in general terms about what was to become the Fourteenth Amendment. Bingham explained that this "general" amendment would give Congress the express power to enforce "the rights which were guarantied (sic) . . . from the beginning, but which guarantee unhappily has been disregarded by more than one state of this Union . . . simply because of want of power in Congress to enforce that guarantee."[101]

Ensuring congressional power to protect the rights of federal citizens was arguably the *raison d'etre* of the Fourteenth Amendment. Congress had freed people from slavery, and given itself power to enforce those provisions, in the Thirteenth Amendment.[102] Soon thereafter, many southern states attempted to perpetuate the institution of slavery in all but name by enacting laws commonly known as the Black Codes, which denied freed slaves the right to vote, to own property, to appear in court, and other basic rights of citizenship, treating them as second-class citizens.[103] According to the Report of the Joint Committee on Reconstruction, these laws made it necessary for Congress to inquire into what it could do to secure the civil and political rights of freed slaves.[104] The Committee recommended enacting a Fourteenth Amendment to the Constitution to ensure congressional power to protect those rights.[105]

99. *Id.* at 70-71.

100. *Id.* at 71.

101. CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866).

102. U.S. CONST. amend. XIII.

103. *See* CONG. GLOBE, 39th Cong., 1st Sess., Senate Exec Doc. No. 2 (1865) (Schurz Report on Condition of the South; predicting that southern states would try to reinstate slavery-like conditions such as peonage); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Senator Trumbull). *See also* Smith, *supra* note 13, at 752 (southern states used Black Code to make newly freed slaves into second class citizens); Fox, *supra* note 49, at 490 (noting the context of Reconstruction, where "real people had been denied basic human dignity and citizenship"). *See also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) (maintaining that when people were talking about abridging privileges or immunities in 1866, they were mostly talking about the Black Codes).

104. CONG. GLOBE, 39th Cong., 1st Sess., Senate Report No. 112 (1866) (Joint Committee on Reconstruction) (proposing a Fourteenth Article of Amendment).

105. *Id. See also* Farber & Muench, *supra* note 75, at 275 ("The general theory of the Civil Rights Act [of 1866] was that Congress had the same power to protect citizens at home [as

Simultaneously with the debate over the Fourteenth Amendment, Congress enacted a Civil Rights Act[106] providing that "All citizens of the United States shall have the same right, in every State or Territory" to engage in real property transactions, make and enforce contracts, and have the right to "the full and equal benefit of the laws."[107] Some members of Congress believed that the Thirteenth Amendment was sufficient to give Congress power to enact the legislation needed to secure those rights.[108] For example, Senator Lyman Trumbull of Illinois, who served as both a Democrat and a Republican, argued that depriving a citizen of civil rights creates a badge of servitude and that prohibiting such a practice was within Congress' power to enforce the Thirteenth Amendment.[109] Similarly, Representative M. Russell Thayer, Republican of Pennsylvania, insisted that the Thirteenth Amendment and the Fifth Amendment gave Congress the power to enact the civil rights bill.[110] While Bingham was a strong supporter of the 1866 Civil Rights Act, stating that he wanted the Federal Bill of Rights to be enforced "everywhere,"[111] Bingham was one of few Republicans that thought Congress lacked the power to enact the Civil Rights Act of 1866, absent the Fourteenth Amendment.[112] Based in large part on Bingham's concerns, the Framers of the Fourteenth Amendment eventually decided that enacting this Amendment would be the best approach to ensure the constitutionality of proposed civil rights legislation.[113]

abroad] . . . [the framers] believed that the fourteenth amendment supplied the missing authority to protect basic human rights.").

106. 14 Stat. 27 (1866) now codified at 42 U.S.C. §1982.

107. *Id.* The original version considered by Congress also provided that all persons born in the United States would be citizens of the United States. That portion of the bill was omitted after the Citizenship Clause of the Fourteenth Amendment made it unnecessary.

108. *See* Samuel Estreicher, Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 452 (1974).

109. CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866).

110. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866); CURTIS, *supra* note 18, at 79. James Wilson, chair of the House Judiciary Committee, also thought that the Bill of Rights, and especially the Due Process Clause, gave Congress the power to pass the Civil Rights Bill before the Thirteenth Amendment. He said that citizens of the United States were entitled to "certain rights" and being entitled to those rights, "it is the duty of the government to protect citizens in the perfect enjoyment of them." CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). *See* CURTIS, *supra* note 18, at 81.

111. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

112. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (Representative Bingham) (arguing that Congress lacked the constitutional power to enact the Civil Rights Act); CURTIS, *supra* note 18, at 81.

113. *See* CURTIS, *supra* note 18, at 86. (pointing out that several congressmen observed that the

Many members of Congress argued that congressional power was necessary to ensure that those guarantees would be implemented. For example, Senator Trumbull stated that ensuring congressional power to enforce the rights of citizenship was crucial because "[t]here is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of those benefits."[114] Similarly, Congressman Ignatius Donnelly, speaking in favor of the proposed amendment, argued:

> Why should this not pass? Are the promises of the Constitution mere verbiage? Are its sacred pledges of life, liberty and property to fall to the ground through lack of power to enforce them? Or shall that great Constitution be what its founders meant it to be, a shield and a protection over the head of the lowliest and poorest citizen in the remotest region of the nation?[115]

In addition, William Lawrence of Ohio, a widely respected lawyer and former judge, argued that Congress had the incidental power to enforce and protect civil rights.[116] Lawrence said:

> The Constitution declares these rights to be inherent in every citizen, and Congress has the power to enforce the declaration. If it does not, then the declaration of rights is in vain, and we have a government powerless to secure or protect rights which the Constitution solemnly declares every citizen shall have.[117]

That congressional enforcement power was predominant in the minds of the framers is evident from the fact that the first draft of the Fourteenth Amendment that John Bingham presented to Congress was not self-executing, but relied solely on congressional enforcement.[118]

Fourteenth Amendment would eliminate any question about the power of Congress to pass the Civil Rights bill). *See also*, CONG. GLOBE, 39th Cong., 1st Sess. 2498 (1866) (Broomall); CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (Eliot); 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 447 (2002) (Section 5 "would be the justification for the sweeping measures that Congress adopted in its efforts to rebuild the South."); Estreicher, *supra* note 108, at 498.

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

115. CONG. GLOBE, 39th Cong., 1st Sess. 586 (1866).

116. *See* CURTIS, *supra* note 18, at 78.

117. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866).

118. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). It said only "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property." *Id.* (Presented to Congress by Bingham on Feb. 26, 1866). In *City of Boerne v. Flores*, Justice Kennedy viewed the change in language as

Moreover, the framers had a very broad view of congressional power in mind when they enacted the enforcement provisions of the Reconstruction Amendments. The Supreme Court's broad interpretation of congressional power in *McCulloch v. Maryland*[119] remained the standard on congressional enforcement power throughout the Antebellum Era, and the framers consciously invoked its broad meaning when they authorized Congress to enact "appropriate" legislation in Section five to enforce the rights established by Section one of the Amendment.[120] The Court had relied on *McCulloch* in its broad reading of congressional power to legislate against the rights of fleeing slaves and their protectors in *Prigg v. Pennsylvania.*[121] Throughout the ratification debates, Republican supporters of the Fourteenth Amendment referred to *Prigg* to argue that Section one of the Amendment, including the Citizenship Clause, gave Congress implied powers to protect freed slaves.[122] Some framers even believed that *Prigg* meant that the Fourteenth Amendment was unnecessary because the existence of rights necessarily meant that Congress had the power to enforce them.[123] The framers intended to turn *Prigg* on its head,

proof that Congress did not intend to give itself broad enforcement power. 521 U.S. 507, 523-28 (1997). However, Kennedy's point in *Boerne* is inconsistent with the overwhelming evidence that Congress intended to give itself broad enforcement power. *See infra*, notes 121-29 and accompanying text.

119. 17 U.S. (4 Wheat.) 316 (1819) (finding that the "Necessary and Proper" Clause of Article I authorized Congress to enact any legislation that was "appropriate" to furthering a "legitimate end"). "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." *Id.* at 421.

120. *See* Amar, *supra* note 22, at 825 n.299.

121. 41 U.S. (16 Pet.) 539, 615 (1842) (upholding Congress' power to enact a fugitive slave law pursuant to its Article IV enforcement powers, even though the Fugitive Slave Clause did not contain an enforcement provision, stating "[i]f indeed, the constitution guaranties the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."). *See* Amar, *supra* note 22, at 69. *See also* Finkelman, *supra* note 23, at 614 (arguing that "the structure of the Constitution, as well as nineteenth-century notions of Congressional power suggest that Congress may have lacked the power to enact the 1793 law"). *See also id.* at 658 (arguing that Justice "Story's main concern in Prigg was to strengthen federal power at the expense of the states, in disregard of the rights of northern free blacks"). Congress later enacted the more broadly sweeping Fugitive Slave Act of 1850, upheld by the Court in *Ablemon v. Booth.* 62 U.S. (21 How.) 526 (1858). Congress relied on *Prigg* when enacting the later, more comprehensive law. Amar, *supra* note 22, at 26, 70.

122. Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 139 (1999).

123. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Wilson); CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866) (Thayer); CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866) (Thayer). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (Lawrence). *See* CURTIS, *supra* note 18, at 82. *But see* Raoul Berger, *Incorporation of the Bill of Rights of the Fourteenth Amendment: A Nine-*

protecting the rights of those freed from slavery with the very powers once used to enslave.[124]

Finally, members of Congress during Reconstruction made it clear that they understood their Fourteenth Amendment enforcement power to be used primarily to define and protect the rights of citizenship. For example, during the debate over the Civil Rights Enforcement Act of 1871,[125] Representative Shellaberger, Republican of Ohio who participated in the 1866 debates over the Amendment, asserted that the Fourteenth Amendment gave Congress the power to "legislate directly for enforcement of such rights as are fundamental elements of citizenship."[126] Similarly, in 1872 Senator Matthew Carpenter, Republican of Wisconsin who joined Congress the year after the Fourteenth Amendment was ratified, argued that the Amendment's enforcement power "included the power to enforce national privileges and immunities, because the assertion of national citizenship and the mention of national privileges and immunities implied their existence."[127] Though these members of Congress may have disagreed about the extent of the rights of federal citizenship,[128] they all accepted the view that the Fourteenth Amendment had given them the power to define and enforce those rights.

II. THE RIGHTS OF FEDERAL CITIZENSHIP

What rights of federal citizenship did the framers intend to protect? To the framers, federal citizenship had both a structural and a substantive component. Structurally, federal citizenship was intended to guarantee that the fundamental rights of citizenship would be uniform throughout the country. The substantive meaning of citizenship rights is more difficult to discern. The Privileges or Immunities Clause, which directly follows the Citizenship Clause, was at least intended to

Lived Cat, 42 OHIO ST. L. J. 435, 453-56 (1981).

124. This interpretation of *Prigg* is not necessarily inconsistent with the intent of the author of the opinion of the Court, Justice Story, who arguably saw *Prigg* primarily as a case about the power of Congress, not the extension of slavery. *See* Finkelman, *supra* note 23, at 608 (describing *Prigg* as "a proslavery opinion written by a Justice personally opposed to slavery but driven by a desire to nationalize all law, including the law of slavery.").

125. 17 Stat. 13 (1871).

126. CONG. GLOBE, 42nd Cong., 1st Sess. App. 69 (1871). *See also*, Fox, *supra* note 80, at 127-28.

127. Fox, *supra* note 80, at 143 (citing CONG. GLOBE, 42nd Cong., 2d Sess. 762 (1872)). The statements of Senator Carpenter here are ironic, given that he served as counsel for the state of Louisiana in *The Slaughter-House Cases*. 83 U.S. 36 (1873); *Id.* at 142.

128. *See id.* at 137-48.

incorporate the Bill of Rights and make it enforceable against the states, and there is considerable evidence that many of the framers thought the Privileges or Immunities of citizenship to encompass a "natural rights" theory of the fundamental rights of citizenship.[129] The issue of incorporation has been hotly debated by a number of scholars.[130] But the approach of this essay is to focus on what the framers understood the term "citizen" to mean and what rights they intended to be encompassed within that concept, because the framers explicitly linked the Privileges or Immunities Clause to the rights of citizenship.[131] Evidence from the Ratification debates and contemporaneous legal doctrine indicates that the framers viewed the meaning of federal citizenship very broadly and that the rights that adhered to citizenship were considerably broader than those enumerated in the Bill of Rights. Most importantly, the framers intended future Congresses to define citizenship rights expansively when exercising their enforcement power under Section five of the Fourteenth Amendment.[132]

A. The Ratification Debates

With the Citizenship Clause, the framers overturned the Court's ruling in *Dred Scott*, made freed slaves into citizens who belonged to the national political community and guaranteed to them the protection of the federal government. When Bingham and the other framers of the Fourteenth Amendment spoke of citizenship, what they wanted most was to create uniform federal rights that would not vary from state to state. Prior to the Civil War, the basic rights of citizens of one state did

129. *See* Farber & Muensch, *supra* note 75; Fox, *supra* note 80.

130. *See, e.g.*, CURTIS, *supra* note 18; 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089-95 (1953); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (arguing that the Privileges and Immunities Clause does incorporate the Bill of Rights). *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (arguing that the Privileges and Immunities Clause does not incorporate the Bill of Rights because it has no clear meaning); Lino A. Graglia, *Interpreting the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1033-34 (1992) ("[T]here is very little basis for the implausible proposition that the states that ratified the Fourteenth Amendment understood that it would 'incorporate' the Bill of Rights, making its restrictions applicable to the states. . . ."); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993) (arguing against Amar's incorporation theory). Prior to the Fourteenth Amendment, the Court had ruled that the Bill of Rights was not intended to limit the states in the case of *Barron v. Baltimore.* 32 U.S. (7 Pet.) 243 (1833).

131. The Court in *Saenz v. Roe*, followed this approach. 526 U.S. 489 (1999). Emphasizing the fundamental nature of the right to travel, the Court pointed out that "[t]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence." *Id.* at 506.

132. See *supra*, notes 119-24 and accompanying text.

not extend beyond the borders of that state.[133] The Citizenship Clause reflects the framers' view of a more inclusive national political community, where it was only necessary to be born to become a member.

Also, that national community had the responsibility to protect *all* of its members in exchange for their allegiance to that community.[134] This theory of citizenship reflected the "social compact" theory of John Locke, that people submit to the authority of the government in return for its protection.[135] Consistent with this theory, an influential treatise at the time, the 1873 edition of Justice Story's *Commentaries on the Constitution* defined a "citizen" as "a person owing allegiance to the government, and entitled to protection from it."[136] Thus, in protest of President Johnson's veto of the first Civil Rights Act of 1866,[137] Representative Lyman Trumbull argued that citizens are entitled to protection within the United States, as well as abroad, stating, "allegiance and protection are reciprocal rights."[138]

Finally, the framers intended that the rights of federal citizens should be equal throughout the country. The theme of equality of rights directly reflects the concerns of expressed by northern members of Congress in debates over the rights of citizenship prior to the Civil War. Prior to the Civil War, those members of Congress were outraged that citizens of one state could be denied their most basic rights by another state[139] and they intended the Fourteenth Amendment to rectify this

133. For example, prior to the Civil War, South Carolina could imprison people of color who were citizens of other states solely because they entered South Carolina. *Id.* Oregon could exclude people of color and deny them the right to own property, enter into contracts or sue in state courts. *See supra* note 51 and accompanying text.

134. *See* Kaczorowski, *supra* note 75, at 878 (Republicans felt "a general obligation to secure the rights of Americans because they believed that in return for an allegiance to government, citizens were entitled to the protection of the government."); Fox, *supra* note 49, at 504 (Congress enacted the Freedman's Bureau legislation based on the theory that the federal government should reward the good citizenship of those who were loyal to the Union during the Civil War). This theory of citizenship reflected the "social compact" theory of John Locke, who believed that people submit to the authority of the government in return for its protection. *See* Smith, *supra* note 13, at 695. Hence, the 1873 edition of Justice Story's famous *Commentaries on the Constitution* defined a "citizen" as "a person owing allegiance to the government, and entitled to protection from it." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 654 (Thomas M. Cooley ed., Little, Brown, & Co., London 4th ed. 1873).

135. *See* Smith, *supra* note 13, at 695; Farber & Muench, *supra* note 75, at 241.

136. STORY, *supra* note 134, at 654.

137. 14 Stat. 27 (1866).

138. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). *See also* Farber & Muench, *supra* note 72, at 275 ("[The framers] believed that the Fourteenth Amendment supplied the missing authority to protect basic human rights.").

139. *See supra* notes 114-18 and accompanying text.

situation by creating a baseline of rights that would be uniform throughout the country. Thus, that the rights of citizenship should be equal regardless of the state of one's residence was expressed not only in the Equal Protection Clause, but also in the notion of citizenship itself.[140]

The record is less clear with regard to which substantive rights the framers had in mind.[141] However, a general paradigm emerges from the congressional debates at the time. John Bingham and other antislavery constitutionalists believed that the privileges and immunities of citizenship, protected by the Fourteenth Amendment, at least included the Bill of Rights.[142] Thus, in March 1871, Bingham noted that the Bill of Rights "chiefly defined" the privileges and immunities of citizenship.[143] Also, there is ample evidence that the framers at least intended to protect the trio of rights referred to in the Declaration of Independence, the right to life, liberty and property. For example, in a debate over the Civil Rights Act of 1866,[144] Representative William Lawrence of Ohio stated, [t]here are certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him . . . the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property."[145] Included in the meaning of "liberty" were the freedoms of speech and religion that southern states had denied too many citizens prior to the Civil War.[146]

As expressed in the debates over the Negroes Seamen's Acts[147] and the admission of Oregon,[148] the antislavery constitutionalists who later became the framers of the Fourteenth Amendment also believed that access to government facilities, such as courts[149] and the right to enter

140. *See* Farber & Muench, *supra* note 75, at 251 (noting the framers were heavily influenced by vision of equality). Senator Howard, when introducing Section 1 of the Fourteenth Amendment on the floor of Congress, declared that Section one "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights as it gives the most powerful, the most wealthy, the most haughty." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866); Fox, *supra* note 49, at 520 n.357.

141. *See* Farber & Muench, *supra* note 75, at 277 (stating that the difficult part about interpreting the Fourteenth Amendment is determining which fundamental rights the framers intended to protect).

142. *See* Aynes, *supra* note 14, at 71.

143. CONG. GLOBE, 42nd Cong., 1st Sess., App. 84 (1871).

144. 14 Stat. 27 (1866).

145. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

146. *See* Farber & Muench, *supra* note 75, at 277; CURTIS, *supra* note 17, at 76.

147. *See supra,* notes 29-41 and accompanying text.

148. *See supra,* notes 53-62 and accompanying text.

149. *See also* Smith, *supra* note 13, at 802 (framers of Fourteenth Amendment wished to establish the right to sue in federal courts, pursuant to Article III of the Constitution, as a right of

into legal contracts, as well as the right to travel, were privileges and immunities of citizenship. However, a majority of the framers did not see the right to vote as a right of citizenship.[150] They differentiated "civil rights," centering on the right to participate in the legal system in such basic means as entering into contracts and owning real property, from "political" rights like the right to vote. Only the former "civil" rights were considered to adhere to federal citizenship.

There is also considerable evidence that some framers of the Fourteenth Amendment intended the rights of citizenship to be considerably broader, encompassing all fundamental human rights and linking those rights to national citizenship.[151] Prior to the Civil War, John Bingham had argued that the rights of citizens included "the equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil . . . the rock on which that Constitution rests."[152] Others went even further, propounding a "natural law" view of citizenship rights that encompassed all fundamental rights. For example, when Senator Howard introduced Section one of the Fourteenth Amendment to the Senate, he indicated that in order to find the privileges or immunities of federal citizenship, one should look to the Bill of Rights and to the Circuit Court's opinion in *Corfield v. Coryell*,[153] a lower court case that was well known for embodying a broad, natural rights theory of citizenship.[154] Similarly, Senator Lyman Trumbull declared in a debate over the ratification of the Fourteenth Amendment: "To be a citizen of the United States carries with it some rights, and what are they? They are those inherent, fundamental rights which belong to free citizens as

citizenship).

150. SMITH, *supra* note 19, at 306; Curtis, *supra* note 18. Enacted in 1870, the Fifteenth Amendment extended the right to vote to freed slaves and prohibited states from denying the franchise "on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, §1. Significantly, that Amendment also included a congressional enforcement provision. U.S. CONST. amend XV, §2.

151. *See* Fox, *supra* note 49, at 503-04 ("For Republicans, fundamental human rights and American citizenship were closely linked, since America was founded on fundamental human rights."); Smith, *supra* note 13, at 730; Farber & Muench, *supra* note 75, at 236 (discussing the influence of natural law theory on the Framers of the Fourteenth Amendment).

152. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

153. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

154. In *Corfield*, the court articulated a comprehensive list of the fundamental rights of "citizens of all free governments," including "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . . . The right of a citizen of one state to pass through, or to reside in any other state . . . to claim the benefit of writ of habeas corpus . . . [and] to institute and maintain actions of any kind in the courts of the state." *Corfield*, 6 F. Cas. at 551-52.

free men in all countries."[155]

That many of the framers believed in natural rights does not mean that they intended the rights of federal citizenship to be unlimited. As even Senator Trumbull's remarks make clear, those rights must be linked with citizenship in some way in order to be enforceable through the Fourteenth Amendment. For example, a congressional provision defining the standards for divorce procedures would clearly not fit within the citizenship framework, nor would a federal law criminalizing pick-pocketing. Nevertheless, congressional debates during the Reconstruction Era, as well as legislation that Congress enacted during that period, reveal that Congress intended the Citizenship Clause and rights of federal citizenship to be a broad font of nationally uniform individual rights. Congressional debates also reveal that the framers intended Congress to play an active role in defining those rights through legislation.

B. Reconstruction Era Legislation

The most concrete expression of the framer's understanding of the rights of citizenship can be found in the civil rights legislation that they enacted contemporaneously to the Fourteenth Amendment. Those statutes are replete with the language of citizenship and the rights that adhere thereto. For example, in the 1866 Civil Rights Act, Congress declared that "[a]ll citizens of the United States shall have the same right, in every State or Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."[156] The Act also guaranteed "all persons" in the United States "the same right . . . to make and enforce contracts . . . and to the full and equal benefit of the laws . . . as is enjoyed by white citizens."[157] The Ku Klux Klan Act of 1871 prohibited conspiracies by state or private actors to prevent a person from "exercising any right or privilege of a citizen of the United States. . . ."[158] Finally, the Civil Rights Act of 1875, which prohibited race discrimination in privately owned places of public accommodation, was titled "[A]n act to protect all citizens in their civil

155. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

156. 14 Stat. 27 (1866), now codified at 42 U.S.C. § 1982. The original version considered by Congress also provided that all persons born in the United States would be citizens of the United States. That portion of the Bill was omitted after the Citizenship Clause of the Fourteenth Amendment made it unnecessary.

157. 16 Stat. 144 (1870) now codified at 42 U.S.C. § 1981.

158. Ku Klux Klan Act of 1871, ch. 22, § 2(3), 17 Stat 13 (1871), codified in Rev. Stat. of 1874, § 1980, now 42 U.S.C. § 1985(3).

and legal rights."[159] That portions of both the 1871 and the 1875 Acts applied to private conduct indicates that immediately following the ratification of the Fourteenth Amendment, members of Congress believed that their power to protect the rights of citizenship was not limited to state action.[160]

The civil rights legislation of the Reconstruction Era reflected the themes of belonging, protection and equality that resound throughout the framer's discussion of the rights of citizenship. The 1866 Civil Rights Act[161] enabled all citizens to participate in basic legal processes, such as entering into contracts and using the court system, that would facilitate their belonging to their community. During the Reconstruction Era, members of Congress repeatedly referred to the right to own property and enter into contract as a basic right of citizenship because citizens were entitled to participate in the legal structure.[162] That some states had denied free persons of color access to their legal systems had prevented them from belonging to the legal polity.

Protection was the theme of the 1871 Enforcement Act,[163] which made it a crime to interfere with a citizen's exercise of his rights of citizenship. Throughout Congressional debates over the Fourteenth Amendment, the framers repeated their desire to protect the freed slaves, and other federal citizens, from infringement of their rights.[164] For example, the 1871 Act[165] responded to massive organized race based violence in the southern states, and thus is commonly known as the Klu Klux Klan Act.[166] Members of Congress were concerned that states

159. 18 Stat. 335. The Supreme Court struck down the Civil Rights Act of 1875 in *Civil Rights Cases*, stating that it was beyond Congress' Thirteenth Amendment enforcement powers because it was not directly related to slavery, and that it was beyond Congress' Fourteenth Amendment enforcement power because it applied to private, not state action. 109 U.S. 3 (1883). In one of the strongest articulations of the rights of citizenship by any member of the Court in that era, Justice Harlan vociferously dissented. *Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting). In retrospect, as with his dissent to *Plessy v. Fergusson*, 163 U.S. 537 (1896) (arguing that "separate but equal" Jim Crow laws violated the Equal Protection Clause of the Fourteenth Amendment), Justice Harlan's interpretation of the 14th Amendment in the *Civil Rights Cases* was undoubtedly the correct one. See *infra* notes 206-12 and accompanying text. Nevertheless, the Court recently relied on the majority opinion of the *Civil Rights Cases* to support its holding in *Morrison* that Congress's authorization of suits against private individuals in the Violence Against Women Act fell beyond its Section five enforcement power. 529 U.S. 598 (2000).

160. Fox, *supra* note 80, at 135-36 (pointing out that the 1871 Act applies to private conduct).

161. 14 Stat. 27 (1866).

162. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

163. 17 Stat. 13 (1871).

164. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

165. 17 Stat. 13 (1871).

166. *See* Fox, *supra* note 80, at 126.

were not actively prosecuting the instigators of this violence, so they created federal causes of action, hoping to use the jurisdiction of the federal courts to protect their citizens from that violence when the states would not.[167] The Klu Klux Klan Act made it a federal crime for private individuals or state actors to conspire to deprive citizens of their right to vote, serve on juries, and obtain equal protection of the law.[168] Members of Congress clearly believed that the Fourteenth Amendment gave them the power to protect their citizens in this fashion. For example, the principle proponent of the Act, Representative Shellabarger emphasized the establishment of national citizenship in the Citizenship Clause and argued that "to legislate directly for enforcement of such rights are fundamental elements of citizenship."[169] Other members of Congress shared Shellabarger's view of the scope of congressional power to protect the rights of citizenship.[170]

Finally, the theme of equality of rights, expressed by the framers as they introduced the Fourteenth Amendment,[171] is reflected throughout the Reconstruction Era civil rights acts, which were intended to ensure that United States citizens had equal rights regardless of where they lived or traveled. The Civil Rights Act of 1875[172] took that theme one step further, attempting to equalize the rights of citizens in their private transactions. The 1875 Act indicates a very broad view of citizenship rights, prohibiting race discrimination even in the "social" realm.[173] Moreover, the 1875 Act provided that the freedom from race discrimination was such a fundamental right of citizenship that its denial, even by private parties, would be a federal offense.[174]

167. *See* CURTIS, *supra* note 18, at 158 ("The denial of equal protection by local officials was a major problem that concerned the Republicans," and the reason why Congress decided to provide direct federal protection).

168. Ku Klux Klan Act of 1871, 17 Stat. 13 (1871).

169. CONG. GLOBE, 42nd Cong., 1st Sess. App. 69 (1871).

170. *See* Fox, *supra* note 80, at 127, *citing* CONG. GLOBE, 42nd Cong., 1st Sess. 334 (1871) (statement of Representative Hoar) ("Congress is empowered by the fourteenth amendment to pass all 'appropriate legislation' to secure the privileges and immunities of the citizen.").

171. *See supra*, note 82.

172. 18 Stat. 335 (1875).

173. *See* UROFSKY & FINKELMAN, *supra* note 113, at 481 (noting the Civil Rights Act of 1875 was "aimed to protect the freedmen from deprivation of the minimal rights of citizenship.").

174. *See* Fox, *supra* note 80, at 137 (arguing that supporters of the 1875 Act saw it as implementing the privileges and immunities of federal citizenship). That Act created civil and criminal liability for violations. The Court struck down that Act in the *Civil Rights Cases*, reading a state action requirement into Congress' Section five enforcement powers. 109 U.S. 3 (1883). See *infra* notes 200-03 and accompanying text.

III. THE FADING VISION AND THE ROLE OF THE COURT

Unfortunately, that broad vision of citizenship rights and congressional power has been lost over time, and since Reconstruction Congress has not expressly relied on its power to define the rights of citizenship. What happened to the vision of the framers? Much of the decline of this vision is attributable to the post-Reconstruction retrenchment of the political branches of federal government,[175] especially after the compromise of 1876 when President Rutherford B. Hayes agreed to pull northern troops out of the south, putting an end to Reconstruction, in exchange for his election to President.[176] The Supreme Court also played a major role in squelching congressional enthusiasm in two important rulings, *The Slaughter-House Cases*[177] and *The Civil Rights Cases.*[178] In *The Slaughter-House Cases* the Court rejected Senator Howard's broad, natural rights view of the rights of federal citizenship, reading the Privileges or Immunities Clause of the Fourteenth Amendment more narrowly than intended by the Framers.[179] In *The Civil Rights Cases*, the Court held that Congress' power to enforce the Fourteenth Amendment is limited to remedying state action.[180] These rulings help to explain why Congress has abandoned its earlier vision of federal citizenship as a font of congressionally enforceable rights. However, closer scrutiny of these cases reveals that neither ruling prevents Congress from resurrecting its vision now.

A. The Slaughter-House Cases

In *The Slaughter-House Cases* the Court rejected the broadest,

175. *See* Farber & Muench, *supra* note 75, at 260-61 (describing President Andrew Johnson's measures to undermine Reconstruction); SMITH, *supra* note 19, at 302.

176. *See* FONER, *supra* note 51, at 577 (chapter 12).

177. 83 U.S. 36 (1873).

178. 109 U.S. 3 (1883). The Court's ruling in *United States v. Cruikshank*, 92 U.S. 542 (1876) that the right of peaceable assembly and the right to bear arms were not privileges secured by the 14th Amendment and in *Walker v. Sauvinet*, 92 U.S. 90 (1876), that the Seventh Amendment right to trial by jury was not a privilege or immunity of citizenship, also caused Congress to adopt a much more restrictive view of the Privileges or Immunities Clause by 1876. CURTIS, *supra* note 18, at 170.

179. *See* Aynes, *supra* note 84, at 627 ("'[E]veryone' agrees [that] the Court [in *Slaughter-House*] incorrectly interpreted the Privileges or Immunities Clause. . . ."). *But see* Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1063 (2000) (arguing that Justice Miller's majority opinion in *Slaughter-House* was a compromise ruling that left open the possibility of incorporation of the Bill of Rights and was consistent with the intent of the framers).

180. 109 U.S. at 15.

natural rights theory of the privileges and immunities of citizenship held by some framers of the Fourteenth Amendment when it held that those rights did not include the right to pursue an occupation, but maintain the view that the Privileges or Immunities Clause protects the rights of federal citizenship.[181] The Court held that states, not the federal government, have the responsibility of defining and protecting the fundamental rights of citizens.[182] *Slaughter-House* was not an interpretation of congressional enforcement power under Section five of the Fourteenth Amendment, but of the self-enforcing provisions of Section one. Thus, on its face it does not limit congressional power to enforce the privileges and immunities of citizenship. However, the fact that the Court expressed a more restrictive view of the rights of citizenship than was held by many of the framers may very well have placed a damper on congressional enforcement of those rights following the *Slaughter-House* ruling.

Professor James Fox has recently argued that *Slaughter-House* had a significant impact on congressional debates about civil rights legislation immediately following the Court's ruling.[183] Fox points out that the first version of the 1875 Civil Rights Act,[184] which prohibited race discrimination in privately owned places of public accommodation, was introduced in 1870, and was heavily debated in Congress throughout the period. After the Court's opinion in *Slaughter-House*, opponents of the Bill argued that it now fell outside Congress' power to protect the privileges or immunities of citizenship, because of Justice Miller's narrow interpretation of those rights in *Slaughter-House.*[185] In response, supporters argued that freedom from discrimination remained a right of federal citizenship, emphasizing the equality based nature of citizenship rights.[186] However, Fox is doubtless correct when he points out that *Slaughter-House* played an important role in "effect(ing) the

181. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 659 (2000). The link between the Privileges or Immunities Clause and the rights of federal citizenship is apparent from the fact that the Privileges or Immunities Clause directly follows the Citizenship Clause and refers to the "Privileges or Immunities of citizens of the United States." *Id.* Moreover, the framers relied on their interpretation of the Privileges and Immunities Clause of Article IV in their theory of federal citizenship which is embodied in the Fourteenth Amendment. See *supra* notes 60-62 and accompanying text.

182. *Slaughter-House Cases*, 83 U.S. 36, 76 (1873).

183. *See* Fox, *supra* note 80, at 148-55.

184. 18 Stat. 335 (1875).

185. *Id.* at 148.

186. *See* CONG. GLOBE, 43rd Cong., 1st Sess. 3452-54 (1874) (statement of Senator Frelinghuysen), *cited in* Fox, *supra* note 80, at 149.

subtle elimination of fundamental privileges of national citizenship from the congressional and national political discourse over the Fourteenth Amendment and Reconstruction."[187]

Fox points out that *Slaughter-House* caused members of Congress to steer away from the broad, natural rights view of the privileges and immunities of citizenship, and to pay more attention to the Equal Protection Clause as a source of equal rights.[188] However, as this article has pointed out, equality of rights was a driving theme behind the framers' vision of national citizenship rights.[189] Thus, the language and vision of citizenship rights survived in the final version of the 1875 Act.[190] This is consistent with the argument that the Court's ruling in *Slaughter-House* may be a less restrictive reading of federal citizenship than is generally recognized.[191] On further reflection, Justice Miller's majority opinion appears to be a compromise between eviscerating the Privileges or Immunities Clause and adopting the plaintiff's broad natural law theory. The Court held instead that the Clause does not protect all rights, only uniquely federal rights.[192] Bryan Wildenthal has argued that *Slaughter-House* merely rejected the natural rights theory of the plaintiffs but did not necessarily reject the view that the Fourteenth Amendment was intended to incorporate the Bill of Rights against the states.[193] Even without addressing the issue of Miller's views on incorporation, however, it is apparent that Miller's opinion does not necessarily place significant limits on the rights of federal citizenship.

In *Slaughter-House*, Justice Miller distinguished between the rights

187. Fox, *supra* note 80, at 155. Moreover, after *Slaughter-House*, the Court issued a series of opinions narrowing its views of the Privileges or Immunities Clause, culminating in a list of federal citizenship rights in the case of *Twining v. New Jersey*. 211 U.S. 78 (1908). Many commentators consider this list paltry and redundant, and may have further dampened congressional interest in developing the privileges and immunities of citizenship. For an excellent discussion of the development of the Court's interpretation of the Privileges or Immunities Clause from *Slaughter-House* to *Twining*, *see* Bryan Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000).

188. Fox, *supra* note 80, at 149-50 ("Even among the more forceful defenders of the Bill, therefore, *Slaughter-House* effected a rhetorical shift away from a fundamental or natural rights position and toward a mere equality approach to the Privileges or Immunities Clause.").

189. *Supra* notes 171-74 and accompanying text.

190. 18 Stat. 335 (1875).

191. Aynes, *supra* note 84, at 661. *See* Newsom, *supra* note 181, at 659 (arguing that if the Court had ruled on their behalf, the ruling could have been interpreted as "a wholesale transfer of authority over individual rights—including traditional, common-law rights of contract and property—from the states to the federal government."); Wildenthal, *supra* note 179 (arguing that Justice Miller's opinion in *Slaughter-House* did not reject the view that the Privileges or Immunities Clause incorporated the Bill of Rights against the states).

192. *Slaughter-House*, 83 U.S. 36.

193. *See* Wildenthal, *supra* note 179.

of state and federal citizenship, holding that "fundamental rights," such as the right to enter into a profession of one's choice, argued by the plaintiffs in that case, were rights of state citizenship rather than federal citizenship. Upon reflection, Miller's opinion seems to have merely rejected the broadest, natural rights view of federal citizenship, while maintaining a fairly broad view of the rights of federal citizenship. The federal rights that Justice Miller identified as protected by the Privileges or Immunities Clause of the Fourteenth Amendment in his *Slaughter-House* opinion are those that have direct links to federal citizenship. They include rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[194] In dicta, Miller supplied a non-exhaustive list of some rights of federal citizenship, including the right "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, and to engage in administering its functions, and [t]he right to peaceably assemble and petition for redress of grievances."[195]

The *Slaughter-House* list emphasizes the themes of belonging and protection that had influenced the framers of the Fourteenth Amendment, as well as the importance of citizens' participation in their government. Thus, while the Court in *Slaughter-House* rejected a wholesale fundamental rights theory of federal civil rights, it did not purport to restrict the rights of federal citizenship. Consistent with this reading of *Slaughter-House*, the Court has since found the right to vote in federal elections,[196] the right to appear in federal court,[197] the right to petition the federal government,[198] and the right to travel[199] to be federal citizenship rights.

194. *Slaughter-House*, 83 U.S. at 79.

195. *Id.* at 79-80 (*citing* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 36 (1867)).

196. *See* United States v. Classic, 313 U.S. 299, 328-29 (1941).

197. *See* Terral v. Burke Const. Co., 257 U.S. 529, 531-32 (1922).

198. *See, e.g*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 513 (1939) (noting the right to assemble to discuss national legislation and the rights and benefits to accrue citizens therefrom); United States v. Cruikshank, 92 U.S. 542, 552 (1875) (recognizing the right to petition Congress).

199. Most recently, the Court found the right to travel to be a citizenship right protected by the Privileges or Immunities Clause. Saenz v. Roe, 526 U.S. 489, 503 (1997). The Court had previously found the right to travel to be a protected citizenship right in numerous cases, without identifying the constitutional source of that right. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941) (striking down a California statute that criminalized the entrance of a pauper into the state as violating the right to travel).

B. The Civil Rights Cases

In *The Civil Rights Cases*, the Court directly limited congressional enforcement power when it struck down the Civil Rights Act of 1875, which prohibited "any person" from denying to "any citizen" access to privately owned places of public accommodation on the basis of race.[200] In that case, the Court held that Congress' power to enforce the Fourteenth Amendment is limited to remedying state action.[201] The Court articulated a cramped view of congressional power, stating in dicta that the legislation which Congress is authorized to adopt under the Fourteenth Amendment "is not general legislation upon the rights of the citizen, but corrective legislation such as may be necessary and proper for counteracting such laws as the States may adopt or enforce."[202] The state action limitation has proven to be a major barrier to congressional enforcement of Section five of the Fourteenth Amendment.[203]

However, the opinion in the *Civil Rights Cases* that better reflects the intent of the framers is not the majority ruling, but Justice Harlan's dissent.[204] In *Prigg v. Pennsylvania*,[205] the Court had recognized congressional power to require *private* parties to return fugitive slaves even though Article IV referred only to state action.[206] In his dissent to the *Civil Rights Cases*, Justice Harlan relied on the *Prigg* ruling to argue that state action is not required for Congress to enforce the civil rights guaranteed by the Fourteenth Amendment.[207] Harlan pointed out that by

200. 18 Stat. 335 (1875).

201. Civil Rights Cases, 109 U.S. 3, 11 (1883). The Court also found that the Act fell beyond Congress' power to enforce the Thirteenth Amendment because the Thirteenth Amendment "relates only to slavery and involuntary servitude." *Id*. at 20. However, the Court overruled that aspect of the *Civil Rights Cases* in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). This question was over the constitutionality of 42 U.S.C. §1982 which was originally part of the Civil Rights Act of 1866, and prohibited discrimination on the basis of race in real property transactions. In *Jones*, the Court found that the bill was a constitutional attempt on the part of Congress to remedy "badges and incidents" of slavery. *Id.*

202. *Civil Rights Cases*, 109 U.S. at 13-14. The Court later cited this language to support its holding in *City of Boerne v. Flores*, that Congress cannot create new substantive constitutional rights, but is limited to remedying constitutional violations. 521 U.S. 507 (1997).

203. *See* Fox, *supra* note 80, at 162. For example, in *United States v. Morrison*, the Court cited the *Civil Rights Cases* to support the proposition that civil rights provision of the Violence Against Women Act, which created a federal cause of action against private individuals who engaged in gender motivated violence, did not fall within Congress' Section five power to enforce the equal protection clause. 529 U.S. 598 (2000).

204. *Civil Rights Cases*, 109 U.S. at 33 (Harlan, J., dissenting).

205. 41 U.S. (16 Pet.) 539 (1842).

206. Amar, *supra* note 22, at 70.

207. *Id.* at 53.

ruling otherwise, the majority created an anomaly.[208] Namely, the Court enabled the Congress to legislate to vindicate slavery, but not to secure the rights of freed slaves.[209] In fact, members of Congress *had* cited *Prigg* during the debates over the Ku Klux Klan Act in support of their power to legislate with regard to private action.[210] Congressional power to *enforce* civil rights is even clearer than the power it had enjoyed to derive the rights of fugitive slaves, since Section five is an explicit congressional empowerment that Article IV lacked.[211] Based on this reasoning, the Citizenship Clause itself may provide an affirmative grant to Congress to protect the rights of federal citizens against infringement by private parties. It is possible that the Court would have to overrule the *Civil Rights Cases* before Congress could exercise this power against private parties.[212] Nonetheless, the *Civil Rights Cases* ruling does not prevent Congress from broadly protect the rights of citizenship against state infringement.

C. Retrenchment

Finally, the federal civil rights statutes from the Reconstruction Era failed to deliver their promise of belonging, protection and equality. The statutes were largely not enforced.[213] By the turn of the century, the Supreme Court found that state sponsored segregation did not violate the Equal Protection Clause of the Fourteenth Amendment in the case of *Plessy v. Ferguson*, gutting that provision's power to bring about racial justice.[214] Jim Crow was in full swing, as was rampant racial violence against blacks throughout the south. By the turn of the 20th century, equal citizenship was no longer a realistic alternative for African Americans. Instead, they were reduced to seeking bare physical protection against lynching,[215] and even that protection was seldom

208. *Id.*

209. *See id.* ("The national legislature may, without transcending the limits of the constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this Court, for the protection of slavery and the rights of masters of freed slaves.").

210. CURTIS, *supra* note 18, at 159.

211. *See* Amar, *supra* note 22, at 71.

212. *But see infra*, notes 274-302 and accompanying text (arguing that the State Action Requirement might not limit congressional enforcement of the Citizenship Clause).

213. *See* Chambers, *supra* note 96, at 1600*:* ("The national government's retreat from civil rights enforcement following Reconstruction and relinquishment of responsibility to state and local officials led to lawlessness, lynching, and the entrenchment of segregation.").

214. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

215. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 50 (1999).

received.[216]

IV. A LOST OPPORTUNITY TO ENFORCE THE RIGHTS OF CITIZENSHIP

During the Reconstruction Era, Congress was motivated by John Bingham's vision of national citizenship and enacted a flurry of legislation to define and protect the rights that adhered thereto. By the end of the 19th Century, however, Congress appears to have lost that vision. During the Civil Rights Era of the 1960s, Congress again enacted wide-reaching legislation to protect the rights of its citizens, but did not return to its Reconstruction Era vision of national citizenship rights.[217] Proponents of the 1960s legislation relied on not the Citizenship Clause, but the Equal Protection Clause and the Commerce Clause for authorization of its legislation.[218] Thus, the era was a lost opportunity for Congress to expansively define the rights of federal citizenship in accordance with Bingham's theory of citizenship.

A. 1960s Era Civil Rights Legislation

In 1954, the Supreme Court reactivated the Equal Protection Clause by its ruling in *Brown v. Board of Education*[219] that segregated elementary schools violated equal protection. This ruling effectively overturned *Plessy v. Fergusson*[220] and revived the almost moribund Equal Protection Clause of the Fourteenth Amendment. *Brown* led to a series of Supreme Court decisions striking down state sponsored segregation,[221] and eventually dismantling the Jim Crow system in the south. Simultaneously, the civil rights movement of Dr. Martin Luther King and his followers ignited political opposition to race based segregation. In response, Congress enacted a new flurry of civil rights

216. Chambers, *supra* note 96, at 1600.

217. Although it is not a congressional document, the 1947 Report of the President's Committee on Civil Rights in an indication of the prevalent view within the federal government about what rights were linked to citizenship. That document's discussion of citizenship rights is limited to the right to vote, and principally, the denial of the right to vote to African Americans by southern states. *See* TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 32-40 (1947).

218. *See* Pope, *supra* note 6, at 5 ("The great social movements that sought to expand congressional powers during the twentieth century framed their claims in the language of human rights, not commerce.").

219. 347 U.S. 483 (1954).

220. 163 U.S. 537 (1896).

221. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); New Orleans City Park Improvement Ass'n. v. Detiege, 358 U.S. 54 (1958) (parks).

legislation, beginning with the 1964 Civil Rights Act[222] and the 1965 Voting Rights Act.[223] Title II of the 1964 Act, like its Reconstruction Era predecessor almost 100 years before, prohibited race discrimination in places of public accommodation, and prohibited discrimination on the basis of race, color, sex or religion in employment.[224] In 1875, Congress had viewed the freedom from private discrimination as a right of citizenship. Congress' focus had changed by the early 1960s, and as members of Congress sought a source of power to enact laws preventing private discrimination, they focused instead on the Equal Protection Clause and the Commerce Clause. Proponents of the Civil Rights Act of 1964 relied primarily not on the broad promise of freedom and equality embodied in the Fourteenth Amendment, but on congressional power to regulate interstate commerce. [225]

At the time that Congress was considering the Civil Rights Act of 1964, there was considerable debate about whether Congress should rely on Section five of the Fourteenth Amendment or the Commerce Clause powers.[226] The Kennedy/Johnson administration argued from the start that the bill should rest on Commerce Clause powers because that authority was clearly constitutional.[227] But some members of Congress countered that because the bill was about discrimination and civil rights, the authority clearly came from the Equal Protection Clause.[228] Other members were concerned about using the Commerce Clause to intrude on matters that had historically been under local control.[229] The reason

222. 42 U.S.C. § 2000 (1964).

223. 42 U.S.C. § 1973 (1965).

224. While Title VII originally only applied to private employers, Congress expanded its coverage in 1972 to state employees.

225. BUREAU OF NATIONAL BUSINESS AFFAIRS, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY: WHAT IT MEANS TO EMPLOYERS, BUSINESSMEN, UNIONS, EMPLOYEES, MINORITY GROUPS 81-82, 324 (1964).

226. *See A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, 1963: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. (1963); Post & Siegel, *supra* note 6, at 448 (discussing the congressional debate over the source of its power to address private discrimination).

227. For example, in his testimony before the Senate Commerce Committee's hearings in 1963, Attorney General Robert Kennedy stated that the law would be "clearly constitutional" under the commerce clause, and that the Fourteenth Amendment did not clearly give Congress the authority to enact the statute. *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, 1963: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. 28 (1963).

228. Note, for example, the comments of Senator Pastore, "[I] believe in this bill, because I believe in the dignity of man, not because it impedes out [commerce]. [I] like to feel that what we are talking about is a moral issue. [A]nd that morality, it seems to me, comes under the Fourteenth Amendment [about] equal protection of the law." *Id.* at 252.

229. For example, Senator Mulroney, a Democratic Senator sympathetic with the policy of the

why members of Congress relied on the Commerce Clause instead of the Equal Protection Clause as the primary source of power to enact the Civil Rights Act of 1964 was because Title II of that Act prohibited discrimination by privately owned places of public accommodation. The Court's ruling in the *Civil Rights Cases* appeared to limit congressional power to enforce the Equal Protection Clause to state action.[230] Members of Congress eventually decided to rely on both sources, but do not appear to have considered the citizenship power as a source for this legislation.

In support of its use of the commerce power, Congress relied on reports that individual instances of segregation cost thousands to millions of dollars because people were deterred by discrimination from engaging in interstate commerce.[231] However, the central focus of the debate over the bill, which included an 82-day filibuster in the Senate, "inhered in disputes about the norms and commitments that inhabit the Equal Protection Clause."[232] Ultimately, the Court upheld Congress' power to enact the bill under the Commerce Clause and did not reach the question of whether congressional enforcement of the Equal Protection Clause could address private discrimination.[233] Following rulings by the

law, noted that he was "worried about the use" of the Commerce Clause "on matters which have been for more than 170 years thought to be within the realm of local control. . . . [If] we pass this bill, even though the end we seek is good, I wonder how far we are stretching the Constitution." *Id.* at 66.

230. *See* Estreicher, *supra* note 108, at 451.

231. *See Civil Rights—Public Accommodations, Hearing on S. 1732 before the Senate Committee on Commerce*, 88th Cong., 1st Sess., App. V, pp. 1383-87 (1963).

232. Post & Siegel, *supra* note 6, at 494.

233. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (finding the application of Title II to a hotel in downtown Atlanta to be within Congress' Commerce Clause powers); Katzenbach v. McClung, 379 U.S. 294 (1964) (finding the application of the bill to a large barbecue restaurant located eleven blocks from an interstate highway to be within the Commerce Clause powers). The Court found that the aggregate effect of discrimination on interstate commerce was sufficient to satisfy its test under *Wickard v. Filburn.* 317 U.S. 111 (1942). On the issue of whether the commerce power was a proper source of power for anti-discrimination law, the Court stated, "[t]hat Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. . . . [T]hat fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Heart of Atlanta Motel*, 379 U.S. at 257. Congress' reliance on the commerce clause made it unnecessary for the Court to re-visit its ruling in the *Civil Rights Cases*, which appeared to require state action for congressional enforcement of the Equal Protection Clause. *See* Post & Siegel, *supra* note 6, at 495-96. Siegel and Post point out the Court's broad reading of Congress' power to address private discrimination under the Thirteenth Amendment in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and that six Justices in *United States v. Guest*, 383 U.S. 745 (1966), suggested that Congress could use its § 5 powers to address private discrimination. *See generally*, *id.* They argue, "[b]y the end of the decade, Congress, the Court and the American people all expected the federal government to lead the fight against discrimination in the public and private sectors." *Id.* at 501.

Court, Congress accepted the Court's invitation and based much of its subsequent civil rights legislation, including the Americans with Disabilities Act at issue in *Garrett*,[234] the Age Discrimination in Employment Act at issue in *Kimel*,[235] and the civil rights provision of the Violence Against Women Act of 1995 at issue in *Morrison*,[236] on its power under the Commerce Clause and Section five of the Fourteenth Amendment.[237]

B. The Lost Opportunity for Bingham's Theory of Citizenship

The 1960s were a lost opportunity for a revival of Bingham's theory of citizenship. During the 20th Century, members of Congress did not appear to have considered the Citizenship Clause, the Privileges or Immunities Clause, or the rights of federal citizenship as a source of power to enact legislation in that era. Yet there is a strong argument that they could have done so consistently with the intent of the framers of the Fourteenth Amendment. As discussed above, there is apt authority to support the view that "the framers intended to grant Congress authority to protect the fundamental rights of all American citizens, regardless of the source of the infringement."[238] Moreover, during that time, the Court was receptive to congressional power, adopting an elastic approach to legislative action that was conducive to congressional experimentation while broadening its power to legislate the rights of its citizens.[239] If Congress had based this legislation on its power to enforce the rights of citizenship, it could have obviated the need for the expansion of the commerce power and instead modeled a source of

The *Guest* opinion explicitly reserved the question of whether Congress' power to enforce the Equal Protection Clause could reach private discrimination, but found that Congress could address private conduct when enforcing the rights of federal citizenship. *See infra* notes 284-91 and accompanying text. In retrospect that may have been an unfortunate result, as the Court sent many signals during that time that it did not believe that state action was required, and that it might have been willing to bow to the strong political will behind the Civil Rights Act of 1964 and overturn the *Civil Rights Cases*. Post & Siegel, *supra* note 6, at 494.

234. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

235. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

236. United States v. Morrison, 529 U.S. 598 (2000).

237. Congress has also often used its spending power to enact anti-discrimination legislation. *See* Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 172 n. 208 (2002). Given the Court's recent cutbacks on Congress' other powers, the spending power is increasingly important as a source of civil rights legislation. *Id.*

238. Kaczorowski, *supra* note 75, at 869. *See supra* Part III.A.

239. *See* Post & Siegel, *supra* note 6, at 517 (arguing that the Court saw Congress as a partner in making its vision of the Fourteenth Amendment "more firmly law" during the 1960s).

rights that provided broad power to enforce the rights of its citizens without unduly threatening the sovereignty of the states.

While John Bingham and the other framers of the Fourteenth Amendment did not provide an exhaustive list of citizenship rights, it is clear that they intended to create a national community, the members of which were to be protected by laws on an equal basis. Who the national community includes, as well as the meaning of citizenship itself, have expanded considerably since the ratification of the Fourteenth Amendment. For example, while the framers did not consider the right to vote to be a citizenship right,[240] it is now axiomatic that the right to vote is a right of citizenship. Moreover, while the framers did not consider women to be equal citizens, they are now considered to be such as a result of the Nineteenth Amendment, which gave women the right to vote and reflects an expansive vision of the civil rights of women.[241] The specific rights of citizenship today therefore cannot and should not be limited to what the framers intended them to be. Nor is it possible to determine what those specific rights would have been.[242] However, what is possible to discern is that Bingham and the others intended Congress to have broad power to define the rights of citizenship over time and to enact legislation to protect those rights.

The argument that Congress could have relied on its power to enforce the rights of citizenship is the strongest with regard to Title II of the Civil Rights Act of 1964.[243] Like that Act, the Civil Rights Act of 1875 prohibited discrimination in places of private accommodation. That the Reconstruction Era Congress understood the Civil Rights Act of 1875 to define and protect the values of citizenship is clear from the title of the act, "An act to protect all citizens in their civil and legal rights,"[244] and from repeated references to the rights of federal citizenship made by supporters of the bill throughout the debate over the Act.[245] Because the provisions of the 1875 and 1964 Acts are so similar, it takes a small step to consider the protections provided by the 1964 Act as falling within congressional power to enforce the rights of citizenship, as intended by the framers of the Fourteenth Amendment.

Envisioning other anti-discrimination legislation, such as the Age

240. *See supra* note 150 and accompanying text.

241. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 960 (2002).

242. *See supra* notes 141-55 and accompanying text.

243. 42 U.S.C. § 2000 (1964).

244. 18 Stat. 335 (1875). *See supra* notes 173-74 and accompanying text.

245. *Id.*

Discrimination in Employment Act at issue in *Kimel*,[246] and the Americans with Disabilities Act at issue in *Garrett*,[247] as legislation to protect citizenship rights requires more of a stretch. However, this legislation arguably enables citizens to participate more broadly in the national community, and therefore may fall under the rubric of protection of citizenship rights. When a person suffers discrimination on the basis of a characteristic that is unrelated to his or her qualifications, the discrimination limits that person's ability to participate as an active and productive member of his or her community and limits his or her ability to belong to that community. The link to belonging is particularly clear with regard to the Americans with Disabilities Act, which requires states and private employers to make their facilities accessible to the disabled, enabling them to participate regardless of their disability.

Finally, the civil rights provision at issue in *Morrison*,[248] which created a federal cause of action for victims of gender-motivated violence, also falls within Congress' power to protect the rights of its citizens. Like the Klu Klux Klan Act of 1871,[249] it is a congressional attempt to protect the rights of its citizens that states had repeatedly failed to protect,[250] by providing access to federal courts for the vindication of what Congress had defined as a civil right, the right to be free from gender motivated violence.[251] Thus, it is possible that all of the statutes at issue in the Court's recent decisions restricting congressional power to enforce civil rights might have been based on Congress' power to define and protect the rights of its citizens.

V. OVERCOMING BARRIERS WITH THE CITIZENSHIP POWER

Given that the Court upheld the Civil Rights Act of 1964,[252] why does it matter that Congress did not base that legislation in its Fourteenth Amendment citizenship power? It matters because, had Congress relied on its power to enforce the Citizenship Clause, it could have established

246. 528 U.S. 62 (2000).

247. 531 U.S. 356 (2001).

248. 529 U.S. 598 (2000).

249. 17 Stat. 13 (1871).

250. *See* Brief of Amici Curiae States of Ariz. *et al.*, U.S. v. Morrison, 529 U.S. 598, *5-*6 (2000) (Nos. 99-5) *available at* LEXSEE 1999 U.S. BRIEFS 5. (arguing that numerous studies of the treatment of women in state courts show that states are failing to protect women from gender motivated violence).

251. For a more in-depth argument that the civil rights provision of Violence Against Women Act falls within Congress' Citizenship Power, see Zietlow, *supra* note 7, at 328-30.

252. See *supra* note 233.

a firm base for other civil rights legislation that it wanted to enact during periods, like now, when the Court is less deferential to congressional power.[253] Although most people agree that defining and enforcing civil rights is an important aspect of congressional power,[254] the Court's recent rulings restricting the commerce power, and the power to enforce Equal Protection under Section five of the Fourteenth Amendment, have greatly weakened Congress' power to enact civil rights legislation. If Congress were to return to Bingham's theory of citizenship, congressional power to define and enforce the rights of citizenship might provide a solution to both problems.

A. The Barriers

The recent rulings of the Court have created two barriers to Congress enacting civil rights legislation, limiting congressional power to protect its citizens against both private and state discrimination. First, the Court's ruling in *United States v. Morrison*[255] greatly limits Congress' power to regulate discriminatory private activity.[256] In *Morrison*, the Court disregarded congressional data that violence against women caused economic harm and held that gender motivated violence was simply a matter of family and criminal law and could therefore not be addressed by Congress' power to regulate commerce.[257] Because the Court in *Morrison* also drew a firm line on requiring state action to enforce the Equal Protection Clause,[258] after *Lopez*[259] and *Morrison*, Congress' power to address private discrimination was limited to prohibiting discriminatory activity that the *Court* defines as economic.[260]

253. *See* Pope, *supra* note 6, at 116 (arguing that if the New Deal Era Congress had relied on the Thirteenth Amendment, rather than the commerce power, to enact protective labor legislation, there would have been no need "to inflate the commerce clause beyond recognition," and Congress' human rights powers might have escaped "permanent truncation.").

254. *See* Post & Siegel, *supra* note 6; Balkin & Levinson, *supra* note 76; Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002). That this is an area of almost universal agreement is evident from the paucity of scholarship arguing that states, and not the federal government, are better suited to protect civil rights. *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045 (1997).

255. 529 U.S. 598 (2000).

256. Thus, in *Morrison* the Court reaffirmed the determination to limit the commerce power that it expressed in *United States v. Lopez*, 514 U.S. 549 (1995), while at the same time continuing to apply the nineteenth century limits on Congress' human rights powers, in the form of the state action requirement from *The Civil Rights Cases*, 109 U.S. 3 (1883). *See* Pope, *supra* note 6, at 6.

257. 529 U.S. 598 (2000).

258. *See Morrison*, 529 U.S. at 621.

259. United States v. Lopez, 514 U.S. 549 (1995).

260. Resnik, *supra* note 8.

The second barrier to Congress' power to enact civil rights legislation is that the Court has greatly reduced Congress' power under Section five to enforce the Equal Protection Clause with its "congruence" and "proportionality" test of *City of Boerne v. Flores*.[261] This test makes it difficult for Congress to enable private parties to sue states for discriminating against them because in *Seminole Tribe v. Florida*,[262] the Court held that Congress cannot use its commerce power to abrogate state's immunity to suits by private parties, leaving Section five as the only source of congressional power to abrogate sovereign immunity.[263]

On its own, *Seminole Tribe* already creates a significant barrier to Congress making a state accountable for discrimination. But the true impact of *Seminole Tribe* was not apparent until the Court applied *Boerne* to the civil rights legislation enacted since the 1960s, which is based on Congress' power to enforce Section five as well as the commerce power. In *Board of Trustees of the University of Alabama v. Garrett*[264] and *Kimel v. Florida Board of Regents*,[265] the Court held that Congress' Section five power did not extend to legislation prohibiting discrimination based on disability and age, respectively, categories that the Court itself has not identified as meriting heightened equal protection scrutiny.[266] The Court's narrow reading of Congress' Section five power in *Kimel* and *Garrett* have virtually disabled Congress from abrogating sovereign immunity and making states accountable for their discriminatory actions.

Ironically, the statutes at issue in *Kimel* and *Garrett*, the Age Discrimination in Employment Act and the American's with Disabilities Act, respectively, remain good law because Congress also based them on its commerce power and both statutes regulate economic activity. However, those statutes are now unenforceable against state actors by private parties, and therefore are essentially limited to addressing private discrimination.[267] Thus, the Court has created a strange dichotomy—

261. 521 U.S. 507 (1997).

262. 517 U.S. 44 (1996).

263. The Court had earlier held that Congress can abrogate states' sovereign immunity with legislation based on Section 5 of the Fourteenth Amendment in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

264. 531 U.S. 356 (2001).

265. 528 U.S. 62 (2000).

266. *See Garrett*, 531 U.S. at 370-72; *Kimel*, 528 U.S. at 86-87.

267. The federal government can still sue states to enforce the ADA and the ADEA. *See generally Garrett*, 531 U.S. 356 (2001); *Kimel*, 528 U.S. 62 (2000). However, given the limited resources of the federal government, direct federal enforcement of civil rights statutes is not a viable alternative for most individuals who remain formally protected by those statutes. *See* Zietlow,

Congress can address only private (and not state) discrimination in the economic realm, and Congress cannot address private discrimination in non-economic realms.

There are also some more subtle pitfalls of Congress' reliance on the commerce power to enact civil rights legislation, illustrated in the Court's recent rulings of *Morrison*, *Kimel* and *Garrett.* Congress' reliance on the connection of the regulated activity to interstate commerce, instead of the connection of that activity to the principles of belonging, protection and equality from the rights of citizenship, has enabled the Court to require all civil rights legislation that addresses private activity to be economic in nature, reducing its potential to protect human rights. In *Morrison*, the Court struck down the civil rights provision of the Violence Against Women Act[268] because it did not regulate economic activity.[269] Congress had identified that provision as a civil rights remedy,[270] but the Court didn't believe Congress. The Court saw the remedy as a family law remedy, thus beyond federal power altogether.[271] With regard to state action, on the other hand, civil rights legislation that only addresses economic activity is not enough. Once the Court views the regulated activity as economic, it appears to discount the human rights protecting nature of that legislation, thus finding it beyond Congress' Section five power. Thus, in *Kimel* and *Garrett*, the Court appears to view the ADEA and ADA as only economic based, and not human rights based, legislation.[272]

supra note 237, at 207-08.

268. 42 U.S.C. § 13981.

269. United States v. Morrison, 529 U.S. 598, 613 (2000) (determining "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.") In so ruling, the Court disregarded numerous congressional findings linking gender motivated violence to interstate commerce. *See* Resnik, *supra* note 8, at 630-33 (2001) (arguing that the Court both ignored the extensive congressional record showing the connection between gender-motivated violence and interstate commerce, and reinforced the stereotype of women as belonging outside the economic realm.).

270. The provision was entitled a "civil rights remedy" and created a federal cause of action against any person "who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from that violence]." 42 U.S.C. §13981. In both language and purpose, §13981 mirrored the Ku Klux Klan Act of the Reconstruction Era, 42 U.S.C. §1985, which prohibited conspiracies by "any person" to use violence to interfere with the exercise of the rights of citizenship. *See supra* note 158 and accompanying text. *See also* Resnik, *supra* note 8, at 642 (arguing Congress had identified violence against women as a national problem, meriting a federal remedy).

271. *See Morrison*, 529 U.S. at 613-16. *See* Resnik, *supra* note 8, at 619 (critiquing the Court's categorical approach in *Morrison*).

272. *See generally* Post & Siegel, *supra* note 6, at 518.

B. Overcoming the Barriers?

Thus, the Court has recently created barriers to Congress' power to address both private and state discrimination. On the one hand, the Court has restricted Congress' use of its commerce power to address private discrimination because it views that power as unduly threatening to state sovereignty.[273] On the other hand, the Court has restricted Congress' use of Section five to address state discrimination because it sees that power as unduly threatening to its own role as interpreter of the Constitution.[274] The Citizenship Clause could address both concerns, if interpreted consistently with Bingham's theory of citizenship.

1. Addressing Private Discrimination

The Court has cut back on the commerce power because it sees that power as overly threatening to state sovereignty. Without any limiting principles, the Court feared that the commerce power could become a general federal police power.[275] However, if Congress relied on the Citizenship Clause and the rights of federal citizenship rather than the Commerce Clause to enact civil rights legislation such as the ADA and the ADEA, it could have created a source of rights with a limiting principle—protecting the rights of federal citizens to belong to a national community as equal citizens.[276] Moreover, if Congress had based the civil rights provision of the Violence Against Women Act on its power to protect federal citizenship rights,[277] then it might have been harder for the Court to re-categorize the law as a family law that encroached on the traditional province of the states.[278] In John Bingham's vision of

273. *Morrison*, 529 U.S. 598 (2000); U.S. v. Lopez, 514 U.S. 549 (1995); Post & Siegel, *supra* note 6.

274. City of Boerne v. Flores, 521 U.S. 507 (1997); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Post & Siegel, *supra* note 6.

275. *See generally Morrison*, 529 U.S. 598 (2000); *Lopez*, 514 U.S. 549 (1995).

276. *See* Balkin & Levinson, *supra* note 76, at 1099 ("In our view Congress has the power to pass laws that protect the equal citizenship of Americans.").

277. I have argued elsewhere that Congress could have done so, since providing victims of gender motivated violence access to federal courts fits well within the paradigm of belonging, protection and equality that identifies citizenship rights. *See* Zietlow, *supra* note 7, at 328-29.

278. Of course, it is very possible that the Court would have applied its own categorical approach and identified § 13981 as a family law provision no matter what source of power Congress purported to rely on. Jed Rubenfeld has recently argued that the Court's rulings in the cases discussed in this article are motivated by an anti-discrimination agenda. *See* Rubenfeld, *supra* note 253. If so, it could be futile to search for an alternate source of congressional power to enact civil rights legislation. However, given the Court's recent receptive attitude towards federal citizenship rights in other cases, those rights seem the most promising source of law to alter this Court's direction regarding anti-discrimination laws.

citizenship rights, states still retained the power to bestow rights upon their citizens, but federal citizenship would provide the standard as a baseline of rights that could not be taken away.[279] This overlapping theory of jurisdiction is considerably less threatening to states than the general police power potential of the commerce power.

The Court's opinion in the *Civil Rights Cases*[280] may pose an obstacle to this approach. In that case, the Court held that the 1875 Civil Rights Act[281] fell beyond Congress' power to enforce the Fourteenth Amendment because that power was limited to remedying state action. In dicta, the Court used language that could be interpreted to limit Congress' power to enforce citizenship rights.[282] Moreover, the Court did not distinguish between provisions of the Fourteenth Amendment in that ruling. However, in subsequent rulings, the Court has only followed the *Civil Rights Cases* when interpreting Congress' power to enforce the Equal Protection Clause.[283] Unlike the Equal Protection Clause, the Citizenship Clause does not contain the prefatory phrase "no state shall."[284] Moreover, because of the structural nature of federal citizenship rights, which are directly linked to the relationship between the state and federal government, citizenship rights might not be limited by the state action requirement.

In *United States v. Guest*,[285] the Court ruled that the state action requirement did not limit Congress' power to protect the rights of citizenship.[286] In *Guest*, the Court upheld the indictment of private individuals for conspiring to prevent a person from using state facilities because of his race, thereby interfering with his right to engage in interstate travel.[287] The Court treated the right to travel differently than the other equal protection rights at issue in the case, noting that "[t]he

279. *See* Fox, *supra* note 80, at 134, *citing* Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMM. 123, 141 (1986).

280. 109 U.S. 3 (1883).

281. 18 Stat. 335 (1975).

282. *Id.* The Court said that the legislation which Congress is authorized to adopt under the Fourteenth Amendment "is not general legislation upon the rights of citizen. . . ." *Civil Rights Cases*, 109 U.S. at 13-14.

283. *See, e.g.*, U.S. v. Morrison, 529 U.S. 598 (2000).

284. Of course, this argument only works if the Citizenship Clause is enforceable separately from the Privileges or Immunities Clause, which does contain the prefatory "no state shall" language, and does appear to be limited to state action.

285. U.S. v. Guest, 383 U.S. 745 (1966).

286. *Id.* The *Guest* Court reserved the issue of whether Congress could reach private action when enforcing the equal protection clause. *Id.*

287. *Id.* at 760. *But see Morrison*, 529 U.S. at 679-80 (distinguishing *Guest* on the grounds that some state official was involved in the private activity at issue in *Guest*).

constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union."[288] The Court then emphasized the structural nature of the right to travel, pointing out "it is important to reiterate that the right to travel freely . . . finds constitutional protection that is quite independent of the Fourteenth Amendment."[289] The structural nature of the right to travel is the reason that the Court also stated, "the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private."[290] Thus, in *Guest* the Court found that the federal government is able to enforce rights of federal citizenship against private parties if those rights are inherent in the structure of the federal government.[291]

Similarly, in *Griffin v. Breckenridge*, a unanimous Court ruled that 42 U.S.C. §1985(3), a Reconstruction Era civil rights statute which provided a civil remedy for victims of private conspiracies aimed at depriving them "of the equal protection of the laws, or of equal privileges and immunities under the laws . . . (or) of having or exercising any right of privilege of a citizen of the United States," was not limited by state action.[292] The Court's ruling in *Griffin* expressed a particularly broad reading of congressional power to address private deprivations of federal rights.[293] The Court stated "that there is nothing inherent in the phrase [equal protection of the laws] that requires the action working the deprivation to come from the state"[294] and opined further that Congress' failure to insert any "state action" requirement into section 1985(3) indicated its intent to reach "*all* deprivations of 'equal protection of the laws' . . . whatever their source."[295] The Court held that §1985(3) fell

288. *Guest*, 383 U.S. at 757.

289. *Id.* at 759 n.17.

290. *Id.*

291. *See* Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U.L. REV. 1047, 1940 (1994).

292. Griffin v. Breckenridge, 403 U.S. 88, 96-97 (1971).

293. *See* Estreicher, *supra* note 108, at 498*:* (citing *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 100 (1971)) (arguing that "[i]n effect, *Griffin* could be read to transform the Bill of Rights protections into a 'federal common law against [private] racial conspiracies.'").

294. *Griffin*, 403 U.S. at 97.

295. The Court limited the breadth of its ruling somewhat by noting that §1985(3) applied only to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ." *Griffin*, 403 U.S. at 102. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Court again declined to precisely define the meaning of "class" for the purposes of §1985(3), but stated that "the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the §1985(3) defendant disfavors." *Bray*, 506 U.S. at 275. The Court was concerned that otherwise the statute would be turned into a "general federal tort law." *Id.*

within Congress' power to enforce the Thirteenth Amendment but also noted that the right to travel, "like other rights of national citizenship," is "assertable against private as well as government interference."[296]

Finally, there is an interesting parallel between the Thirteenth Amendment, which does not require state action, and the Citizenship Clause.[297] Many members of the 39th Congress believed that the Thirteenth Amendment had the effect of making former slaves citizens.[298] This connection is reflected in the fact that a vast majority of Republicans believed that the Thirteenth Amendment gave them the power to enact the 1866 Civil Rights Act, with its Citizenship Clause and protection for the rights of citizenship.[299] The Supreme Court has held that Congress' power to address private discrimination in real estate transactions fell within its Thirteenth Amendment enforcement power.[300] Similarly, the right to own property was one of the principle rights of citizenship recognized by the framers of the Fourteenth Amendment.[301] The connection between the Citizenship Clause and the Thirteenth Amendment provides further support for the argument that Congress' power to define and protect citizenship rights is not limited to state action.[302]

296. *Griffin*, 403 U.S. at 105-06. The plaintiffs had asserted that they were deprived of "their rights to travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi." *Griffin*, 403 U.S. at 106.

297. The Thirteenth Amendment states affirmatively, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, *shall exist* within the United States, or any place subject to their jurisdiction." U.S. CONST. amd. XIII (emphasis added). It was directed primarily at ending the *private* ownership of slaves.

298. Thanks to Richard Aynes for pointing this parallel out to me.

299. *See supra* notes 107-13 and accompanying text.

300. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding the constitutionality of 42 U.S.C. §1982). The Court has also found that 42 U.S.C. §1981, which prohibits race discrimination in private contracts, falls within Congress' power to enforce the Thirteenth Amendment. In both cases, the Court ruled that the legislation was justified by Congress' power to remedy the "badges and incidents" of slavery. Significantly the Petitioners in Jones had argued that §1982 was justified by Congress' power to enforce the Fourteenth Amendment as well. The Court sidestepped that determination, which would probably have required it to revisit its ruling in the *Civil Rights Cases*, and upheld the statute solely on the basis of the Thirteenth Amendment enforcement powers. *See* Post & Siegel, *supra* note 6, at 496.

301. *See supra* notes 145-46 and accompanying text.

302. Although the Thirteenth Amendment is conventionally considered to only address "badges and incidents of slavery," some lawmakers and reformers have considered it to be a source of a much wider range of laws protecting individual rights. For example, labor leaders in the first half of the Twentieth Century argued forcefully that the Thirteenth Amendment was a source of congressional power to enact protective labor legislation. *See generally* Pope, *supra* note 6. In addition, the Justice Department under President Franklin Delano Roosevelt developed a wide ranging litigation strategy for enforcing the Thirteenth Amendment as a vehicle for instituting "free labor" and prohibiting various kinds of legal and economic coercion. *See generally* Risa Goluboff,

The Court's rulings in *Guest* and *Griffin*, that state action is not required for Congress to protect federal citizenship rights, suggest that citizenship rights may still provide a font of congressional power to address private violations of those rights, notwithstanding the Court's ruling in the *Civil Rights Cases*. More recently, in *United States v. Morrison*, the Court relied on the *Civil Rights Cases* when it held that Congress could not use its Section five power to enforce the Equal Protection Clause to reach actions of private parties.[303] In *Morrison*, the Court appears to have hardened its stance on the state action requirement and the opinion could be interpreted to limit all Section five based legislation addressing state action. However, *Morrison*, like the *Civil Rights Cases*, involved legislation based on the Equal Protection Clause. It might be possible to distinguish the ruling from congressional enforcement of citizenship rights on that basis.

2. Addressing State Discrimination

The Court has cut back on congressional power to enforce equal protection rights under Section five of the Fourteenth Amendment because it sees that power as unduly threatening to the institutional role of the Court. Like equal protection rights, citizenship rights are clearly enforceable against the states pursuant to Section five. Whether or not Congress' use of the citizenship power could overcome the restrictive barriers imposed by the Court in *Kimel*[304] and *Garrett*[305] will depend on how the Court would apply the congruence and proportionality test of *Boerne v. Flores*[306] to congressional enforcement of citizenship rights. For several reasons, it is possible that the Court might act more deferentially towards Congress' use of its citizenship power than it has towards Congress' use of its power to enforce the Equal Protection Clause.

In *Boerne* the Court held that legislation enforcing Section five must be congruent and proportional to the constitutional violation being remedied.[307] That is, Court said that Congress can't create rights that would not otherwise be found in the Constitution. In *Garrett* and *Kimel*, the Court applied the *Boerne* test stringently, holding that the ADA and the ADEA are beyond congressional enforcement power because they

The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 DUKE L. J. 1209 (2001).

303. U.S. v. Morrison, 529 U.S. 598 (2000).

304. 528 U.S. 62 (2000).

305. 531 U.S. 356 (2001).

306. 521 U.S. 507 (1997).

307. *Boerne*, 521 U.S. 507.

give plaintiffs more rights than they would otherwise have if they sued directly under the Equal Protection Clause. In earlier rulings, the Court had held that both age and disability based classifications are subject to rational basis review, requiring only a legitimate government purpose to justify a distinction based on those categories.[308] According to the Court, when Congress prohibited discrimination based on age and disability in the ADEA and the ADA, respectively, it effectively heightened the level of scrutiny given to distinctions based on those characteristics in a manner that was inconsistent with the Court's treatment of those categories.[309] This approach violated the congruence and proportionality test of *Boerne* and was therefore beyond congressional power under Section five.

Notwithstanding the Court's rulings in *Kimel* and *Garrett*, the Court might feel less threatened by congressional interpretation of the citizenship power than it is with congressional interpretation of the equal protection power. Since *Brown v. Board of Education*,[310] the Court has carefully developed an equal protection jurisprudence in numerous cases, interpreting Section one of the Fourteenth Amendment to protect the interests of "discrete and insular minorities" and developing a system of differing levels of scrutiny depending on whether those claiming Section one protection were "discrete and insular minorities," as defined by the Court.[311] In contrast to equal protection, the Court has not developed a clear "citizenship" jurisprudence. The Court has never interpreted the meaning of the Citizenship Clause, and it has only considered what a right of citizenship might be in a handful of cases.[312] Therefore, it is possible that the Court's application of the "congruence and proportionality" test to legislation enforcing the rights of citizens

308. *See* Clerburne v. Clerburne Living Center, 473 U.S. 432 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

309. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). Congress' attempt to heighten scrutiny is particularly clear with respect to the Americans with Disabilities Act, in which Congress declared that people with disabilities are "discrete and insular minorities" meriting heightened governmental protection.

310. 347 U.S. 483 (1954).

311. *See*, *e.g.*, U.S. v. Carolene Products Co., 304 U.S. 144, 153 fn.4 (1938) (distinguishing cases in which greater judicial scrutiny might be appropriate, including situations where prejudice against "discrete and insular minorities" may be a factor). *See also Clerburne*, 473 U.S. 432 (classifications based on disability merit rational basis scrutiny); Craig v. Boren, 429 U.S. 190 (1976) (gender based classifications merit "intermediate" scrutiny); *Murgia*, 427 U.S. 307 (age based classifications merit rational basis scrutiny); James v. Valtierra, 402 U.S. 137 (1971) (poverty based classifications merit rational basis scrutiny); Korematsu v. United States, 323 U.S. 214 (1944) (race based classifications merit strict scrutiny).

312. *See supra* notes 196-99 and accompanying text.

might be more deferential, allowing that legislation to withstand the Court's scrutiny.

Moreover, the current Supreme Court recently indicated a receptivity to the Fourteenth Amendment's values of citizenship in its ruling in two cases, *Saenz v. Roe*[313] and *U. S. Term Limits, Inc. v. Thornton.*[314] In *Saenz*, the Court struck down a California state welfare law as violating the right to travel imbedded in the citizenship provisions of the Fourteenth Amendment.[315] Significantly, the Court in *Saenz* cited both the majority and dissenting opinions in *The Slaughter-House Cases* to support its ruling.[316]In *Term Limits*, the Court found that states cannot set limits on the terms of federal representatives because those limits interfere with the relationship between federal citizens and their representatives.[317] The rights of federal citizenship played a key role in both cases, which stand in remarkable contrast to the Court's many recent rulings against federal power because of its intrusion on state sovereignty.[318] This contrast has led this author to argue elsewhere that the rights of federal citizenship may set the limits on this Court's federalism.[319] If so, that approach would be consistent with Bingham's theory of citizenship. Although neither *Saenz* nor *Term Limits* address the issues of congressional enforcement of the rights of citizenship, those rulings indicate that this Court is receptive to those rights and they should encourage congressional proponents of those rights today.

C. A Cautionary Note

No discussion of the rights of citizenship would be complete without noting the potential of citizenship to be an exclusionary, rather than an inclusionary, concept.[320] This is particularly worrisome in light of the current federal government's response to terrorism, in which it has rounded up numerous non-citizens for interrogation without apparent reason other than their nationality. Moreover, even before September 11, 2001, in the Personal Responsibility Act of 1996,[321] Congress made

313. 526 U.S. 489 (1999).

314. 514 U.S. 779 (1995).

315. *Saenz*, 526 U.S. at 503-04.

316. *Id.*

317. *Term Limits*, 514 U.S. at 783.

318. *See* Zietlow, *supra* note 7, at 296-300.

319. *Id.* at 296.

320. Rogers Smith has written as great deal about this danger. *See, e.g.*, SMITH, *supra* note 19. *See also* Fox, *supra* note 49, at 443 (discussing "tiered and exclusionary" aspects of citizenship).

321. Personal responsibility and Work Opportunity Reconsiliation Act, 8 U.S.C. § 1600, *et. seq*. (1996).

numerous distinctions based on citizenship, denying the basic survival benefits of food stamps and welfare benefits to non-citizens who are legally residing in this country. Fortunately, Congress has since abolished those discriminatory measures, but the danger of future discrimination and exclusion clearly remains.

The author is mindful of the exclusionary effect potentially resulting from the Court's reliance on citizenship as a source of rights. Although aliens are considered to be "persons" protected by the Fourteenth Amendment as a whole,[322] a court or a member of Congress could find that they are excluded from the protection of the Citizenship Clause.[323] The exclusionary aspect of citizenship is evident in the view of citizenship of the framers of the Fourteenth Amendment, because the social compact theory that predominated at the time required allegiance to the government in exchange for its protection.[324] According to this theory of republican citizenship, only citizens are truly members of society and entitled to the privileges and immunities of citizenship.[325]

John Bingham's view of citizenship was arguably somewhat exclusionary. For example, one of the reasons he opposed the admission of Oregon as a state was because Oregon allowed non-citizens to vote. Bingham believed that the franchise should be limited to citizens.[326] Similarly, Representative Wilson explained an amendment to the 1866 Civil Rights Act,[327] replacing the word "inhabitants," in the original draft, with the word "citizens of the United States" on the grounds that "[t]his amendment is intended to confine the operation of this bill to citizens of the United States, instead of extending it to the inhabitants of the several states."[328] On the other hand, Bingham opposed the amendment because of the exclusionary potential of the latter word. He stated:

> If this is to be the language of the bill, by enacting it are we not

322. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886).

323. *See* Bosniak, *supra* note 290, at 1087 (pointing out that the United States laws regarding the protection of the rights of aliens in the United States is "striking in its apparent capriciousness").

324. *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 630-31 (1866) (Representative Hubbard) (describing the 1866 Civil Rights Bill: "It is intended to cast the shield of protection over four million American citizens, including old men, young men, and women and children. . . . We owe them protection in return for their faithful allegiance."); Smith, *supra* note 13, at 730-31.

325. *Id.*

326. CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859) (Representative Bingham) (arguing that the elective franchise for the election of federal officers should be confined to citizens of the United States. States can not confer rights of citizenship on aliens).

327. 14 Stat. 27 (1866).

328. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

> committing the terrible enormity of distinguishing here in the laws in respect of life, liberty and property, between the citizen and stranger within your gates? . . . Sir, that is forbidden by the Constitution of your country. The great men who made that instrument, when they undertook to make provision, by limitations upon the power of this government for the security by the universal rights of man, abolished the narrow and limited phrase of the old Magna Carta, which gave the protection of the laws only to "free men" and inserted in the words "no person," thereby obeying that higher law given by a voice out of heaven: "Ye shall have the same law for the stranger as for one of your own country."[329]

Bingham's impassioned speech shows that his vision was not entirely exclusionary. The belief of Bingham and many other Framers of the Fourteenth Amendment that people had certain fundamental rights that warranted protection by the government reflects the other side of the American tradition of citizenship—the inclusionary nature of our nation of immigrants. As professor Kenneth Karst has commented, "[e]quality and belonging are inseparably linked; to define the scope of the ideal of equality in America is to define the boundaries of the national community."[330] Even, the Supreme Court has been willing to blur the lines between citizens and non-citizens even in finding individual rights where citizenship was an important factor. For example, the Court emphasized the connection between education and citizenship in the case of *Plyler v. Doe*,[331] even as it ruled in favor of the non-citizen plaintiffs and found that they had a right to state funding of their public education. The Court's ruling in *Plyler* indicates that citizenship-based rights need not be exclusionary in scope. The author is hopeful that members of Congress would follow the Court's lead in *Plyler* when legislating the rights of citizenship.

VI. CONCLUSION

In conclusion, the Citizenship Clause and the rights of federal citizenship remain a fertile source of congressional power to enact civil rights legislation even after *Morrison*, *Kimel* and *Garrett*. It's time to revitalize Bingham's vision of citizenship so that Congress can still define and protect our rights in the Twenty-first Century.

329. CONG. GLOBE, 35th Cong., 1st Sess. 1292 (1858).

330. KENNETH L. KARST, BELONGING TO AMERICA 2 (1989). *See also* Forbath, *supra* note 215 (discussing progressive vision of citizenship rights).

331. 457 U.S. 202, 230 (1982).