

**Insert the following before the Note on p. 309:**

SENATOR JACOB HOWARD, SPEECH INTRODUCING THE FOURTEENTH  
AMENDMENT

Speech delivered in the U.S. Senate, May 23, 1866

[Senator Jacob Howard of Michigan was a member of the Joint Committee on Reconstruction that drafted the Fourteenth Amendment. He was the floor manager for the Amendment in the Senate. In this speech, he introduces the Amendment on the floor of the Senate and explains its purposes.]

Mr. HOWARD. . . . I can only promise to present to the Senate, in a very succinct way, the views and the motives which influenced th[e] committee, so far as I understand those views and motives, in presenting the report which is now before us for consideration, and the ends it aims to accomplish. . . .

The first section . . . relates to the privileges and immunities of citizens of the several States, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States. It declares that—

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. That is its first clause, and I regard it as very important. . . . [It] relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States. It is not, perhaps, very easy to define with accuracy what is meant by the expression, "citizen of the United States,"<sup>1</sup> although that expression occurs twice in the Constitution, once in reference to the President of the United States, in which instance it is declared that none but a citizen of the United States shall be President, and again in reference to Senators, who are likewise to be citizens of the United States. Undoubtedly the expression is used in both those instances in the same sense in which it is employed in the amendment now before us. A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws. Before the adoption of the Constitution of the United States, the citizens of each State were, in a qualified sense at least, aliens to one another, for the reason that the several States before that event were regarded by each other as independent Governments, each one possessing a sufficiency of sovereign power to enable it to claim the right of naturalization; and, undoubtedly, each one of them possessed for itself the right of naturalizing foreigners, and each one, also, if it had seen fit so to exercise its sovereign power, might have declared the citizens of every other State to be aliens in reference to itself. With a view to prevent such confusion and disorder, and to put the citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the

---

<sup>1</sup> Senator Howard delivered this speech before the first sentence, the Citizenship Clause, which defined citizenship, was added to the proposed amendment.

**Supplemental materials for Brest, Levinson, Balkin, Amar and Siegel, Processes of Constitutional Decisionmaking (5<sup>th</sup> ed. 2006)**

Constitution declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. And how did they antecedently become citizens of the several States? By birth or by naturalization. They became such in virtue of national law, or rather of natural law which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were, therefore, citizens of the United States as were born in the country or were made such by naturalization; and the Constitution declares that they are entitled, as citizens, to all the privileges and immunities of citizens in the several States. They are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several states of the Union.

[T]he Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guaranteed. . . . But we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington . . . . It is the case of *Corfield vs. Coryell* . . . . Judge Washington says:

"The next question is whether this act infringes that section of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states?'

"The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental,, to which may be added the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.'"

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by

virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. . . . This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?

But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.

**Supplemental materials for Brest, Levinson, Balkin, Amar and Siegel, Processes of Constitutional Decisionmaking (5<sup>th</sup> ed. 2006)**

As I have already remarked, section one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment. Look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.

.....

[Section five] gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment or any one of its sections. It casts upon congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.

*Discussion*

1. *The Privileges or Immunities Clause and the Privileges and Immunities Clause.* Senator Howard begins his explanation of the Fourteenth Amendment by pointing to the Privileges and Immunities Clause of Article IV, section 2. Like many Republican thinkers of the time, Howard argued that the Privileges and Immunities Clause in Article IV already bound the states to protect fundamental rights of national citizenship. In other words, Howard and other Republicans read “of the several states” to mean “of the United States.” Nevertheless, the Republican argument went, there was no method in the 1787 Constitution to enforce these guarantees. Hence the Privileges or Immunities Clause of the new Fourteenth Amendment would establish a clear legal obligation enforceable by the courts; moreover Congress could also pass enforcing legislation under its section 5 powers. Thus, it was no accident that Howard believed to be the central clause in section one of the Fourteenth Amendment uses the same language as Article IV, section 2.

The new Privileges or Immunities clause had another important effect. Just as states had to treat outsiders equally with their own citizens with respect to certain fundamental rights, so too they would now have to treat their own citizens equally with respect to these rights. Thus, the privileges and immunities clause was not only a guarantee of liberty provision; it was also a guarantee of equality with respect to the basic rights of national citizenship.

As we shall soon see, the Supreme Court quickly robbed the Privileges or Immunities Clause of any importance in the *Slaughter-House Cases* (casebook p. 320). As described in Chapter Nine, a century later the Warren Court once again raised the idea that the Fourteenth

Amendment protects equal fundamental rights, although this time under the Equal Protection Clause.

2. *Incorporation.* According to Senator Howard, the Privileges or Immunities Clause protects the “the personal rights guaranteed and secured by the first eight amendments of the Constitution.” Thus, Howard believed—and represented to the Senate when he introduced the Amendment—that the Fourteenth Amendment incorporated the personal rights guarantees of the Bill of Rights. As we will see later on in the casebook (pp. 487-89), the Supreme Court did not take up this invitation, and the Bill of Rights did not become incorporated until the 20th century. Moreover, incorporation when it occurred was through a creative reading of the Due Process Clause, and not the Privileges and Immunities Clause.

3. *Unenumerated rights.* Note Senator Howard’s reliance on *Corfield v. Coryell* and his remark that the privileges and immunities of citizens of the United States “are not and cannot be fully defined in their entire extent and precise nature.” Howard offers a declaratory theory of privileges or immunities. That is, he assumes that these rights are natural rights which preexist the state, and that the Constitution merely declares their existence and makes them enforceable in positive law. How can courts and legislatures determine what those rights are?

4. *Class and caste legislation.* When Howard turns to the equal protection and due process clauses he argues that they serve a different function: “This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.” What does the principle against “caste” legislation mean, beyond the prohibition of something like the Black codes? One possibility is that “caste” legislation is legislation that subordinates one social group to another. Another is that caste legislation is legislation that denies some group of people equal civil rights without a sufficiently good justification.

The related notion of “class legislation” involved singling out a particular group for special burdens or special benefits. Indeed, the expression “equal protection” famously appeared in Andrew Jackson’s July 10, 1832 veto message (Casebook p. 77), where he stated

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

5. *Voting*. Note that Justice Washington included “the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised” in his list of privileges and immunities. Senator Howard, however, takes pains to insist that voting is not one of the rights guaranteed by the new Fourteenth Amendment. In part that was because he and other supporters of the Amendment did not believe it could pass if blacks were given the right to vote. As Howard explained later on in his speech when discussing section 2.

I could wish that the elective franchise should be extended equally to the white man and to the black man; and if it were necessary, after full consideration, to restrict what is known as universal suffrage for the purpose of securing this equality, I would go for a restriction; but I deem that impracticable at the present time, and so did the committee.

The colored race are destined to remain among us. They have been in our midst for more than two hundred years; and the idea of the people of the United States ever being able by any measure or measures to which they may resort to expel or expatriate that race from their limits and to settle them in a foreign country, is to me the wildest of all chimeras. The thing can never be done; it is impracticable. For weal or for woe, the destiny of the colored race in this country is wrapped up with our own; they are to remain in our midst, and here spend their years and here bury their fathers and finally repose themselves. We may regret it. It may not be entirely compatible with our taste that they should live in our midst. We cannot help it. Our forefathers introduced them, and their destiny is to continue among us; and the practical question which now presents itself to us is as to the best mode of getting along with them.

The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the states of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. We may be right in this apprehension or we may be in error. Time will develop the truth; and for one I shall wait with patience the movements of public opinion upon this great and absorbing question. The time may come, I trust it will come, indeed I feel a profound conviction that it is not far distant, when even the people of the States themselves where the colored population is most dense will consent to admit them to the right of suffrage. Sir, the safety and prosperity of those States depend upon it; it is especially for their interest that they should not retain in their midst a race of pariahs, so circumstanced as to be obliged to bear the burdens of Government and to obey its laws without any participation in the enactment of the laws.

The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right. . . .

The Fifteenth Amendment was ratified four years later in 1870. Does this history mean that the Fourteenth Amendment has no application with respect to voting?